

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

Promoting an Integrated Approach

A Discussion Paper

March 2008



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1. INTRODUCTION

Under the Water Environment and Water Services (Scotland) Act 2003 (the WEWS Act), Scottish Ministers, SEPA and public bodies have a general duty to protect the water environment when carrying out their wider functions. This discussion paper has two aims:

- to raise the profile of this duty within the wider policy context; and
- to set out our proposals for identifying particular enactments and functions, in respect of the Scottish Ministers and SEPA, where this duty is strengthened.

As its starting point, the paper provides a platform for discussing the continuing exchange of best practice across various parts of Government. We recognise that in many cases a collaborative approach is already being adopted by all those involved, and this is leading to real benefits 'on the ground'. Accordingly, one of the key aims of this discussion paper is to reinforce the importance of this work, and promote an increasing awareness across Government of the impact that policy development and implementation can have on the water environment in Scotland.

It is through this exercise that we aim to promote further the contribution that Ministers and SEPA can make, when going about their normal day-to-day activities, to the overall implementation of the WFD in Scotland. Our policy in relation to the role of public bodies in this regard was previously set out in our Ministerial policy statement of 2006.¹

Your views and comments are welcome in relation to any aspect of our proposals. These will be used to inform the policy development process prior to the finalisation of our policy statement and the designation of WEWS relevant enactments in 2008.

2. RESPONSE ARRANGEMENTS

Please send your views and comments on the proposals in this discussion paper to:

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EDINBURGH
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Responses should reach us by 25 April 2008. Earlier responses would be welcomed.

¹ <http://www.scotland.gov.uk/Publications/2006/03/08143009/6>

3. FRAMEWORK FOR PROTECTING THE WATER ENVIRONMENT

The WEWS Act transposed the requirements of the Directive into Scots law, introducing a broad framework for the management of our rivers, lochs, groundwater and coasts. The introduction of this framework represents a significant shift in water resource management, requiring us to adopt a holistic source-to-sea approach through the introduction of River Basin Management Plans (RBMPs). For the first time we will be able to take a more strategic look at the water environment, on a river basin scale. As the lead competent authority for protection of the water environment in Scotland, SEPA is responsible for the preparation of the draft RBMPs. This process is now underway, and the first draft plan will be published for consultation during 2008. The RBMP will be finalised in December 2009, and updated every 6 years thereafter.

Throughout the implementation programme our overarching aim is to establish a framework within which an appropriate balance can be struck between the protection of the water environment and its use for the purposes of sustainable social and economic development. In order to achieve this balance in the most effective and constructive way possible, we believe it is essential that WFD principles are embedded in all other relevant policy and regulatory areas. For example, those relating to energy, public water supply, transport, land-use planning, fisheries, enterprise, recreation and tourism, and agriculture. **The purpose of this paper is to highlight and support this overriding objective of integration.**

RELEVANT ENACTMENTS - GENERAL PURPOSE AND PRINCIPLES

Section 2 of the WEWS Act introduced a general duty for the Scottish Ministers and every public body and office-holder to have regard to the desirability of protecting the water environment when exercising any functions.

It also gives the Scottish Ministers the power to specify, by order, any piece of legislation as a WEWS Relevant Enactment where that legislation gives statutory functions to the Scottish Ministers and/ or SEPA and those functions are relevant to the water environment.

The Scottish Ministers and SEPA will be required to exercise their functions under the relevant enactments in a manner which secures compliance with the requirements of the Directive, thus contributing to the overall achievement of its aims and objectives.

In addition, section 2(4) of the WEWS Act provides that the Scottish Ministers and SEPA must, in exercising their functions under the relevant enactments to secure compliance with the Directive –

- have regard to the social and economic impact of such exercise of those functions,
- so far as is consistent with the purposes of the enactment in question:
 - (i) promote sustainable flood management, and
 - (ii) act in the way best calculated to contribute to the achievement of sustainable development, and
- so far as is practicable, adopt an integrated approach by co-operating with each other, and with the WEWS Responsible Authorities, with a view to co-ordinating the exercise of their respective functions.

4. KEY STEPS TOWARDS DEVELOPING AN INTEGRATED FRAMEWORK

We have already taken a number of steps to facilitate and formalise the delivery of our vision of a collaborative and integrated approach to the protection of the water environment in Scotland. An outline of these steps is presented below:

- Designating the Water Environment (Controlled Activities) (Scotland) Regulations (CAR) as a Relevant Enactment²

The WEWS Act imposes an explicit duty on the Scottish Ministers and SEPA to exercise their functions under the Act in a manner which secures compliance with the requirements of the Directive. As well as introducing River Basin Management Planning, the WEWS Act allows Scottish Ministers to introduce a range of secondary legislation to ensure that Scotland's water environment is protected appropriately. As a result, CAR was introduced in 2005 to regulate activities which have the potential to impact on the water environment in Scotland, such as discharges, abstractions, impoundments and engineering works in the freshwater environment. We have now extended this explicit duty to the functions of Ministers and SEPA under CAR.

- Designating WEWS Responsible Authorities

This process identified those public bodies (for example, local authorities and Scottish Water) whose day-to-day activities have a particularly high degree of relevance to the water environment in Scotland, and placed them under an explicit obligation to secure compliance with the aims and principles of the Directive when exercising certain statutory functions. In doing so, the responsible authorities are also required to take account of the social and economic impact of the exercise of those functions; and to work collaboratively with each other, Ministers and SEPA.

- Legislative amendment programme

Certain pre-existing regimes have such relevance to the water environment that more direct action was required to ensure a transparent, integrated and effective approach. Accordingly, we have clarified how these other regimes should operate in respect of their potential impacts on the water environment; for example, by making amendments to existing legislation where necessary to align key regimes (such as the consenting process for new electricity generation developments under the Electricity Act 1989) with the aims of the Directive, the WEWS Act and CAR.

It will be essential to ensure that WFD aims and objectives are embedded into any new legislation that has a potential impact on the water environment, such as land use planning or flood management.

Alongside these statutory mechanisms, the Scottish Government is continuing to work closely with our partners and stakeholders to integrate and align other policy mechanisms such as guidelines and administrative arrangements, to support efficient delivery of not only WEWS and CAR but also future RBMPs and their implementation.

² <http://www.opsi.gov.uk/legislation/scotland/ssi2006/20060554.htm>

5. PURPOSE OF DESIGNATING WEWS RELEVANT ENACTMENTS

5.1 General purpose of designation

As discussed above, in the light of the duties set out in the WEWS Act on Scottish Ministers, SEPA, and public bodies generally, we expect due regard to be given to the requirements of the Directive in any decision-making process which could have an impact on Scotland's water environment. Accordingly, we consider that all public bodies should adopt the following measures in appropriate circumstances in order to support the achievement of the Directive's aims.

- Engage all relevant parties and work collaboratively to resolve any possibility of conflict or duplication at the earliest possible opportunity when developing plans, policies, and legislation, or taking regulatory decisions that may have implications for the water environment;
- Have regard to the objectives set out in the River Basin Management Plans in carrying out their functions;
- Ensure that options for decision-making which could have an impact on the water environment take full account of WFD requirements so that the best environmental option is identified at an early stage;
- Achieve the most appropriate balance between the protection of the water environment and the social and economic impacts of that protection; and
- Comply with the Scottish Government's policy and advice on sustainable flood management.

In certain circumstances however, we do not believe that this general obligation is sufficiently transparent or robust to meet the Directive's aims. And it is for this reason that section 2 of the WEWS Act confers powers on the Scottish Ministers to clarify these existing obligations, where necessary, through the designation of WEWS 'responsible authorities' and 'relevant enactments'.

5.2 Benefits of designating relevant enactments

Identifying a piece of legislation as a WEWS Relevant Enactment will place the Scottish Ministers and SEPA under an explicit duty to exercise their functions or powers under that legislation in a way that promotes the successful implementation of the Directive in Scotland. It will also afford the Scottish Ministers and SEPA the necessary flexibility to ensure that a balanced approach can be arrived at in any particular case.

There are four associated benefits of designating WEWS Relevant Enactments:

The first of these is that the Scottish Ministers and SEPA must take into account the **social** and **economic impact** of the exercise of their functions when protecting the water environment. This flexibility will enable a balanced, measured and proportionate approach which is tailored to the individual circumstances of a particular situation. For example, where the Scottish Ministers are approving an activity, such as a drought order under the Natural Heritage (Scotland) Act 1991, the approval or otherwise of that activity should involve consideration of the social and

economic consequences of the decision-making process alongside environmental protection.

The second and third considerations relate to **sustainable flood management** and **sustainable development**. Sustainable flood management consideration means that the Scottish Ministers and SEPA must ensure that any flood prevention measures taken in the future work as closely as possible with the natural environment, ensuring protection for future generations. Similarly sustainable development considerations will ensure that our actions today do not limit or compromise the ability of future generations to meet their own needs. However both of these considerations apply only insofar as they are consistent with the purpose of the designated enactment.

Finally, designation also brings with it a duty for the Scottish Ministers, SEPA and the WEWS Responsible Authorities to **co-ordinate** the exercise of their functions. This is a core objective of our implementation strategy, designed to ensure a joined-up approach is taken to all areas of working. In turn, this will ensure an efficient approach to the protection of Scotland's water environment by minimising duplication of effort and, wherever possible, ensuring that operators are provided with consistent information, advice and or decisions.

Examples of Collaborative Working:

The Scottish Government's River Basin Management Planning (RBMP) Network

Since the introduction of the Water Framework Directive, the Scottish Government has been working bi-laterally across Departments to encourage an integrated approach to developing or reviewing both policy and legislation having an impact on the water environment. With the continuing move towards the development of River Basin Management Planning, a cross-Government RBMP Network has been established to formalise this ongoing work, with a focus on supporting the development of the RBMPs. The Network includes key policy representatives from land-use planning, transport, energy, fisheries, enterprise, recreation and tourism, agriculture and the water industry. The aim is to provide a forum within which we can maximise the potential synergies between different policy interests and minimise any conflicts in delivering policy initiatives. A further benefit will be the ability to utilise this forum for identifying and agreeing whether any emerging elements of the draft programme of measures within the RBMP might require underpinning by new legislation and/ or delivery mechanisms, and the subsequent development of such mechanisms.

River basin management planning and advisory groups

SEPA has also established a network of Area Advisory Groups and a National Advisory Group to help in river basin management planning. The membership of these advisory groups includes responsible authorities, other public bodies and representatives of users of the water environment. Among other things, the groups provide a focus for communication and coordinated action between the different public bodies and for partnership with the private sector and environmental non-government organisations.

6. CRITERIA FOR ASSESSING LEGISLATION FOR DESIGNATION

In order to be a candidate for designation, a piece of legislation must contain **functions or powers** of the **Scottish Ministers and/ or SEPA** which are capable of being exercised in a manner which impacts directly on the water environment in Scotland.

As with the designation process for responsible authorities, we intend to specify whole enactments. This approach will avoid the unintentional exclusion of any functions or powers of Ministers and/ or SEPA which are relevant to the water environment. It will also allow the section 2 WEWS Act duties to apply to any relevant amendments that are made to these specified pieces of legislation over time.

We have therefore examined a wide range of legislation to identify whether they are appropriate for designation because they contain functions which have a direct bearing on the water environment, through the decisions of Ministers, policy-makers or regulators. Further discussion on the specific legislation proposed for such designation is set out in section 7.

Ministers will primarily look to WEWS and CAR to deliver Scotland's objectives for the water environment. However there are other significant legislative regimes which could have an impact on the delivery of our objectives for Scotland's water environment, and we consider it desirable to place an explicit obligation on Ministers and SEPA to secure compliance with the Directive when exercising functions under these other regimes. By promoting early consideration of the water environment and river basin management planning objectives, we will facilitate an integrated approach and help to ensure that the best environmental option is identified at the outset (for example, the location of a proposed development or the design of sustainable flood management schemes). This approach is in line with our policy approach to the designation of responsible authorities, thus ensuring that all bodies concerned with activities having an impact on the water environment are working together to deliver our WFD goals from the outset.

Conversely, there may be circumstances where Ministers or SEPA have functions as a statutory consultee, providing specialist advice on matters which could have an impact on the water environment. In such circumstances, there is a clear expectation that the advice of any statutory consultee should incorporate the requirements of the Directive. However only the ultimate decision-maker has the ability to secure compliance with the requirements of the Directive. Consequently, we do not consider that it would be appropriate to designate Ministers' or SEPA's statutory consultee functions in this way.

Similarly we have adopted the same approach to Ministers' appeal functions. As it is the primary regulator to secure compliance with the Directive, we do not propose to designate Ministers' appeal functions.

7. LEGISLATION PROPOSED FOR DESIGNATION

This section of the paper outlines each enactment that we propose to designate under section 2(8) of the WEWS Act, and provides a summary of the key reasons for the proposed designation.

There are 6 key policy areas where we propose designations, to facilitate a joined-up approach to securing compliance with the WFD. These are as follows:

- Sustainable flood management and surface drainage
- Marine and coastal activities
- Water supply
- Freshwater fisheries
- Land-use planning
- Sustainable transport

These are discussed in more detail in the following sections.

Your thoughts on any further legislation that should be considered for designation are particularly welcome.

7.1 Sustainable flood management and surface drainage

Policy context

As previously noted, the WEWS Act includes requirements for sustainable flood management (SFM). Responsible authorities and SEPA are required to ensure co-delivery of WFD and SFM.

Currently flood prevention schemes are confirmed by Ministers, but may also require authorisation under CAR. We need to encourage good integration in planning stages, to ensure these separate processes can work together effectively. Guidance for responsible authorities explaining how these processes may work in tandem is under development. The Scottish Government is currently consulting on a future Flooding Bill which is expected to address Scottish issues as well as support transposition of the EC Floods Directive. We recognise the difficulties posed by the current parallel systems and the development of this Bill offers us an opportunity to streamline these separate processes.

Already in place is legislation that supports the development and long-term maintenance of Sustainable Urban Drainage Systems (SUDS). Ongoing work by the Scottish Government is to confirm the standards that will be applied for SUDS and the ongoing management by Scottish Waters of SUDS in public spaces.

Flood Prevention (Scotland) Act 1961 (“the 1961 Act”)

The 1961 Act confers a range of powers to enable local authorities to take measures to prevent or mitigate the flooding of non-agricultural land in their areas and for connected purposes. As a WEWS Responsible Authority, each local authority is

obliged to exercise its normal functions under the 1961 Act so as to secure compliance with the requirements of the Directive. In addition, they are required to comply with the duties specified in section 2(4) of the WEWS Act.

As such, when exercising their functions under the 1961 Act, the local authorities are required to ensure that any flood prevention scheme and any modifications to it embody WFD requirements from the outset; for example, by taking steps to ensure that the proposal incorporates all practicable mitigation in the choice and design of schemes with the aim of avoiding or minimising any adverse impacts of proposed solutions on the water environment.

The Scottish Ministers are currently responsible for confirming such schemes as made by the Councils, in terms of section 4(1) of the 1961 Act. But in doing so, the Scottish Ministers also have the power to confirm the flood prevention scheme with or without modifications as they think fit. In our view, this power introduces a degree of discretion upon the Scottish Ministers which would permit them to innovate upon the scheme that has been proposed by the Council where appropriate.

For this reason, we consider it is desirable to designate the 1961 Act in respect of Ministers' functions. This approach also demonstrates our commitment to developing a joined-up policy that delivers our obligations for both WFD and sustainable flood management.

7.2 Marine and coastal activities

Policy context

The WEWS Act and CAR set out the broad framework for delivering our obligations under the WFD. However, although these instruments give SEPA powers to regulate activities impacting on the water environment, the scope of those powers is determined by the definitions of such activities under section 20(3) of the WEWS Act; and in particular by 20(3)(d). This specifically excludes SEPA from regulating engineering activities in transitional and coastal waters (TRAC). This approach was taken as Fisheries Research Services (an Executive Agency of the Scottish Government) already have powers to regulate activities of an engineering nature in TRAC waters, via the Food and Environment Protection Act (Part II). The Scottish Government is now considering how to take forward the delivery of Ministers' WFD obligations in TRAC waters. We anticipate that proposals for applying WFD-compliant standards and conditions in TRAC waters will be brought forward in 2008³.

However it is important to note the wider context within which these considerations sit. The Scottish Government is currently considering the formulation of wider policy in relation to a Scottish Marine Bill. In the longer term our continuing WFD obligations in respect of coastal waters may be addressed by developments in that arena.

³ Note – the required standards are currently subject to technical review by UKTAG. Further consultation will be undertaken in early 2008 prior to the standards and conditions being implemented later that year.

Food and Environment Protection Act 1985 (“FEPA”)

Part II of FEPA (as amended) regulates, amongst other things, deposits associated with engineering works in coastal waters. In particular, section 5 of FEPA sets out a requirement for a licence to be obtained in certain circumstances for the deposit of substances and articles in the sea or under the sea-bed. The procedures to be applied by the licensing authority in determining whether to issue such a licence are then dealt with by section 8 of FEPA. Section 10 of FEPA also affords the licensing authority the power to take remedial action where a licence has not been obtained, or has not been complied with, where necessary or expedient for, amongst other things, the purpose of protecting the marine environment or the living resources which it supports, and to recover the costs of so doing from any person convicted of an offence in relation to the operation.

In Scotland the responsibility for issuing FEPA licences has been largely devolved to the Scottish Ministers, and the licensing scheme is administered and executed on their behalf by the Marine Laboratory, Aberdeen which is part of the Fisheries Research Service. There are however reservations in respect of oil and gas exploration and exploitation within UK waters beyond 3 nautical miles from the coastal baseline, or from operations falling within the subject matter of Part VI of the Merchant Shipping Act 1995 (Prevention of pollution) anywhere within UK waters, where the licensing authority is the Secretary of State.

In order to support the delivery of the Directive’s requirements in Scotland – in particular as regards the hydromorphological impacts of activities in transitional and coastal (TRAC) waters – we propose to specify FEPA as a WEWS Relevant Enactment. This will place an express duty on the Scottish Ministers (FRS) to secure compliance with the requirements of the Directive when carrying out these functions.

This approach will provide an appropriate platform from which to review current operational policy and practice as applied by Scottish Ministers when considering licences under section 5 of FEPA in order to deliver the Directive’s aims; for example, by making clear our expectation that the relevant WFD environmental standards and conditions should be one of the considerations to be applied to licences covering engineering activities carried on in TRAC waters.

7.3 Water supply

Policy context

Scotland is taking a risk assessment approach to the management and protection of public and private drinking water supplies. This is in line with the approach recommended by the World Health Organisation for drinking water quality and is likely to be adopted under the revised Drinking Water Directive. The WFD also recognises the need to protect drinking water sources. Our need to manage any pressures in those areas will be supported by Scottish legislation and funding programmes (such as WEWS, CAR, Nitrate Vulnerable Zone Action Programme, and the Scottish Rural Development Programme).

Scottish Water provides essential water and wastewater services to businesses and over 2.2 million homes. As well as its essential role in providing clean affordable drinking water and good sewerage services, the Scottish Water industry also plays an important role in the continuing improvement of Scotland's aquatic environment. Considerable recent investment in infrastructure has already led to improvements in drinking water quality, and significant reductions in pollution in rivers, estuaries and coastal waters. Investment has also reduced instances of flooding, as well as providing better quality services for customers. Ministers will shortly be starting the process of identifying the objectives for the water industry for the period 2010-14.

Water Safety Plans (WSPs) are being developed for public water supplies by Scottish Water, in association with SEPA and Scotland's Drinking Water Quality Regulator (DWQR). These will be a planning tool providing protection for public water supplies and will be aligned with the river basin management plan and regulatory action under CAR. Scottish Water has prepared an initial phase of draft WSPs which are being considered by the regulators and plan to prepare an additional 20 WSPs in 2007-08.

The *Private Water Supplies (Scotland) Regulations 2006* include a requirement for a risk based assessment of large private water supplies for public and commercial use. Local authorities enforce the regulations as part of their wider public health role. For private water supplies attached to individual properties, owners are encouraged to assess if there are any risks, and if required, seek advice from the relevant local authorities regarding appropriate steps to lessen those risks.

Water Industry (Scotland) Act 2002 ("the 2002 Act")

Part III of the 2002 Act establishes Scottish Water as a body corporate, and confers responsibility on it for the discharge of the core water and sewerage functions as laid down principally by the Sewerage (Scotland) Act 1968 and the Water (Scotland) Act 1980. In discharging these functions Scottish Water must make a charges scheme which fixes charges to be paid for the provision of such services. Scottish Water is now a WEWS Responsible Authority and so must consider the requirements of the Directive from the outset of the development of its proposed charging scheme.

The system for determining such charges was amended in 2005 by the Water Services (Scotland) Act in order to clarify the roles of the different parties involved in

the charge setting process, ensuring that policy and economic functions are clearly separated. As such, it is the Scottish Ministers who retain responsibility for setting the overall policy framework and are required to issue a statement of policy regarding charges under a charges scheme to both Scottish Water and the Water Industry Commission (“WIC”). It is then a matter for the WIC to determine the lowest reasonable overall cost for delivery of those objectives, and how the relevant costs should be split between different groups of customers.

Consequently, we consider that it will be essential for Ministers to ensure that this overall policy framework takes due account of the requirements of the Directive to recover the costs of water services in line with the polluter pays principle; for example, through the appropriate use of water pricing structures in order to provide adequate incentives for different types of water users to utilise water resources efficiently.

By also designating Ministers’ functions under the 2002 Act, we will therefore ensure that the framework within both Scottish Water and the WIC operate takes due account of the Directive’s requirements.

Natural Heritage (Scotland) Act 1991 (“the 1991 Act”)

The 1991 Act provides a mechanism to enable Scottish Water to abstract sufficient quantities of water to maintain the public water supply, in so far as possible, during a drought situation. In particular, Part III of the 1991 Act empowers the Scottish Ministers, on the application of Scottish Water, to grant a drought order. Such an order may contain provisions to meet the short-term deficiency (for example, authorising Scottish Water to take water from another source subject to appropriate mitigation measures). Before the order may be granted, Scottish Water must be able to demonstrate that intensified efforts have been made to reduce leakage, rezone supplies and use redundant sources; and that these measures have been insufficient to address the situation.

In the most severe drought situations, where the deficiency is likely to impair the economic or social well-being of persons in the area, the Scottish Ministers also have the power to require more stringent steps to be taken to address the situation (for example, by authorising Scottish Water to prohibit or limit the use of water for such purposes as the Scottish Ministers think fit). Accordingly, by designating Ministers’ functions under the 1991 Act, we will make clear our expectation that Ministers must give due regard to the requirements of the Directive when taking such decisions. Designation will also afford Ministers the essential flexibility to ensure that an appropriate balance can be struck between environmental, social and economic considerations in any drought situation.

The Scottish Government is currently considering whether these existing provisions needs further alignment with the provisions of CAR, to ensure that appropriate action can be taken in emergency situations as a result of drought.

7.4 Freshwater fisheries

Policy context

Freshwater fisheries are recognised as a key beneficiary of any improvements to the water environment from actions taken under WEWS. Critically the legislative and policy framework and those involved in the management of freshwater fisheries also play a key role in managing the water environment.

The Scottish Government has already taken a number of steps to achieve a co-ordinated approach to the implementation of our policies in this area. For instance, as the generation of hydro-electricity can have a major impact on fisheries, the Fisheries Committee (Scotland) has an important role in providing advice on such matters. In order to ensure coordinated advice on electricity proposals wherever possible, we have amended the Electricity Act 1989 and designated the Fisheries Committee (Scotland) as a WEWS responsible authority; and are now supporting the development of an Memorandum of Understanding between the Fisheries Committee (Scotland) and SEPA.

In addition, SEPA, FRS and the Scottish Government plan to consider the best way to coordinate Fisheries Management Plans (under the *A Strategic Framework for Scottish Freshwater Fisheries*) and future Eel Management Plans (under European regulation) with RBMPs so as to ensure a coordinated management of the water environment in Scotland.

Aquaculture and Fisheries (Scotland) Act 2007 (“the 2007 Act”)

Part 1 of the 2007 Act underpins the Scottish Government’s policy to address problems common to both aquaculture and wild fisheries, and to seek solutions to ensure the maintenance of healthy stocks of wild fish whilst at the same time promoting a sustainable aquaculture industry. In particular, steps have been taken to formalise arrangements for best practice to control parasites at fish farms and shellfish farms in Scotland, for example by promoting a co-ordinated approach to the chemical treatment of parasites on a catchment level.

However, as a contingency where best practice arrangements for the treatment regimes of sea lice are ineffective, Section 6 of the 2007 Act ensures that the Scottish Ministers can take steps to ensure the prevention, control and reduction of such parasites. Ultimately, such steps may require the discharge of chemicals into the water environment in order to bring the levels of parasite under control. Accordingly, we propose to specify the 2007 Act so as to formalise the policy intention underpinning section 6 – that the Scottish Ministers (FRS) and SEPA will work collaboratively with each other in such circumstances to identify an appropriate balance between the protection of the water environment and fish health issues.

Diseases of Fish Act 1937 (“the 1937 Act”)

Scotland has international obligations to protect our Atlantic salmon populations, and the 1937 Act (as amended) provides a range of powers in order to prevent the spreading of disease among salmon and freshwater fish. In particular, section 5A of

the 1937 Act confers powers on the Scottish Ministers to arrange for the creation of barriers to the movement of fish in inland waters in Scotland where necessary or appropriate to contain any outbreak of the parasite known as *Gyrodactylus salaris* ("GS") and to facilitate the treatment of the water environment with chemical agents with a view to achieving eradication. Ministers are also given powers to maintain, dismantle and remove any such barriers. Section 5B then explicitly confers powers on the Scottish Ministers to arrange for the treatment with chemical agents of specified waters with a view to eradicating GS.

Clearly any such treatment has the potential to have a significant effect on the water environment, including deterioration of status. Therefore, by designating Ministers' functions under the 1937 Act, we will highlight that such powers may only be exercised in compliance with the Directive. The Scottish Government's *Gyrodactylus salaris contingency plan* sets out the respective roles and responsibilities of relevant organisations in dealing with any outbreak of GS; thus in practice we anticipate that FRS and SEPA will work closely together to deliver our joint objectives for fisheries and the water environment. We recognise that further work needs to be done on developing agreed processes, possibly including a fast-track approach for ensuring these joint objectives can be delivered effectively in the event of any outbreak.

7.5 Land use planning

Policy context

The land use planning system exists to guide the future development and use of land in Scotland. It plays an important role in shaping and protecting the quality of towns, cities and countryside. The planning system in Scotland is currently undergoing significant modernisation, and The Planning etc (Scotland) Act 2006, which amends the Town and Country Planning (Scotland) Act 1997, introduces substantial new provisions. Work has already begun to implement these.

The 3 main delivery mechanisms for the modernised planning system are outlined below.

a) Firstly, the Scottish Ministers have responsibility for preparing and publishing a **National Planning Framework** (NPF). The Framework provides a strategy for Scotland's long-term spatial development. It identifies key strategic infrastructure needs so that we can plan for the right investment in the right places. The NPF provides a national context for development plans and planning decisions and informs the ongoing programmes of The Scottish Government, public agencies and local authorities. The Framework is a key element in the modernised planning system. The recent Planning etc. (Scotland) Act 2006 puts the Framework on a statutory footing which requires planning authorities to take the NPF into account in preparing their development plans. The Planning Act also makes provision for the Framework to be used to designate certain developments as national developments and establishes specific procedures for the consideration of such developments. National Developments may include major water and drainage related projects. Designation in the Framework as a national development establishes the need for such developments.

There are opportunities to create links between the NPF and the RBMPs, by ensuring the two planning processes inform each other:

- The NPF, currently under review, is drawing on information about the water environment identified as part of the preparation of the first draft RBMP. The RBMPs, being introduced in 2009 to manage our water environment, will in turn look to information set out in the NPF;
- In reviewing the Framework, Scottish Ministers will take into account the newly created River Basin Management Plans;
- It is anticipated that when the NPF is further revised in 2012, we can further align the two planning systems.

b) **Development plans** provide the statutory framework for safeguarding environmental quality, providing development opportunities and ensuring public involvement. Decisions on planning applications must be taken in line with the development plan, unless material consideration indicate otherwise. In a major move to simplify development planning, the Planning etc. (Scotland) Act will introduce a single tier of local development plans across large parts of Scotland. Within the four largest city regions, there will also be strategic development plans dealing with key land and infrastructure issues which cross planning authority boundaries.

Scotland's planning legislation allows many detailed aspects of the system to be prescribed by the Scottish Ministers through **Regulations**. The Scottish Government is currently consulting on draft regulations in relation to development planning, which contain two important proposals that could ensure more effective protection of the water environment. These are first that SEPA should be designated as a 'key agency' for development planning. This would require SEPA to be consulted on all strategic development plans and local development plans and require them to respond to the planning authority. Secondly, it is proposed that planning authorities, in drawing up their development plans, should have regard to the relevant river basin management plan. Consultation on these draft regulations is running until 20 February 2008 and copies of the consultation paper are available from www.scotland.gov.uk/topics/planning/modernising .

In relation to both the current and future system of development plans, the Scottish Ministers are the ultimate decision-maker in planning legislation. While they have a formal role in approving structure plans (and strategic development plans in future), they also have powers to seek modifications to or even approve local plans (local development plans in future) for example, if there are concerns around the implementation of legislation or national policy. As such, planning legislation ensures that before these plans are approved or adopted, the Scottish Ministers can seek to secure compliance with the Directive.

c) **Development Management** (previously known as Development Control) is a term defined in law which relates to the process of applying for planning permission for work defined as 'development'. This includes a wide range of building and engineering work as well as changes in the way land and buildings are used. Planning law also covers changes to listed buildings and control of advertisements as well as enforcement of planning law. In the modernised planning system

applications for planning permission will be processed and scrutinised depending on whether they raise issues of national, major, local or minor importance.

The following approaches may be appropriate in development plans and in development management decisions to help achieve an approach consistent with the WFD & WEWS:

In identifying land for development, measures to safeguard the water environment should be considered with a view to preventing deterioration of status (e.g. is there carrying capacity in the water environment to receive waste water discharges following treatment; provide water for abstraction; etc);

Further development should be prevented if it would have a significant probability of flooding or would increase the probability of flooding elsewhere;

Sustainable urban drainage systems should be promoted and suitable policies included in development plans;

Planning policies should as appropriate support the treatment or removal of dereliction of the water environment (e.g. by opening culverted watercourses; enhancing or restoring the structure and condition of the bed and banks of rivers; creating flood water storage areas to attenuate flood flows; preventing canalisation etc);

Generally avoid developments being served by private waste water treatment systems when connection to the public sewer system is possible;

Support measures which would enhance the ecological quality of the environment and its sustainable use;

And generally seek to avoid proposals which would adversely impact on the water environment; increase flood risk; and compromise identifiable future sustainable uses of the water environment.

(Scottish Planning Policies and Planning Advice Notes may be material considerations to be taken into account in the preparation of development plans and development management decisions, including cases which come before the Scottish Ministers.)

Town and Country Planning (Scotland) Act 1997 (“the 1997 Act”)

Although the Planning etc Act sets out the mechanisms for modernising the planning system, it does so by amending the Town and Country Planning (Scotland) Act 1997. It is therefore the 1997 Act which requires to be designated to ensure that the planning system and river basin management planning are effectively co-ordinated to meet our joint aims.

7.6 Sustainable transport

Policy context

Transport has an influence on river basins through new infrastructure development, operations and work to maintain and manage transport networks. These activities can affect the morphology of water bodies and contribute to diffuse and point source pollution loads. The planning, design, construction and operation of transport networks is now subject to regulation and control under the Controlled Activities Regulations (CAR). Transport Scotland (an Executive Agency of the Scottish Government) takes these requirements into account in fulfilling its duties to deliver Scotland's capital investment programme for transport and in overseeing the trunk road and rail network operations. In order to minimise the effects of pollution from road run-off on the water environment and potential flood risk, Transport Scotland endeavours to incorporate SUDS measures in new trunk road schemes wherever practicable, with the proviso that the effectiveness of the drainage is not compromised. Transport Scotland is committed to working with SEPA and other agencies in reducing the environmental impacts of transport plans and projects.

Roads (Scotland) Act 1984 ("the 1984 Act")

Section 2, 7 and 19 of the 1984 Act confer powers on the Secretary of State (now the Scottish Ministers) to construct and maintain trunk and special roads.

By designating this Act as a WEWS relevant enactment, Ministers will be expected to consider possible impacts on the water environment when carrying out their functions under this Act. This will, for example, require Ministers to –

- Consider the route of any such transport system so as to avoid or minimise:
 - the need to divert, realign, culvert or otherwise reinforce any part of the water environment;
 - the loss of potential to enhance or restore the status of the water environment;
 - the use of routes at risk from flooding, considering the anticipated long-term position;
 - the need for modifications to the water environment or to flood plains. Such modifications may enhance flood risk elsewhere by, for example, reducing flood water storage;
- Ensure that where engineering modifications to the water environment are necessary, all practicable mitigations are incorporated into the choice and design of those works so as to avoid or minimise deterioration of the water environment;
- Consider incorporating sustainable urban drainage systems with an agreed maintenance programme as an integral part of any such transport system. This will help to avoid increasing flood risk elsewhere and protect the water environment against pollution from water run-off.

8. EXAMPLES OF LEGISLATION NOT PROPOSED FOR DESIGNATION

There are a number of pieces of legislation which may appear to be candidates for designation as WEWS Relevant Enactments. On closer scrutiny however, we believe that many of these do not require to be designated, for a number of reasons. Some examples are discussed below.

The Water Scotland Act 1980 (“the 1980 Act”)

Section 17(2) of the 1980 Act gives powers to Scottish Ministers to authorise Scottish Water to acquire compulsorily the right to take water from any watercourse. Clearly the decision to grant such rights to Scottish Water could have significant impacts on the water environment.

As it was essential to ensure a degree of synergy between the conferral of water rights under the 1980 Act and the environmental regulation of those rights under CAR, steps have already been taken to clarify how these key decisions should work in tandem, through textual amendments to the 1980 Act. Therefore it is not considered necessary to designate the 1980 Act as a WEWS Relevant Enactment.

The Electricity Act 1989 (“the 1989 Act”)

The 1989 Act gives powers to Scottish Ministers to authorise the construction of schemes to generate energy including hydropower. This has the potential to overlap with the environmental regulation introduced via CAR for the protection of the water environment.

As with the 1980 Act, it was essential to clarify the operation of these separate authorisation processes, and thus the 1989 Act has been textually amended to provide such clarification. Therefore it is not considered necessary to designate the 1989 Act as a WEWS Relevant Enactment.

The Land Management Contracts (Menu Scheme) (Scotland) Regulations 2005 (“the LMC Regulations”)

The LMC Regulations provide for payments of aid to be made by the Scottish Ministers to farmers who enter into a Land Management Contract (“LMC”) to carry out a number of activities from a “menu”, for example animal health and welfare programmes and farm woodland management. The LMC system is essentially a whole farm system of support, which makes payments for the delivery of environmental, social and economic benefits. In addition to adhering to the principles of each “menu” that is chosen, the farmers must also comply with the general environmental requirements set out in Schedule 2 to the LMC Regulations.

As the purpose of the funding is not specifically to promote water environment objectives, it is not considered necessary or appropriate to designate the LMC Regulations as a WEWS Relevant Enactment.

Nevertheless there are clearly benefits to be gained from ensuring that the application of the LMC scheme fits alongside WFD objectives within a river basin

management planning framework. The Scottish Government is considering how best this might be done.

Conservation (Natural Habitats &c) Regulations 1994 (“the 1994 Regulations”)

The 1994 Regulations (as amended) transpose the provisions of the Habitats Directive, and it is a condition of the WFD that the Habitats Directive be complied with throughout the River Basin Districts in Scotland. In addition, the 1994 Regulations have recently been amended to oblige the Scottish Ministers and SEPA when exercising their functions under the WEWS Act and CAR to exercise those functions so as to secure compliance with the Habitats Directive.

While the provisions of WFD provide for a relaxation of standards in the case of social and economic factors, the Habitats Directive provides less scope for such relaxation and the WFD provides that where a stricter standard applies under Community law in relation to an area that the WFD shall concede to that stricter standard. As such, we are of the view that there would be little practical effect to be achieved from specifying the functions of the Scottish Ministers and SEPA under the 1994 Regulations. Where the two regimes interact, it will be likely that the Habitats Directive imposes the more stringent standard.

The Transport and Works (Scotland) Act 2007 (“the 2007 Act”)

The 2007 Act takes forward the Scottish Ministers’ commitment to introducing an efficient regime for the authorisation of certain transport systems in Scotland. With this in mind, Part 1 of the 2007 Act confers powers on the Scottish Ministers to enable them to authorise, by Order, the construction or operation of specified types of transport system, as well as connected matters. Consequently, the effect of Part 1 of the 2007 Act is to remove the requirement for individual Private Bills for specified types of transport development in Scotland (for example, the types of rail developments that have been brought forward for Glasgow Airport and Airdrie-Bathgate over the last few years.) Such developments will now be regulated according to the procedures established by the 2007 Act regime, including the range of subordinate legislation to be made in due course.

An overriding objective of the 2007 Act is to ensure that consideration and authorisation of such transport proposals can take place as expeditiously as possible. Although the Scottish Ministers have been conferred with powers for an Order under the 2007 Act to disapply the statutory requirements for other related consents, permissions, licences etc, it is generally expected that CAR will be the vehicle for delivering our WFD obligations. Ultimately the Scottish Ministers will not approve any such Order that is in breach of any environmental obligation, including those to be met under the WFD. The 2007 Act also requires that SEPA is notified at an early stage in the process, such that consideration of the relevant WFD obligations can proceed in a timely fashion.

ANNEX A: SUMMARY OF LEGISLATION PROPOSED FOR DESIGNATION AS WEWS RELEVANT ENACTMENTS

- Flood Prevention (Scotland) Act 1961
- Food and Environment Protection Act 1985
- Water Industry (Scotland) Act 2002
- Natural Heritage (Scotland) Act 1991
- The Aquaculture and Fisheries (Scotland) Act 2007
- Diseases of Fish Act 1937
- Town and Country Planning (Scotland) Act 1997
- Roads (Scotland) Act 1984

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