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SCOTTISH STATUTORY INSTRUMENTS

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**2005 No. 348**

**The Water Environment (Controlled Activities) (Scotland) Regulations 2005**

**PART I**

**General**

**Citation and commencement**

1.—(1) These Regulations may be cited as the Water Environment (Controlled Activities) (Scotland) Regulations 2005.

(2) Subject to paragraphs (3) and (4) these Regulations shall come into force on 1st April 2006.

(3) Regulation 54 shall come into force for the purposes of paragraphs 7 and 8 of Schedule 10 only, on 1st July 2005.

(4) Regulation 54 for all other purposes, and the remainder of Schedule 10, shall come into force on 1st October 2005.

**Interpretation**

2.—(1) In these Regulations—

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

“an application” means an application made in accordance with regulation 12;

“authorisation” means an authorisation granted under regulation 7, 8 or 9;

“controlled activity” is any activity referred to in regulation 4(1);

“the Directive” means Directive [2000/60/EC](#) of the European Parliament and of the Council establishing a framework for Community action in the field of water policy as amended<sup>(1)</sup>;

“the Groundwater Directive” means Council Directive [80/68/EEC](#) on the protection of groundwater against pollution caused by certain dangerous substances<sup>(2)</sup>;

“general binding rules” has the meaning given in regulation 7;

“land” includes land covered by water, and any works, plant or fixed machinery, building or other structure in, on or over land;

“operator” means, in relation to a controlled activity, any person who carries on or has control over the carrying on of that activity;

“person” includes a body corporate, limited liability partnership and Scottish partnership;

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(1) O.J. No. L 327, 22.12.2000, p.1; amended by decision [2455/2001/EC](#) of the European Parliament and of the Council of 20th November 2001 establishing the list of priority substances in the field of water policy and amending Directive [2000/60/EC](#) (O.J. No. L 331, 15.12.2001, p.1).

(2) O.J. L 020, 26.1.80, p.43.

“pollutant” means any substance or heat liable to cause pollution, including those listed in Schedule 1, and for the purposes of this definition “substance” includes bacteria and other pathogens;

“premises” includes any land, vehicle, vessel or mobile plant;

“the register” means the register maintained by SEPA under regulation 33;

“registration” means an authorisation granted under regulation 8;

“responsible person” means the person who is responsible for securing compliance with the terms of a water use licence and has been identified as such by SEPA in accordance with regulation 9(6), and for the purposes of these Regulations includes—

- (a) where the responsible person has been adjudged bankrupt or the estate of the responsible person is sequestrated, the trustee in bankruptcy;
- (b) where an executor has been appointed to the responsible person’s estate, the executor;
- (c) where the responsible person is a company, and—
  - (i) a receiver has been appointed, the receiver;
  - (ii) an administrator has been appointed, the administrator;
  - (iii) a liquidator has been appointed, the liquidator;

“SEPA” means the Scottish Environment Protection Agency; and

“water use licence” means an authorisation granted under regulation 9.

(2) A reference in these Regulations to anything done in writing or produced in written form includes a reference to an electronic communication, as defined in section 15 of the Electronic Communications Act 2000<sup>(3)</sup> which has been recorded in written form and is capable of being reproduced in that form.

### **Amendment of the Act – controlled activities**

3.—(1) Section 20 of the Act is amended as follows.

(2) In subsection (3), for paragraphs (b), (c) and (d) there is substituted—

- “(b) abstraction of water from the water environment,
- (c) construction, alteration or operation of impounding works in surface water or wetlands,
- (d) carrying out building or engineering works, or works other than those referred to in paragraph (c)—
  - (i) in inland water (other than groundwater) or wetlands, or
  - (ii) in the vicinity of inland water or wetlands and having or likely to have a significant adverse effect on the water environment,
- (da) artificial recharge or augmentation of groundwater.”.

(3) In subsection (6)—

- (a) for the definition of “abstraction” there is substituted—
 

““abstraction” means the doing of anything whereby any water is removed or diverted by mechanical means, pipe or any engineering structure or works from any part of the water environment, whether temporarily or permanently, including anything whereby the water is so removed or diverted for the purpose of being transferred to another part of the water environment, and includes—

(3) 2000 c. 7; amended by the Communications Act 2003 (c. 21).

- (a) the construction or extension of any well, borehole, water intake or other work by which water may be abstracted, and
  - (b) the installation or modification of any machinery or apparatus by which additional quantities of water may be abstracted by means of a well, borehole, water intake or other work,”; and
- (b) for the definition of “impounding works” there is substituted—
- ““impounding works” means in relation to surface water—
- (a) any dam, weir or other works by which water may be impounded,
  - (b) any works diverting the flow of water in connection with the construction or alteration of any dam, weir or other works falling within paragraph (a),”.

### **Application of the Regulations**

- 4.—(1) Subject to paragraph (2), these Regulations apply to—
- (a) the activities referred to in section 20(3) of the Act;
  - (b) the direct or indirect discharge, and any activity likely to cause a direct or indirect discharge, into groundwater of the substances listed in Schedule 2; and
  - (c) any other activity which directly or indirectly has or is likely to have a significant adverse impact on the water environment.
- (2) These Regulations do not apply to any activity for which a licence is needed under Part II of the Food and Environment Protection Act 1985(4).

### **Prohibition**

5. No person shall carry on, or shall cause or permit others to carry on, any controlled activity except insofar as it is—
- (a) authorised under these Regulations; and
  - (b) carried on in accordance with that authorisation.

### **Duty to use water efficiently**

6. It shall be the duty of any person carrying out a controlled activity authorised under these Regulations to take all reasonable steps to secure efficient and sustainable water use.

## **PART II**

### **Authorisations**

#### **General Binding Rules**

- 7.—(1) A controlled activity specified in Column 1 of Part 1 of Schedule 3 is authorised under these Regulations if it is carried out in accordance with the rules of general application (“general binding rules”) specified for that activity in Column 2 of that Schedule.
- (2) Part 2 of that Schedule has effect for the purposes of the interpretation of the Schedule.

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(4) 1985 c. 48; amended by the Statute Law Repeals Act 1993 (c. 50), the Environmental Protection Act 1990 (c. 43), the Petroleum Act 1998 (c. 17) and the Food Standards Act 1999 (c. 28).

## Registration

8.—(1) Subject to Part 2 of Schedule 10, SEPA may authorise the carrying on of a controlled activity in accordance with the provisions of this regulation.

(2) SEPA may, in authorising such an activity, impose such conditions as it considers necessary or expedient for the purposes of protection of the water environment.

(3) An authorisation given under this regulation (“registration”) shall be given by registering the particulars specified in paragraph (4) in the register maintained under regulation 33.

(4) The particulars are—

- (a) the activity authorised;
- (b) any conditions imposed under paragraph (2); and
- (c) the date of authorisation.

## Water Use Licence

9.—(1) Subject to Part 2 of Schedule 10, SEPA may authorise the carrying on of a controlled activity under this regulation subject to the conditions provided for in this regulation.

(2) SEPA shall impose such conditions as it considers necessary or expedient for the purposes of protection of the water environment.

(3) A condition imposed under this regulation may require an applicant to carry out works or do other things in relation to land not within the ownership or control of that applicant.

(4) Where a condition is imposed in accordance with paragraph (3), it shall be the responsibility of the applicant to obtain all consents necessary to allow the condition to be complied with.

(5) When considering whether to grant an authorisation under paragraph (1), and when imposing conditions in respect of a licence under this regulation, SEPA—

- (a) shall have regard to all controlled activities being carried on or likely to be carried on in the area of the water environment likely to be affected by the controlled activity to which the application relates;
- (b) may have regard to any agreement reached between different persons concerning controlled activities carried on in the relevant area of the water environment.

(6) SEPA shall only grant an authorisation under this regulation if—

- (a) a person has been identified who will be responsible for securing compliance with the authorisation and the conditions specified in it;
- (b) it is satisfied that that person will secure such compliance; and
- (c) it is a condition of that authorisation that that person secures such compliance.

(7) An authorisation granted under this regulation (“water use licence”) shall specify the date on which it takes effect.

## Groundwater Directive

10.—(1) When considering an application in respect of a controlled activity which falls within the provisions of the Groundwater Directive, SEPA shall impose such conditions as it considers necessary to ensure compliance with the Groundwater Directive<sup>(5)</sup>.

(2) SEPA is the competent authority for the purposes of Articles 2, 8, 12 and 13 of the Groundwater Directive.

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(5) O.J. No. L 020, 26.1.80, p.43.

### **Power of SEPA to impose authorisation**

**11.**—(1) If it appears to SEPA that a person is carrying on (or is likely to carry on) a controlled activity—

- (a) which has not been authorised under regulations 8 or 9;
- (b) under regulation 7, but that additional measures are necessary to protect the water environment;
- (c) under regulation 8 but that it should now be authorised under regulation 9;
- (d) under regulation 9 but that it should now be authorised under regulation 8,

SEPA may treat the activity as an activity in respect of which an application has been made, and may, as it thinks fit, grant an authorisation under regulation 8 or 9.

(2) Where SEPA decides to treat an activity as an activity in respect of which an application has been made—

- (a) the charge referred to in regulation 12(a) is payable, and
- (b) the remaining provisions of Part III apply as if such an application had been made.

(3) SEPA shall give notice to the responsible person, if any, or to the operator that it is treating the activity in accordance with paragraph (1).

## **PART III**

### **Applications and Application Procedure**

#### **Form and content of applications for authorisation**

**12.** An application to SEPA for an authorisation to carry on one or more controlled activities shall be made in writing, in such form as SEPA may from time to time require, and shall be accompanied by—

- (a) any charge prescribed in accordance with Schedule 5; and
- (b) such information in such form as SEPA may reasonably require.

#### **Advertisement of application**

**13.**—(1) Where SEPA receives an application it may, where it considers that the controlled activity has or is likely to have a significant adverse impact on the water environment, require the application to be advertised in accordance with this regulation.

(2) SEPA shall serve notice requiring the applicant to advertise the application within 28 days beginning with the date on which the notice was served.

(3) SEPA shall specify in a notice under paragraph (2)—

- (a) the form of the advertisement;
- (b) the text to be included in the advertisement;
- (c) the publications or locations in which the advertisement should be placed; and
- (d) the dates between which the advertisement should be placed.

(4) An advertisement under paragraph (2) shall explain that any person affected or likely to be affected by, or having an interest in, the application may make representations to SEPA in writing within 28 days beginning with the date of the advertisement and give the address to which such representations should be sent.

(5) SEPA shall consider all written representations made under paragraph (4).

(6) The requirements of this regulation shall not apply insofar as they would require the advertisement of information which is not to be included in the register maintained under regulation 33 by virtue of regulation 34.

#### **Further information etc.**

**14.**—(1) SEPA may request such additional information in relation to any application as it reasonably requires.

(2) SEPA may request such additional information within such period as it may specify, or agree with the applicant in writing.

(3) SEPA may carry out such examination and investigation as it considers necessary to allow it to make a determination in respect of the application.

(4) SEPA may require an applicant to nominate a person who shall be responsible for securing compliance with the terms of any authorisation to be granted in accordance with regulation 9, within such period as it may specify.

#### **Determination of application**

**15.**—(1) Before determining an application SEPA shall—

- (a) assess the risk to the water environment posed by the carrying on of the activity referred to in the application;
- (b) assess what steps may be taken to ensure efficient and sustainable water use;
- (c) apply the requirements of—
  - (i) the legislation referred to in Part 1 of Schedule 4, and
  - (ii) regulation 24(5); and
- (d) have regard to the provisions of the legislation referred to in Part 2 of Schedule 4.

(2) Where an application is in respect of the carrying on of more than one controlled activity, SEPA may grant or refuse to grant it in relation to any one or more of those activities.

(3) SEPA shall consider an application and shall either grant or refuse to grant an authorisation to carry on the activity, or, as the case may be, each of the activities referred to in that application, and shall notify the applicant of its decision.

(4) Where SEPA refuses to grant an application (in whole or in part) it shall, when notifying that refusal, give its reasons for doing so.

(5) Where SEPA decides to grant an authorisation, it shall, having considered the matters referred to in paragraph (1) and the nature of the impact or likely impact of the activity (whether on its own or in association with other activities) on the water environment, grant it in the form of an authorisation under either—

- (a) regulation 8, or
- (b) regulation 9.

#### **Time-limits for determining applications**

**16.**—(1) SEPA shall determine an application—

- (a) for an authorisation under regulation 8, within 30 days; and
- (b) for an authorisation under regulation 9 within 4 months,

beginning with the date on which it receives the application; but may determine it within such other period as may be agreed in writing with the applicant.

(2) For the purposes of calculating the periods mentioned in paragraph (1), SEPA shall disregard any periods—

- (a) beginning with the date on which it serves notice under regulation 13(2) and ending with the date by which any written representations must be made under regulation 13(4); and
- (b) beginning with the date it requests information under regulation 14(1) and ending with the expiry of the period specified or agreed under regulation 14(2).

(3) Where SEPA fails to determine the application within the period provided for in paragraph (1) the application shall be deemed to have been refused.

(4) Where paragraph (3) applies, SEPA shall notify the applicant of that refusal and the reasons for it.

### **Determinations of applications by the Scottish Ministers**

17.—(1) The Scottish Ministers may direct SEPA to refer to them for their determination—

- (a) applications under these Regulations of any class or description specified in the direction;
- (b) any particular application, or any part of any particular application,

and the provisions of this regulation apply to any application referred to the Scottish Ministers for their determination in accordance with this paragraph.

(2) The Scottish Ministers shall consult SEPA before issuing a direction under paragraph (1).

(3) The Scottish Ministers may cause a local inquiry to be held in relation to any such application, and the provisions of subsections (2) to (8) of section 210 of the Local Government (Scotland) Act 1973<sup>(6)</sup> (power to direct inquiries) apply to inquiries held in accordance with this provision.

(4) The provisions of regulations 13, 14 and 15(1) to (3) apply to the Scottish Ministers in respect of an application referred in accordance with paragraph (1) as they do to SEPA in respect of an application made under regulation 12.

(5) When they have determined an application, the Scottish Ministers shall direct SEPA—

- (a) to grant or refuse to grant an authorisation to carry on the activity, or any of the activities, referred to in the application or in the relevant part of the application, as the case may be;
- (b) where the determination is that an authorisation is to be granted under regulation 8 or 9, to grant that authorisation in accordance with that regulation;
- (c) where the determination is that an authorisation is to be granted subject to conditions, to grant that authorisation, specifying the conditions on which the authorisation is to be granted, and, if appropriate, identifying the responsible person for that authorisation;
- (d) where the determination is to refuse to grant an authorisation, to notify the applicant of that refusal, specifying the reasons for refusal.

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(6) 1973 c. 65; amended by the Criminal Procedure (Scotland) Act 1975 (c. 4) and the Housing and Planning Act 1986 (c. 63).

## PART IV

### Modification and termination of authorisations

#### Review of authorisations

**18.**—(1) SEPA shall periodically review authorisations granted under regulations 8 and 9, and may do so at any time.

(2) SEPA shall periodically review the provisions of Schedule 3 and shall make recommendations, in writing, to Scottish Ministers as to any changes to that Schedule which it considers necessary or appropriate.

#### Variation of authorisation

**19.**—(1) Whether or not as a result of a review under regulation 18(1), SEPA may vary an authorisation granted under regulation 8 or 9.

(2) A variation under paragraph (1) may include removing, adding or amending any condition of an authorisation.

#### Procedure for variation

**20.**—(1) Regulations 12, 13, 14 and 15(1) apply when SEPA is considering variation of an authorisation under regulation 19 as if the variation proposed by SEPA is an application, and the responsible person or operator, as the case may be, is the applicant.

(2) If SEPA decides to vary an authorisation, it shall serve notice on the applicant specifying—

- (a) the variations being made to the authorisation; and
- (b) the date on which the variations are to take effect which shall not be less than 3 months from the date on which the notice was served.

(3) SEPA may issue a varied authorisation to the applicant incorporating the variations made under this regulation.

#### Request for variation

**21.**—(1) A responsible person or operator may apply to SEPA for a variation of an authorisation granted under regulation 8 or 9.

(2) The provisions of regulations 12, 13, 14 and 15(1) apply to an application under paragraph (1) as if it is an application.

(3) SEPA must either grant or refuse to grant (in whole or in part) an application under paragraph (1), and if it refuses to grant the application it must give its reasons for such refusal.

(4) Where SEPA grants an application under paragraph (1), it shall serve notice on the applicant specifying—

- (a) the variations being made to the authorisation; and
- (b) the date on which the variations are to take effect, which shall not (unless agreed by the applicant in writing) be less than 3 months from the date on which the notice was served.

(5) SEPA may issue a varied authorisation to the applicant incorporating the variations made under this regulation.



### **Transfer of authorisation**

**22.**—(1) A responsible person may, jointly with another person, apply to transfer an authorisation granted under regulation 9 (in whole or in part) to the other person.

(2) The provisions of regulation 12 and 14(1) to (3) apply to an application under paragraph (1) as if it is an application.

(3) SEPA shall not grant an application under paragraph (1) unless it is satisfied that the person to whom the authorisation is to be transferred will secure compliance with the terms, limitations and conditions specified in the authorisation, or relevant part thereof.

(4) SEPA shall determine an application under this regulation within 2 months beginning with the date on which it receives the application, or such longer period as may be agreed with the applicants in writing.

(5) SEPA shall notify the applicants of its determination and, if it refuses the application, give its reasons for doing so.

(6) Where SEPA fails to determine the application within the period specified in paragraph (4), it shall be deemed to have been granted.

### **Conditions of transferred authorisations**

**23.**—(1) Where an application under regulation 22 is granted, or deemed to have been granted, the following provisions of this regulation apply.

(2) In the case of a transfer of the whole of an authorisation SEPA shall send a copy of the amended authorisation specifying—

- (a) the date on which the transfer is to have effect; and
- (b) the responsible person in respect of the authorisation,

to that responsible person.

(3) In the case of transfer of part of an authorisation, SEPA shall—

- (a) issue a new authorisation in respect of the part to be transferred, which specifies—
  - (i) the controlled activities being transferred and any conditions applying to them;
  - (ii) the responsible person for that authorisation; and
  - (iii) the date on which the new authorisation is to have effect,to the responsible person for that part; and
- (b) issue an amended authorisation in respect of the part not so transferred which specifies—
  - (i) the controlled activities in relation to that part and any conditions applying to them;
  - (ii) the responsible person for that authorisation; and
  - (iii) the date on which the amended authorisation is to have effect,to the responsible person for that part.

### **Surrender of authorisation**

**24.**—(1) This regulation applies where an authorisation granted under regulation 8 or 9 is in force and either—

- (a) it is intended to cease the authorised activity; or
- (b) the authorised activity has ceased.

(2) Where paragraph (1) applies and the authorisation is under regulation 8, the operator—

- (a) where possible, shall notify SEPA of the intention to cease the authorised activity and the date on which it will cease as soon as that information is known to the operator; and
  - (b) shall in any event notify SEPA of the cessation of the activity within 7 days of that cessation.
- (3) Where paragraph (1) applies and the authorisation is under regulation 9, the responsible person shall apply to SEPA to surrender the authorisation or part of it.
- (4) The provisions of regulations 12, 13 and 14(1) to (3) apply to an application under paragraph (3) as if it is an application.
- (5) Before determining an application under paragraph (3) SEPA shall—
- (a) assess the risk to the water environment posed by the cessation of the activity referred to in paragraph (1); and
  - (b) take account of the steps (if any) that have been taken and identify any steps necessary to—
    - (i) avoid any risk of adverse impact on the water environment resulting from the cessation of the authorised activity; and
    - (ii) leave the relevant part of the water environment affected by the authorised activity in a state which will permit compliance with any relevant requirements of the legislation referred to in Part 1 of Schedule 4.

#### **Determination of application for surrender**

- 25.**—(1) SEPA shall give notice to the applicant of its determination of an application under regulation 24(3) within 2 months beginning with the date on which SEPA receives the application, or within such longer period as it may agree with the applicant in writing.
- (2) The provisions of regulation 16(2) apply in respect of the period mentioned in paragraph (1) as they apply in respect of the periods mentioned in regulation 16(1).
- (3) Where SEPA grants an application, the notice given under paragraph (1) shall specify the date on which the authorisation ceases to have effect.
- (4) In the case of a partial surrender, if SEPA is of the opinion that it is necessary to vary the authorisation to take account of the surrender, it shall send a notice to the applicant specifying—
- (a) variations to the authorisation consequent on the partial surrender; and
  - (b) the date on which the authorisation, as varied, takes effect.
- (5) If SEPA has failed to determine the application within the period specified in paragraph (1) the application will be deemed to be granted at the end of that period.

#### **Suspension and revocation of authorisation**

- 26.**—(1) SEPA may at any time suspend or revoke an authorisation (in whole or in part) by serving a notice on the responsible person or operator, as the case may be.
- (2) A notice under paragraph (1) shall specify—
- (a) in the case of a partial suspension or partial revocation, the extent to which the authorisation is being revoked or suspended;
  - (b) the date on which the suspension or revocation shall take effect, which shall be at least 28 days after the date on which the notice is served; and
  - (c) the reasons for the suspension or revocation .
- (3) An authorisation shall cease to have effect (in whole or in part) from the date specified in the notice.

## PART V

### Enforcement and other powers

#### **Powers and duty to monitor, enforce etc.**

27.—(1) It shall be the duty of SEPA to monitor compliance with, and to enforce the provisions of these Regulations.

(2) In the discharge of its duties under paragraph (1) in relation to the Northumbria River Basin District(7) and the Solway Tweed River Basin District(8), SEPA shall, as necessary, consult and collaborate with the Environment Agency.

(3) SEPA may secure the carrying out, through such persons as it considers appropriate, of such examination and investigation as it considers necessary for the purpose of discharging its duties under these Regulations.

(4) Any person who appears suitable to SEPA may be authorised in writing by it to exercise, in accordance with the terms of that authorisation, the powers specified in Part 1 of Schedule 6 in accordance with the requirements of Parts 2 and 3 of that Schedule.

(5) The powers referred to in paragraph (4) are to be exercised for the purpose of discharging any of SEPA's functions under—

- (a) the Act;
- (b) the Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003(9);
- (c) the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004(10); and
- (d) these Regulations.

(6) The provisions of Parts 4 and 5 of Schedule 6 apply in relation to the exercise of the powers referred to in paragraph (4).

#### **Enforcement notices**

28.—(1) This regulation applies where—

- (a) a person has carried out, is carrying out or is likely to carry out a controlled activity; and
- (b) SEPA is of the opinion that the activity—
  - (i) has contravened, is contravening or is likely to contravene an authorisation granted under these Regulations;
  - (ii) has caused, is causing or is likely to cause significant adverse impacts on the water environment or any part of it; or
  - (iii) has caused, is causing or is likely to cause a direct or indirect discharge into groundwater of any of the substances listed in Schedule 2.

(2) SEPA may serve a notice on the responsible person, or the operator, as the case may be, specifying—

- (a) the activity;

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(7) The Northumbria River Basin District was identified by virtue of the Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003 (S.I.2003/3245).

(8) The Solway Tweed River Basin District was identified by virtue of the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004 (S.I. 2004/99).

(9) S.I. 2003/3245.

(10) S.I. 2004/99.

- (b) whether or not that activity was, is or is likely to be in contravention of an authorisation under these Regulations;
  - (c) the adverse impacts or the likely adverse impacts on the water environment; or
  - (d) the direct or indirect, or likely direct or indirect discharge into groundwater; and
  - (e) the steps to be taken by the person responsible or the operator which SEPA considers to be necessary or appropriate to prevent, mitigate or remedy the contravention of the authorisation, the adverse impacts on the water environment or the direct or indirect discharge into groundwater.
- (3) The steps referred to in paragraph 2(e) may include cessation of a controlled activity for such period as SEPA considers necessary or appropriate.
- (4) SEPA shall revoke a notice served under paragraph (2) where—
- (a) the contravention or likely contravention of an authorisation has ceased and is unlikely to recur, and any remedial mitigating or preventive steps required by SEPA have been carried out;
  - (b) the adverse impacts or likely adverse impacts on the water environment have ceased and are unlikely to recur and any remedial mitigating or preventive steps required by SEPA have been carried out;
  - (c) the direct or indirect, or likely direct or indirect discharge to groundwater has ceased and is unlikely to recur and any remedial mitigating or preventive steps required by SEPA have been carried out.
- (5) SEPA may impose such time limits as it considers appropriate in a notice under paragraph (2) and may describe a time limit by reference to the completion of steps or any other requirement specified in that notice.

#### **Power of SEPA to carry out works**

**29.**—(1) Where SEPA considers that a notice should be served under regulation 28(2), it shall be entitled to take any steps that would be identified in that notice, or secure that those steps are taken, if—

- (a) it considers it necessary to do so forthwith; or
  - (b) it appears to SEPA, after reasonable inquiry, that no person can be found on whom to serve that notice.
- (2) Where SEPA has—
- (a) carried out, or secured the carrying out of, any investigation to establish whether or not a notice under regulation 28(2) is necessary, and if necessary, on whom it requires to be served; or
  - (b) taken steps, or secured that steps were taken under paragraph (1),

it shall be entitled to recover the costs of doing so from the responsible person or operator who has carried out, is carrying out or is likely to carry out the activity in respect of which the notice is served.

#### **Enforcement notices – rights of entry, compensation etc.**

**30.**—(1) A notice under regulation 28(2) may require the responsible person or operator to carry out work in relation to land outwith the ownership or control of that person.

(2) Where paragraph (1) applies, any person whose consent is required before that work may be carried out shall grant, or join in granting such rights in relation to any land as will enable the notice to be complied with.

(3) Where paragraph (1) applies, SEPA shall, before serving a notice under regulation 28(2), insofar as it is reasonably practicable, consult such persons as appear to it to be—

- (a) the owner or occupier of land which will be affected by the notice; and
- (b) any person who might be required under paragraph (2) to grant or join in granting any rights,

in respect of the rights which that owner, occupier, or person, may be required to grant.

(4) A notice shall not be regarded as invalid by reason only of a failure to comply with paragraph (3).

(5) A person who grants, or joins in granting, any rights in accordance with paragraph (2) shall be entitled to apply for compensation, in accordance with Schedule 7, of such amount and in such manner as may be determined under that Schedule.

(6) Compensation payable under paragraph (5) shall be paid by the person on whom notice under regulation 28(2) was served or would have been served but for regulation 29(1).

(7) Where no person can be found by whom compensation should be payable or where a person found liable in compensation has failed to make the payment of it, compensation under this regulation shall be payable by SEPA; and SEPA shall be entitled to recover any payment of compensation made by it under this paragraph from any person on whom notice under regulation 28(2) was served or would have been served but for regulation 29(1).

### **Enforcement by the courts**

**31.** If SEPA is of the opinion that proceedings for an offence under regulation 40(1)(j) would afford an ineffectual remedy against a person who has failed to comply with a requirement of any notice under regulation 28, it may take proceedings in any court of competent jurisdiction for the purpose of securing compliance with that notice.

## **PART VI**

### **Information and Register**

#### **Power of the Scottish Ministers and SEPA to obtain information**

**32.—(1)** The Scottish Ministers may require SEPA, by notice served on it, to furnish such information about the discharge of its functions under these Regulations as the Scottish Ministers may require.

(2) SEPA may serve on any person a notice requiring that person to furnish to SEPA, within a period or at times specified in the notice and in a form so specified, any information so specified which SEPA reasonably considers is necessary for the purpose of any function conferred on SEPA by—

- (a) the Act;
- (b) the Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003(**11**);
- (c) the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004(**12**); and
- (d) these Regulations.

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(11) S.I. 2003/3245.

(12) S.I. 2004/99.

(3) The information which a person may be required to furnish under paragraph (2) shall include information which, although it is not in the possession of that person or would not otherwise come into the possession of that person, is information which it is reasonable to require that person to obtain for the purposes of complying with the information notice.

(4) Nothing in this regulation authorises the Scottish Ministers or SEPA to require disclosure of anything which a person would be entitled to refuse to disclose on grounds of confidentiality in proceedings in the Court of Session.

### **Public register of information**

**33.**—(1) Subject to paragraph (5) and regulation 34, it shall be the duty of SEPA, to maintain a register containing the particulars described in Schedule 8.

(2) Where, by virtue of regulation 34, information of any description is not included in the register maintained by SEPA under this regulation, a statement shall be entered in the register indicating the existence of information of that description.

(3) It shall be the duty of SEPA—

- (a) to secure that the register maintained by it under this regulation is available, at all reasonable times, for inspection by the public free of charge; and
- (b) to afford to members of the public facilities for obtaining copies of entries, on payment of reasonable charges.

(4) The register maintained by SEPA under this regulation may be kept in any form.

(5) Where the Scottish Ministers exercise functions under regulation 51, they shall send any particulars referred to in Schedule 8 which relate to that exercise of functions to SEPA, and SEPA shall enter those particulars in the register.

### **Confidential information**

**34.**—(1) Information relating to the affairs of any individual or business which is commercially confidential shall only be included in the register if—

- (a) the individual or the person for the time being carrying on the business has given consent to that inclusion; or
- (b) the information requires to be included in the register in pursuance of a direction under regulation 39.

(2) For the purposes of these Regulations, information is only commercially confidential in relation to the affairs of any individual or business if SEPA has determined that putting it on the register would prejudice to an unreasonable degree the commercial interests of that individual or business.

### **Application for determination of commercial confidentiality**

**35.**—(1) Where information is given to SEPA for the purposes of these Regulations, the person giving it may apply to SEPA to have the information excluded from the register on the ground that it is commercially confidential (as regards that person or another person).

(2) The application under paragraph (1) shall include representations indicating why the applicant considers the information commercially confidential, together with such further information in support of the application as the applicant considers appropriate.

(3) The provisions of regulation 14(1) and (2) shall apply to an application under paragraph (1) as they do to an application.

(4) SEPA shall determine whether the information is or is not commercially confidential and shall give notice of its determination to the applicant within 28 days beginning with the date of the application or within such longer period as may be agreed with the applicant in writing.

(5) The provisions of regulation 16(2)(b) shall apply in respect of the period mentioned in paragraph (4) as they apply in respect of the periods mentioned in regulation 16(1).

(6) If SEPA fails to give notice of its determination of an application under paragraph (2) within the period allowed by or under paragraph (4), the information shall be deemed to be commercially confidential.

### **Procedure relating to information which might be confidential**

**36.**—(1) Where it appears to SEPA that any information that has been obtained by it under or by virtue of any provision of these Regulations and is required to be included in the register, might be commercially confidential, SEPA shall—

- (a) give to the person to whom or whose business it relates notice that that information is required to be included in the register; and
- (b) give that person a reasonable opportunity—
  - (i) of objecting to the inclusion of the information on the ground that it is commercially confidential; and
  - (ii) of making representations to SEPA indicating why the person considers the information to be commercially confidential, together with such further information in support of the objection as the person considers appropriate.

(2) The provisions of regulation 14(1) and (2) shall apply to an objection under paragraph (1) as they do to an application.

(3) SEPA shall determine whether the information is or is not commercially confidential and shall give notice of its determination to the person to whom or whose business it relates.

(4) This regulation does not apply where the information is the subject of an application under regulation 35.

### **Review of determination of commercial confidentiality**

**37.**—(1) SEPA shall periodically review its determinations under this Part that information is commercially confidential, and may do so at any time.

(2) Where SEPA is carrying out a review under paragraph (1), it shall—

- (a) give the person to whom or to whose business the determination relates notice that it is reviewing that determination; and
- (b) give that person a reasonable opportunity of making representations regarding the commercial confidentiality of the information, including an indication of why the person may consider that the information remains commercially confidential, together with such further information in support of those representations as the person considers appropriate.

(3) The provisions of regulation 14(1) and (2) shall apply to representations made under paragraph (2) as they do to an application.

(4) SEPA shall determine whether or not the information remains commercially confidential and shall give notice of its determination to that person.

**Effect of determination**

38. Subject to the provisions of regulation 48(1)(b), where SEPA has determined under this Part that information is not commercially confidential, the information shall not be entered in the register until the end of the period of 21 days beginning with the date on which the determination was notified.

**Directions to SEPA concerning confidential information**

39. The Scottish Ministers may give to SEPA a direction as to specified information, or descriptions of information, which the public interest requires to be included in the register, notwithstanding that the information may be commercially confidential.

**PART VII****Offences****Offences**

- 40.—(1) It is an offence for a person to—
- (a) contravene regulation 5;
  - (b) fail to comply with or contravene a general binding rule;
  - (c) fail to comply with or contravene a registration (including any condition imposed);
  - (d) fail to comply with or contravene a water use licence (including any condition imposed);
  - (e) obstruct an authorised person in the exercise of that person's powers under regulation 27(4) and Schedule 6;
  - (f) fail to comply with any requirement imposed in the exercise of that person's powers under regulation 27(4) and Schedule 6;
  - (g) fail or refuse to provide facilities or assistance or any information or to permit any inspection reasonably required by an authorised person in the exercise of that person's powers or duties under or by virtue of regulation 27(4) and Schedule 6;
  - (h) prevent any other person from appearing before an authorised person, or answering any question to which an authorised person may require an answer, pursuant to regulation 27(4) and Schedule 6;
  - (i) pretend to be a person authorised in accordance with regulation 27(4);
  - (j) fail to comply with the requirements of a notice issued under regulation 28(2);
  - (k) fail to comply with the requirements of an information notice under regulation 32(2);
  - (l) make a statement which that person knows to be false or misleading in a material particular, or recklessly to make a statement which is false or misleading in a material particular, where the statement is made—
    - (i) in purported compliance with a requirement to furnish any information imposed by or under any provision of these Regulations; or
    - (ii) for the purpose of obtaining an authorisation issued under these Regulations to that or any other person, or the variation, transfer or surrender of an authorisation;
  - (m) intentionally make a false entry in any record required to be kept as a condition of an authorisation;
  - (n) with intent to deceive, forge or use a document issued or authorised to be issued under the condition of an authorisation or required for any purpose under a condition of such



- an authorisation or to make or have in that person's possession a document so closely resembling any such document so as to be likely to deceive; or
- (o) cause or permit any other person to commit an offence under sub-paragraphs (a) to (n) above.
- (2) A person guilty of an offence under paragraph (1) shall be liable—
- (a) on summary conviction—
- (i) to a fine not exceeding £40,000 or to imprisonment for a term not exceeding 6 months, or to both; and
- (ii) in the case of a continuing offence, to a further fine not exceeding £250 for every day during which the offence is continued after conviction;
- (b) on conviction on indictment—
- (i) to a fine or to imprisonment for a term not exceeding 5 years, or to both; and
- (ii) in the case of a continuing offence to a further fine not exceeding £1,000 for every day during which the offence is continued after conviction.

### **Offences by bodies corporate**

- 41.**—(1) Where an offence under these Regulations is committed by—
- (a) a body corporate (other than a limited liability partnership) and is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or a person who was purporting to act in any such capacity;
- (b) a limited liability partnership and is proved to have been committed with the consent or connivance of, or have been attributable to any neglect on the part of, any member of that partnership or person who was purporting to act as such;
- (c) a Scottish partnership (other than a limited liability partnership) and is proved to have been committed with the consent or connivance of, or have been attributable to neglect on the part of, any partner or a person who was purporting to act as such,

that person as well as the body corporate, the limited liability partnership or the partnership, as the case may be, shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate (other than the affairs of a limited liability partnership) are managed by its members, paragraph (1) shall apply in relation to the acts or defaults of a member in connection with the functions of management of that member as if that member were a director of the body corporate.

### **Offences – acts or default of third person**

**42.** Where the commission by any person of an offence under these Regulations is due to the act or default of some other person, that other person may be charged with and convicted of the offence by virtue of this regulation whether or not proceedings for the offence are taken against the first-mentioned person.

### **Admissibility of evidence**

- 43.**—(1) Where—
- (a) by virtue of a condition of an authorisation, an entry is required to be made in any record as to the observance of any condition of the authorisation; and

(b) the entry has not been made,

that fact shall be admissible as evidence that that condition has not been observed.

(2) Information provided or obtained pursuant to or by virtue of a condition of an authorisation including information so provided or obtained, or recorded, by means of any apparatus, shall be admissible in evidence in any proceedings, whether against the person subject to the condition, or any other person.

(3) For the purposes of paragraph (2), apparatus shall be presumed in any proceedings to register or record accurately, unless the contrary is shown, or the authorisation otherwise provides.

### **Defence to principal offences**

**44.** A person shall not be guilty of an offence under regulation 40(1)(a) to (d), (j) or (o) where the contravention is a result of—

- (a) —
  - (i) an accident which could not reasonably have been foreseen; or
  - (ii) natural causes or force majeure which are exceptional and could not reasonably have been foreseen; and
- (b) —
  - (i) all practicable steps are taken to prevent deterioration of the water environment;
  - (ii) all practicable steps are taken as soon as is reasonably practicable to restore the water environment to its condition prior to the contravention; and
  - (iii) particulars of the contravention are furnished to SEPA as soon as practicable after it occurs.

### **Power of court to order offence to be remedied**

**45.—(1)** Where—

- (a) a person is convicted of an offence under regulation 40(1)(a) to (d), (j) or (o) in respect of any controlled activity which has had an adverse impact on the water environment; and
- (b) it appears to the court that it is in the power of that person to mitigate or remedy that adverse impact,

the court may, in addition to, or instead of, imposing any punishment, order that person, within such time as may be fixed by the order of the court, to take such steps as may be specified in that order for remedying those matters.

(2) Before making such an order, the court shall have regard to any representations by SEPA as to the steps required to mitigate or remedy the adverse impact.

(3) The time fixed by an order of the court under paragraph (1) may be extended or further extended by a further order of the court on an application made before the end of the time originally fixed or extended under this paragraph, as the case may be.

(4) As long as an order under this regulation is in force, the convicted person shall not be liable under regulation 40(1) as regards the matters in respect of which steps require to be taken in accordance with that order.

## PART VIII

### Appeals

#### Appeals to the Scottish Ministers

**46.** The following persons, namely:–

- (a) a person who has been refused the grant of an authorisation in accordance with regulation 15(3) or is deemed to have been refused the grant of an authorisation in accordance with regulation 16(3);
- (b) a person who has been granted a form of authorisation under regulation 15 which is different from the form of authorisation which that person believes ought to have been granted;
- (c) a person who is aggrieved by the terms and conditions attached to that person's authorisation in accordance with regulation 8 or 9;
- (d) a person who has been served with a variation notice under regulation 20(2) or is aggrieved by the conditions attached to that variation notice;
- (e) a person who has been refused the variation of an authorisation on request under regulation 21;
- (f) a person whose application under regulation 22 for SEPA to effect the transfer of an authorisation has been refused; or who is aggrieved by the conditions attached to that person's authorisation to take account of such a transfer;
- (g) a person whose application to surrender an authorisation under regulation 24(3) has been refused or who is aggrieved by the conditions attached to that authorisation in order to take account of the surrender;
- (h) a person whose authorisation has been suspended or revoked (in whole or in part) under regulation 26;
- (i) a person on whom a notice has been served under regulation 28(2), or who is aggrieved by the terms of that notice; and
- (j) where SEPA has determined that information is not commercially confidential under Part VI, the person to whom, or whose business, that information relates,

may appeal against the decision of SEPA to the Scottish Ministers.

#### Determination of Appeals

**47.** On determining an appeal against a decision of SEPA referred to in regulation 46, the Scottish Ministers may–

- (a) affirm the decision, or any part of it;
- (b) where the decision was a refusal to–
  - (i) grant an authorisation;
  - (ii) grant a form of authorisation; or
  - (iii) vary any condition of an authorisation,direct SEPA to grant the authorisation, the form of authorisation or vary the conditions of the authorisation, as the case may be;
- (c) where the decision was as to the conditions attached to an authorisation, quash or vary all or any of the conditions of the authorisation;

- (d) where the decision was a refusal to effect the transfer of, or accept the surrender of, an authorisation, direct SEPA to effect the transfer or accept the surrender, as the case may be;
- (e) where the decision was to serve a notice under regulation 20(2), 26 or 28(2), either quash or affirm the notice, and if they affirm it, they may do so in its original form or with such modifications as they may think fit;
- (f) where the decision was a determination that information is not commercially confidential, either affirm the determination or quash it,

and where they exercise any of the powers in paragraph (b), (c) or (e) the Scottish Ministers may give directions as to the conditions to be attached to the authorisation or the terms of the notice, as the case may be.

### **Effect of notices etc. during consideration of appeal**

**48.**—(1) Where an appeal is against—

- (a) a notice served under regulation 20(2) the notice shall not take effect until the day following the day on which the appeal is finally determined or withdrawn;
- (b) a determination under Part VI that information is not commercially confidential, the information shall not be entered in the register until the day following the day on which the appeal is finally determined or withdrawn.

(2) Where an appeal relates to—

- (a) the conditions attached to an authorisation under regulation 8 or 9, the bringing of the appeal shall not have the effect of suspending the operation of the conditions;
- (b) a notice under regulation 26 or 28(2), the bringing of the appeal shall not have the effect of suspending the operation of the notice.

### **Appeals – miscellaneous**

**49.**—(1) The provisions of regulation 15(1) apply where the Scottish Ministers, in exercising any of the powers in regulation 47, give directions as to the conditions to be attached to an authorisation under regulation 8 or 9 as they would apply to SEPA when determining the conditions of the authorisation.

(2) Schedule 9, which makes provision for procedures for appeals under regulation 46, has effect.

(3) Section 114 of the Environment Act 1995(13) (delegation of reference of appeals) shall apply to this Part and to Schedule 9 as it applies to appeals referred to in that section.

## **PART IX**

### **General**

#### **Application to the Crown**

**50.**—(1) Subject to the provisions of this regulation, these Regulations bind the Crown.

(2) No contravention by the Crown of any provision of these Regulations shall make the Crown criminally liable under regulation 40 and no proceedings may be taken against the Crown under regulation 40 but the Court of Session may, on an application by SEPA, declare unlawful any act or omission of the Crown which constitutes such a contravention.

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(13) 1995 c. 25, amended by the Pollution Prevention and Control (Scotland) Regulations 2000 (S.S.I. 2000/323).

(3) Notwithstanding anything in paragraph (2), the provisions of these Regulations shall apply to persons in the public service of the Crown as they apply to other persons.

### **Application to SEPA**

**51.**—(1) In the application of these Regulations to SEPA where it is carrying on, or intends to carry on, a controlled activity, and subject to paragraph (2), any functions conferred on SEPA by these Regulations shall instead be carried out by the Scottish Ministers.

(2) Paragraph (1) does not apply to regulations 12(a), 17, 18(2), 27 to 31, 39, 46 to 49 and 52.

### **Guidance to SEPA**

**52.** The Scottish Ministers may issue guidance to SEPA with respect to the carrying out of its functions under these Regulations, and SEPA shall have regard to any guidance issued by the Scottish Ministers under this regulation.

### **Notices**

**53.**—(1) Any notice served or given under these Regulations by the Scottish Ministers or SEPA—

- (a) shall be in writing; and
- (b) may be withdrawn, varied or revoked by a further notice in writing (whether before or after the notice has come into effect).

(2) Any such notice may be served on or given to a person by leaving it at that person's proper address or by sending it by post to that person at that address.

(3) Any such notice may—

- (a) in the case of a body corporate, be served on the secretary or clerk of that body;
- (b) in the case of a partnership, be served on or given to a partner or person having the control or management of the partnership business.

(4) For the purpose of this regulation and of paragraph 4 of Schedule 1 to the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999(14) in its application to this regulation, the proper address of any person on or to whom any such notice is to be served or given shall be the last known address of that person, except that—

- (a) in the case of a body corporate or their secretary or clerk, it shall be the address of the registered or principal office of that body;
- (b) in the case of a partnership or person having the control or management of the partnership business, it shall be the principal office of the partnership,

and for the purposes of this paragraph the principal office of a company registered outside of the United Kingdom or of a partnership carrying on business outside the United Kingdom shall be their principal office within the United Kingdom.

(5) If the person to be served with or given any such notice has specified an address in the United Kingdom other than the proper address of that person within the meaning of paragraph (4) as the one at which that person or someone on behalf of that person will accept notices of the same description as that notice, that address shall be treated for the purposes of this regulation and the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 as the proper address of that person.

**Transitional, savings and supplemental provisions**

**54.** The transitional, savings and supplemental provisions contained in Schedule 10 to these Regulations shall have effect.

St Andrew's House, Edinburgh  
7th June 2005

*LEWIS MACDONALD*  
Authorised to sign by the Scottish Ministers