



Water Use

# Regulatory Method (WAT-RM-22)

## Managing Refusals and Appeals

### **Note on Planned Deterioration, Derogation & Significant Adverse Impacts**

For guidance on planned deterioration, including cases requiring 'derogation', and more generally on determining any application likely to result in significant adverse impacts on the water environment. Operations staff should refer to *WAT-RM-34: Derogation Determination - Adverse Impacts on the Water Environment*

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### Update Summary

Version	Description
(v1)	This document is based on and replaces the following document: <i>WAT-RM-22: Planned Deterioration, Refusal and Appeal (inc Derogation (v1)</i> ( <i>WM Filename: RM_22_Planned_Deterioration.doc</i> )
v2.0	Info on Planned Deterioration, Derogation, Significant Impacts removed (now available in WAT-RM-34.). ( <i>WM Filename: RM_22a_Refusals_Appeals.doc</i> )
v3.0	New base template applied, links to docs revised for new SEPA website, Nov 2008
v4.0	Improvement on definitions and procedures throughout the document

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# 1. Introduction and Key Points

Under the Controlled Activities Regulations (CAR) SEPA can refuse CAR applications (new, variation, surrender) due to the following reasons:

- Potential environmental harm
- Incorrect application
- SEPA not being satisfied that the applicant will secure compliance with the conditions of the authorisation

Appeals may be made, under CAR, against decisions SEPA has made in relation to:

- The determination (new, variation, transfer, surrender, commercial confidentiality) of a CAR authorisation
- The suspension or revocation of an authorisation
- The issuing of a notice;

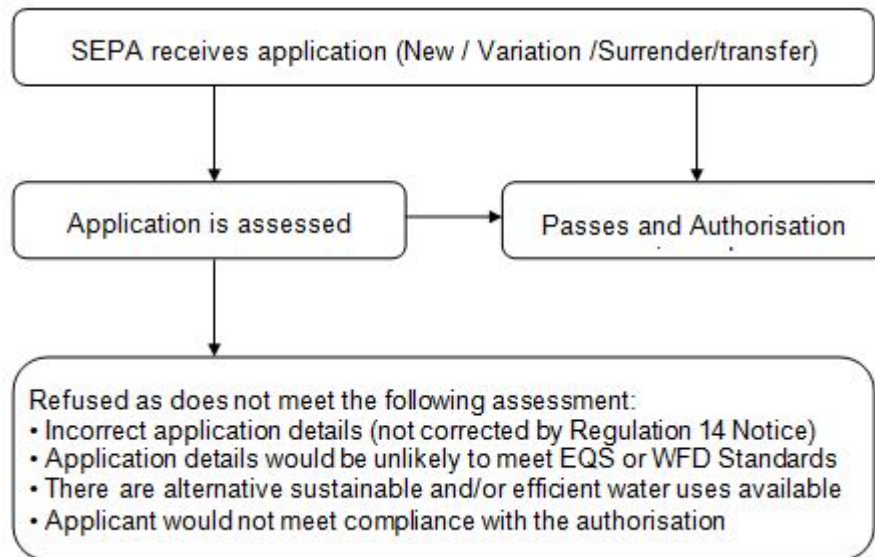
This document will provide guidance on the application of the tests for refusal and appeals.

**It does not provide any guidance** on determining applications likely to cause significant adverse impacts, including cases where 'derogation' would be required. When dealing with any proposal (including operator-initiated variations) that would result in a breach of an environmental standard or condition limit refer to *WAT-RM-34: Derogation Determination - Adverse Impacts on the Water Environment*.

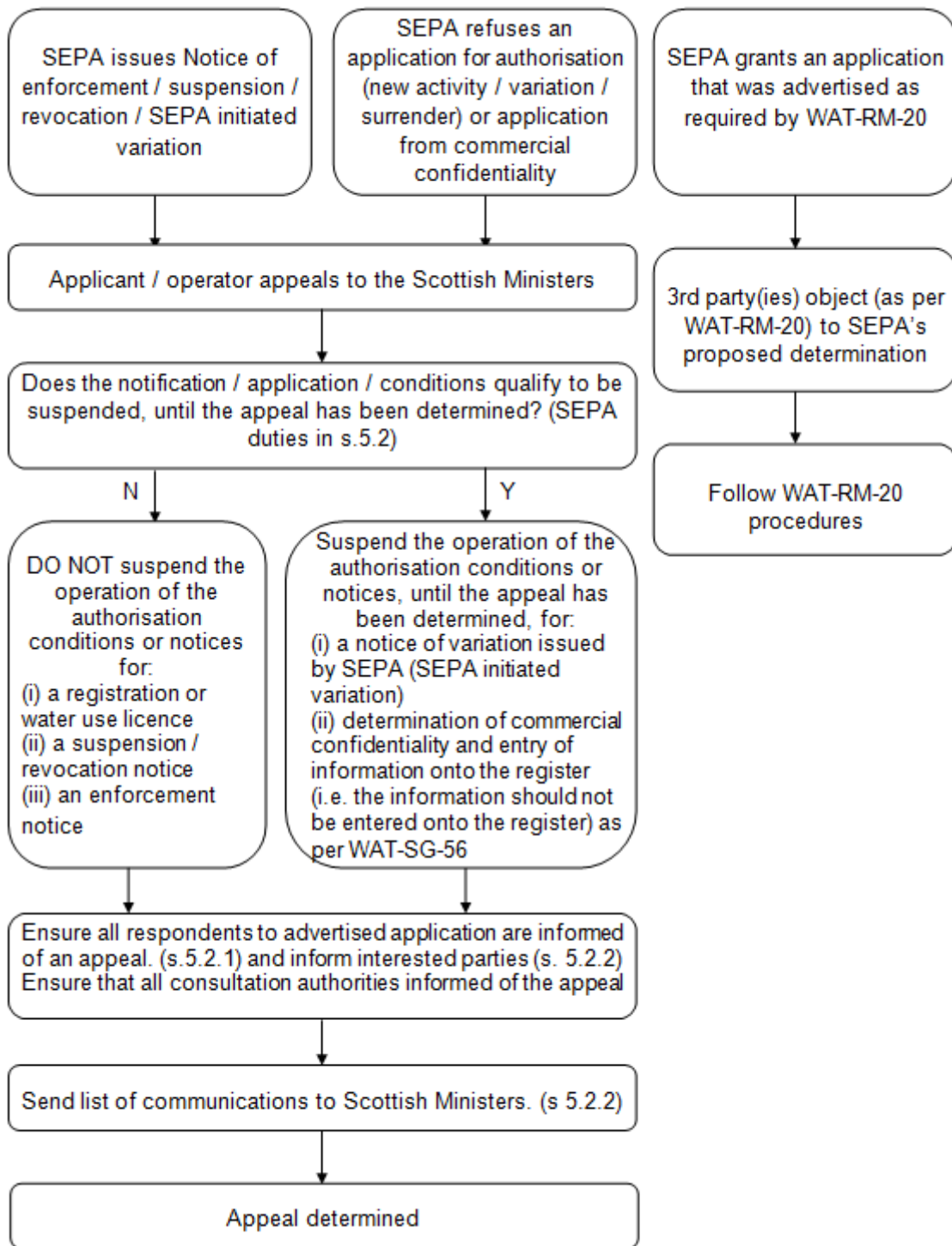
Support for those using *WAT-RM-34* is available from the *Water Unit*.

## 2. Process Summaries

### Refusal of CAR Authorisation



## Appeals against CAR Authorisations & Notices



## 3. Refusals

This section details the various refusal criteria that can be applied at the different stages of a CAR application.

3.1 CAR Authorisation Applications (including New and Variations)

3.2 Transfer of a CAR Licence

3.3 Surrender of a CAR Licence

3.4 Commercial Confidentiality

3.5 Refusal procedure

### 3.1 CAR Authorisation Applications (including New and Variations)

SEPA will assess and determine all CAR applications, in order to protect the water environment. SEPA will authorise activities where there is adequate environmental capacity and third party interests are taken into account where appropriate.

SEPA are minded to refuse a CAR application where:

- breaching of environmental standards (i.e. Environmental Quality Standards) would compromise achieving the Water Framework Objectives; or
- harm of third party interests (e.g. natura); or
- there are alternative sustainable and efficient water uses available; or
- the Responsible Person would not be able to secure compliance.

SEPA will consider the criteria in Table 1 when determining whether or not an application should be refused. Where an application is refused on these grounds, the criteria should be used to inform the applicant of the reasons for refusal.

**Table 1 Refusal Criteria for New Licence Applications**

Criteria	Test	Additional Info	Decision
WFD objective	Will the activity meet the environmental standards?		If EQSs are likely to be breached, refuse.  If morphological environmental standards (see figure 1&2 in RM-02) are not met, refuse.
Third Parties	Has the activity application received third party representations during the advertising and consultation process (WAT-RM-20)		If SEPA considers that relevant representations cannot be sufficiently addressed then refuse.  Engineering activities follow guidance in conservation procedure and WAT SG 89
Sustainable and efficient water use	Have the sustainable and efficient water use tests in WAT-RM-21: Allocation of Capacity been met?		If not, refuse.
Responsible Person	For Licence applications, has a Responsible Person being identified, and does the applicant qualify as a Responsible Person?	See application guidance	If not, refuse.
	Has SEPA previously used its powers to revoke or suspend a licence held by the Responsible Person?	The techniques, systems, personnel and controls proposed by the applicant need to ensure compliance with the authorisation.	Refuse if not adequate.



	<p>Has SEPA had to use its powers (i.e. Enforcement Notice) to require remediation works at current / other sites with similar activities carried out by responsible person?</p>	<p>The techniques, systems, personnel and controls proposed by the applicant need to ensure compliance with the authorisation.</p>	<p>Refuse if not adequate.</p>
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### 3.2 Transfer of a CAR Licence

The regulations only make provision for the transfer of water use licences where a responsible person can be identified who is able to secure compliance with the conditions in the authorisation.

When two persons apply to SEPA for the transfer of a licence the regulations require that the new responsible person is able to secure compliance with the conditions in the licence. In general, the existing conditions would be transferred with the licence and reviewed in line with the planned cycle of authorisation reviews. Where a review is due within the coming calendar year, this should be completed at the time of the licence transfer. Refer to *WAT-RM-09: Modifications to CAR Authorisations* for guidance on SEPA's approach to licence reviews.

In general SEPA is content to accept any responsible persons who intend to carry out a water use activity without any further checks on competence. However, where there is a history of non-compliance SEPA may require further evidence from the applicant that it has the systems and resources to ensure compliance for an activity in question. The criteria in Table 2 should be used to consider any transfer applications.

**Table 2 Refusal Criteria for Licence Transfers**

Criteria	Test	Additional Info	Decision
Ability of responsible person to secure compliance with conditions	Does the applicant qualify as a responsible person?	See application guidance	If not, refuse.
	Has SEPA previously used its powers to revoke a licence held by the responsible person?	The techniques, systems, personnel and controls proposed by the applicant to ensure compliance with the authorisation.	Refuse if not adequate.
	Has SEPA had to use its powers to require remediation works at current / other sites with similar activities carried out by responsible person?	The techniques, systems, personnel and controls proposed by the applicant to ensure compliance with the authorisation.	Refuse if not adequate.

### 3.3 Surrender of a CAR Licence

Before determining an application for surrender, the regulations require SEPA:

- to assess the risk posed to the water environment by the cessation of the activity; and
- take account of the steps taken, and identify any steps necessary, to avoid adverse impact on the water environment being caused by the cessation of the activity.

Further guidance on the surrender of licences is given in *WAT-RM-09: Modifications to CAR Authorisations*. The criteria in *Table 3* should be used to determine whether the refusal of a licence is appropriate.

**Table 3 Refusal Criteria for Licence Surrenders**

Criteria	Test	Additional Info/Decision
Adequacy of measures to avoid adverse impacts on water environment.	Has the applicant produced plans for the management of any decommissioning works that might impact on the water environment?	If not, refuse.
	Are these plans proportionate and adequate?	If not, refuse.

### 3.4 Commercial Confidentiality

The procedures for determining whether an application does or does not meet the requirements are given in *WAT-SG-56: Determining Claims for Commercial Confidentiality*.

### 3.5 Refusal procedure

Where SEPA determines that an application should be refused it must notify the applicant giving its reasons for refusing the application (Regulation 15(4)). Standard letters are available for this:

- *WAT-LETT-06: Letter Advising Applicant that Authorisation will be Refused*
- *WAT-LETT-20: Letter Advising Applicant of (Partial) Refusal to Vary Authorisation*
- *WAT-LETT-46: Partial Surrender and Variation Notice - Covering Letter*

## 4. Appeals Against Authorisations and Notices

Water users may appeal against the decisions taken by SEPA with respect to the authorisation and control of water use activities. Regulation 50 of the Controlled Activities Regulations 2011 specifies the situations where this provision may be used. These are set out in Information Box 1.

### Information Box 1: Circumstances of Appeal under CAR

- (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 17(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 7 or 8;
- (d) a person who has been served with a variation notice under regulation 23(3) or is aggrieved by the conditions attached to that variation notice;
- (e) a person who has been refused the variation (in whole or in part) of an authorisation on request under regulation 24;
- (f) a person who has been granted the variation of an authorisation on request under regulation 24 but is aggrieved by the removal, addition or amendment of any condition pursuant to that variation;
- (g) a person whose application under regulation 25 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;
- (h) a person whose application to surrender an authorisation under regulation 27(3) has been refused or who is aggrieved by the conditions attached to that authorisation in order to take account of the surrender;
- (i) a person whose authorisation has been suspended or revoked (in whole or in part) under regulation 29;
- (j) a person on whom a notice has been served under regulation 32(2), or who is aggrieved by the terms of that notice; and
- (k) if SEPA has determined that information is not commercially confidential under Part VI, the person to whom, or whose business, that information relates.

### 4.1 Status of Notices, Conditions and Information

The effect of an appeal against an authorisation or notice issued by SEPA depends on the sensitivity of the information held within it and its type. Regulation 52 of the Controlled Activities Regulations specifies when these do and do not remain in force. These are set out in Information Box 2.

### Information Box 2: Effect of an Appeal on Status of Authorisations and Notices

DOES NOT suspend the operation of the authorisation conditions or notices for:

- (i) a registration or water use licence issued under Reg. 7 or 8
- (ii) a notice of suspension and revocation issued under Reg. 29
- (iii) an enforcement notice issued under Reg. 32

DOES suspend the operation of the authorisation conditions or notices for:

- (i) a notice of variation issued by SEPA under Reg. 23(3)
- (ii) determination of commercial confidentiality and entry of information onto the register (i.e. the information should not be entered onto the register)

These conditions or notices do not come into force until the appeal has been determined.

## 4.2 SEPA Duties

When an appeal is submitted to Scottish Ministers by a water user, SEPA has a number of duties to perform to help facilitate this process and ensure that all parties with an interest in the activity have the opportunity to submit their views (see Figure 1). SEPA operates a consultation and advertisement system for the most significant applications and will be able to use this process to ensure all relevant parties are considered during the application period. More detail on the consultation and advertisement arrangements can be found in *WAT-RM-20: Advertising and Consultation*. SEPA must inform Scottish Ministers who it has notified about the appeal and how it would like the appeal to be considered.

The applicant will send a copy of the notice of appeal to SEPA.

### 4.2.1 Notification of Interested Parties

Within 14 days of its receipt SEPA must give notice of the appeal to:

- Any person who made representations to SEPA with respect to the subject matter of the appeal.
  - Local Operations / Legal should give notice to all persons and organisations from whom a response has been received as a result of any advertisement or consultation requirements associated with an application.
- Any person who appears to SEPA to be affected or likely to be affected by, or have an interest in, the subject matter of the appeal.
  - Local Operations / Legal should give notice to all agencies and persons who were deemed appropriate according to the criteria and guidelines in *WAT-RM-20: Advertising and Consultation*.

- Local Operations / Legal should give notice to all agencies and persons who appear to SEPA to have an interest in the subject matter of the appeal. See section 4.2.2 for guidance on identifying interested parties.

## 4.2.2 Identifying interested parties

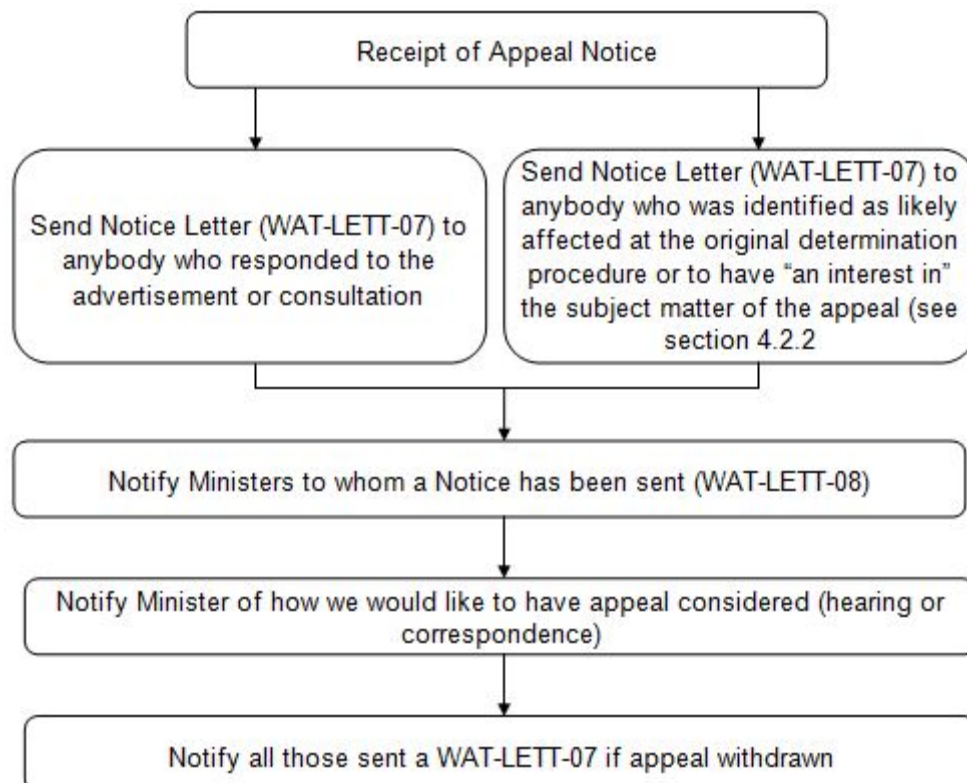
SEPA is required to notify any persons or organisations that appear to have an interest in the subject matter of the appeal. This is not restricted to those who have been consulted or submitted a response to the advertisement. The subject of the appeal may be of interest for a number of reasons. It could relate to the way SEPA modelled the potential environmental impacts or included mitigation in the proposed licence for example. The outcome could alter the way future CAR licence applications are processed or current licences are assessed.

In those cases every effort should be made to notify those who may have an interest on the subject matter.

It is not possible to provide an exhaustive list of those who SEPA should notify as this relates to the specific nature of the appeal. See Appendix 1 for suggested interested parties. Every effort should be made to notify those interested in the subject matter in addition to the suggested list.

For advice please contact the *Water Unit*.

**Figure 1 Sequence of SEPA Duties for Appeals**



The notice provided by SEPA must:

- State that the notice of appeal has been given:
- State the name of the appellant and the address of the site where the controlled activity is being carried on:
- Describe the application or authorisation to which the appeal relates:  
and
- State that representations with respect to the appeal may be made to the Scottish Ministers in writing by any recipient of the notice within a period of 21 days beginning with the date of the notice and that copies of any representations so made will be furnished to the appellant and to SEPA:
- Explain that any such representations made by any person will be entered in a public register unless that person requests in writing that they should not be so entered, and that where such a request is made there will be included in the register a statement indicating only that representations have been made which have been the subject of such a request:
- State that if a hearing is to be held wholly or partly in public, a person mentioned in paragraph 6(a) or (b) who makes representations with respect to the appeal will be notified of the date of the hearing.

A template for the notice, or letter, which should be submitted to the "interested parties" above has been provided (*WAT-LETT-07: Letter Advising Respondents of an Appeal*)

Finally, in the event of an appeal being withdrawn, SEPA must give notice of the withdrawal to every person to whom an appeal notice was sent.

### 4.2.3 Notification of Ministers

Once SEPA has notified all the "interested parties" it must, within 14 days of sending a notice:

- Notify the Scottish Ministers of the persons to whom and the date on which the notice was sent: and
- Indicate whether it wishes the appeal to be in the form of a hearing or to be disposed of on the basis of written representations.

A template for the notification letter has been provided (*WAT-LETT-08: Letter Advising Scottish Ministers of Interested Parties*)

Given the more formal mechanisms for the consideration of an appeal through a public hearing, SEPA generally supports the use of written representations, supported by an informal hearing when appropriate for "the appointed person" provided by Scottish Ministers.

There may, however, be cases where SEPA should be recommending a public hearing. This would be appropriate for:

- Very large development schemes with a large number of water use activities
- High risk water use activities taking place in a sensitive environment (e.g. Natura site)
- Proposals that have attracted a large number AND range of representations in response to the advertisement required by CAR.

A case-by-case decision will need to be made by SEPA (via discussions with Regulatory Services Team and Legal) on the recommendation for Ministers for the consideration of an appeal.

N.B. Even though we may recommend consideration of an appeal through written representations, it is still possible to request a hearing with the appointed person to clarify and reiterate the basis of the SEPA decision.



## Appendix 1: Suggested interested parties

### OPTION 1

The list below should be used to provide suggestions of third parties in relation to specific CAR activities.

CAR Activity		Interested Parties
Abstraction/ Impoundment	Drinking Water Private	COSLA
	Drinking Water Public	DWQR/ WIC
	Fish Production	Scottish Salmon Producers Association
	Golf Course	Scottish Golf Union
	Hydropower	RAFTS/ADSFB/British Hydro Association/Scottish Renewables Forum
	Agricultural Irrigation	NFU Scotland/ Scottish Land and Estates/Scottish Tennant Farmers Association
	Agricultural water supply	NFU Scotland/ Scottish Land and Estates/Scottish Tennant Farmers Association
	Industry	
Agrochemical disposal		NFU Scotland
Fish Farm	Freshwater	Scottish Salmon Producers Association/ Crown Estates
	Marine	
Flow Regulation		
Industrial or Commercial	Evaporative Cooling, Non evaporative cooling, Process Water	<b>Distilleries:</b> Scotch Whisky Association/Malt Distillers Association/ Scottish Craft Distillers Association
		<b>Brewing:</b> Chemical Industries Association
		<b>Paper:</b> Confederation of Paper Industries
Infrastructure		
Jetties/Platforms /Marinas		British Ports Association
Mineral Washing		
Mining and Quarrying		Coal Authority
Navigation (canals)		Scottish Canals
Other effluent	Boiler blowdown water	
	Brewing effluent	Brewers' Association of Scotland
	Cooling Water	

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	De-watering of Dry Docks	British Ports Association
	Distilling Effluent	Scotch Whisky Association
	Fish Farm	Scottish Salmon Producers Association
	Food Processing	Scottish Food and Drink Federation
	Landfill Leachate	Environmental Services Association
	Mine Water	Coal Authority
	Potable Water Treatment and Supply	Drinking Water Quality Inspectorate
Pumping Test		
Recreation		
Sediment	Addition/ reintroduction	Association of Salmon Fisheries Boards
	Manipulation	
	Removal	
Sewage	CSO	Scottish Water, British Water, Association of Scottish Shellfish Growers (if shellfish water)
	EO	
	Preliminary	
	Primary	
	Secondary	
	Tertiary	
	Untreated	
Sheepdip to Land		NFU Scotland
Straightening/ Resectioning		
Surface Water	Commercial/ Industrial	
	Housing	Homes for Scotland
	Motorways	

## OPTION 2

The list below should be used to provide suggestions of third parties in relation to CAR activities generally.

- Association of Salmon Fishery Boards
- Brewers' Association of Scotland
- British Hydropower Association
- British Ports Association
- British Water
- Chemical Industries Association
- Coal Authority
- Coal Authority
- Confederation of Paper Industries
- COSLA
- Crown Estates
- Drinking Water Quality Inspectorate
- Environmental Services Association
- Homes for Scotland
- Malt Distillers Association of Scotland
- National Farmers Union (NFU) Scotland
- Rivers and Fisheries Trusts
- Scotch Whisky Association
- Scottish Canals
- Scottish Craft Distillers Association
- Scottish Food and Drink Federation
- Scottish Golf Union
- Scottish Land and Estates
- Scottish Renewables
- Scottish Salmon Producers Association
- Scottish Tennant Farmers Association
- Water Industry Commission

## References

### Key Documents

- *WAT-RM-09: Modifications to CAR Authorisations*
- *WAT-RM-20: Advertising and Consultation*
- *WAT-RM-34: Derogation Determination - Adverse Impacts on the Water Environment*
- *WAT-SG-56: Determining Claims for Commercial Confidentiality*

### Standard Letters

- *WAT-LETT-06: Letter Advising Applicant that Authorisation will be Refused*
- *WAT-LETT-07: Letter Advising Respondents of an Appeal*
- *WAT-LETT-08: Letter Advising Scottish Ministers of Interested Parties*
- *WAT-LETT-20: Letter Advising Applicant of (Partial) Refusal to Vary Authorisation*
- *WAT-LETT-46: Partial Surrender and Variation Notice - Covering Letter*

### Contact

- *Water Unit (DL-WaterRegSupp@sepa.org.uk)*

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