

SEPA POSITION STATEMENT TO SUPPORT THE IMPLEMENTATION OF THE WATER ENVIRONMENT (CONTROLLED ACTIVITIES) (SCOTLAND) REGULATIONS 2011:



WAT-PS-06-01: MULTIPLE OWNERSHIP OPERATORS - AUTHORISING EXISTING AND NEW ACTIVITIES

THIS DOCUMENT OUTLINES SEPA'S POSITION FOR THE AUTHORISATION OF MULTIPLE-OWNERSHIP SITES UNDER THE CONTROLLED ACTIVITIES REGULATIONS. THEY PROVIDE A BASIS FOR INTERPRETING SEPA'S OBJECTIVES UNDER THE CONTROLLED ACTIVITY REGULATIONS (CAR), AND A BASIS FOR INTERPRETING AND IMPLEMENTING SEPA'S GOOD PRACTICE GUIDANCE. THEY PROVIDE A SUMMARY OF THE KEY REGULATORY POSITION BUT DO NOT REPLACE DETAILED REGULATORY METHODS OR SUPPORTING GUIDANCE.

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1 PURPOSE

This position statement summarises the background and interpretation proposals for the authorisation of multiple-ownership sites under the Controlled Activities Regulations (CAR). Circumstances of multiple-ownership operators can be expected for most types of water use activity within the CAR regime.

2 BACKGROUND AND CAR PROVISIONS

The Controlled Activities Regulations have introduced the concept of a single responsible person for the authorisation of water use activities requiring a licence. This raises particular issues for water service infrastructure developments serving multiple properties. It should not present any problems for other water use activities.

Transitional arrangements have been made under Schedule 10 of CAR to move existing water use activities into the regime. This can present problems where these activities are presently owned and operated by multiple persons.

Under Section 8(6) of CAR, SEPA shall only grant a licence if– (a) a person has been identified who will be responsible for securing compliance with the authorisation and the conditions specified in it; and (b) it is satisfied that that person will secure such compliance. Both these requirements raise particular issues when applied to activities operated by, or on behalf of multiple owners.

CAR states that a “person” includes a body corporate, limited liability partnership and Scottish partnership. All new licensed activities must have a responsible person that meets these requirements and applicants can provide only one Responsible Person for a water use licence. This will require a change to the management arrangements of some existing activities with a longstanding system of multiple ownership.

CAR does not ask Responsible Persons to satisfy any specific tests to demonstrate they can secure compliance with a licence. However, where SEPA has grounds to question the ability of a person to ensure compliance it will ask for evidence to demonstrate that adequate management systems have been put in place. For example, SEPA Regulatory Method 22 (Planned Deterioration, Refusal and Appeal) states that evidence of the management arrangements in place to secure compliance must be provided where SEPA has previously used its powers to revoke a licence against a person.

Historical experience with the management of multiple ownership activities suggests that similar questions of compliance arise where an activity is owned by more than one person.

3 LICENSING OF NEW WATER USE ACTIVITIES

It is expected that new applications for the authorisation of water activities that could involve multiple owners will mainly be limited to the provision of water supply and sewage treatment plant (STP) commissioned to serve numerous domestic properties. All such applications must nominate a single responsible person.

Developments requiring a water service infrastructure should be retained in single ownership wherever possible. The developer may wish to retain ownership and maintenance of the infrastructure, or alternatively, transfer its ownership to a competent enterprise, such as a water company. For new developments that are not able to connect to an existing water or wastewater system this is SEPA's preferred outcome.

Where an activity cannot be owned or maintained by a single operator, a number of options are available for the identification of a responsible person who can secure compliance with a water use licence. The owners of the activity can: (i) form a body corporate, limited liability partnership or Scottish partnership to act as a Responsible Person (ii) secure the commitment of a factor to act as a Responsible Person (iii) agree to put forward one owner to act as the Responsible Person

Options (ii) and (iii) present significant liabilities to the Responsible Person as they will be agreeing to be held solely responsible for compliance with the licence and its conditions as long as the activity holds a licence, irrespective of their ability to secure the support or financial resource of the other owners. It would, therefore, be advisable for Responsible Persons to put in place appropriate administrative systems to secure the financial provisions required to secure long-term compliance with the licence.

The compliance tests developed for the assessment of licence applications should be adapted to require evidence of adequate management systems where an activity is owned by more than one person. The revised refusal criteria for the assessment of a responsible person in *WAT-RM-22: Managing Refusals and Appeals* have been set out in Table 1 below.

Table 1 - Refusal Criteria for New Licence Applications

| Criteria | Test | Additional Checks/Decision |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------|
| Identification of Responsible Person | Does the applicant qualify as a Responsible Person? | Are they an individual, body corporate, limited liability partnership or Scottish partnership? |
| If no, refuse. | Criteria Test | Additional Checks/Decision |
| 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. | If not adequate, refuse. |
| Has SEPA had to use its powers to carry out remediation works at current / other sites with similar activities carried out by responsible person? | The provisions made for the prevention of impact on the water environment and restoration at decommissioning of activity. | If not adequate, refuse. |
| Does the activity have multiple owners? (Responsible Person is one of the owners, factor acting on behalf of owners or limited partnership comprised of owners) | Applicant should be asked to provide a work-plan as additional information to the application. The work-plan should demonstrate plans for maintenance and replacement or decommissioning of the activity. | If not provided or inadequate, refuse |

Further guidance will be produced on the expected contents of a work-plan in order to assess its adequacy. An initial outline of the expected contents has been provided in Annex 1.

4 TRANSFER AND REGULATION OF EXISTING WATER USE ACTIVITIES

CAR will be transferring a large number of existing activities from COPA, as well as bringing previously uncontrolled activities into the regime. A transitional scheme is provided to authorise these activities according to their existing operating circumstances. Some of these activities are expected to have multiple owners.

Authorisation of these existing activities will require the identification of a responsible person who can secure compliance with the authorisation. Activities with multiple owners will, therefore, be required to make arrangements for this. SEPA will identify the options available for the identification of a responsible person and ask for an application to be made. The owners of the activity can: (i) form a body corporate, limited liability partnership or Scottish partnership to act as a Responsible Person (ii) secure the

commitment of a factor to act as a Responsible Person (iii) agree to put forward one owner to act as the Responsible Person

Where no application to transfer an existing activity into the CAR regime is made and SEPA identifies the activity is operating without an authorisation it will take the following steps to ensure authorisation: (i) Issue an informal letter to the house owners setting out the requirements and options available to secure compliance with the CARs; (ii) Issue a final warning to the house owners setting out the requirements and options available to secure compliance with the CARs and the timescale within which an application must be submitted; (iii) Depending on the scale of activity, risk of environmental harm or impact on the environment: -Submit a report to the procurator fiscal re controlled activity being carried on without authorisation; -Issue an Enforcement Notice to the house owners setting out the improvements they must make to their activity in order to remove the impact on the water environment and the timescale by which this must be completed. The need for a Responsible Person and the submission of an application will be highlighted, together with supporting information on the options available; -Take a civil action under Regulation 35 to secure compliance with the notice; -Initiate works under Regulation 33 to complete any maintenance or improvement requirements which would have been required by an enforcement notice, either if steps need to be taken forthwith or no person can be found on whom to serve an enforcement notice.

5 CONCLUSION

These proposals should be reflected in Regulatory Method 22 and SEPA guidance on the enforcement of CAR.

6 ANNEX 1 – OUTLINE OF CONTENTS OF A WATER USE WORK PLAN

The work-plan on the maintenance and replacement of the water use activity should contain a description of:

- The water use activity taking place
- Population equivalent served / volume abstracted
- Identity of properties connected
- Type of treatment plant provided
- Discharge type (soakaway, surface water)
- The expected time of operation / need for the activity
- Time-limited water use activity (e.g. in anticipation of water supply / sewerage provision)
- Indefinite water use activity
- The materials and equipment making up the water use activity
- Supplier of equipment
- Hard or soft systems (e.g. reed bed treatment or package plant)
- The maintenance requirements identified by suppliers, builders or specialists for the materials / equipment
- Ongoing maintenance of operations
- Planned inspection and maintenance
- The expected life of the equipment / materials (or parts thereof), if maintained in accordance with the above
- Infrastructure (foundations, skeleton, pipework)
- Electrical and Mechanical Equipment
- The arrangements for whole or partial replacement of the materials or equipment (or components thereof)
- Pumps
- Pipework
- Measurement & Control Equipment
- The expected running, capital maintenance and replacement costs expected over the expected need for the activity
- Chemicals, waste disposal, electricity
- The provisions made to ensure these costs can be met
- Bond
- Charging Scheme / Fees