

SCOTTISH ENVIRONMENT PROTECTION AGENCY

Introduction to the Controlled Activities Regulations

1.0 Purpose

This paper is intended to provide a simple explanation of the Controlled Activities Regulations (Regulations) 2005 (CAR).

2.0 Introduction

Section 20 of the Water Environment and Water Services Act (Scotland) 2003 (WEWS) gave Ministers powers to introduce regulatory controls over activities in order to protect and improve the water environment. The water environment includes:

- groundwater,
- wetlands (directly associated with surface and groundwater bodies);
- rivers;
- lochs;
- transitional waters (estuaries and saline lagoons); and
- coastal waters (3nm from territorial baseline).

WEWS defines the purpose of the regimes and therefore provides the basis of interpreting the powers in CAR.

The Regulations were laid before Parliament in April 2005 and were accompanied by a Policy Statement and a Regulatory Impact Assessment. They can be accessed on the Scottish Executive's web site www.scotland.gov.uk The Policy Statement explains the Executive's intent in developing the Regulations and should form the basis of their interpretation.

If the Regulations are approved by Parliament then they are likely to come into force on 1 July 2005. Transitional arrangements start from 1 July 2005 to 31 March 2006. The regimes come fully into force from 1 April 2006.

The Regulations are based upon procedures within the PPC Regime but do not include the prescriptive requirements. Powers are widely drawn allowing SEPA to use them in a flexible manner. In this sense they are similar to the Control of Pollution Act.

3.0 Scope of the regulations

The Regulations are built upon a requirement for controlled activities to be authorised.

The controlled activities are defined within WEWS but are modified by CAR to include the following activities:

- abstractions from surface and groundwater;
- impoundments of rivers, lochs, wetlands and transitional waters;
- groundwater recharge;
- engineering in rivers, lochs and wetlands;
- engineering activities in the vicinity of rivers, lochs and wetland which are likely to have a significant adverse impact upon the water environment;
- activities liable to cause pollution;
- direct or indirect discharge of List I substances to groundwater;
- any other activities which directly or indirectly is liable to cause a significant adverse impact upon the water environment.

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4.0 Authorisations

In order to ensure proportionate controls over activities, the Regulations provide for three levels of control: General Binding Rules (GBR), Registrations and Water Use Licences. SEPA can move activities between registration and licences and from GBR to registration or licences as it considers necessary in order to protect the water environment.

General binding rules

GBR provide statutory controls over the following low risk activities:

- weirs less than 1metre high
- abstractions of less than 10m³/d
- construction of boreholes
- dredging of rivers less than 1metre wide
- construction of minor bridges
- laying of pipeline or cable
- control of bank erosion covering less than 10m
- operating plan or machinery in the vicinity of water
- discharge of surface water runoff which does not cause pollution of the water environment.
- prohibition against the discharge of specified substances into a surface water drainage system.

Any person undertaking an activity which falls within the scope of the GBR do not have to contact SEPA but must abide by any rule laid out in the Regulations which relates to their activity.

Registration

Registration is intended to cover low risk activities which cumulatively pose a risk to the water environment. SEPA can impose conditions associated with a registration but the policy intention is that these should only describe the activity. A registration authorises an activity and any person can then carry out that activity. A registration is an activity-specific authorisation comparable with a COPA consent.

Licence

If site-specific controls are required and in particulate if constraints upon the activity are to be imposed than the activity should be authorised using a licence. A licence requires the identification of a “responsible person” who is responsible for ensuring compliance with the conditions of the licence. A licence is therefore a person-specific authorisation comparable to PPC permits. A responsible person can be a “natural” person or a body corporate. In most cases SEPA would expect a company to be named (e.g. Scottish Water).

In settling licence conditions SEPA shall also consider the impact of the activity upon other controlled activities. SEPA must also assess whether it consider that the named responsible person is capable of securing compliance with the conditions of the licence.

Collectively, the above three forms of regulation are known as authorisations.

5.0 Application procedures

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SEPA has 30 days for determining an application for Registration and 4 months for a licence. SEPA may request more information and require the applicant to advertise the applications (where SEPA considers that the activity may have a significant adverse impact). The clock stops for information requests or advertising.

6.0 Determining an authorisation

In determining an authorisation SEPA shall:

- Assess the risk to the water environment;
- Assess the steps necessary to secure efficient and sustainable water use;
- Apply the requirements of the Water Framework Directive (and as a consequence other EU water legislation);
- Have regard to listed domestic legislation.

7.0 Enforcement and offence provisions

There is a single enforcement notice. This notice can be used to ensure compliance with conditions within an authorisation or to require remedial action against an activity which has, or is liable to, cause a significant adverse impact upon the water environment. The notice may define measures required 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”. The notice can require the cessation of the activity.

Where SEPA considers it necessary or where it cannot identify a person to undertake the work, it may carry out the work and recover the costs.

In addition, the Regulations provide a mechanism for SEPA to go to a court of civil jurisdiction and ask the court to order compliance with the terms of a notice. This remedy is available where SEPA feels it would be more appropriate than pursuing a criminal sanction under the offence provisions.

The key offence provisions are:

- Undertaking a controlled activity without being authorised
- Not complying with the conditions of an authorisation.

There are defence provisions to principal offences which cover unforeseeable accidents.

8.0 Other provisions

- There are appeal provisions covering key SEPA decisions such as level of authorisation, conditions and powers to issue notices. At present these appeals will be handled by Scottish Ministers, but in due course it is envisaged that a new type of environmental appeals system will be introduced as part of a River Basin Management structure.
- Registry requirements are similar to PPC and include exceptions to cover commercial confidentiality and national security. The onus will be on the applicant to prove to SEPA why such confidentiality should be assured.
- Ministers have powers to call in applications for determination, although it is envisaged that such powers would only be used for significant cases.
- Powers of access are provided for regulatory and environmental monitoring purposes. These have been derived from s108 Environment Act powers.
- A right to compensation in respect of a Grant of Rights

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9.0 Transitional provisions

All COPA consents subject to the subsistence charging scheme are required to apply to transfer to CAR and identify a responsible person by 31 March 2006.

All other COPA consents are deemed to have applied for transfer to CAR and are deemed to be registered. Existing conditions will be retained, and details maintained on the COPA Register. SEPA will review these registrations and transfer some activities into licences.

All abstractions and impoundments not covered by the GBR must apply for authorisation between 1 October 2005 and 31 March 2006.

All controlled activities which are covered by a PPC permit, and RSA authorisation and a WM licence are deemed to be authorised under CAR. The Regulations impose a requirement to review such existing authorisations to ensure that they are CAR compliant by 2010. Any new determinations of applications or reviews under PPC, RSA and WML must ensure compliance with CAR.

The transfer centre is currently dealing with transitional matters and establishing responsible person contact information to be used by SEPA to effect the transition.

10.0 Charging scheme

The Regulations provide for the operation of a charging scheme to enable SEPA to recover its costs in respect of its functions with regard to protecting and improving the water environment. Two new charging schemes will be issued and SEPA has already launched a consultation on the transitional charging scheme. This charging scheme consultation will shortly be followed by consultation on the subsistence charging scheme, which will set out the charges requiring to be made to recover annual WEWS costs. These charges will become effective from 1st April 2006.

11.0 Legislative impact

Inevitably, the implementation of WFD through the WEWS and CAR mechanism will impact on other legislation, most of which SEPA is routinely familiar with. While over 200 legislative instruments are likely to be effected by implementing the Water Framework Directive, the main legislative impact will be felt in changes to the following:

- Control of Pollution Act 1974 (principally, Part II and all secondary legislation passed as ancillary thereto).
- Groundwater Regulations 1998
- The Water (Scotland) Act 1980
- Pollution Prevention and Control Regulations 2000

The amendment and repeal of existing provisions is currently being undertaken in a phased manner. This will result in a number of amending orders being laid before the Scottish Parliament in the coming year.

12.0 Conclusion

In conclusion, the CAR regulations enable SEPA to implement the objectives of the Water Framework Directive, and provide in effect a 'framework' for the protection of the water environment in Scotland. In short, they represent a fundamental first step in the path to ensuring effective protection and improvement of the water environment, whilst at the same time, reducing the regulatory burden on Scotland's business community.

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