

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

Process for taking into consideration third party representations in connection with applications under the Water Environment (Controlled Activities) (Scotland) Regulations 2005

Policy Statement



December 2006

1. INTRODUCTION

This document sets out the procedure whereby the Scottish Environment Protection Agency (SEPA), and Scottish Ministers as appropriate, will consider third party representations made to them in respect of an application for authorisation, variation or surrender of a controlled activity under the Water Environment (Controlled Activities) (Scotland) Regulations 2005 (CAR).

This paper accompanies the laying of the Water Environment (Controlled Activities) (Third Party Representations Etc) (Scotland) Regulations 2006 in the Scottish Parliament. It has been prepared by the Scottish Executive and has not been endorsed by the Parliament.

GENERAL PURPOSE AND PRINCIPLES OF THE POLICY STATEMENT

The Water Framework Directive (WFD) establishes a framework for the management of Europe's water resources. In doing so it recognises that there needs to be a balance between protecting the water environment and securing the sustainable use of this resource for the purposes of sustainable economic and social development.

The Water Environment and Water Services (Scotland) Act 2003, (WEWS) introduced a holistic approach to managing the water environment in Scotland. CAR, made under WEWS, enables SEPA to control activities which may have an impact on the water environment and on the interests of all who use and enjoy it. In doing so, SEPA must aim to strike the right balance between protecting and improving the water environment and the social, economic and environmental needs of all water users.

This document follows our discussion paper of July 2006 on this matter, and sets out how CAR, as amended by the 2006 Regulations, provides a process for third party interests to be taken into account in regulatory decisions. It also sets out how these provisions will be implemented by SEPA and, in appropriate cases, by Scottish Ministers.

2. BACKGROUND AND POLICY FRAMEWORK

The WEWS Act introduced a holistic approach to managing the water environment in Scotland. The aim of the Act is to protect and improve the ecological status of the water environment whilst also supporting the social and economic interests of those who depend upon it. CAR, made under the Act, enables SEPA to control activities which may have an impact on the water environment and on the interests of other users of the water environment. In the course of its regulatory activities SEPA must aim to protect and improve the water environment but in determining how, and to what extent this should be done, it must take account of the social, economic and environmental needs of those who depend on the water environment for their livelihood or quality of life. This includes taking into account wider sustainable development issues, such as biodiversity conservation, flood management, drinking water protection, and access to recreation.

CAR came into force on 1 April 2006 and replaced the environmental control regime established under Part II of the Control of Pollution Act 1974 (CoPA). Under CoPA, Scottish Ministers had the power to call in applications for discharge consents for their own determination. Third parties who felt SEPA had not taken proper account of their interests were able to challenge SEPA's regulatory decisions by asking Ministers to exercise this power. This provided an opportunity for third parties to make sure that their own and wider interests were given due consideration in the consents process.

During the development of CAR, many consultees felt that it was important that third party views continued to be taken into account in regulatory decision-making. However, they also felt that Ministerial intervention should be reserved for the most significant cases. To achieve this required focus on significant cases, we expect that SEPA will make the large majority of licensing decisions, taking due notice of wider environmental and socio-economic interests including those raised in any representations made to it by third parties; but have made provisions under regulation 17 for Ministers to have the power to direct SEPA to refer to them for their determination any particular cases or types of cases.

This policy statement supports the wider environmental justice agenda by ensuring third party interests in the water environment can be fully considered, and outlines the process through which SEPA will give consideration to third party issues raised during the process of authorising or reviewing controlled activities. It also sets out at which points Scottish Ministers may choose to intervene in the determination process, and outlines criteria Scottish Ministers will use to help assess whether they wish to exercise their discretion to direct SEPA to refer a case for their determination in response to third party representations.

The process set out in this paper is intended to consider any representations made by **third parties only** – any concerns from operators about SEPA's regulatory decisions should be taken forward through the appeals process set out in regulation 46 of CAR. Third parties include other operators, other users of the water environment, other responsible authorities and those having an interest in the water environment generally, such as NGOs.

This policy will not change existing requirements for SEPA to engage with statutory consultees in the normal manner as mandated under other legislation, for example regarding biodiversity conservation. We expect SEPA to carry out any such required consultation in the normal process of gathering the information needed to assess the environmental, social and economic impacts of an application prior to making its determination.

3. GENERAL PRINCIPLES UNDERPINNING THIS APPROACH TO THIRD PARTY REPRESENTATIONS

From 1 April 2006 activities liable to have an adverse impact on the water environment, including abstractions, impounding works, discharges, engineering works and the artificial recharge of groundwater, require authorisation under CAR. SEPA may grant, vary, suspend, revoke or refuse authorisation for such activities, and may impose operating conditions on any authorisation. In addition, an authorisation made under CAR may be surrendered by an operator.

CAR has three separate tiers of authorisation with increasing levels of monitoring and control. The 3 tiers of control are general binding rules, registration and licences. This tiered approach allows the level of regulation to which an activity is subject to be in proportion to the environmental risk posed by the activity and minimises the regulatory burden for both SEPA and operators.

The regulatory process enables consideration of third parties' views where the proposed activity is likely to have significant adverse impacts on the water environment and on the interests of other users of the water environment. Such impacts include causing a failure to achieve one or more of the objectives of the WFD. Under CAR, activities posing the greatest risk to the water environment will require a licence. We expect that the risk to the interests of other users of the water environment will, in general, be proportionate to the risk posed to the water environment itself, and consequently the approach described below will normally be used only during the determination of relevant applications for, or variations and surrenders of, licences, the highest tier of control.

In considering applications for authorisation, variations and surrenders under CAR, there are a number of factors SEPA has to take into account. These include the need to ensure compliance with the Water Framework Directive and the other relevant Directives such as the Groundwater Directive, Bathing Water Directive and Shellfish Water Directive, and the need to have regard to the social and economic impacts of its regulatory activities.

We expect that SEPA will make the vast majority of regulatory decisions, giving due account to third party issues without the need for Ministerial intervention. However, there will be some circumstances where third parties raise issues of such significance for their own interests or for the public interest that it may be more appropriate for Scottish Ministers to determine the application. It is for this reason that Ministers have the power under regulation 17 of CAR to direct SEPA to refer to them for their determination any application, review or surrender, or any part of such, although we expect its use to be limited to a minority of cases.

We expect SEPA to publicise these procedures to ensure all third parties are aware of these opportunities.

4. DETAILED PROCEDURE FOR CONSIDERING THIRD PARTY REPRESENTATIONS

4.1 Use of Advertisement Process

The advertisement process will allow third parties with an interest in the proposed activity to make any representations to SEPA, who will then be obliged to take any such issues into consideration in determining the application.

New applications

Under regulation 13 of CAR, SEPA may require an applicant to advertise an application for a new controlled activity where the proposed activity is likely to have a significant adverse impact on the water environment or on the interests of users of the water environment in the area affected. For example, SEPA would normally advertise an application to undertake a controlled activity which would:

- be likely to result in deterioration of the status of the water environment;
- compromise the achievement of conservation objectives; or
- adversely affect the interests of third parties.

Reviews and variations

Regulations 20 and 21 of CAR provide that variations of existing authorisations may be treated as applications for authorisation and advertised where appropriate. SEPA will normally require an authorisation review to be advertised where

- any of the above criteria are met; or
- the person responsible for the activity is claiming that the variation proposed by SEPA would impose disproportionate costs on them.

An operator applying for a variation will normally be required to advertise the application if any of the above criteria are met.

Surrenders

Finally, regulation 24 pertains to the surrender of authorisations, and these will normally be advertised on the same basis as new applications.

4.2 SEPA's Determination Procedure

Any required advertisement will advise third parties who have an interest in the proposed activity, or who believe that it will impact upon their interests, to notify SEPA of their comments and objections. SEPA must consider any representations it receives from third parties within the 28-day period allowed for making such representations. SEPA may also ask third parties for further information relating to their comments or objections.

SEPA is expected to take into account any significant third party issues raised during the advertisement stage when making its determination, for example through discussions with the operator and the relevant third parties. SEPA will notify both the operator and any third

parties who have made representations concerning an application, variation or surrender of its draft determination of an application. If they feel the draft determination leaves any significant issues outstanding, third parties will then have a further 21 days in which to request that Ministers determine the case themselves under regulation 17 of CAR. During this time, SEPA cannot issue its determination.

4.3 Ministerial Consideration Procedure

In the interests of achieving a balance between giving such cases due consideration and providing business certainty, we have introduced a three-stage process, as follows.

Stage 1

If Scottish Ministers receive representations from third parties, they will carry out an initial screening process and, within 14 days of receipt, inform SEPA, any relevant third parties and the operator of their decision:

- that the case merits further consideration, based on the first four criteria set out in section 5 below; or
- that any representations do not fulfil the criteria for giving the case further consideration. In this case, Ministers will inform SEPA that they do not intend to call the case in, thus enabling SEPA to make and publish its final determination; and, if relevant, issue a new or varied authorisation for the activity, or accept the surrender of the authorisation, as the case may be.

In order to ensure that developments are not delayed unnecessarily, the steps outlined above will fall within the normal determination period established by regulations 16, 21, and 25 (4 months, 4 months and 2 months respectively). (CAR does not establish a time limit for variations initiated by SEPA). If a case is not determined by SEPA within that period, the case is deemed to have been refused in the case of an application for authorisation or variation, and deemed to have been granted in the case of a surrender, in line with the normal rules.

Stage 2

Where Ministers decide that a case merits further consideration, they will seek such further information as they may need regarding the application to enable them to decide whether to direct SEPA to refer a case for their determination. Ministers will have 28 days in which to obtain any required information and reach their decision. This 28-day period is outside the normal time limits established by regulations 16, 21, and 25 for determining a case.

At the end of this 28-day period Ministers will inform SEPA, any relevant third parties and the operator of their decision:

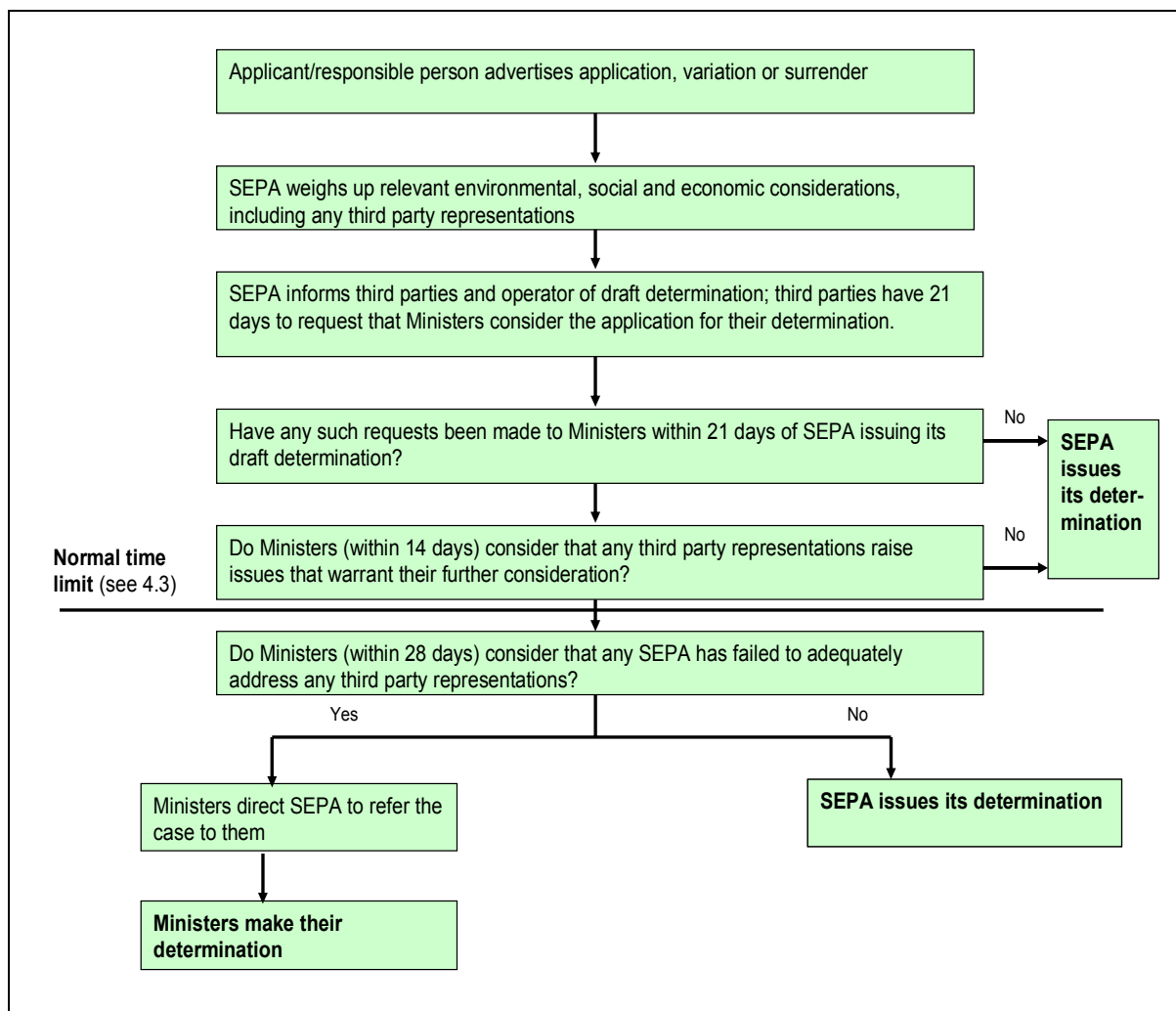
- that SEPA should refer the case to them for their determination based on one of the further criteria set out in section 5 below; or
- that any representations do not fulfil any of the criteria for a referral for their determination. In this case, Ministers will inform SEPA that they do not intend to call the case in, thus enabling SEPA to make and publish its final determination; and, if

relevant, issue a new or varied authorisation for the activity, or accept the surrender of the authorisation, as the case may be. If Ministers do not inform SEPA within the 28-day period, then SEPA may proceed to make and publish its final determination.

Stage 3

If Ministers direct SEPA to refer the case to them for their determination, any subsequent time taken by Ministers for determining a case will be outside the normal time limits established by regulations 16, 21 and 25. In due course Ministers will advise SEPA, the operator and the relevant third parties of their determination. SEPA will then issue a new or varied authorisation for the activity, or accept the surrender of the authorisation, as the case may be.

The process for considering third party representations regarding new applications, variations and surrenders is shown in the diagram below.



5. CRITERIA FOR MINISTERIAL CONSIDERATION

Ministerial discretion to direct SEPA to refer an application for their determination will apply at all times. However, in order to ensure Ministers focus on significant cases, there is a strong presumption that Scottish Ministers will, on receiving representations from a third party, exercise this discretion only when **all of the following** four criteria are met:

- **the third party wrote to SEPA within 28 days of any required advertisement of the application, variation or surrender and the subject and nature of the objection has not substantially altered;**
- **the objection is not an objection to the appropriate use by SEPA of current principles, policies, methodologies or standards that have been subject to public consultation or Ministerial direction;**
- **the objection relates to matters that are material considerations in the determination of the case; and**
- **the representation made to Scottish Ministers makes clear the reasons for objection and provides suitable scientific, technical or other factual evidence to substantiate the objection.**

In addition, **one or more** of the following must normally be met for an application to be referred for a Ministerial determination under regulation 17:

- **the third party is a responsible authority designated under section 2(8) of the Water Environment and Water Services (Scotland) Act 2003 and its objection raises issues of significance for the delivery of national, local or regional policy priorities or compliance with international obligations; or**
- **the third party's objection is that either its own, or wider interests which it represents, will be directly and significantly adversely affected by a proposed activity; or**
- **there are substantial numbers of objections and these objections raise issues of significance for the social, economic or environmental well-being of those objecting.**

6. CONCLUSIONS

We wish to ensure that there is a transparent process by which third parties can make representations to SEPA and to Ministers, and by which these may be considered. The principles underpinning this policy have been set out in the Executive's previous consultations and in our policy statement on CAR of May 2005. CAR makes provisions for SEPA to determine applications for authorisation, variation or surrender under these Regulations, and for Ministers to direct SEPA to refer an application for their own determination as appropriate.

This policy statement refines our policy for ensuring that third party interests are properly considered, and takes into account the responses received to our discussion paper of July 2006.