

**EXECUTIVE NOTE TO**  
**THE WATER ENVIRONMENT (DIFFUSE POLLUTION) (SCOTLAND)**  
**REGULATIONS 2008**  
**SSI/2008/54**

**Introduction**

The above instrument was made by the Scottish Ministers in exercise of the powers conferred by section 20, and 36(3) of, and Schedule 2 of, the Water Environment and Water Services (Scotland) Act 2003(a), and of all other powers enabling them to do so, after consulting with the persons specified in section 21(1) of that Act, having published a draft of the proposed general binding rules in accordance with section 21(2) of that Act, having had regard to the representations received about the proposed rules in accordance with section 21(4) of that Act, and having complied with the requirements of section 21 of that Act.

**Policy Objectives**

To control the impact of diffuse pollution on the water environment from rural land use activities General Binding Rules (GBRs) have been introduced under The Water Environment (Controlled Activities) (Scotland) Regulations 2005 (CAR). The additional GBRs will apply to the use of fertilisers, keeping of livestock, land cultivation, drainage, construction of roads and tracks and the application of pesticides and sheep dip. The Regulations also contain an amendment to the Silage, Slurry and Agricultural Fuel Oil (Scotland) Regulations. This amendment allows lightly contaminated water from some areas of the farm steading, which is currently required to be stored and spread to land, to be treated through a Constructed Farm Wetland before discharge to the water environment

**Financial Effects**

The GBRs are based largely on existing codes of good practice drawn up in conjunction with industry. The rules will form part of the regulatory structure which already exists under CAR. A RIA has been prepared.

**Consultation**

A consultation has been issued on the proposed amendments of CAR. The consultation period required under the WEWS Act for the introduction of regulations ended on 17 October 2007. Although no major changes have been made to the rules consulted upon we have made some textual amendments to clarify some rules. It is also intended to publish supplementary guidance.

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(a) 2003 asp 3: section 20 was amended by regulation 3 of the Water Environment (Controlled Activities) (Scotland) Regulations 2005 (S.S.I. 2005/348).

**ENVIRONMENTAL QUALITY DIRECTORATE**

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

**The Water Environment (Diffuse Pollution)  
(Scotland) Regulations 2008**

**Diffuse Water Pollution from Rural Land Use**

General Binding Rules and related provisions

Regulatory Impact Assessment

**January 2008**

## 1. Introduction

1.1 The Water Framework Directive (Directive 2000/60/ EC) (WFD) came into force in 2000. It was transposed into Scots law by the Water Environment and Water Services (Scotland) (WEWS) Act 2003. Among other things, the Directive requires that Scotland has a system of regulatory controls for the following activities:

- Point source discharges and diffuse sources liable to cause pollution;
- The abstraction of water from the water environment; and
- The impoundment of surface water.

1.2 The Directive's overall objectives are to prevent deterioration of the status of the water environment and to restore waters to good status by 2015. This will be achieved through the river basin management planning process. A draft plan must be prepared by 2008, with the full plan in place by 2009. This plan must include a programme of measures to meet the Directive's good status objectives. The Directive requires that the programme of measures is operational by 2012.

1.3 The WEWS Act developed the framework for the future management of our rivers, lochs, coasts and groundwater. It gives Ministers powers to make regulations to control activities that impact on the water environment. In 2005 the Scottish Ministers introduced the Water Environment (Controlled Activities) (Scotland) Regulations 2005 ('CAR') as a means of protecting the water environment.

1.4 CAR, which came into force in April 2006, requires activities that pose a threat to the water environment to be subject to authorisation. It provides a regulatory regime for point source pollution, replacing many of the provisions under the Control of Pollution Act 1974, and includes a general binding rule for the major part of urban diffuse pollution, run-off from buildings and roads.

1.5 CAR is designed to ensure that the level of regulatory control, and hence the burden on industries and on the regulator, is proportionate to the risk to the water environment. Accordingly, CAR provides for three levels of authorisation, depending on the risk that an activity involves.

1.6 General Binding Rules (GBRs) represent the most basic level of control. They form part of the Regulations and cover specific low-risk activities. Activities undertaken in accordance with the rules do not require an application for authorisation from SEPA; compliance with a GBR is considered as authorisation. The operator is not required to contact SEPA and, therefore, there are no associated charges.

1.7 GBRs are a 'light touch' form of control in comparison to;

- Registrations - which allow for the registration of small-scale activities which individually pose a small environmental risk but, cumulatively, can result in environmental harm. Operators must apply to SEPA to register these activities. A registration will include details of the scale of the activity and its location, and will be valid so long as the activity is carried out in accordance with the terms of the application. There is an application fee for registrations.

- Licences - which allow for site-specific conditions to be set to protect the water environment. Application fees apply to all licences, and subsistence charges may apply. SEPA has divided licence activities into simple licence and complex licence activities, dependent on risk.

1.8 The Water Environment (Diffuse Pollution) (Scotland) Regulations 2008 are designed to amend the existing Controlled Activities Regulations and to apply across Scotland. Those areas of Scotland designated as Nitrate Vulnerable Zones will continue to be subject to the rules of the Action Programme for Nitrate Vulnerable Zones (Scotland) Regulations.

## **2. Background**

2.1 The use of General Binding Rules to tackle diffuse pollution from rural land use was consulted on by the Scottish Executive in a strategy document in December 2005. This considered the various actions that might be taken, including guidance and incentives for good practice, and recommended that a set of controls in the form of GBRs should be developed as part of a broad strategy.

2.2 Diffuse pollution in rural areas typically involves a multitude of small sources, such as run-off from fields, which may be individually insignificant but cumulatively have a substantial effect. Agriculture accounted for the greater part of the discharges of nitrate, phosphates and suspended sediments (mainly soils).

2.3 In these circumstances there is scope for substantial improvements in the quality of Scotland's water environment to be achieved through good practice measures being adopted by those sectors involved in rural land use. Much has been achieved through adherence to good practice already set out in guidance, such as the Prevention of Environmental Pollution from Agricultural Activity (PEPFAA) Code or the Forests and Water Guidelines. The proposed GBRs, in giving statutory effect to good practice, would involve little or no change for those who apply such practices and would not be onerous to comply with.

2.4 Nutrients are necessary for plant growth, but there is a need to control their use in the proximity of the water environment. Loss of nutrients or of soil from fields, through run-off, is the loss of a valuable resource to the farmer; and it can have a devastating effect on river biodiversity or downstream enterprises. Better control over nutrient application and cultivation practices can enhance plant growth and save using manufactured fertilisers.

2.5 There are differing views on how far agricultural activity should be removed from surface waters. The approach in the proposed GBRs, following the consultations, is to set a minimum which will be applicable across Scotland. This does not mean that any activity more than 2 metres, or whatever distance is specified, is entirely safe for the water environment or for drinking water supplies. The distances stated are a minimum requirement. Where necessary, other measures, either regulatory, voluntary, or by agreement with Scottish Water, may be required to protect water used for human consumption.

2.6 Discretion and judgement on the part of operators are still required, but the rules set a minimum standard which can be seen as clear and applicable to everyone. If improvements are achieved in a catchment, there will be less pressure for tighter rules in future to meet the targets, in line with the Water Framework Directive, of good quality in Scotland's waters.

2.7 The proposals for a system of GBRs were generally welcomed. A set of proposed general binding rules was issued in 2006; there were criticisms that they were too detailed and too much concerned with means, rather than outcomes., The set was revised before issue for consultation in September 2007 and has been further revised.

2.8 In previous consultations it was proposed that there should be a relaxation of a particular provision in the Control of Pollution (Silage, Slurry and Agricultural Fuel Oil) (Scotland) Regulations 2003 (SSAFO). This relaxation is designed to allow the use of constructed farm wetlands to treat lightly contaminated water from farm steadings. This will help reduce the current problems of slurry storage encountered by many farmers.

2.9 The Scottish Ministers are committed to ensuring that the regulatory burden is reduced in so far as this can be done without jeopardising the protection of the water environment. Controls over diffuse pollution are essential to achieving good water quality, in line with the aims of the Water Framework Directive.

2.10 In compliance with the WEWS Act, we have consulted with stakeholders and taken account of responses to the consultations.

### 3. Objectives of Diffuse Pollution General Binding Rules

3.1 SEPA’s current assessment, in the Significant Water Management Issues report, is that 39% of Scotland’s waters are at risk of failing to achieve good status in 2007. The report has identified the extent of rivers, lochs, transitional, coastal and groundwater at risk of being adversely affected by diffuse pollution. The results are summarised below.

**Waters, in the Scotland, and Solway Tweed, River Basin Districts, identified by SEPA as being at risk of failing to achieve good status due to diffuse pollution:**

**Table 1: Scotland River Basin District<sup>1</sup>**

Rivers	Lochs	Transitional	Coastal	Groundwater
5339 km	286 km <sup>2</sup>	299 km <sup>2</sup>	2052 km <sup>2</sup>	16946 km <sup>2</sup>

**Table 2: Solway Tweed River Basin District<sup>2</sup>**

Rivers	Lochs	Transitional	Coastal	Groundwater
2333 km	18 km <sup>2</sup>	322 km <sup>2</sup>	177 km <sup>2</sup>	6069 km <sup>2</sup>

<sup>1</sup> Significant water management issues in the Scotland river basin district

<sup>2</sup> Significant water management issues in the Solway Tweed river basin district

3.2 The introduction of diffuse pollution GBRs at this time is necessary:

- to provide clear rules under which rural land use activities are permitted;
- to prevent deterioration in the quality and the status of water bodies;
- to ensure that the regulatory process of identifying and agreeing the control measures and the environmental improvements they will deliver can be completed by the Directive's deadline in 2009; and
- to provide stakeholders with sufficient certainty for planning purposes and a longer lead-in time for delivering the necessary improvements.

3.3 The proposed GBRs will complement the existing CAR framework under which SEPA has a duty to control activities that could have, or are having, an adverse impact on the water environment. The controlled activities for the purpose of these GBRs are activities liable to cause diffuse pollution of the water environment from rural land use activities including farming, forestry and amenity sectors.

3.4 The introduction of GBRs to control diffuse pollution will provide for land managers a simple set of rules without any form filling or the need to seek authorisation.

#### **4. Reducing the regulatory burden**

4.1 The Controlled Activities Regulations already provide a simple and flexible system of regulatory control, including general binding rules.

4.2 The introduction of GBRs on diffuse pollution from rural land into the CAR will provide a regime with a small number of simple rules that require no applications for authorisation, a minimum of inspection and enforcement action, and no fees for operators.

#### **5. Options considered by the RIA**

5.1 For the purpose of assessing the regulatory impact of the proposed GBRs, a number of options have been considered. These are:

- **Option A:** Controls on diffuse pollution would not be applied until 2009;
- **Option B:** A set of national GBRs on diffuse pollution introduced through CAR in 2008;
- **Option C:** All land use activities would as a minimum have to be registered with SEPA by 2009; and
- **Option D:** All land use activities would need to be licensed by SEPA by 2009.

5.2 Under the option B proposal for national GBRs, operators will not be required to register with SEPA, but must comply with the rules set out nationally for each activity.

## **6. Analysis of the options**

6.1 The main benefits of Options B, C and D compared to Option A are:

- Enabling compliance with the requirements of the Water Framework Directive;
- Putting into effect measures to prevent deterioration of and to improve the status of the water environment earlier than 2009;
- Significantly reducing the period of uncertainty for businesses about the measures that will be required of them, for Scotland to implement the Directive, from 2012;
- Providing SEPA with the additional information it needs to establish alternative objectives and prepare a coherent river basin management plan for 2009.

6.2 Early implementation would be beneficial due to the long timescale between land management practice changes and improvements in water quality.

6.3 The costs of implementing the measures would fall primarily on the agriculture industry, the regulatory authority, in this case SEPA, and on Scottish Government. Those benefiting would be all users of water, including Scottish Water, anglers, and all other recreational users. Improvements in biodiversity can be expected following reductions in nutrient and soil losses to surface waters and wetlands.

6.4 Costs to regulators

The Controlled Activities Regulations already provide the regulatory structure through which the GBRs would be introduced. Any additional costs to SEPA, as regulators, under option B would be very small. The costs under options C and D would be dependent on the controls introduced, but would require SEPA to prepare arrangements to deal with much increased numbers of registrations or licences.

6.5 Costs to businesses

As the rules are mainly based on good practice, there should be no additional cost implications to businesses already employing such good practice. Those not already employing such practice may incur costs in raising their standards depending on which sector they operate in and which activity they undertake.

6.6 There is a consideration that no cultivation within 2 metres, or no organic fertilisers within 5 metres, of a watercourse would result in a reduced yield for arable crops. This would apply primarily to arable fields which bordered watercourses and may vary on an annual basis due to crop rotation. It is estimated that on average the gap between the cultivated area and a watercourse is 1.5 metres. The costs are difficult to quantify; a reduced yield would be offset by reduced fertiliser usage and cultivation costs. The area of arable land that is within 2 metres of a watercourse, and that is currently cultivated, is estimated to be well under 1% of the total land under cultivation in Scotland.

## **7. Compliance with Water Framework Directive**

7.1 The overarching aim is to ensure that water bodies are not at risk of failing WFD targets due to diffuse pollution from rural land use.

7.2 Options B, C or D would be expected to enable compliance with the Directive's requirements.

**Table 3: Summary of compliance assessment**

<b>Option A</b>	Risk of non compliance with the requirements of the Water Framework Directive.  High risk of legal proceedings by the European Commission in the European Court of Justice
<b>Option B</b>	Would enable compliance with the Water Framework Directive's requirements
<b>Option C</b>	Would enable compliance with the Water Framework Directive's requirements
<b>Option D</b>	Would enable compliance with the Water Framework Directive's requirements

## **8. Small Firms Impact Assessment**

8.1 In drawing up these proposals consideration was given to the potential impact of controls on small businesses. For most small businesses there will be a limited impact from the new proposals. In many cases it will be because they have not adopted current good practice that brings them within the scope of the Regulations.

8.2 Under Option A in the short term there would be an advantage to small businesses in that they would not incur any possible additional costs until 2009. Under Option B there is the possibility of relatively low costs for those businesses carrying out small scale and low risk activities. This option also provides the fairest approach as there is equity of treatment for all operators by ensuring the proposals are proportionate to risk. Under Options C and D the relative costs of stricter regulatory requirements and associated administrative burden to small businesses could be distinctly higher.

## **9. Enforcement and sanctions**

SEPA, as the regulatory body, will be responsible for enforcement. The existing provisions of the Controlled Activities Regulations will apply.

## **10. Monitoring and Review**

The GBRs will be reviewed in line with the current arrangements under CAR.

## **11. Objectives of amendment to SSAFO Regulations**

11.1 The storage of slurry is governed by the Silage, Slurry and Agricultural Fuel Oil (Scotland) Regulations 2003 (SSAFO), which require that run-off from farm steadings, if contaminated by animal excreta, must be collected and stored in line with the requirements for slurry. The effect of this provision is that livestock farmers are required to have and to use valuable slurry storage capacity for substantial volumes of lightly contaminated water.



11.2 As a result, farmers may then find that their storage capacity is inadequate and come under pressure to spread slurry when conditions are less than suitable. This “dirty water” has to be transported or pumped, which involves costs in time and fuel. A better environmental option in many cases will be constructed farm wetlands (CFWs), to which lightly contaminated water may be drained. Grass when it is ensiled often produces an effluent with a high Biochemical Oxygen Demand (BOD), and the SSAFO Regulations have been effective in protecting surface waters from it. However, by the winter there is very little effluent, and there may be large volumes of rainwater running off the silage pit.

11.3 The relaxation of the SSAFO Regulations through an amendment allows ‘dirty water’ run-off from certain areas of the farm steading to be drained and treated through a constructed farm wetland (CFW). This run-off can be either: i) ‘dirty water’ that is currently required, under SSAFO, to be classed as slurry, or ii) silage run-off during certain periods of the year. Both of these are currently required to be stored in a specified way.

11.4 SEPA is preparing advice on the design specification for CFWs. CFWs must be constructed; that is, they may not be made by damming an existing watercourse or wetland. They must be a treatment facility, which means that they are not in legal terms part of “the water environment”. Water draining from the CFWs would then enter the water environment. These CFWs would be required to perform a treatment function to ensure that the water discharging from them to the water environment would not result in a deterioration of the status of the receiving watercourse.

11.5 If operators wish to take the option to use a CFW to treat lightly contaminated water rather than the option to ‘store and spread’, there will be construction costs. These construction costs can be part funded through the Rural Development Contract scheme. Where an operator’s storage facilities are proving inadequate, the option to construct a CFW could prove more cost-effective than the construction of more storage capacity.

11.6 Reducing the need for greater storage capacity, and making better use of existing capacity, using an alternative method of treatment, will provide valuable environmental protection. The construction costs will be at least partly offset by future savings in farmers’ time and in fuel and machinery/vehicle running costs.

## **12. Recommendation**

12.1 The recommendation is to take forward Option B, the diffuse pollution GBRs as proposed. This option is considered to be much less demanding than options C or D, and it offers the appropriate balance between the administrative costs incurred by water users and the provision of effective controls for the protection and improvement of the water environment.

12.2 Option A of postponing the introduction of diffuse pollution controls until after 2009 is not considered to be a viable option. Scotland's ability to complete the river basin management planning process by 2009 would be significantly compromised. Businesses would remain in a position of uncertainty until after 2009 about the measures that will be required to be operational from 2012. It could also result in non-compliance with the Water Framework Directive and a serious risk of proceedings in the European Court of Justice.

12.3 Options C and D would both produce greater informational benefits than the recommended option. This could lead to more informed programmes of measures in the future. However, in both options it is considered that the potential additional benefits are outweighed by the additional administrative costs to SEPA, and major costs to the operators.

### **Summary**

The General Binding Rules, and SSAFO amendment, have taken into consideration the responses to previous consultations and they will be an important step towards achieving good quality in Scotland's water environment. The proposed rules are in many cases good practice as set out in the PEPFAA Code, the Forests and Water Guidelines and guidance provided by amenity/leisure sector associations. Those land managers who already work to such standards will find the changes, if any, to their existing methods will be minimal.

The General Binding Rules are designed to set reasonable standards, which are transparent and fair, applicable to all land managers in Scotland.

### **Declaration**

'I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs'.

**Signed:**

**Michael Russell**  
**Minister for Environment**