



1. Response to the consultation by Scottish Government on *Delivering Scotland's River Basin Management Plans: Improving the physical condition of Scotland's water environment*

The UK Environmental Law Association aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of environmental law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

UKELA prepares advice on proposals of governments and regulators covering a range of environmental law topics, with the help of its specialist working parties. This response has been prepared with the help of the water law sub-group of the Scots Law working party.

PRELIMINARY OBSERVATIONS

UKELA welcomes the opportunity to respond to this consultation and draft regulations. We welcome the intention to provide further policy guidance and regulation to improve the physical condition of Scotland's water environment.

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We note that this consultation is part of the activity surrounding the second River Basin Management Plans (RBMPs) in Scotland. We also note that physical restoration work was part of the first round of RBMPs, and at that time the Government focused on voluntary measures and on land management agreements to secure work by private land managers, whilst recognising that some restoration work was too complex and expensive to be managed in that way.¹ SEPA has since funded restoration work through what is now the Water Environment Fund, but at that time the Government did not create new powers to enforce works, especially under the enabling provision of s.22 of the Water Environment and Water Services (Scotland) Act 2003. Although s.22 is in force and has been amended by the Reservoirs (Scotland) Act 2011 to enable the inclusion of offence provisions in any regulations, no regulations have yet been made.

Morphological alterations, for example to the bed or banks of the river, are an important factor in causing waterbodies to be designated as 'heavily modified', necessitating a different set of objectives for the RBMPs. Alterations which do not lead to this designation, may instead cause that waterbody to fail to achieve 'good' ecological status under the EU Water Framework Directive (2000/60/EC, WFD). In turn this will require measures to be taken to improve these waterbodies, unless such measures are disproportionately expensive or technically infeasible, or otherwise meet the conditions for extension or exemption. In the analysis of the first round of RBMPs across the EU, the Commission noted that morphology is a key pressure causing waterbodies to fail good status. Some 12% of Europe's waterbodies are designated as heavily modified, with some designations outstanding;² and in more than 60% of RBDs, measures required will include work on structures, fish passes or other physical restoration.³

¹ Scottish Government (2009) *Implementing the Water Environment and Water Services (Scotland) Act 2003: Restoration of the Water Environment A Consultation*

<http://www.gov.scot/Resource/Doc/255446/0075720.pdf>

² European Commission (2012) *COMMISSION STAFF WORKING DOCUMENT Accompanying the document REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the Implementation*

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In Scotland, as in other parts of the EU, it was the case that the ‘easy wins’ of the WFD process were identified and achieved in the first RBMPs. It is now necessary to make decisions about the relative balance of the second and third sets of Plans in terms of the relative costs and benefits of improvements, and we note in this regard that (in the Scotland RBD and the Scottish parts of the Solway Tweed RBD) the consultation on the RBMP2s offers a ‘baseline’ option, which is unlikely to meet the WFD objectives, and two ‘step-change’ scenarios. These involve progressively higher expenditure, increased realisation of the WFD objective, but also a higher risk of failure due to the practicalities of implementing large capital restoration programmes. This consultation provides a mechanism to take forward such works where they are not found to be disproportionately expensive; but that decision will depend in part on which of the scenarios is adopted in the final RBMPs. We recognise that this is an iterative process and that lessons learned during the first RBMPs and in preparation for the second round, will assist in determining which projects should be prioritised.

In the Solway Tweed RBD, some 80 rivers and a small number of lochs will not reach good status by 2015 on the grounds of physical condition, with some 60 rivers and a small number of lochs affected by barriers to fish passage (and these may overlap). In the Scotland RBD, some 335 waterbodies are affected by physical condition and around the same number with barriers to fish passage, and again there is some overlap. This is somewhere between 10-20% of the total number of waterbodies and perhaps 40-50% of those which will not be at good status for 2015.

Hence we fully support any steps which are taken to facilitate improvements for these pressures. We also support any measures which can contribute to other beneficial outcomes, including biodiversity and flood management. We do note some concerns as to the funding of works undertaken by public authorities, especially Scottish Water. As Scottish Water’s activities are funded solely by customer charges, with some Government borrowing repaid from those charges,

of the Water Framework Directive (2000/60/EC) River Basin Management Plans SWD (2012) 379 final Vol.2
p.139

³ *Ibid* p.215

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there are already some issues around funding of activities which bring multiple benefits. The additional benefits from catchment protection is one example, as are wider benefits from flood management. As these types of activities expand, the issue is likely to attract more attention. We do strongly agree that an integrated approach and better coordination will result in positive synergies and consider that such win-win activities should be facilitated.

We agree that improvement works should be determined in consultation with all interested parties. We note that the focus in this paper is on historic structures not subject to a reviewable authorisation under the Water Environment (Controlled Activities) (Scotland) Regulations (2011/208, CAR). Where there is a CAR authorisation (especially, for dams and weirs) we agree that the proper approach is to review that authorisation. For other assets (such as bridges and culverts) we agree that the proper approach is through asset management programmes such as the Quality and Standards process for Scottish Water.

We would also agree that for smaller projects and structures in private hands, it is appropriate to offer financial assistance to landowners but as suggested, only where the structure is not involved in any commercial use. We note the intention to deliver such funding through the Water Environment Fund or the Scottish Rural Development Programme as appropriate, including some income foregone, subject to Commission approval of the latter. We agree in principle that some contribution can be made from the Water Environment Fund to larger projects with multiple partners. We are concerned that the relative costs and benefits will be difficult to apportion, but probably not any more difficult than other requirements for economic analysis under the WFD. We note the intention to pay for income foregone for a five year period and wonder how that period was decided – is it just a ‘reasonable’ timescale? Or is it related to the currency of the Scottish Rural Development Programme? We do note that current literature on payment for ecosystem services schemes finds that many schemes do operate on around a five year timescale.

We note the ‘twin-track’ approach of using voluntary measures for private owners and land managers, and compulsory powers for public authorities. We appreciate there may be practical reasons for this, but do wonder if it might not be desirable to

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have such powers in relation to private owners, as we have always understood was the initial intention under s.22. Especially we wonder if compulsory powers might be necessary in relation to private assets that are being used commercially or indeed are held by operators currently engaging in business with similar assets elsewhere. It may be that all such assets are subject to reviewable consent, but if not, then a power to act might be useful.

We are particularly pleased to note a focus on the urban environment, for example to unblock culverts. These types of works will have multiple social and environmental benefits and go some way to redress the (inevitable) emphasis on the rural dimensions of the water environment.

We agree that the current responsible authorities for the WFD, as well as Transport Scotland, should be subject to the new powers. We agree with the proposal for 'remedial measures' notices and we agree that the broad process should be comparable to the CAR process, for example in terms of public notification.

We note in the text (p.14) that works being undertaken should obtain a CAR authorisation and thus be fully aligned. We strongly support that but we are not clear as to how this will be mandated. Is it the case that the government considers that any such restoration work will automatically fall within CAR? In addition, other consents, for example under planning law, may be required. Therefore, it might need to be clarified that work cannot be required to commence until relevant authorisations are obtained (which may be up to 4 months, rather than 28 days).

It might also help to avoid confusion/uncertainty/unfairness etc., if Reg.12 made it a defence to a notice: that the applicant has lodged applications for authorisations to do the necessary work that has yet to be determined; or that the necessary authorisation has been applied for and refused.

Otherwise we are content with the content of the draft regulation.

Finally, we would note that SEPA changed its website during this consultation and therefore, many of the document links did not work. In future is it possible to also

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give the reference to the document in a footnote so that it can still be found? In addition some links take readers to a password protected page.

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