

**Better Environmental
Regulation Programme**

Consultation on Proposals for an Integrated Authorisation Framework

January 2017

Part 8 – Controlled Activities Regulations (CAR)

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8.1 Background

- 8.1.1 The Water Environment (Controlled Activities)(Scotland) Regulations 2011 (CAR 2011) currently provide the principal regulatory framework for protecting the water environment in Scotland. First introduced in 2005, the regulations have been progressively improved and are widely recognised as a leading example of better regulation.
- 8.1.2 Many aspects of the proposed integrated authorisation framework are derived from CAR 2011 and consequently, there are a number of similarities, including the availability of different tiers of authorisation depending on environmental risk.
- 8.1.3 CAR 2011 already provides some integration across regimes in particular CAR's requirements for activities liable to cause pollution are integrated into the existing authorisation processes under PPC 2012, WML 2011 and RSA 1993. Therefore, in these circumstances a separate authorisation under CAR is not required.
- 8.1.4 Other activities, such as water abstraction or engineering works in the water environment, are also undertaken at some of the sites regulated under these other existing regimes. Currently, such activities do require a separate authorisation under CAR 2011. Separate authorisation is also required under CAR 2011 for any discharges, abstractions or engineering works in the water environment undertaken by a person who also requires a waste exemption under WML 2011. The proposed integrated authorisation framework will allow these gaps in the integration already provided by CAR 2011 to be closed.
- 8.1.5 The integrated authorisation framework will enable SEPA to continue to work with operators of controlled activities to protect, and improve, the water environment in a similar way to now. However, there will be some differences in detail. The integrated authorisation framework will reduce regulatory flexibility compared with that of CAR 2011 in the registration tier and increase it in other areas. These changes are outlined below.
- 8.1.6 It is proposed that CAR 2011 will be repealed completely, and the provisions will be incorporated into the new integrated authorisation framework. As the existing regulations transpose parts of a wide range of EU legislation, the single framework will need to re-transpose the relevant provisions of the legislation detailed below:
- The Water Framework Directive (Directive 2000/60/EC);
 - The Groundwater Directive (Directive 2006/118/EC);
 - The Priority Substances Directive (Directive 2008/105/EC as amended by Directive 2013/39/EU); and
 - The Environmental Impact Assessment (EIA) Directive (Directive 85/337/EEC).

8.1.7 The Water Framework Directive includes requirements relating to a number of protected areas, the establishment of which is required under other European legislation. Consequently, CAR 2011 also contributes to the implementation of:

- The Bathing Waters Directive (Directive 2006/7/EC);
- The Habitats Directive (Directive 92/43/EEC);
- The Birds Directive (Directive 79/409/EEC); and
- Urban Waste Water Treatment Directive (Directive 91/271/EEC),

8.2 Proposed new legislative regime

Proposed regulated activities

8.2.1 We propose that the same range of activities that can affect the condition of the water environment will be controlled under the new integrated authorisation framework as is currently controlled under CAR 2011.

Where CAR regulated activities will fit in the tiers of authorisation

8.2.2 The approach within the integrated authorisation framework is drawn from CAR 2011, which currently provides different tiers of authorisation; with the tiers intended to provide for a targeted, streamlined and risk-proportionate approach to regulation. As such, the changes for activities currently regulated under CAR 2011 are likely to be far less than for the other regulatory regimes.

8.2.3 The integrated authorisation framework will provide for four tiers of authorisation. As well as potential environmental impact, various other factors will influence the tier of authorisation that may be required.

8.2.4 A full list of activities currently authorised, and the level at which they are licenced, under CAR 2011 can be found in the [CAR Practical Guide](#).

GBRs

8.2.5 Activities currently authorised under CAR 2011 at the GBR tier of authorisation would continue to be authorised at the GBR tier in the integrated authorisation framework.

Notifications

8.2.6 The proposed notification tier does not provide for prior-assessment of proposed activities. Under CAR 2011, SEPA carries out such assessments for all proposed activities posing a greater risk to the water environment than activities authorised under the general binding rule tier. SEPA has no plans at this time to include any of the activities currently authorised by licence, registration or general binding rules in the notification tier. However, it will keep this position under review and will be able to move activities into the notification tier should it consider doing so would be appropriate.

Registrations

8.2.7 Our intention would be that the vast majority of activities currently authorised at registration-level under CAR 2011 would be authorised under the similar registration tier of the integrated authorisation framework.

8.2.8 However, there are some differences between the proposed registration tier of the integrated authorisation framework and that of CAR 2011. These differences may mean that in some circumstances activities that could currently be authorised at registration level would move to the permit tier under the integrated authorisation framework (see below).

Permits

8.2.9 We anticipate that activities currently authorised at water-use licence level under CAR 2011 would be authorised at the permit tier of the integrated authorisation framework.

8.3 Overview and comparison of arrangements

8.3.1 This section describes any differences between the existing and proposed administrative arrangements for CAR activities.

Registration tier and a named authorised person

8.3.2 Under CAR 2011, registrations are activity-specific. This means that anyone can carry on the authorised activity and no application to SEPA is required to transfer an authorisation from one operator to another. Under the integrated authorisation framework they will be person-specific, so that the person who has control over the carrying on of the activity will be the registration holder. However, it will still be possible for other people to carry on the activity under the registration. The authorised person must retain overall control, and will be responsible for overall compliance with the registration.

8.3.3 However, for wastewater discharges from domestic properties, the owner of the property would be deemed to be the authorised person so that there is no need to apply for a transfer of the registration when the house changes ownership. SEPA intends to engage with conveyancing solicitors to make them aware of this change and reinforce the need to make sure they make new owners aware of their environmental responsibilities. For other registrations, an application to SEPA would be required to transfer a registration from one person to another.

8.3.4 This change to person-specific registrations would:

- Make any enforcement action by SEPA more straightforward than under CAR 2011 as it removes the step of identifying and proving who the authorised person is in that particular case;
- Help make sure people are aware of their responsibilities.

- Result in transfer costs for SEPA, and the authorised person, when the person in control of an activity changes (although it is intended that this will be a simple on-line process with no associated fee); and
- Make the transfer of existing registrations under CAR 2011 into the integrated authorisation framework potentially more onerous for SEPA and operators than if registrations remained activity-specific.

Registration tier and standard rules

- 8.3.5 Currently, the conditions SEPA applies in registrations are not restricted to standard rules. Under the integrated authorisation framework the conditions of registrations would be restricted to standard rules.
- 8.3.6 Under the integrated authorisation framework, SEPA would have to establish standard rules. To do this it would be required to consult the public on those proposed rules SEPA would then publish the finalised rules on its website. This will be a transparent process that ensures all stakeholders with an interest have an opportunity to comment.
- 8.3.7 Under the CAR 2011, SEPA can create a new registration for an appropriately low-risk type of activity within a few days (and has done so on a number of occasions since 2005). When doing so, SEPA has engaged with relevant parties as a matter of good practice. However, the formal consultation requirements in making standard rules under the integrated authorisation framework mean that putting in place a new registration for authorising a particular type of activity is likely to take longer and be more onerous for SEPA than it is currently the case. However, it will still be possible to create a set of standard rules for a new low-risk activity within a reasonable timescale.
- 8.3.8 Under the integrated authorisation framework, authorisations granted for a particular type of registration-level activity would be subject to compliance with one of the published sets of standard rules. SEPA would be able to consult on, and amend, the standard rules for that activity. Authorisations granted subject to the previous set of standard rules would then be subject to the amended standard rules without the need to vary individual authorisations but SEPA would notify the authorised person of the change to the standard rules. This makes it quicker and easier for SEPA to change conditions where necessary. However, at the moment SEPA does not anticipate making such amendments to standard rules applicable to activities that currently fall within the CAR 2011 registration tier.
- 8.3.9 Currently, under CAR 2011, SEPA can vary individual registration-level authorisations where necessary to protect or improve the water environment. Under the integrated authorisation framework, SEPA would not be able to vary the conditions of individual registrations. Instead, SEPA may have to revoke the existing individual registration and then impose a new registration subject to the required new standard rules or impose a permit-level authorisation if a suitable set of standard rules was not available.

8.3.10 We believe this loss of the flexibility in CAR 2011 is outweighed by the benefits of standard rules across all activities in the integrated authorisation framework in that:

- There is greater transparency across a regulated sector;
- Clear rules on the regulatory requirements are available at the time an application is made, rather than when the authorisation is granted (this will help applicants in planning, financing and producing a good application). CAR 2011 already makes wide use of standard conditions so that applicants can already see when making an application what conditions they are likely to need to meet. However, the arrangements under the integrated authorisation framework provide greater certainty for applicants, provided they are able to comply with the standard rules.
- There will be reduced burden and cost for SEPA to review and change authorisation conditions overall; and
- SEPA can more consistently monitor and compare compliance across a regulated sector. Noting that there are no plans to increase the level of compliance assessment for CAR registration activities.

Registration tier and applications that pose a significant risk to water use

8.3.11 Very few applications for authorisation by registration under CAR 2011 pose a significant risk to the water environment, or the interests of other users of the water environment. This is because the types of activities for which authorisation by registration is available pose a low-risk in most circumstances.

8.3.12 However, there are some situations where the risks posed by a registration-level activity can be significant. For example, this can be the case where the water environment is already under considerable pressure (i.e. cumulative impact) or where there are vulnerable habitats, or species, of conservation importance. In Special Areas of Conservation (SACs), the required risk assessment process has two stages. If at the first SEPA determines that a significant effect is likely, it must consult SNH about the proposal.

8.3.13 In CAR 2011 when determining an application for, or considering a variation of, a registration-level activity, if SEPA considers the activity is having, or would be likely to have, a significant impact on the water environment or the interests of other users of the water environment, SEPA has powers to consult other relevant public bodies and require advertisement of the proposal in order to enable the public to make representations. Formal consultation on registration-level applications would not be provided for under the integrated authorisation framework.

8.3.14 Under CAR 2011, SEPA can decide whether to escalate registration-level applications posing a significant risk to water use to licence-level or determine at registration-level. Under the integrated authorisation framework, SEPA will

escalate any such applications to permit-level because of the need to assess the potential risk and to ensure it can appropriately consult on the proposals. This means that a small number of activities SEPA might currently have authorised at registration-level would need to be authorised at permit-level. We believe this appropriately reflects the potential risks of an activity and means the cost of the additional work needed by SEPA is borne by the individual applicant rather than across all registration holders.

Permit tier

8.3.15 Under CAR 2011 the maximum determination time without agreement from the applicant is 4 months for a water use licence. However, where SEPA requires (a) advertisement of a proposal, or (b) further information from the applicant about a proposal, the “clock” stops and so the time between an application being made and SEPA completing the determination can be longer than 4 months.

8.3.16 Under CAR 2011, SEPA only requires advertisement where it considers that the activity proposed is likely to have a significant adverse impact on the water environment or the interests of other users of the water environment. In addition, the determination of such applications more often requires additional information to be provided to SEPA by the applicant during the determination period than is the case for other applications.

8.3.17 Under the integrated authorisation framework, SEPA anticipates treating applications for activities that pose a significant risk to the water environment or to the interests of other users of the water environment as non-standard applications. The determination time for standard permit-level applications would be 4 months. For non-standard applications, SEPA would be able to set case-by case determination periods with agreement from the applicants concerned. The timescales for determining such applications are expected to be the same as under CAR 2011 in practice. However, the efficiencies that SEPA is continually making to the determination process, and SEPA’s new permitting service, mean that SEPA intends to process applications more quickly, wherever possible.

Fit and proper person (FPP)

8.3.18 Under CAR 2011 there is no fit and proper person test required for registration-level activities. At licence-level, before granting authorisation, SEPA must be satisfied that the responsible person will secure compliance with the authorisation and the conditions specified in it.

8.3.19 Under the integrated authorisation framework, a fit and proper person test will be required at registration and licence level. SEPA will be able to have regard to a wide range of factors in applying the test, depending on what it considers appropriate.

8.3.20 The level of assessment SEPA undertakes as part of the FPP test will be proportionate to the activity and this will be set out in guidance. It will depend

on the risk and scale of the activity and the vulnerability of the activity to misuse (e.g. waste crime). For example, we aim to provide sufficient flexibility in the integrated authorisation framework to ensure that SEPA may generally assume that householders are fit and proper persons to secure compliance with registrations for septic tank discharges.

8.3.21 A small number of activities controlled under CAR 2011, such as opencast coal works, can require:

- Aftercare to maintain protection of, or restore, the affected part of the water environment once operations have ceased; or
- Intervention to prevent serious harm to the environment should the operator cease trading or otherwise fail to operate the site.

8.3.22 Whilst arguably SEPA can require applicants to make financial provision in relation to such activities under CAR 2011, it would be clear under the integrated authorisation framework that it can and must do so where appropriate.

8.3.23 For other activities controlled under the CAR 2011, SEPA currently assesses applications and method statements but does not undertake any other detailed checks on the abilities of applicants to secure compliance with authorisations. At this stage, SEPA does not anticipate routinely doing more than this, particularly for lower-risk activities such as those authorised at registration-level, or for activities that public bodies, such as Scottish Water, have a duty to undertake.