



Water Use

# **Regulatory Method (WAT-RM-34)**

## **Derogation Determination - Adverse Impacts on the Water Environment**

**Note**

If you need help in applying this method, you should contact SEPA's *Water Unit*.

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### Update Summary

Version	Description
v1.0	Unpublished draft document. Temporary access available via the <i>Crosstube</i> folder.
v2.0	First published version of document, based on: <i>WAT-RM-34 final (v5) 2009-07ref checkedMW</i>
v3	<i>Note on Test C (p10)</i> clarified, WAT-FORM-28 replaces WAT-FORM-34, River Basin links now 2009, updated for CAR 2011
v4	Further clarification for <i>Note on Test C (p10)</i>
v5	Expired CMS links reviewed and updated.
v5.1	Refs to Derogation Support Group now Water Unit. EPI now RS, WAT-FORM-28 title corrected, Legislation links updated.

### Notes

**References:** Linked references to other documents have been disabled in this web version of the document. See the References section for details of all referenced documents.

**Printing the Document:** This document is uncontrolled if printed and is only intended to be viewed online.

If you do need to print the document, the best results are achieved using Booklet printing or else double-sided, Duplex (2-on-1) A4 printing (both four pages per A4 sheet).

**Always refer to the online document for accurate and up-to-date information.**

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## Key Points

This document provides information for determining the applicability of a derogation for proposals that would:

- Breach an environmental standard
- Cause deterioration of status or
- Prevent the future achievement of an objective in a River Basin Management Plan.

Once you have taken on the case, you can ask for advice from SEPA's *Water Unit* at any stage. Even if you do not need advice, you should make contact with the Water Unit early on in the process so that you can plan your work properly. This is because you may have to allow time within the determination period to consult the group before submitting your proposed determination to a SEPA Regulatory Review Team.

**Sections 1, 2 and 3** below set out the policy and legislative basis for handling applications likely to result in significant adverse impacts on the water environment. You should familiarise yourself with these sections before applying the method. There is a considerable body of European, UK and Scottish policy underpinning SEPA's approach to such applications. The method uses terms taken from the Directive's derogation provisions or from this body of guidance. The use of such terms is necessary so that the link to the derogation provisions and guidance is clear. This can make the method appear legalistic and complex. The Water Unit can provide you with legal and policy advice if required.

- *Section 1*  
provides a brief overview of the key principles that should underpin how such cases are handled.
- *Section 2*  
looks at the procedures that SEPA will apply when a proposal poses a risk to the status of a water body or the achievement of a River Basin Management Plan objective relating to the status of a water body.
- *Section 3*  
looks at the procedures that SEPA will apply when a proposal would cause the breach of an environmental standard or condition limit but does not pose a risk to the status of a water body or the achievement of a River Basin Management Plan objective relating to the status of a water body.

# 1. Overview and Key Principles

This regulatory method (WAT-RM-34) and accompanying supporting guidance (*WAT-SG-67: Assessing the Significance of Impacts - Social, Economic, Environmental* and *WAT-SG-68: Assessing Significantly Better Environmental Options*) are intended for use by SEPA staff when handling applications for authorisation, variation or surrender made under the *Water Environment (Controlled Activities) (Scotland) Regulations 2011* (CAR) and likely to result in significant adverse impacts on the water environment. Such cases can be complex and controversial.

Significant adverse impacts include:

- any breach of an environmental standard or condition limit, whether or not that breach is of a sufficient spatial extent to threaten the status of a water body<sup>1</sup>
- any impact which would lead to deterioration of status (i.e. drop in class) of a water body; and
- any impact which would compromise the achievement of a River Basin Management Plan objective relating to the status of a water body (i.e. an environmental objective, set by Scottish Ministers by being identified in a river basin management plan).

SEPA is required to operate under a general presumption against authorising proposals<sup>2</sup> likely to result in such significant adverse impacts. However, SEPA is responsible for controlling alterations to the water environment that serve a wide range of beneficial purposes, including public water supply, flood alleviation, hydropower generation and navigation.

SEPA will consider authorising such proposals if:

- the proposal's benefits to human health, human safety or sustainable development outweigh the benefits of protecting the water environment; and
- compliance with the requirements of legislation relevant to the protection of the water environment (including the *Water Framework*

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<sup>1</sup> Such breaches, although limited in spatial extent, can nevertheless have significant consequences for the interests of third parties or for nature conservation objectives.

<sup>2</sup> In this document, the term 'proposal' is used to cover any application under CAR for a new activity, variation of an existing activity or for a surrender or partial surrender of an existing authorisation. The term 'authorise' is used to mean the granting of any such application.

*Directive*<sup>3</sup> and other EU legislation, such as the legislation governing Protected Areas<sup>4</sup>) will not be compromised.

Staff should follow the method in the guidance document *WAT-SG-67: Assessing the Significance of Impacts - Social, Economic, Environmental* when assessing the significance of positive and negative impacts associated with a proposal. This includes consideration of the impacts of proposals on the interests of third parties in so far as those impacts result from alterations to the water environment<sup>5</sup>.

The method and supporting guidance are designed to help SEPA structure, analyse and record information in order to help it make consistent and objective decisions in a transparent and auditable manner. The method does not include any formulaic, "black box", decision generator. This is because reaching a decision requires a balanced judgement to be made, taking account of the relevant and available information.

To help obtain the information necessary to make appropriately balanced judgements, SEPA will:

- require all proposals likely to have significant adverse impacts on the water environment to be advertised; and
- seek, and have regard to, the advice of Responsible Authorities<sup>6</sup> and other public bodies with relevant knowledge and expertise on the likely positive or negative impacts of a proposal.

SEPA will also encourage prospective applicants to enter into pre-application discussions with SEPA at an early stage in the development of their proposals.

In responding to consultations on proposals likely to have significant adverse impacts on the water environment, SEPA's Planning Unit will raise the advantages of the applicant twin tracking their planning and CAR applications, remind the planning authority of their duties as a "responsible" authority in respect of WFD interests and highlight that the proposals may be

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<sup>3</sup> Including the requirements are set out in paragraphs 7, 8 and 9 of Article 4 and in Article 7 of the Directive.

<sup>4</sup> Protected Areas under the Water Framework Directive include Natura 2000 sites dependent on the status of surface water or groundwater, Bathing Waters, Shellfish Waters and Freshwater Fish Waters.

<sup>5</sup> For example, there may be a number of environmental, social or economic impacts associated with the construction of buildings, power-lines and roads intended to serve a new development. SEPA will only consider those impacts which result from changes to the water environment caused by such works.

<sup>6</sup> See The Water Environment and Water Services (Scotland) Act 2003 (Designation of Responsible Authorities and Functions) Order 2006. The Responsible Authorities are: local authorities, Scottish Natural Heritage, Scottish Water, District Salmon Fisheries Boards, National Park Authorities, British Waterways, Forestry Commission and the Fisheries Committee.

required to undergo a derogation assessment as part of the CAR determination process.

Early pre-application discussions will allow SEPA to provide advice on how to avoid or minimise significant adverse impacts and on the information SEPA requires to determine whether a derogation is applicable or not (and hence whether the proposal could be authorised) where a significant adverse impact is likely. SEPA's aim is to help applicants avoid unnecessary costs and streamline the subsequent application process.

## 2. Water Framework Directive Requirements

Under certain circumstances, the Water Framework Directive provides for derogation from its objectives of (a) preventing deterioration of status of water bodies and (b) achieving good status or, in the case of water bodies designated as heavily modified or artificial, good ecological potential and good surface water chemical status, by 2015. This provision for derogation is designed to allow for developments that would benefit human health, human safety or sustainable development or which are of overriding public interest.

Any uses of derogations, and the reasons for them, must be reported in the River Basin Management Plan or next update thereof.

SEPA expects that proposals likely to cause a failure of one of the Directive's objectives and hence require derogation will be a small proportion of the applications it receives under CAR.

To ensure compliance with the Water Framework Directive, SEPA will only authorise such proposals if all the following conditions are met:



**Table 1 Conditions required to authorise derogation proposal**

Test	Derogation conditions for polluting discharges	Derogation conditions for abstractions, impounding works and engineering works
<b>A</b>	The discharge <sup>7</sup> (a) will not (i) cause deterioration of a surface water body to a status worse than good; (ii) cause deterioration of the status of a body of groundwater; or (iii) compromise the future achievement of a River Basin Management Plan objective for a water body <sup>8</sup> ; and (b) is for the purposes of a new sustainable human development activity (See <i>Test A</i> )	Not applicable
<b>B</b>	All practicable steps will be taken to mitigate the adverse impacts of the activity on the status of the water body (See <i>Test B</i> )	
<b>C</b>	The benefits to the environment and to society of preventing deterioration of status or achieving a River Basin Management Plan objective would be outweighed by the benefits of the proposal to (a) human health; (b) the maintenance of human safety; or (c) sustainable development (See <i>Test C</i> ); or the reasons for the proposal are of overriding public interest (See <i>Note on Test C</i> below);	
<b>D</b>	The benefits that would result from the proposal cannot for reasons of technical infeasibility or disproportionate cost be provided by other means, which are a significantly better environmental option (See <i>Test D</i> ); and	
<b>E</b>	The application of a derogation would be consistent with the implementation of other Community environmental legislation (e.g. the achievement of a standard or objective applicable to a Protected Area under the legislation establishing the area would not be compromised) (See <i>Test E</i> )	

The conditions described above are set out in Paragraph 7 and Paragraph 9 of Article 4 of the Directive. The determination of whether a proposal meets these conditions will be known as the **derogation tests**.

The direct or indirect discharge of pollutants into groundwater is covered by a different set of derogations. These are governed by the 1980 Groundwater Directive, the new (2006) Groundwater Directive and the Water Framework Directive's general prohibition on direct discharges into groundwater. They are not covered in this regulatory method.

<sup>7</sup> Derogation Test A does not apply where a water quality impact results indirectly from a morphological alteration (e.g. as a result of disturbance of contaminated sediments during engineering works).

<sup>8</sup> i.e. an environmental objective established in a river basin management plan in 2009 or in subsequent updates of that plan.

### Note on Test C - How SEPA will assess Overriding Public Interest

When assessing any proposal likely to have a significant adverse impact on the water environment, CAR requires inter alia SEPA to consider the proposal's likely environmental, social and economic benefits.

Weighting these benefits enables SEPA to reach a judgement on whether or not the proposal's adverse impacts are acceptable by reason of them being outweighed by the proposal's benefits to human health, the maintenance of human safety or sustainable development or by reason that the proposal's benefits are of overriding public interest.

In practice, for most proposals judged acceptable, the reason will be because their adverse impacts are outweighed by benefits to human health, human safety or sustainable development. The vast majority of proposals will not be of overriding public interest. For the few that are, the most likely reason is that their benefits are of strategic importance to human health, human safety or sustainable development. For example, a proposed flood defence scheme designed to protect a major conurbation might provide benefits to human health and safety that are of overriding public interest. However, the process of considering the full range of environmental, social and economic benefits allows SEPA to assess whether a proposal might be of overriding public interest for any other reason.

SEPA will apply the derogation tests where a proposal is likely to result in deterioration of the condition of any biological, hydrological, morphological, chemical or physicochemical quality element in a body of surface water or a failure of any one of the conditions required for good groundwater status. Any change in the condition of a quality element such that its new condition would be consistent with standards or condition limits applicable to a lower status class than was the case prior to the adverse effects constitutes a deterioration of the condition of the quality element.

A River Basin Management Plan objective may be compromised by authorising a proposal that would mean that the measures identified in that Plan for achieving the objective would no longer be sufficient to do so. However, the Plan's objective would not be compromised if the applicant agreed to take sufficient additional measures in time to achieve the objective by the planned deadline for doing so (e.g. 2015, 2021, 2027). In such cases, SEPA may authorise the proposal (subject to conditions that will require the additional measures to be taken in good time) despite there being an initial but temporary deterioration **within** status class and without applying the derogation tests.

### 3. General Protection of the Water Environment

A proposal may cause damage by breaching an environmental standard but not cause deterioration of status of a water body because the geographical extent over which the breach occurs is too small. Such breaches may nevertheless adversely affect third party interests. For example, a proposal may have significant adverse impacts on biodiversity conservation interests in part of a water body even though it does not threaten the status of the water body.

SEPA must apply environmental standards as laid down by Ministers in the following Directions:

- *The Scotland River Basin District (Surface Water Typology, Environmental Standards, Condition Limits and Groundwater Threshold Values) Directions 2009*
- *The Solway Tweed River Basin District (Surface Water Typology, Environmental Standards, Condition Limits and Groundwater Threshold Values) (Scotland) Directions 2009*

To appropriately protect the water environment, SEPA will require the following tests to be met before authorising any proposal which causes a failure of an environmental standard. The tests are equivalent to those in Tests B, C and E in Table 1 above.

- all practicable mitigation measures will be taken to minimise the magnitude and extent of the failure and its consequent adverse effects
- the benefits of the proposal to human health, human safety or sustainable development outweigh the benefits of avoiding<sup>9</sup> the adverse impacts resulting from the failure; and
- the proposal is consistent with the requirements of other EU environmental legislation (e.g. the achievement of the objectives of a protected area will not be compromised).

Unless deterioration of status of a water body would result or the achievement of a River Basin Management Plan objective for a water body would be compromised (see *Section 2* above), the above tests will only be applied to engineering proposals if a third party has raised concerns following an advertisement.

The application of the tests will help fulfil the requirements of the policy framework set for SEPA by:

- *The Water Environment and Water Services (Scotland) Act 2003*, which requires SEPA to have regard to the social and economic impact of the exercise of its functions under CAR; to promote sustainable flood management, and to act in the way best calculated to contribute to the achievement of sustainable development

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<sup>9</sup> i.e. by refusing the proposal.

- Scottish Ministers' *Process for taking into consideration third party representations in connection with applications under CAR*
- Scottish Ministers' Policy Statement on *Assessing Scotland's water environment - use of environmental standards, condition limits and classification schemes*, which sets out guiding principles on how Ministers expect standards to be used in Scotland; and
- The *Environment Act 1995*, which requires SEPA to have regard to the social and economic needs of an area and, in particular, to such needs of rural areas; and to take account of the likely costs and benefits of the exercise or non-exercise of its functions.

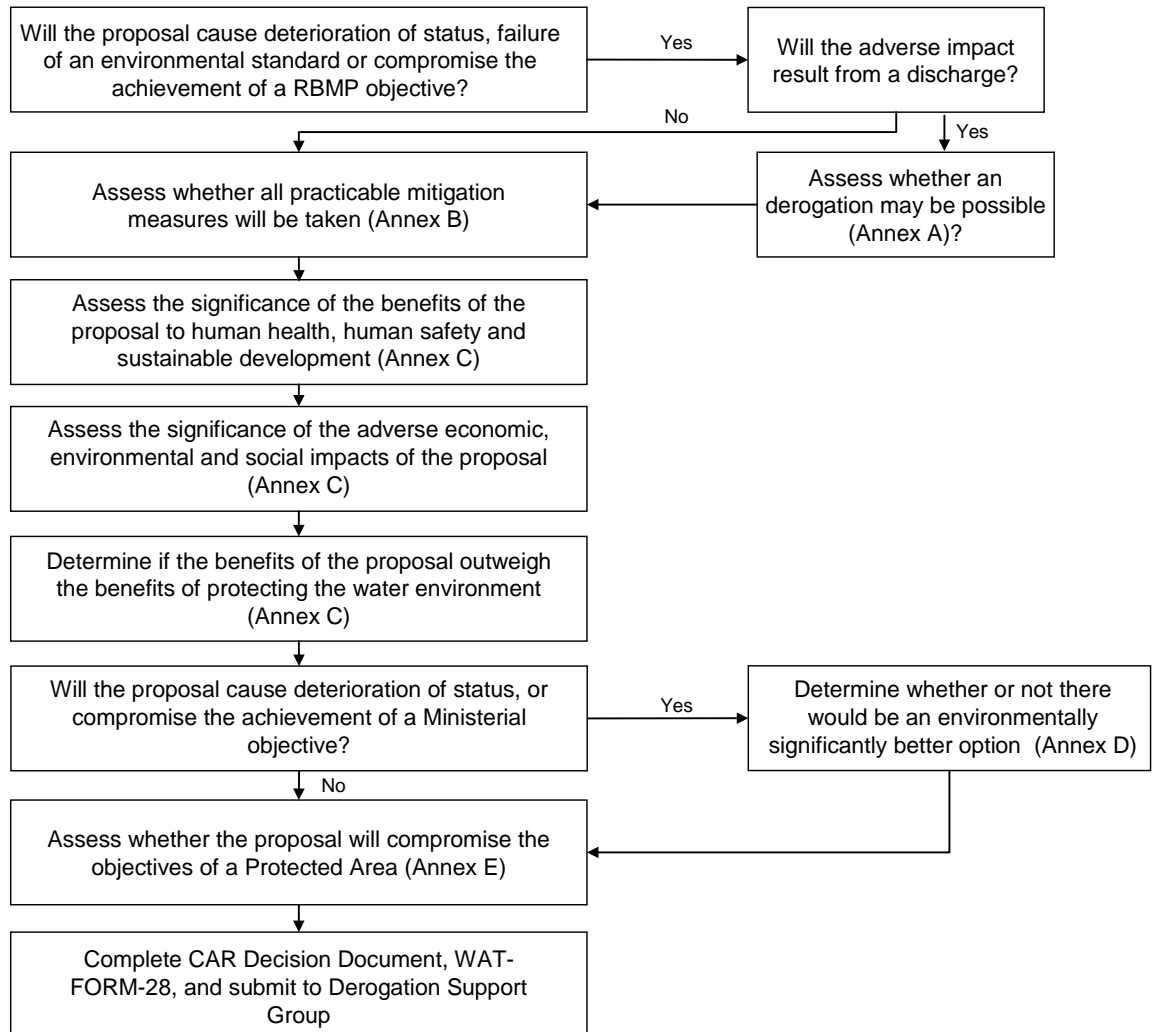
Additionally, SEPA will not normally authorise:

- \*any polluting discharge that would result in failure of a "good", "moderate" or "poor" water quality standard beyond the edge of the physical mixing zone associated with that discharge, or
- any proposal that would compromise the interests of other operators unless the applicant has reached an agreement that is acceptable to those operators or the proposal would enable the achievement of good status. For example, SEPA will protect the interests of an abstractor threatened with a loss of supply by a proposed new abstraction upstream.

\*SEPA may make exceptions to the point above where, for example, a proposed discharge of one pollutant would not result in additional harm to the water environment because water quality is already severely degraded because of pollution by another pollutant (e.g. because of severe minewater pollution, a discharge of ammonia would cause no further harm).

## 3.1 Process Summary

**Figure 1 Flowchart of the derogation determination process**



## 4. Special Requirements when Processing Applications

### On Receipt of an Application

Where there is a reasonable likelihood that the proposal would result in deterioration of status; cause a failure of an environmental standard; or compromise the future achievement of a River Basin Management Plan objective, you must:

- ensure that the applicant is aware of the tests SEPA will apply in determining whether to authorise the proposal or not; and
- assess whether sufficient information has been provided by the applicant to enable SEPA to determine whether the relevant tests are passed or failed (See *Section 5*).

Remember that you will also need to allow time in the determination period for the Water Unit to review your proposed derogation determination document and then for the relevant Regulatory Review Team to consider your proposed decision on derogation.

### Level of Analysis Required of Proposed Implications

The level of analysis and the information necessary to support it will depend on the difficulty of the decision and the likely implications of a wrong decision. This is a matter of judgement and you should be experienced or suitably trained in making such judgements if you are using this method.

A summary of the information required from external sources to help determine an application is set out in Table 2. Where the information provided by external sources relates to issues of a complex or specialist technical nature, you should seek advice from appropriate experts in the relevant SEPA departments to help assess and interpret the information.

SEPA's Planning Unit should also be contacted so discussions between SEPA and the applicant in respect of, as applicable, corresponding planning applications or Section 36 applications under the *Electricity Act 1989* can be taken into consideration.

**Table 2 List of information necessary prior to making a proposed derogation determination**

Information required	Expected sources (in addition to SEPA)
The measures proposed by the applicant to mitigate the adverse impacts of the proposal on the water environment	Applicant
Appropriate information on any significant benefits of the proposal to human health, human safety or sustainable development [See WAT-SG-67].	Applicant, relevant consultees and other third parties
Appropriate information on any significant environmental, social and economic benefits that would be foregone (i.e. the significant adverse impacts of the proposal) if the application were to be granted [See WAT-SG-67]	Applicant (e.g. as part of an EIA or similar), relevant consultees, other third parties
Where relevant, information on other options for delivering the benefits expected from the proposal, including information explaining whether or not these options are significantly better environmental options [See WAT-SG-68]	Applicant (e.g. as part of an EIA or similar), relevant consultees, other third parties

Where an issue may be a decisive factor in a case, you should make all reasonable and proportionate checks and investigations you consider necessary to be confident that SEPA's information about the issue is accurate and correctly interpreted by SEPA.

Where an applicant proposes to modify an application for any reason after it has been made, you should ensure that the applicant sets out the modifications in writing to SEPA. Depending on the scale of the modifications and the stage of determination at which they are made, a new application may be appropriate, particularly if the application has already been advertised. This is a matter of judgement for you.

A proposal may result in potentially significant positive or negative impacts in relation to which Responsible Authorities or other public bodies have specialist expertise and responsibilities. Where this is the case, you should seek the advice of the relevant Responsible Authority or other public body to help assess the significance of those impacts.



## 5. Determination of a Proposed Derogation

You should use *WAT-FORM-28: CAR Derogation Decision Document* to record the basis for any proposed determination.

The form is split into two main parts:

- **Sections A to G**, which should set out your judgement on each of the derogation tests; along with the draft decision
- **Annex A**, which provides references to the source of the information used.

Guidance on applying the derogation tests is provided in:

- *Test A*: New Sustainable Human Development Activity (discharges)
- *Test B*: All Practicable Mitigation Measures
- *Test C*: Benefits to Human Health, Human Safety or Sustainable Development'
- *Test D*: Significantly Better Environmental Option
- *Test E*: Compliance with Other Legislative Requirements

You should assess how confident you are in the results of the key assessments that have been made in relation to the tests that are being applied. The key assessments are those on which the decision is likely to hinge.

If a decision is particularly sensitive to the results of a particular assessment and there is significant uncertainty about whether that assessment is correct, you should decide whether further information could reasonably be obtained that would significantly increase confidence in the results of the assessment. If so, you should seek to obtain that information before finalising your determination.

If confidence in the results of a key assessment is low and cannot reasonably be improved, you should highlight that this is the case when making your proposed derogation determination. You should also describe the sensitivity of your overall judgement to the results of such assessments.

In producing a proposed derogation determination, you should take a balanced and objective a view. The basis for the proposed determination must be clear and defensible.

### 5.1 Application Support

You should submit the *WAT-FORM-28: CAR Derogation Decision Document* to SEPA's Water Unit for review.

You should ensure that a timetable for the review by the Water Unit is agreed with the group, taking into account the period allowed under CAR for determining the case. The Water Unit will normally require a minimum of **five days** to review a proposed derogation determination. This period may be



reduced if you have been in discussion with the Water Unit prior to submitting the draft determination for review.

The Water Unit will review the draft of the derogation determination document and advise you on:

- whether the derogation tests have been correctly applied and their application documented in a clear, defensible and consistent manner; and
- any improvements in these matters which it considers you should make to the draft derogation determination document.

Where the Water Unit considers that the application of the derogation tests has been inadequate or incorrect in some way, it will advise you to make the necessary improvements and update the draft derogation determination document accordingly.

## 6. Submit Proposed Determination to RRT

All proposals which if authorised would be expected to result in deterioration of status or compromise the future achievement of a River Basin Management Plan objective must be submitted by the relevant Unit Manager to the appropriate SEPA Regulatory Review Team (RRT) for its recommendation.

Proposals which if authorised would be expected to cause a failure of an environmental standard but **not** result in deterioration of status or compromise the future achievement of a River Basin Management Plan objective must also be submitted to the appropriate SEPA Regulatory Review Team (RRT) unless, using *WAT-SG-67: Assessing the Significance of Impacts - Social, Economic, Environmental*, you have:

- assessed the adverse impacts on the water environment to be of negligible or very low significance; and
- determined there to be no or only negligible adverse impacts on other economic, environmental and social factors which depend on the condition of the water environment.

When submitting a draft derogation determination document to your Unit Manager for referral to the RRT, you must confirm in the document that the Water Unit has reviewed and approved the documentation.

The draft derogation determination document should be used as an appendix to the standard Regulatory Review Team report on environmental licence determination and be cross-referred to by the latter. It is not necessary to repeat detail contained in the draft derogation determination document in the RRT report.

If the determination is to refuse authorisation, you should ensure that any refusal notice is drafted in consultation with an RS solicitor prior to submission to the RRT.

## 7. Recording a Derogation Determination

*WAT-FORM-28: CAR Derogation Decision Document* is SEPA's record of its judgement on the applicability of derogation. You must finalise the draft document following any changes recommended by the RRT or your Unit Manager. You must then submit the finalised derogation determination document to the Water Unit.

Should SEPA's determination be subject to an appeal or to Ministerial call-in, you should update the derogation determination document by annexing any changes made by Ministers to SEPA's original determination. You must submit the revised derogation determination document to the Water Unit.

## Appendices: Derogation Tests

- *Test A*: New Sustainable Human Development Activity (discharges)
- *Test B*: All Practicable Mitigation Measures
- *Test C*: Benefits to Human Health, Human Safety or Sustainable Development
- *Test D*: Significantly Better Environmental Option, and
- *Test E*: Compliance with Other Legislative Requirement
  - Including *Risks to Protected Areas*

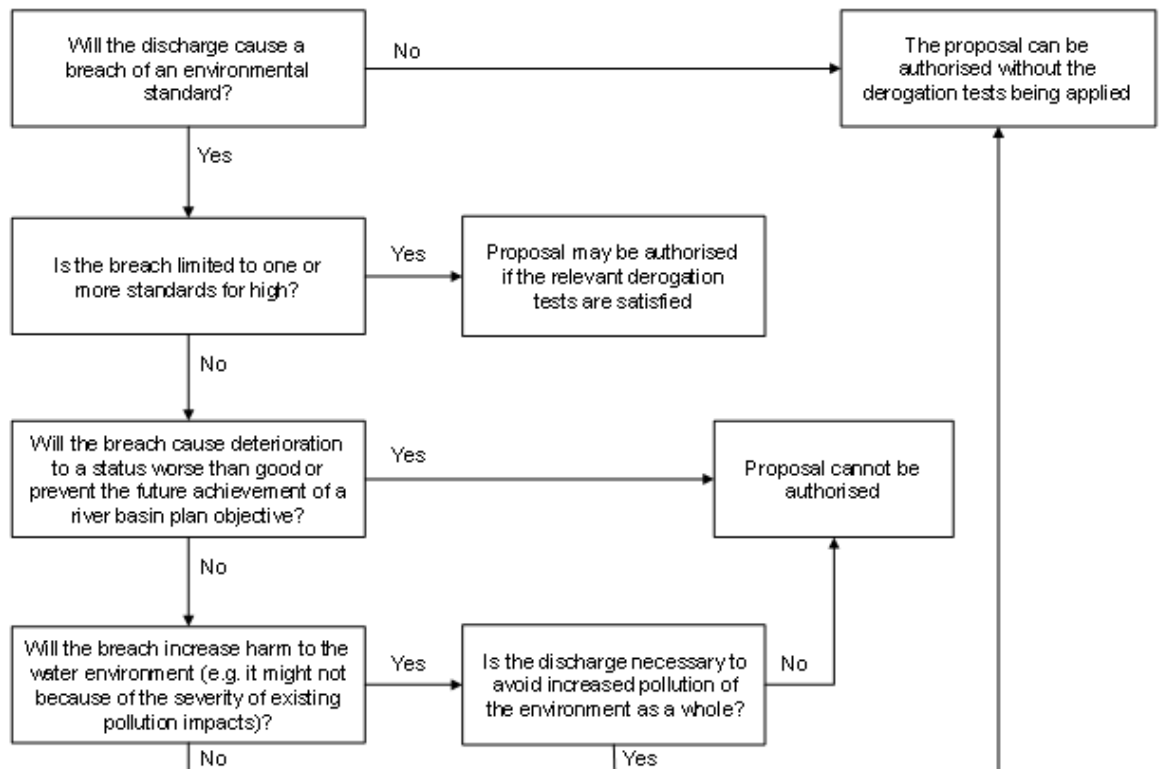
## Test A: New Sustainable Human Development Activity (Discharges)

Derogations are not applicable for proposals for polluting discharges likely to cause significant adverse impacts unless:

- the impacts would be limited to deterioration from high status to no worse than good status of bodies of surface water; and
- the discharges are associated with new sustainable human development activities.

*Part 2 of Test C* includes guidance on assessing whether a proposal represents sustainable development and hence a new sustainable human development activity.

**Figure 2 Determining whether a proposal for a polluting discharge can be considered for authorisation**



By contrast, if the derogation tests are passed, a proposal involving any scale of water resource or engineering activity can be authorised. Such derogations can also encompass the indirect impacts of such activities on water quality (e.g. as a result of disturbance to contaminated sediments) even if this results in water quality deteriorating to worse than good.

## Test B: All Practicable Mitigation Measures

To pass derogation Test B, a proposal must include all practicable mitigation measures for reducing the adverse impact on the water environment<sup>10</sup>.

Practicable mitigation measures are measures that:

- are technically feasible
- will reduce adverse impacts on the water environment; and
- do not entail excessive cost.

SEPA will normally expect mitigation measures to include the best techniques available to a sector for reducing the adverse effects of a particular type of activity. However, SEPA will take account of local circumstances which may make such techniques infeasible or excessively costly.

SEPA will expect applicants to provide it with information on the mitigation measures they wish SEPA to take into account and any mitigation measures that have been considered by the applicant but rejected, and the reasons for the rejection.

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<sup>10</sup> i.e. by reducing the extent by which environmental standards are failed

## Test C: Do Benefits of Proposal Outweigh Benefits of Preventing its Impact on Water Environment

- *Part 1 – Apply the test*
- *Part 2 – Assess results to identify any benefits from the proposal. These are divided into:*
  - *A: Benefits to sustainable development*
  - *B: Benefits to human health and human safety*

### Part 1: Steps involved in applying the test

To pass derogation Test C, the benefits to the environment and to society of protecting the water environment must be outweighed by the benefits of the proposal to one or more of the following:

- human health
- the maintenance of human safety; or
- sustainable development.

To apply Test C, you should:

1. Identify which of the factors listed in Table 3 below are likely to be positively or negatively impacted by the proposal
2. Assess the significance of each likely impact by considering the magnitude of the impact and the importance of the impacted factor using *WAT-SG-67: Assessing the Significance of Impacts - Social, Economic, Environmental*.
3. If on the basis of (a) and (b) above, you have identified significant benefits (i.e. positive impacts) to human health or the maintenance of human safety (See Part 2A below), you will need to make a judgement as to whether or not these benefits on their own outweigh the benefits of protecting the environment from deterioration (see *WAT-SG-67*). For the purposes of this assessment, the benefits of protecting the water environment are the benefits of avoiding the proposal's negative impacts on the factors listed in Table 3.
4. If derogation Test C is not passed by reason of benefits to human health or the maintenance of human safety, you will need to make a judgement as to whether or not the benefits of the proposal to sustainable development outweigh the benefits of protecting the environment from deterioration. Part 2A below provides guidance on how to decide whether or not a proposal represents sustainable development. In making this judgement you will need the information obtained through steps 1 and 2 above; and, where relevant, information on possible alternative means of providing the benefits of the proposal (see *Test D* and *WAT-SG-68: Assessing Significantly Better Environmental Options*). If you apply the guidance in *Part 2A* and conclude that a proposal represents sustainable development, you will be concluding that its benefits to sustainable development will outweigh

the benefits of protecting the water environment from deterioration. This is because development is only sustainable development if its benefits outweigh its costs (see *Part 2A*).

**Table 3 Factors to be taken into account in impact assessments**

<b>Economic impacts</b>	<b>Social impacts</b>	<b>Environmental impacts</b>
Scottish economy	Health	Water environment
	Safety	Biodiversity
	Recreation	Landscape
	Visual amenity	Climate change
	Nuisance	Built heritage
	Vulnerable/disadvantaged groups	Earth heritage
		Waste and resource use



## Part 2: Assessing test results for any benefits

- A: *Benefits to sustainable development*
- B: *Benefits to human health and human safety*

### A: Benefits to sustainable development

#### Background

In coming to any decision involving sustainable development, SEPA is obliged to have regard to the statutory guidance on sustainable development given to SEPA by Scottish Ministers under Section 31 of the Environment Act ("the Section 31 guidance"). The guidance refers to the most commonly used definition of the term "sustainable development" which derives from the 1987 report, *Our Common Future*, by the World Commission on Environment and Development (known as the Brundtland Commission). This defines sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".

The European Commission's Communication, *Towards a Thematic Strategy on the Sustainable Use of Natural Resources* identifies that sustainable development requires that economic growth, social progress and improving environmental quality go together. It also identifies that these three pillars of sustainable development rely on the sustainable use of natural resources and that sustainable resource use requires the de-linking, or decoupling, of economic growth and environmental degradation. Member States adopted a renewed European Union strategy on sustainable development in June 2006. This also has an objective of breaking the link between economic growth and environmental degradation.

This principle is embodied in *Choosing our future: Scotland's Sustainable Development Strategy* published by the Scottish Executive in December 2005. This identifies the key challenge of sustainable development as being economic growth in which the link to environmental damage is broken.

The strategy also includes the common goal for sustainable development across the UK, namely "to enable all people throughout the world to satisfy their basic needs and enjoy a better quality of life without compromising the quality of life of future generations". The aim is to achieve a "sustainable, innovative and productive economy" in ways that "protect and enhance the physical and natural environment, and use resources and energy as efficiently as possible". This policy is re-iterated in the commitment to sustainable development reflected in the new purpose and strategic objectives announced by the Scottish Government following the Scottish Parliament elections in May 2007.

The Section 31 guidance says sustainable development is about "promoting integration rather than about making trade-offs. It will not be achieved simply

by weighing competing demands in the balance". It identifies that a rigorous analysis of costs and benefits is important to inform decisions about whether actions are contributing to sustainable development.

It also states that environmental carrying capacity provides an important link between environmental protection and sustainable development. Proposals that "result in the carrying capacity of an environmental system being exceeded are unlikely to be sustainable, especially if this continues long-term". Environmental standards define the conditions necessary to protect aquatic plant and animal communities. They thus define the carrying capacity of the water environment - its ability to accommodate abstractions, discharges and other controlled activities without significant adverse effects on the structure and functioning of aquatic ecosystems.

If authorised, proposals to which *WAT-RM-34* is applicable would typically breach one or more environmental standards and would therefore, in terms of the Section 31 guidance, be "unlikely to be sustainable, especially if this continues long-term". As part of a derogation determination, SEPA has to decide whether or not a proposal represents sustainable development despite causing the carrying capacity of the affected part of the water environment to be exceeded.

### **Assessing whether a proposal represents sustainable development**

In determining whether a proposal represents sustainable development, you should take into account the following principles:

- proposals which are at odds with the goal of decoupling economic growth and environmental degradation are unlikely to represent sustainable development unless the degradation is limited to short term impacts
- proposals whose positive social, economic and environmental impacts are outweighed by their negative social, economic and environmental impacts will not represent sustainable development; and
- proposals demanding significant trade-offs between economic, social and environmental objectives are unlikely to represent sustainable development [even if their overall benefits outweigh their costs in terms of point (b) above] where other solutions could achieve the same ends without such significant trade-offs.

Table 4 provides an indicative guide to the types of proposals that may represent sustainable development. If the proposal you are assessing does not clearly match one or more of the types in Table 4, you should contact the *Water Unit* for help in deciding whether the proposal may be sustainable development in other ways.

Derogations for proposals for polluting discharges can only be considered if the discharges are for the purpose of new sustainable human development activities. This may be the case where the proposal is of one or more of the types in Table 4. When making a derogation determination for a proposed

discharge, you should explain your reasons for concluding that the proposal is, or is not, a new sustainable development activity.

**Table 4 Example Proposals for sustainable development**

Types of proposals which may represent sustainable development, providing that, where significant trade-offs are involved, there is no significantly better environmental option for achieving the proposal's benefits (See Annex D and WAT-SG-68) <sup>11</sup>	
<b>1</b>	Proposals whose: <ul style="list-style-type: none"> <li>• environmental benefits would <u>outweigh</u> their adverse environmental impacts (e.g. there would be an overall net environmental benefit); and</li> <li>• social, economic and net environmental benefits would at <u>least match</u> any adverse social and economic impacts</li> </ul>
<b>2</b>	Proposals whose: <ul style="list-style-type: none"> <li>• environmental benefits would at <u>least match</u> their adverse environmental impacts; and</li> <li>• social and/or economic benefits would <u>outweigh</u> any adverse social and economic impacts</li> </ul>
<b>3</b>	Proposals whose adverse impacts would be: <ul style="list-style-type: none"> <li>• short-term (e.g. the water environment would be returned to its previous state within one river basin planning cycle); and</li> <li>• outweighed by their social, economic and environmental benefits;</li> </ul>
<b>4</b>	Proposals that would cause deterioration from high to good and whose: <ul style="list-style-type: none"> <li>• social and/or environmental benefits would be greater than very low significance; and</li> <li>• social, economic and environmental benefits would outweigh their adverse impacts;</li> </ul>
<b>5</b>	Proposals whose: <ul style="list-style-type: none"> <li>• social and/or economic benefits would be of high or very high significance;</li> <li>• environmental impacts would be of very low significance; and</li> <li>• adverse impacts would be outweighed by their social, environmental and economic benefits; and</li> </ul>
<b>6</b>	Proposals whose adverse environmental impacts would be of negligible significance.

## B: Benefits to human health and human safety

Table 5 provides examples of proposals which may give rise to significant benefits to human health or human safety.

<sup>11</sup>Proposals providing significant benefits to human health or the maintenance of human safety may also represent sustainable development. However, such benefits are taken into account separately (See Part 2B).

**Table 5 Examples of types of proposals which may give rise to benefits to human health or to human safety**

Benefit to:	Proposed activity
Human health	Abstractions necessary to provide water fit for human consumption Engineering works necessary to reduce flood risk or the impacts of floods <sup>12</sup> Engineering works needed to protect the quality of Bathing Waters (e.g. repairing/installing pipes conveying pollutants under watercourses)
Human safety	Engineering works necessary to reduce flood risk or the impacts of floods Engineering works necessary to improve road/rail safety Engineering works necessary to reduce the risk of catastrophic subsidence

<sup>12</sup> See: *Exploring the Social Impacts of Flood Risk and Flooding in Scotland*

## Test D: Significantly Better Environmental Option

To pass Test D, there must be no significantly better environmental option for achieving the benefits expected to result from the proposal or, if there is such an option, it must be ruled out as:

- technically infeasible; or
- disproportionately expensive

When applying this test, SEPA will follow the principles set out in the supporting guidance *WAT-SG-68: Assessing Significantly Better Environmental Options*.

There will not necessarily be any other options which are environmentally significantly better. For example, if a proposal's adverse impacts would be slightly but not significantly reduced at other locations, then the option of undertaking the proposed activity at an alternative location would not represent a significantly better option. In such cases, SEPA will consider the test passed. But, if the adverse impacts of a proposal are particularly significant because of the special importance of the water body concerned, undertaking the activity at another less important location may constitute a significantly better option.

## Test E: Compliance with Other Legislative Requirements

SEPA cannot authorise proposals which do not comply with the requirements of other Community legislation. For example, SEPA cannot authorise a proposal that would adversely affect the integrity of a Special Area of Conservation unless, in relation to that proposal, Scottish Ministers have determined that derogation under Article 6 of the *Habitats Directive 92/43/EEC* (CELEX: 31992L0043) is applicable.

Existing SEPA guidance will be followed when considering proposals which could affect the achievement of the objectives and standards required by other Community legislation. All proposals for activities located within, or which are otherwise likely to affect, a Protected Area will be screened for compliance with the requirements of the legislation establishing the Protected Area.

## References

NOTE: Linked references to other documents have been disabled in this web version of the document.

See the Water >Guidance pages of the SEPA website for Guidance and other documentation ([www.sepa.org.uk/water/water\\_regulation/guidance.aspx](http://www.sepa.org.uk/water/water_regulation/guidance.aspx)).

All references to external documents are listed on this page along with an indicative URL to help locate the document. The full path is not provided as SEPA can not guarantee its future location.

### Key Documents

*WAT-RM-41: Derogation Determination – Improvements to the Water Environment*

*WAT-SG-67: Assessing the Significance of Impacts - Social, Economic, Environmental*

*WAT-SG-68: Assessing Significantly Better Environmental Options*

*WAT-SG-81: Derogation Determination Form Guidance*

*WAT-FORM-28: CAR Derogation Decision Document*

### External Publications

*Assessing Scotland's water environment - use of environmental standards, condition limits and classification schemes: Policy Statement* Mar 2010 ([www.gov.scot/Publications/](http://www.gov.scot/Publications/))

*Choosing our future: Scotland's Sustainable Development Strategy* Dec 2005 ([www.gov.scot/Publications/](http://www.gov.scot/Publications/))

*Code of Practice for Using Plant Protection Products* Defra 2006 ([www.hse.gov.uk/](http://www.hse.gov.uk/))

*Exploring the Social Impacts of Flood Risk and Flooding in Scotland* (Chapter 2), Apr 2007 ([www.gov.scot/Publications/](http://www.gov.scot/Publications/))

*Flows and Loads* British Water Code of Practice ([www.britishwater.co.uk/](http://www.britishwater.co.uk/))

*PEPFAA Code of Good Practice* Prevention of Environmental Pollution From Agricultural Activity, Scottish Executive ([www.gov.scot/](http://www.gov.scot/))

*Process for taking into consideration third party representations in connection with applications under CAR* Dec 2006 ([www.gov.scot/Publications/](http://www.gov.scot/Publications/))

*Recommendations on Surface Water Classification Schemes*, UKTAG Dec 2007 ([www.wfduk.org](http://www.wfduk.org))

*Towards a Thematic Strategy on the Sustainable Use of Natural Resources*, ([www.gov.scot/Publications/](http://www.gov.scot/Publications/)) including:

- *Towards a strategy for Scotland's biodiversity: Biodiversity Matters!*

## Scottish Legislation

Surface Water Typology, Environmental Standards, Condition Limits and Groundwater Threshold Values) (Scotland) Directions 2009 ([www.gov.scot](http://www.gov.scot)):

*The Scotland River Basin District* (06/01/2010)

*The Solway Tweed River Basin* (14/12/2009)

The Scotland River Basin District Directions ([www.gov.scot](http://www.gov.scot)):

*(Classification of Water Bodies) Directions 2009* (14/12/2009)

*(Standards) Directions 2014* (19/07/2017)

The Solway Tweed River Basin District Directions ([www.gov.scot](http://www.gov.scot)):

*(Classification of Water Bodies) (Scotland) Directions 2009* (14/12/2009),

*(Standards) (Scotland) Directions 2014* (18/08/2014)

*Water Environment and Water Services (Scotland) Act 2003*

([www.netregs.org.uk](http://www.netregs.org.uk))

*Water Environment (Controlled Activities) (Scotland) Regulations 2011 SSI 209* ([www.netregs.org.uk](http://www.netregs.org.uk))

## Other Legislation

*Electricity Act 1989* (Section 36 applications) ([www.legislation.gov.uk](http://www.legislation.gov.uk))

*Groundwater in the Water Framework Directive* EU Policy

(<http://ec.europa.eu/>)

*Habitats Directive 92/43/EEC* (CELEX: 31992L0043)

*Water Framework Directive 2000/60/EC* (CELEX: 32000L0060)

(<http://ec.europa.eu/>)

*Water Unit* (<mailto:DL-WaterRegSupp@sepa.org.uk>)

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