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Dear Dr Connor,

Following your meeting with the Minister for Business, Energy and Tourism on 2 December, you provided the Scottish Government with a consolidated set of questions regarding wind farm consenting procedures and potential environmental risks. A key aspect of some of these questions relates to co-ordination across a number of different organisations and regulatory regimes. As such we have co-ordinated our response with the bodies to provide this response. We have been keen to provide a comprehensive picture, setting out the relevant interactions. I apologise that this took longer than originally anticipated.

Question 1.

The monitoring data from Whitelee Wind Farm (WLWF) and Whitelee Wind Farm Extensions 1 and 2 (WL WF Ext 1 and 2) makes it apparent to the public that the current system for protecting existing public and private water supplies from the effects of wind farm development has failed, despite the involvement and responsibilities of multiple regulatory and statutory authorities .

Why did this failure arise and to what extent has this failing exposed a lack of clarity or coherency between and amongst regulators in meeting their primary function of preventing actual harm and loss of water quality and quantity to consumers?

The different functions of the regulators are clearly set out below.

- 1.1 Responsibility for protecting drinking water supplies is shared across a number of organisations and individuals. The responsibilities are set out in regulations and depend on the source of the risk to the supply. For private supplies, they are summarised in Table 1 below.
- 1.2 In the case of public supplies, Scottish Water has an overarching responsibility for ensuring the supplies it delivers to a property are wholesome. The Drinking Water

Quality Regulator has powers to take enforcement action if necessary to ensure Scottish Water fulfils this responsibility.

1.3 The main risks to the quality of supplies are:

- (i) pollution of the groundwater, watercourses or lochs that act as the sources of those supplies ;
- (ii) ingress of pollutants into the supply between the source and the tap; and
- (iii) insufficient purification treatment.

1.4 A range of activities can pose a risk to the quality of surface water or groundwater from which water supplies are drawn if appropriate precautions are not taken. The principal regulatory framework for controlling risks to the quality of these waters is provided by the Water Environment (Controlled Activities)(Scotland) Regulations 2011. The same regulations also provide the regulatory framework for protecting the water flows and levels in rivers, lochs and groundwater from over abstraction of water.

1.5 In more upland areas, the most common of activities that can pose a risk to the quality of surface waters or groundwater are farming and forestry operations. Developments, such as wind farms, also have the potential to pose a risk, principally during their construction. Sometimes construction may also require the abstraction groundwater for the purpose of dewatering excavations.

1.6 Farming and forestry operations that can pose a risk the quality of surface water and groundwater include the storage and application of fertiliser; the keeping of livestock; the cultivation of land; the application of pesticides; and the operation of sheep dip facilities. Minimum separation distances from wells and springs apply to these activities under the regulatory framework. Farms may also abstract water for irrigating crops or livestock watering.

1.7 Ingress of pollutants into a supply between the source and the tap can occur where:

- (i) poor design or maintenance of wellheads, pipework or tanks allows the ingress into the supply of pollutants from a range of sources, including rain water run-off; soil drainage; animal wastes and animal carcasses falling directly into wells or tanks; or sewage disposal; or
- (ii) materials used in pipework, tanks or purification treatments leach into the supply.

1.8 Another effect of wellheads, pipework or tanks that allow access to rainwater run-off and soil drainage is that the run-off or drainage can be adding to the quantity of the supply. Where this is the case, that addition to the supply will be affected by rainfall patterns and potentially by alterations to land drainage caused by changes in land use.

Table 1: Responsibilities for addressing risks to private water supplies					
Risk to supply	Cause of risk	Responsibility for addressing risk	Enforcing authority	Principal legislation	Specific requirements
Pollution of groundwater or surface water from which the	Construction site operations	Construction site operators	SEPA	Water Environment (Controlled Activities)(Scotland) Regulations 2011	Schedule 3 to the 2011 Regulations: General Binding Rules

supply is sourced					9, 10, 11, 15, 16 & 22
	Farming and forestry operations	Farmers & forestry managers	SEPA	Water Environment (Controlled Activities)(Scotland) Regulations 2011	Schedule 3 to the 2011 Regulations: General Binding Rules 18, 19, 20, 21, 22, 23 & 24
Ingress of pollutants into the supply between the source and the tap; or insufficient treatment	Poorly designed or maintained well heads, pipework or tanks; leaching of materials used in pipework or tanks; treatment level not appropriate or not maintained	Private supply operators	Local authority	Water (Scotland) Act 1980	The Private Water Supplies (Scotland) Regulations 2006
Reduced water levels in the groundwater or surface water from which the supply is sourced	Increased abstraction of groundwater or surface water	Operator of other abstraction	SEPA	Water Environment (Controlled Activities)(Scotland) Regulations 2011	Schedule 3 to the 2011 Regulations: General Binding Rules 2 & 15; or, for other abstractions, as specified in the authorisation issued by SEPA under the 2011 Regulations

1.9 To assist operators of private supplies in meeting their responsibilities, the Scottish Government has set up a grant scheme to assist users improve their private supplies. Grants of up to £800 are available via the relevant local authority provided certain qualifying conditions are met.

1.10 With respect to developments, such as wind farms, the development planning system also ensures that consideration of risks to the quality and quantity of surface water and groundwater is built into the planning and design stages. Table 2 summarises responsibilities under the planning system.

Table 2: Responsibilities under the planning system for development control		
Developers	SEPA	Local authorities
<p>Pre-consent:</p> <ul style="list-style-type: none"> • Identification of risks to the environment. • Mitigation proposals for the risks identified. • Modification of initial layout or design following feedback from the planning authority. <p>Post-consent Compliance with the conditions of planning permission.</p>	<p>Pre-consent:</p> <ul style="list-style-type: none"> • Advice on whether or not risks are likely to be controllable. • Advice on whether or not the layout or design of infrastructure needs to be amended to avoid risks. • Advice on conditions appropriate in planning consent to protect the water environment. 	<p>Pre-consent</p> <ul style="list-style-type: none"> • Grant or refusal of planning permission. <p>Post-consent</p> <ul style="list-style-type: none"> • Enforcement of conditions of planning permission.

1.11 SEPA's advice at the planning stage includes advice on minimum separation distances from wells used for water supplies.

1.12 Any conditions of planning consent advised by SEPA are designed to complement rather than duplicate the conditions of authorisation under Water Environment (Controlled Activities)(Scotland) Regulations 2011.

The Drinking Water Quality Regulator

1.13 The Drinking Water Quality Regulator for Scotland (DWQR) exists to ensure that drinking water in Scotland is safe to drink. Most of the population receive their water from Scottish Water, and DWQR ensures that everything Scottish Water does safeguards the quality of the public supply. DWQR enforces the requirements of The Public Water Supplies (Scotland) Regulations 2014 and takes action where these requirements are not met.

1.14 About 3% of the population receive their drinking water from private water supplies. While these are regulated by local authorities, the DWQR has a duty to oversee this while collecting and interpreting data on these supplies.

Public Water Supplies

1.15 DWQR ensures that Scottish Water complies with its duties in respect of the quality of public drinking water supplies in Scotland. This is done by:

- Auditing and inspecting Scottish Water's water treatment works, operational activities and laboratories to ensure that the quality of drinking water is maintained at all times and that tests undertaken to check the quality of the water supplied are carried out accurately and reported correctly;
- Investigating Scottish Water's response to events and incidents that could affect drinking water quality

- Receiving, interpreting and presenting data on water quality throughout Scotland
 - Participating in the investment planning process to ensure that any necessary improvements to water quality are delivered
 - Checking that Scottish Water responds appropriately to any concerns from consumers about drinking water quality and that information it publishes on the subject is accurate and appropriate
 - Ensuring future issues that may affect drinking water quality in Scotland are adequately understood, and that any knowledge gaps are filled through research
 - Providing Scottish Ministers with an annual report on the quality of drinking water in Scotland.
- 1.16 The DWQR also supervises local authorities' enforcement of the regulations governing the quality of private water supplies in Scotland. This is done by:
- Providing guidance to local authorities on the private water supplies regulations and the role of the local authority
 - Monitoring local authorities' progress with evaluating and improving the quality of private water supplies
 - Receiving, interpreting and presenting data on water quality from private supplies throughout Scotland.
- 1.17 Section 7 of the Water Industry (Scotland) Act 2002 created the role of Drinking Water Quality Regulator for Scotland (DWQR) at the same time as creating Scottish Water.

Legal Framework

- 1.18 As Scottish Water is publicly owned, the DWQR is responsible for enforcing The Public Water Supplies (Scotland) Regulations and acts independently of Ministers.
- 1.19 Under Scottish law, the DWQR appoints a single Regulator, currently Sue Petch, who is assisted in her work by a small team of scientists, engineers and administrative staff within the Drinking Water Quality Division of the Scottish Government.

Powers of the Regulator

- 1.20 The DWQR has three main powers under the Water Industry (Scotland) Act 2002
- The power to obtain information
 - The power of entry or inspection
 - The power of enforcement
- 1.21 Enforcement powers are used where Scottish Water has failed to comply with its duties under the Regulations:
- DWQR must specify the work to be done and a timescale
 - Enforcement notices must be publicised to the population served by the affected supply
 - If Scottish Water fails to comply with an enforcement notice it commits a criminal offence
 - DWQR can arrange to have the necessary work done by a contractor and recoup expenses from Scottish Water
 - The DWQR can vary and/or withdraw notices but must keep a register of any notices issued.

Question 2.

The public at large wish to know which authority or person would be responsible for instigating protective measures and bringing appropriate action for reparation and damages under existing legislation, underpinned by EU environmental law, which states that 'the polluter pays'. The documentary evidence from WLWF and its Ext 1 and 2 records significant deterioration in surface and groundwater at both construction and operation stages, with the appearance of List 1 pollutants in groundwater.

Who is responsible for deciding whether the evidence submitted to an agency or to a Minister's Office may constitute a breach of the Water Framework Directive or the related, transposed Scots Law including the 'The Water Environment and Water Services (Scotland) Act 2003' and 'The Water Environment (Drinking Water Protected Areas) (Scotland) Order 2013' and do these questions go to the Procurator Fiscal for judicial determination?

Responsibilities

- In the context of the planning process SEPA is a Statutory Consultee and will make an assessment of any information supplied by the planning authority and should it feel there is information missing it will comment back to the planning authority, but should any requested information not be supplied to SEPA no assessment can be made.
- However, SEPA is responsible for assessing the status of the water environment in accordance with its duties under the 2003 Act, the Water Environment (River Basin Management Planning: Further Provision) (Scotland) Regulations 2013, the Scotland River Basin District (Status) Directions 2014 and the Scotland River Basin District (Standards) Directions 2014.
- Where SEPA identifies deterioration of status of a body of groundwater or a body of surface, such deterioration would represent a breach of the Directive unless that deterioration satisfied the Directive's provisions for allowing deterioration (i.e. the conditions set out in Article 4.6 or 4.7 applied). Deterioration of the status of a body of groundwater as a result of pollution would constitute a breach unless (a) that deterioration were the result of circumstances of natural cause or force majeure which are exceptional or could not reasonably have been foreseen, in particular extreme floods and prolonged droughts, or the result of circumstances due to accidents which could not reasonably have been foreseen; and (b) a number of other conditions (specified in Article 4.6) are met, including that all practicable steps are taken to prevent further deterioration in status.
- SEPA is also a competent authority (along with SNH and Scottish Ministers) under the Environmental Liability (Scotland) Regulations 2009. Deteriorations of status caused by certain types of activities may constitute environmental damage under the Environmental Liability (Scotland) Regulations, unless the deterioration was the result of excepted circumstances such as natural disaster, armed conflict etc. The primary responsibility rests with the operator to notify and deal with any environmental damage they have caused. There are also specific provisions in terms of how the competent authority must deal with evidence of harm provided by the public. These decisions are not subject to judicial determination by the PF

Do these questions go to the PF for judicial determination?

- In cases where SEPA seeks proceedings for an offence under regulation 44 of the Water Environment (Controlled Activities) (Scotland) Act 2011, the evidence of damage to the environment would normally be considered by the court.
- In cases where SEPA seeks proceedings for an offence under the Environmental Liability Regulations 2009 evidence relating to the offence would normally be considered by the court.

Question 3.

What are the enforcement options available and who is responsible for implementing these measures if wind farm developers fail, or have failed, to comply with the planning conditions of a granted consent? What are the powers of compulsion/or punishment and for determining and recovering any costs of reparation?

Where there has been a breach of planning conditions in a planning authority consent, enforcement action is a matter for that authority. Planning Circular 10/2009: Planning Enforcement sets out Scottish Government policy on the use of the enforcement powers contained in the Town and Country Planning (Scotland) Act 1997, as amended by the Planning etc. (Scotland) Act 2006. Planning authorities have a wide choice of available options for taking enforcement action, whenever they consider it appropriate. Authorities need to assess, in each case, which power (or mix of powers) is best suited to dealing with any particular suspected or actual breach of control to achieve a satisfactory remedy. Every planning authority is required to maintain an Enforcement Charter (attached is the charter for East Renfrewshire Council) setting out their policies for taking enforcement action, as well as information on how the public can report suspected breaches of planning control and the procedure for complaints regarding the taking of enforcement action. Some relevant examples of notices are:

- Breach of Condition Notice - this is used to enforce the conditions applied to any planning permission. It comes into effect 28 days after being served. It may be used as an alternative to an Enforcement Notice (see below), and is served on any person carrying out the development and/or any person having control of the land. There is no right of appeal. Contravening a Breach of Condition Notice can result in the Council deciding to prosecute, with a fine of up to £1,000.
- Enforcement Notice - this is generally used to deal with unauthorised development, but can also apply to breach of planning conditions. There are similar notices and powers to deal with listed buildings and advertisements. An enforcement notice will specify a time period to take effect (in general a minimum of 28 days); the steps that must be taken to remedy the breach and the time for this to be completed. There is a right of appeal against service of an enforcement notice and if an appeal is made, the terms of the notice are suspended until a decision on the appeal is reached. Failure to comply with an enforcement notice within the time specified is an offence, and may lead to a fine of up to £20,000 in the Sheriff Court.

Other powers are available depending upon the type of breach or type of development and these are outlined in the attached charter. Where there has been an impact on the water environment as a result of pollution, SEPA has powers under the 2011 Regulations to take enforcement action in accordance with its own enforcement policy <http://www.sepa.org.uk/media/62707/enforcement-policy.pdf> Where there has been a

deterioration of status, action under the Environmental Liability Regulations (which includes provision for reparations in certain circumstances) may be applicable.

Question 4.

The monitoring results for superficial groundwater (spring) and deep groundwater (borehole) private water supplies during Whitelee windfarm and WL WF Exts 1 and 2 3 documented serious adverse pollution, well beyond the current 250m maximum exclusion buffer zone recommended by SEPA in their advice for windfarm developers.

Why is there no current requirement for developers to provide within their Environmental Statements, a detailed risk assessment (which includes a related geohydrological water risk assessment), of all Private Water Supplies and all related water sources within an appropriate buffer zone of the wind farm site?

SEPA's assessment of wind farm developments is balanced in the context of the generic risk posed by this type of activity and the environmental setting in which it will occur. SEPA recognises that foundations, borrow pits and linear features such as roads, tracks and trenches have the potential to impact groundwater quality and quantity. SEPA adopts a precautionary approach in relation to wind farm developments to protect sensitive water features (receptors) such as groundwater abstractions and groundwater dependant terrestrial ecosystems. Protection is achieved through the use of buffer zones around all excavations. The buffer zones adopted are:

- within 100m of all excavations less than 1m in depth
- within 250m of all excavations greater than 1m in depth

In summary, monitoring is required if a sensitive receptor is identified within the 100m buffer and a site specific risk assessment is required when a sensitive receptor is identified within the 250m buffer. Further details of SEPA's approach to windfarms are provided in the following links:

<http://www.sepa.org.uk/media/136117/planning-guidance-on-on-shore-windfarms-developments.pdf>

<http://www.sepa.org.uk/media/144266/lups-gu31-guidance-on-assessing-the-impacts-of-development-proposals-on-groundwater-abstractions-and-groundwater-dependent-terrestrial-ecosystems.pdf>

In terms of the s36 consenting process, while it may not be appropriate for risk assessments relating to PWS to take place routinely at the scoping stage in all cases, this is an issue which case officers are being asked to consider closely for applicability to individual cases.

The recent review of consenting processes [http://www.gov.scot/Topics/Business-Industry/Energy/Infrastructure/Energy-](http://www.gov.scot/Topics/Business-Industry/Energy/Infrastructure/Energy-Consents/Whatsnew/ReviewofConsentingProcessSummaryReport)

[Consents/Whatsnew/ReviewofConsentingProcessSummaryReport](http://www.gov.scot/Topics/Business-Industry/Energy/Infrastructure/Energy-Consents/Whatsnew/ReviewofConsentingProcessSummaryReport) contains a number of specific recommendations which are underway, one of which being that scoping should be driven by senior case officers - and this is currently being implemented. This is a practice that will evolve and be re-visited to reflect experience and emerging best practice, and to ensure continuous improvement of s36 processes.

All Environmental Statements are collated in accordance with the requirements of the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2000 (amended 2008) and the Electricity Act 1989. Private Water Supplies within the vicinity of a proposed development are included within any ES submitted.

Question 5

During discussion at the above meeting the Minister agreed in response to a question from Graeme Pearson MSP, that he would provide a list of all cases brought by SEPA, as the responsible authority, to any perceived breaches under the devolved and transposed terms of the Water Framework Directive, against renewable energy developers and their associated companies or contractors.

SEPA has reported no cases to the Procurator Fiscal in relation to wind farm development or operation. SEPA has reported 5 cases to the Procurator Fiscal in relation to hydro schemes (3 in relation to construction and 2 in relation to operation of schemes).

There have been no other cases reported to the Procurator Fiscal relating to any other renewable energy type.

Kind regards,
Debbie Kessell
Local Energy and Consents team.