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**SCOTTISH EXECUTIVE ENVIRONMENT GROUP**

**CONSULTATION:**

**Draft Private Water Supplies (Scotland) Regulations 2005  
and  
Proposals for a Private Water Supplies Grant Scheme**

**SUBMISSION BY  
SCOTTISH ESTATES BUSINESS GROUP**

**17<sup>th</sup> June 2005**



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**1. BACKGROUND**

The Scottish Estates Business Group (SEBG) represents a group of progressive land-based estates with significant agricultural and rural business interests. It aims to promote a modern business approach in the management of Scotland's land resource in ways which deliver social, economic and environmental benefits. The group seeks to secure a sustainable and prosperous future for rural areas.

Estates are proven business models that assist the development of smaller rural businesses, and landowners and estates have a vital role to play in the ongoing and future development and prosperity of Scotland. SEBG is committed to rural economies and its members work hard across Scotland across Scotland to stimulate enterprise and economic development.

**2. OVERVIEW**

SEBG is concerned to promote the best interests of Scotland's rural areas and welcomes the opportunity to comment on the proposals contained in the Draft Private Water Supplies (Scotland) Regulations 2005 and proposals for a Private Water Supplies Grant Scheme. It is important that all those who use private water supplies are able to do so with safety, so the taking of action to ensure that water quality standards meet their requirements is to be welcomed in principle. However, SEBG does have concerns about the Draft Regulations as currently drafted, along with a number of detailed points which flow from them.

**Impact on rural areas**

Private water supplies are to be found predominantly in rural areas. Their use is not normally through choice, but through lack of any alternative, public supply. Where any upgrading is found to be required under the new stringent testing regime proposed, costs of remedial work to bring up to the requisite standard will inevitably hit hardest at small rural businesses or commercial operations which are already struggling to remain viable in an already difficult rural economic climate.

SEBG would be concerned if the costs of such upgrade to individual businesses were such that the already fragile rural economic viability were to be undermined. It will be important that any measures required to rectify failure of a private water supply should take account of and be proportionate to an assessment of risk. It will also be important that the proposed Grant Scheme to underpin the costs of required upgrading should be adequately funded. This concern is expanded further below.

### **Impact on small-scale lettings**

SEBG further questions why all let properties, including tenanted properties, are to be included as Type A supplies, irrespective of whether the letting involves only one or many properties, and the number of users of a private water supply.

As presently drafted, the Regulations would require single let properties to undergo annual testing, irrespective of the quantity of water used or of any risk assessment. Yet the costs of this amount of testing of single or small scale lettings may outweigh their annual rental, thereby rendering them unviable as let properties. If as a consequence of such this overly broad classification, burdens of remedial work were to be imposed on small scale lettings, then some landlords may be dissuaded from letting at all, taking the easier option of selling up or reallocating the properties to the second home or holiday market, at a time when affordable property for rent is already in short supply.

Coming at a time when the Housing Bill, currently progressing through the Scottish Parliament, will have further cost implications for rural let properties, this must work against attempts to address the lack of affordable housing for rent in rural areas.

SEBG suggests that instead, some discretion should be allowed for the testing of small scale lettings, with sampling carried out for example every 2 or 3 years, in cases where annual chemical test results show little or no variation and show that water supplies exceed the standards required.

### **Definition of “relevant person”**

SEBG’s major concern with the Draft Regulations flows from the apparent lack of distinction between the legal authority vested alternatively in the owner of the land from which the private water supply is sourced, and its user or consumer. As a consequence, there is a lack of clarity in the Draft Regulations and a lack of consistency between the Draft Regulations and the proposed Grant Scheme.

The Draft Regulations place all responsibility for the private water supply on the “relevant person”, defined as “*the person considered by the local authority to be the person providing the supply, or occupying the land from, or on, which the supply is obtained or located, and any person who exercises powers of management or control in relation to the supply.*”

However, the person who has the responsibility and power to make changes to the infrastructure of a private water supply is, in law, the person holding the servitude right to benefit from the supply, rather than the owner of the land on which it is sourced. The owner and user of the private water supply will only be the same person – and the proposed Draft Regulations will only perform as intended - when a consumer is served by his own private water supply. In many cases, servitude rights to draw water will have been passed on with the sale of title deeds to properties served by the private water supply – and indeed their ownership may not be known to the owner of the land on which the private water supply is sourced.

Where he has no rights over the water supply, the owner of the land on which the water supply is sourced will have no authority over the infrastructure which delivers the supply to its user or consumer. Similarly, he will have no legal authority to comply with a number of the requirements set out in the Draft Regulations, yet according to those same Regulations, could still be guilty of an offence or offences if he fails to comply with any of the legal burdens placed on him by the Regulations.

The proposed Grant Scheme would appear to be much more soundly based since it is open to consumers, or users of the private water supply – a much more practical basis on which to proceed. However, together, the Draft Regulations and proposed Grant Scheme create the anomaly of the “relevant person” being held responsible for the costs of monitoring and any necessary upgrade of a private water supply, whilst the consumer or user is the person eligible to claim assistance for those costs.

SEBG strongly urges that the Draft Regulations should be revised to place all responsibility for the quality of performance of a private water supply on the individual or individuals who have the legal right to use that supply. The Group’s concerns are discussed further as they relate to the detailed points listed below.

### **3. SPECIFIC POINTS IN DRAFT REGULATIONS**

The Draft Regulations require “*all commercial premises (including small hotels, bed and breakfast establishments, campsites and all let properties).....served by private water supplies to meet the drinking water quality standards set by the Directive*”. However, as highlighted earlier, this is far too broad a band and is disproportionate, hitting at the individual property let and the commercial operation such as a caravan park in the same blunt way. Each is presented as offering the same level of risk and subject to the same monitoring frequency when the risk and public interest levels are dramatically different.

The Draft Regulations go on to state that “*Public or commercial premises will also be required to display a prominent notice to alert consumers to the potential risk associated with water from a private supply*” even when that private water supply has not failed any quality assessment. This measure will inevitably be off-putting to the public who may be led to believe, in the vast majority of cases erroneously, that the water supply is defective. It may also prompt businesses to seek legal redress from the “relevant person” for the financial consequences of any resultant loss of business – assuming the “relevant person” has succeeded in obtaining the consent of the business proprietor to post the warning notice in the first place, since he will have no legal authority to post it otherwise.

### **PART I: DEFINITIONS**

The draft Regulations place responsibility for securing the wholesomeness of a private supply on a ‘relevant person’. As set out above, SEBG is concerned that the definition of “relevant person” as proposed in the Draft Regulations is at best unclear and at worst anomalous, particularly since the Draft Regulations distinguish between the “responsible person” – *the person who owns or is otherwise responsible for that [domestic distribution] system* – and the “relevant person” - *the person considered by the local authority to be the person providing the supply, or occupying the land from, or on, which the supply is obtained or located, and any person who exercises powers of management or control in relation to the supply.*

We also question the possible scope for the local authority to have a different interpretation about who the relevant person might be, since the definition in the Draft Regulations states “*the person considered by the local authority to be the person providing the supply, or occupying the land from, or on, which the supply is obtained or located, and any person who exercises powers of management or control in relation to the supply.*”

Legislation must be clear and unambiguous if it is to be not only effective but capable of enforcement. SEBG suggests that the lack of clarity in the Draft Regulation must be resolved if it is to work effectively and as intended.

#### **PART IV: TEMPORARY DEPARTURE FROM PART III REQUIREMENTS**

*Consultation point 1: The Directive and draft Regulations require active steps to be taken to improve the quality of water intended for human consumption. Do you agree with proposals that local authorities should issue improvement notices both where relevant persons (a) fail to apply for a temporary departure; and (b) fail to comply with the conditions attached to a departure?*

According to the Draft Regulations, where they believe that their supply is likely to fail the relevant quality standards, a “relevant person” is required, for a Type A supply, to make an application for an authorisation of a temporary departure. The Executive intends to create an offence where the 'relevant person' fails to comply with this notification requirement.

Yet as set out previously, the “relevant person” as defined in the Draft Regulations may not only have no legal authority over a private water supply, but further, may as a consequence have no knowledge of its status as “likely to fail” relevant standards. It would be inequitable in law if an individual with no legal authority over a supply were to be regarded as creating an offence for failing to comply with a notification with which he was legally unauthorised to comply.

Further, given his lack of legal authority over a supply, it is to be questioned how a “relevant person” could promptly inform people likely to be affected of any application for a temporary departure. He would not be in a position to know who they might be. The same arguments apply to terms and conditions imposed on a “relevant person” when a temporary departure is authorised or rights of appeal when refused.

According to the Draft Regulations, local authorities will be given powers to require a “relevant person” for example to display a poster in a commercial or public premises or place an advert in a local newspaper to ensure that people who are going to consume a supply of drinking water are aware that water quality standards have been relaxed. Yet the same difficulty arises as to the definition of “relevant person”.

As stated earlier, it may prompt legal action by commercial premises, as consumers or users of a private water supply, to seek legal redress from the “relevant person” as currently defined. However, that is on the doubtful assumption that he is able to obtain the consent of the business proprietor to post a warning notice on his premises, since the “relevant person” would otherwise have no legal right to do so.

The issue of the definition of the “relevant person” is not just a legal or financial one. Also to be taken into account is time and administration, together with the practical effects of negative media coverage on the business activities of the “relevant person” through being held legally responsible for the water quality of someone else’s legally held servitude right. Were the approach of the proposed Grant Scheme to be applied to the Draft Regulations, with the consumer or user being defined as the “relevant person”, then the structure as set out for temporary departures from Part III requirements becomes workable.

## **PART V: INVESTIGATIONS, TEMPORARY DEPARTURES AND REMEDIAL ACTION**

### **Regulation 12**

The proposal under the Draft Regulations that the owner of the property, rather than the “relevant person”, is responsible for rectifying any failure of quality standards that may be attributable to the pipe work within the property is welcomed as a much more appropriate and practical approach. However, the requirement imposed on the “relevant person” to notify not only consumers but also public premises affected by the failure is not only “onerous”, as set out in the Draft Regulations, but impractical when the “relevant person” may necessarily have no knowledge of or access to who those affected might be, when he has no legal authority over a water supply or its use.

As suggested previously, the practical solution is the redefinition of “relevant person” to be the beneficiary of the private water supply.

## **PART VII: SAMPLING**

### **Regulation 28 - Charges for sampling and analysis**

SEBG is concerned that whilst the Draft Regulation proposes powers for local authorities to charge the “relevant person” for taking and analysing samples from private water supplies in their areas, and for expenses reasonably incurred for sampling, the “relevant person” as currently defined in the Draft Regulations may have no involvement with and no legal authority over the private water supply in question – and no legal right to pass on maintenance and monitoring costs to the user.

Legal obligations in terms of maintenance and costs of monitoring the quality of the supply should properly be written into the Regulations as being the onus of the person with servitude rights to draw water, i.e. the user.

*Consultation point 5: (a) Is the maximum charge per visit appropriate and (b) should such charges be levied on the basis of full cost recovery?*

*Consultation point 6: Are the proposed analytical charges appropriate?*

SEBG has already set out its concerns that the expected level of charges will be particularly hard for small rural businesses to absorb. It will be important that whatever charges there are must be levied on beneficiaries of the system, rather than the “relevant person” as currently proposed and that those charges should be kept to the minimum, if viability is not to be put further at risk.

## **PART VIII: RECORDS AND INFORMATION**

### **Regulation 31 - Information on premises about water quality**

The practical difficulties involved in the requirement that a ‘relevant person’ must display a public information notice about the latest drinking water quality data prominently have already been highlighted. The premises concerned may not legally be “his” as the Regulations presuppose and he may therefore have no legal right to intervene.

### **Regulation 32 - Offences**

*Consultation point 8: Do you agree that offences should be created for failure to comply with: (a) an improvement notice; (b) notification provision; and (c) requirements to display an information notice?*

It would not be equitable in law to create offences which fall on the “relevant person” when he is not the one in control of the system – or with the legal authority to do what may be required of him by a local authority. They would, however, be appropriate sanctions were the Regulations to require compliance by the user or beneficiary of the water supply.

### **Regulation 33 - Appeals**

*Consultation point 9: Do you agree that appeals should be determined by the Courts?*

Again, the issue here is that of the definition of the “relevant person”. This proposal would be workable if, as suggested, the user or consumer is the one defined by Regulation as having responsibilities in regard to the quality of the private water supply.

## **PRIVATE WATER SUPPLIES GRANT SCHEME**

### **Scheme Proposals**

*Consultation point 10: Are these the right objectives for the proposed Grant Scheme? If not, what objectives would you support?*

In contrast to the Draft Regulations, which do not target the person with the authority to deliver, the Grant Scheme proposals are much more in keeping with the aims of improving the quality of private water supplies, since they are aimed at consumers and users.

SEBG firmly believes there should be consistency between the Draft Regulations and the proposed Grant Scheme. As the two are currently set out, the “relevant person” is liable for all the costs and obligations but the consumer or user is the one qualified to apply for grant support for the work the “relevant person” is being required to have carried out. This must be addressed if the Regulations and Grant Scheme are to function as intended in the delivery in improved quality of private water supplies.

We remain concerned that rural areas are likely to be disadvantaged by the new water quality regime for private water supplies, particularly since their use tends to be the only option available in the absence of a publicly provided water supply. Many of those who may be required by the new regime to upgrade the water supply they use will not have the resources to do so. It will be important that the publicly funded grant support made available to those caught up by the new Regulations is set at a level sufficient to offset reasonable costs. The £650 ceiling proposed appears inadequate when compared to the Regulatory Impact Assessment figure of £1,150 for average cost of upgrade per supply affected.

***Consultation point 11: Do you agree that the proposed Grant Scheme should be: (a) available to both individuals and businesses; and (b) non-means tested?***

Yes, subject to the changes suggested.

***Consultation point 12: Do you agree to the proposed flexible, risk assessment based method of identifying the most effective solution and that consideration of grant applications should be based on this? If not, then what approach would you support?***

SEBG welcomes the explicit recognition of the proposed Grant Scheme that ownership of the land on which a private water supply is sourced is mostly separate from the legal entitlement to use of that water supply. This is why we have suggested, repeatedly, that for the Regulations and Grant Scheme to work effectively, they must target those with the legal right to use that water supply i.e. consumers.

SEBG agree that publicly funded grant aid should be directed to the best and most efficient and effective solution, as resolved by risk assessment. However, there should be no opportunity for individuals to thwart essential repairs by withholding permission unreasonably. Instead, local authorities should be given powers to require necessary work to be carried out in the most efficient and effective way and then to charge it back to all consumers affected.

***Consultation point 13: Do you agree that grant applications should have to meet one of the 3 proposed eligibility criteria?***

Yes, but see response to Consultation point 10 re level of public funding support available.

***Consultation point 14: Do you agree that grants should be available for: (a) capital improvements to private water supplies; and (b) that local authorities must agree the work is necessary? If not, what other work do you believe should be eligible for a grant and why?***

Grant support should be available not only for the provision of new capital works, but also for the upgrade of existing facilities where it is found they need to be replaced.

***Consultation point 15: Do you agree that the format of application forms should be left to individual local authorities?***

***Consultation point 16: Do you agree that decisions on awarding grants should be delegated to local authorities?***

No. It would be more equitable if grants could be based on a nationally applied scale, since that would remove scope for differentiation across different parts of Scotland, ensuring distribution was applied evenly, and based on need.

***Consultation point 17: Do you agree that grants should be available up to a maximum level of £650? If not, what alternative arrangement would you support?***

Our response to Consultation point 10 set out concerns about the level of publicly funded grant support available for distribution to those affected by the new Regulations, and the ceiling on support available to individuals. Since it is reasonable for consumers to be expected to pay a proportion of the costs involved in any necessary upgrade, a more equitable system might be to allocate support on the basis of a fixed proportion or percentage of the approved costs involved. This would allow a greater level of support than the proposed £650 ceiling to be available to those who are required to carry out extensive remedial work, since those whose upgrade costs are limited to £650 or less would similarly receive only the same proportion of support, contributing the balance of necessary upgrade costs themselves.

***Consultation point 18: Should local authorities be given a limited discretion to offer increased grants in exceptional circumstances?***

If publicly funded support were to be based on a risk assessment and capital costs basis, then there would be no need for discretion in the distribution of grant. However, it will be important that other sources of support, such as social funds or housing improvement grant, continue to be available.

***Consultation point 19: Do you agree with the exclusions proposed? Should any other type of application be excluded?***

SEBG questions why premises which are the subject of renovation, to bring them up to tolerable standards, should be excluded from grant support. Under proposals contained in the Housing Bill currently going through the Scottish Parliament, obligations to provide grant funding are to be relaxed or replaced by loan facilities at the same time as the standards which properties are expected to reach are to be raised.

As set out earlier, SEBG is concerned about the combined impact of such measures on the availability of affordable rural housing to let – adequate housing is an essential element of economic viability and thereby of rural sustainability. The Executive should do all in its power to ensure that rural areas can be adequately supported in attempting to fulfill their legal obligations.

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