



that at an Esk River Improvement Group meeting of 7 November 2022, Scottish Water representatives stated that they did not know if the pumping station was operating as per the licence. The minutes note that *'they [Scottish Water representatives] can't be clear where the figure of 947 litres per second comes from. He [Scottish Water representative] does not think the pumping station will ever do that'*.

- In your complaint, you stated that this is in contradiction to what a SEPA representative was quoted as saying in an article in 'The Ferret' on 2 October 2022: *'the Eastfield Pumping Station is now operating as it should be, in compliance with its authorisation from SEPA'*.
- In their response of 31 January 2023, SEPA outlined the remedial work taken by Scottish Water to repair pumps and equipment since the initial reports of pollution incidents in 2019. They stated that following this, the pass forward flow rate from all pumps combined is expected to be greater than the 947 l/s required by the licence.
- SEPA explained that further work is being carried out to optimise the performance of the pumping station with a drop test planned to assess if it passes a forward flow rate of 947 l/s. If not, Scottish Water will be expected to undertake further modelling to ensure there is no impact on the receiving water environment and if appropriate apply for a variation to their existing sewer network licence.
- SEPA further noted that, as a regulator, it is for them to determine how to regulate licence holders and in line with their Enforcement Policy and Guidance, they seek to work with the responsible person and use advice and guidance to achieve enforcement outcomes and secure compliance.
- Your view is that SEPA's failure to take enforcement action is a breach of their legal duties to enforce the CAR Regulations, and to further the conservation of biodiversity.
- The outcome you seek is for ESS to investigate the lack of enforcement action in relation to this site; and for ESS to ensure that SEPA complies with its duty to enforce CAR licences and to further the conservation of biodiversity.

You have stated in your representation that SEPA have a duty to take enforcement action to the 'fullest extent of the law', in relation to the alleged breach of licence conditions. I have understood your position to mean that SEPA must issue an enforcement notice on each and every occasion it identifies a breach of licence conditions and that, given the view that the pumping station may never meet the required flow rate, SEPA must accordingly issue an enforcement notice to remedy this.

The CAR Regulations state that SEPA have a duty to monitor compliance with, and enforce the provisions of, the CAR Regulations;<sup>2</sup> however, I have not identified anything within the CAR Regulations which places SEPA under a duty to issue an enforcement notice when a contravention of licence conditions is found. In this regard, I note that Regulation 32 states that an enforcement notice 'may' be served where SEPA is of the opinion that the activity

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<sup>2</sup> Regulation 31(3) [The Water Environment \(Controlled Activities\) \(Scotland\) Regulations 2011 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

has contravened an authorisation,<sup>3</sup> which appears to me to afford SEPA a level of discretion in how they deal with licence contraventions. Accordingly, in my view, the decision not to take formal enforcement action does not, in and of itself, appear to represent non-compliance with environmental law.

During my assessment, I also considered SEPA's policies and procedures in this area to assess whether any systemic issues arose in terms of enforcement. In my view these documents reflect the requirements of the CAR regulations and I have found no evidence of any broader systemic issue in this connection.

In summary, no further action will be taken by ESS in respect of your representation, as there is no evidence of systemic non-compliance by SEPA in respect of how they interpret their enforcement responsibilities under the CAR Regulations.

I appreciate you may find this response disappointing. As noted above, my position on this is based upon my understanding of your statement regarding 'fullest extent of the law'. If I have misunderstood your position on this point, or if you have any other comments or queries, please do not hesitate to contact me.

Yours sincerely,



Senior Investigations Officer

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<sup>3</sup> Regulation 32 [The Water Environment \(Controlled Activities\) \(Scotland\) Regulations 2011 \(legislation.gov.uk\)](https://www.legislation.gov.uk/uksi/2011/1414/regulation-32)