Directorate for Energy and Climate Change

Scottish Government
Riaghaltas na h-Alba
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E: [redacted]

Emailed to:

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Environmental Standards Scotland
Thistle House
91 Haymarket Terrace
Edinburgh
EH12 5HD

03 September 2026

Dear [redacted],

Storm Overflow - an assessment of spills, their impact on the water environment and the effectiveness of legislation and policy, August 2024

I refer to the above report and the recommendation contained therein that "…*the Scottish Government should as a matter of priority: (1) prepare and publish up to date, clear and specific guidance about the exceptional circumstances in which it is permissible for storm overflows to spill; (2) ensure this guidance takes into account predicted future climatic conditions (commissioning further research if required); and (3) provide up to date information on BTKNEEC requirements*…"

On 10 June 2025, the then Cabinet Secretary for Net Zero and Energy responded to the recommendation:

"…*As my officials have explained, the current legislation is out of date and we are exploring policy options to rectify that situation. However in recognition of the ESS request my* ***officials will look at how much the current guidance can practically be updated*** *in advance of any legislative reform. Officials will discuss this further with ESS as work progresses……*"

I am grateful for the various discussions that we have held on the matter to assist the Scottish Government in reaching a concluded position.

As we have discussed, we have investigated the potential to update the current Scottish Government guidance in advance of any legislative reform to align with the recast Urban Wastewater Treatment Directive. Our investigation has established that the guidance was put in place to assist the three former regional water authorities at

that time in their new obligations when the requirements of the Urban Wastewater Treatment (Scotland) Regulations 1994 came into force.

Those Regulations represented a series of significant step changes in the standards of treatment of wastewater. It also came at a time when SEPA had only recently been established under the Environment Act 1995. The guidance was therefore produced to help manage the transition to the new regime and the establishment of the new regulator.

The guidance is non statutory, runs to 128 pages and dates back to 1998. It is drafted in the name of the Secretary of State and pre-dates devolution in 1999 and the UK leaving the European Union in 2020. Given that the document is out of date in many respects, it would require significant revision to bring it up to date. The SG guidance is not published it being guidance for dischargers and regulators. It is only used by Scottish Water and SEPA for limited aspects of practical implementation, given its age.

Through our discussions we have set out our position that updating this guidance would not be a proportionate use of public money. We have therefore explored other, more proportionate means of addressing the recommendations you have made. In doing so it is our strong view that responsibility for guidance should now sit with SEPA as the well-established regulator. In order to better recognise roles and responsibilities, as we discussed, we also favour withdrawing the 1998 guidance and will consider the implications of that with Scottish Water and SEPA which is responsible for enforcement of the Environmental Authorisations (Scotland) Regulations 2018 (as amended) (EASR). Discussions on this matter are now underway and I will revert with a timeframe for withdrawing the guidance once we have established what is required.

Since your report and recommendation, in August 2025 SEPA have published new guidance for sewer overflows and sewage treatment under EASR. We have reviewed that guidance with SEPA, and the Scottish Government are satisfied that it addresses your recommendations as set out in Annex A.

Clearly this guidance also has the benefit of a statutory basis and is widely available.

We consider the EASR guidance in conjunction with SEPA's regulatory experience, to provide a robust framework for assessing the acceptability of CSO spills. If on considering the EASR guidance and this letter you consider that there remains a gap for the Scottish Ministers to fill please do not hesitate to contact me.

To summarise our response:

- We will move to a clearer adoption of the EASR guidance as the single source of guidance by withdrawing the 1998 SG Guidance. I will provide a timescale for that once we determine what is required. The EASR guidance is already operational.
- In doing so we will remove the confusion around the governance and regulation of wastewater. This role sits with SEPA as a mature and experienced regulator.

- We continue to consider alignment with the recast Directive. I do not yet have a timeframe for that. Policy work is focussed on getting the right balance of impact to customer costs for Scotland.
- The Water Industry Investment Group will remain the forum for testing BTKNEEC for any investment proposals.

Yours sincerely
Jo Blewett

Jo Blewett
Deputy Director for Water Industry and Corporate Operations

Annex A: relevant extracts of EASR guidance

ESS Recommendation	EASR 2025 position
(1) prepare and publish up to date, clear and specific guidance about the exceptional circumstances in which it is permissible for storm overflows to spill.	**Case law and general approach to regulation of spills** As we have discussed the UWWTD does not refer to "*exceptional circumstances*" The judgement in 2012 EU (Case C-301/10) does use the term but goes on to describe it more specifically: "*…I propose is a two-stage verification process, in relation both to collecting systems and to treatment plants. During the first stage, it must be established whether the discharges can be regarded as an* ***exceptional*** *event, or,* ***more accurately****, as an element in the operation of the collecting system or treatment plant which is* ***not 'normal'****. During the second stage, if the first stage has revealed that the events resulting in the discharge of untreated water into the environment were not exceptional, it must be established whether the BTKNEEC clause applies…*" The judgement also states that "*…I believe, however, that, in reality, the only reasonable way of interpreting the obligations under the Directive is to carry out* ***a full analysis of the circumstances in each individual case****, combining, in a single assessment, verification of the extraordinary nature of the event and the projected cost of constructing collecting systems and treatment plants capable of preventing any overflow even in such extraordinary situations. In other words, I consider that the concept of 'unusually heavy rainfall' is not static but may vary in the light of other factors…* We consider that the EASR guidance recognises the complexity of defining "*not normal"* noted in the judgement and transparently sets out how SEPA will consider what is an acceptable spill relating to a range of parameters. The combination of the clarity of the EASR guidance and SEPA's experienced regulatory judgement form a robust methodology for determining what is and is not "*normal*". The 1998 also recognises the role of SEPA in making a determination on acceptability, stating: "*…This Annex and its detailed supporting notes at Appendices H2 and H3 set down in general terms, the minimum requirements which are to be met to ensure compliance with the Regulations. For the purpose of protecting the water environment SEPA may, in certain circumstances, require*

	more stringent standards to be met than those specified in the notes. In view of the local nature of such circumstances it is not appropriate to cover these in this paper or in the notes. Rather they are for consideration at the local level between SEPA and the sewerage authorities…" **EASR relevant extracts** Looking at the specific safeguards in the 2025 EASR guidance: The EASR guidance (*WAT-G-058: EASR Guidance: Sewer overflows*) continues to refer to the SG Guidance of 1998 in terms of permitting existing CSOs or EOs (section 3.2), noting the six failure criteria of an intermittent discharge that: • Causes significant visual or aesthetic impact due to solids or fungus or has a history of justified public complaint. • Causes or makes a significant contribution to a deterioration in chemical or biological status. • Causes or makes a significant contribution to a failure to comply with Bathing Water Quality Standards for identified bathing waters and/or Shellfish Waters. • Operates in dry weather conditions. • Operates in breach of permit conditions provided that they are still appropriate; and/or • Causes a breach of water quality standards (EQS) or other EU Directive requirements. Many of these definitions are now more clearly specified in the EASR guidance. **Consideration of range of factors** In the EASR guidance, acceptability is also based on the significance of the discharge (low, medium, high), available dilution, population served, and compliance demonstrated through Formula A, 99th-percentile assessments, or FIS modelling as appropriate. It is a rounded assessment that recognises that as dilution decreases and risk to the water environment increases, discharges become of medium or high significance and need progressively more detailed catchment modelling and water quality impact assessment.

	Monitoring of pass forward flow Importantly the EASR guidance (*WAT-G-065: Permit Activity: Municipal Sewage Treatment Works*) requires monitoring of pass forward flows to be able to test whether thresholds for certain flow limits are being exceeded. Flow limits are generally calculated based on a number of factors including dry weather flow (DWF). In relation to dry weather flows specifically section 3.2.2 Background, notes: "…*Some Sewage Treatment Works [STW] permits may still define DWF in the permit Interpretation of Terms as:* • *'the average daily flow to or from the STW during a week without rain (excluding a week which includes public or local holidays), following a week during which the rainfall did not exceed 0.25mm on any one day. For sewage with a large industrial component, dry weather flow should be based on the flows during five working days if production is limited to that period'…* *There are various problems with this traditional definition such as the infrequency of qualifying periods of DWF, large variability and difficulties in obtaining local reliable rainfall data…* *A 2006 research project sponsored by UK Water Industry Research recommended using the Q80 DWF definition [given below], rather than the traditional rainfall related definition. The Q80 definition closely matched the rainfall related definition and does not suffer from the problems outlined above…* *This approach also means that Scotland is consistent with that taken by the Environment Agency…* *Flow/overflow compliance is assessed by comparing the 80%ile exceeded flow limit against the measured 90% exceeded flow. The UK Water Industry Research project referred to in section 3.2.2 showed that if this measured Q90 is above the discharge permit limit, we can be 95% confident that the discharge has truly exceeded the permit DWF limit…"*

	Definition of dry day In specifying the design flow to full treatment , a dry day is defined in the EASR guidance as: "…*a day when rainfall does not exceed 0.25mm. However, the first day after it has rained should be removed from the calculation. Where it can be demonstrated that it takes more than one day for rainfall to reach the STW, this second day can be discounted also. Also discount days when there has been significant snow melt and the day after as the flows measured may contain significant runoff or snow melt from the previous day. Infiltration for all the remaining days should be calculated…* *The analysis must normally use data from at least 12 consecutive months, with ideally flow data over several years being used*…" Taking all of the above into account, we are satisfied that the EASR guidance provides a more rounded and measurable methodology for testing acceptability of spills. The role of SEPA as an experienced regulator is vital in the process and the EASR supports SEPA in exercising its role.
(2) ensure this guidance takes into account predicted future climatic conditions (commissioning further research if required); and	SEPA have adopted the guidance contained in the Urban Pollution Manual (UPM) for sewer modelling. That guidance makes allowances for climate change for new and upgraded sewer systems. We accept that future climate change is not taken account for in existing systems. We will consider that as part of work to align with the recast directive. However in the meantime as assets become due for renewal or replacement the UPM standards will apply. We do not yet have a timescale for alignment. Policy work is ongoing but we are mindful that full alignment is likely to come with significant costs to customers and are looking at the correct balance of cost and impact for Scotland. The initial estimate of full alignment with the Directive is in excess of £20 billion and this is likely to rise as the implications of several requirements are still to be fully understood and priced. For context, the current regulatory period has a cost of circa £6 Billion. Full alignment would clearly have a large impact on customer charges.

(3) provide up to date information on BTKNEEC requirements…"	*The 2012 judgement stated: "…The BTKNEEC clause in fact requires, always and in any event, a comprehensive assessment of all the circumstances of each specific case and must necessarily be adjusted to take account of those circumstances…* *During this stage, the burden of proof— which, during the first stage, is shared in the usual way between the Commission and the Member State— falls entirely upon the latter. It is for the Member State to prove that securing an improved level of collection or treatment of the water would be technologically impossible, or would involve costs that are wholly disproportionate as compared with the resultant benefits for the environment.…*" The EASR guidance states that "…*If investment is required, the CSO should be identified in the agreed investment programme.* …" BTKNEEC is simply the application of project appraisal to inform value for money decision making. It is a part of all major projects and, in the water industry, is vital to ensuring that customer charges remain targeted and affordable. In Scotland the balance of investment and affordability is managed through formal sector governance and an investment programme. It is the role of Scottish Water to propose projects for investment in its business plan and to evidence those. That plan is used to agree a regulatory settlement for the 6 year period by the Water Industry Commission for Scotland (WICS) as economic regulator. In undertaking this process, WICS and Scottish Water take advice from both SEPA and the Drinking Water Quality Regulator on risk areas and compliance concerns. Scottish Water's proposed plan for the 2027-2033 period can be found here: Delivery & Business Plans - Scottish Water The programme also recognises that the need for investment must be able to flex during the 6 year period to respond to emerging pressures or risks such as regulatory non-compliance. The investment group (WICS, SW, SG, DWQR, SEPA and Consumer Scotland) meets quarterly to review investment projects and performance. Scottish Water may add or remove projects from the programme due to new pressures or opportunities but they must make those decisions transparent

	to the investment group. It is through this mechanism that any new CSO investment would be considered with Scottish Water providing the business case and feasibility work and WICS and SEPA considering that evidence. In the event Scottish Water felt a necessary investment was not feasible or value for money, both SEPA as regulator and the investment group with a wider economic remit would be fully sighted on that evidence and able to form a view. In effect the investment group considers BTKNEEC as part of its oversight of the investment programme. The investment group is in the process of moving from an SG Chair to a WICS Chair. The previous papers can be found here: Water Industry Investment Group - gov.scot and the latest and future papers can be found on the WICS website here: Water Industry Investment Group | WICS