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Head of Strategy and Analysis
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██████████
Deputy Director for Water Industry and Corporate
Operations
The Scottish Government
St Andrew's House
Regent Road
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EH1 3DG
██████████

9 October 2026

Dear ██████,

Storm Overflows - an assessment of spills, their impact on the water environment and the effectiveness of legislation and policy – September 2024

Thank you for your letter of 3 September 2026 setting out the Scottish Government's proposed response to Recommendation 3 from ESS' above report. I am grateful for the clarification of the Scottish Government's position on this matter. However, ESS does not consider that the actions outlined in your letter will adequately address concerns about the effectiveness of the approach to implementation of environmental law that were set out in our report.

Consequently, I am writing to set out ESS' assessment of your proposed approach and the additional action, information or assurance that we would require to enable us to accept the Scottish Government's proposed approach to addressing this recommendation.

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Recommendation 3: 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.

Taking each of the three elements of the recommendation in turn:

(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

As we have previously discussed, ESS is content, in principle, for the 1998 Scottish Office guidance to be withdrawn, as long as it is satisfactorily replaced. Were Scottish Ministers to make a clear statement withdrawing the 1998 guidance and setting out where SEPA, Scottish Water and others should look to for guidance (either already in existence or to be updated or published) that provides clarity on the circumstances in which it is permissible for storm overflows to spill ESS could accept that. However, we do not consider that the existing EASR guidance issued by SEPA adequately defines the “normal local climatic conditions” in which waste water systems are expected to perform sufficiently, nor the exceptional circumstances in which overflows are permitted to spill.

ESS does accept that, as noted in your letter, case law has clarified that spills will need to be considered on a case by case basis and that this will, in effect, require a two-stage verification process. ESS accepts that, in practice, SEPA is the appropriate organisation to ensure compliance with the law through its enforcement of the Environmental Authorisations (Scotland) Regulations 2018 (as amended) (the EASR regulations). However, SEPA’s operational guidance needs to be informed by a clear definition of the circumstances in which storm overflows may be permitted to spill. As noted in paragraph 7.7 of our report, ESS considers that both the 1998 guidance and SEPA’s guidance do not make it clear that discharges should only occur in exceptional circumstances.

ESS notes that, currently, the EASR guidance (WAT-G-058) sets out the failure criteria for an intermittent discharge. However, none of the failure criteria make reference to spilling in

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“normal local climatic conditions”. The criteria do refer to operating “in dry weather conditions” but, as we have discussed, this is not the same as operating in ‘normal’ conditions and it is clear that overflows should not be spilling in dry weather.

Furthermore, the EASR guidance (both WAT-G-058 and WAT-G-065) refer back to the 1998 guidance in a number of places. Were the 1998 guidance to be withdrawn these references would therefore become obsolete and the EASR guidance would, as a minimum, need to be updated to reflect this and replace those references.

Therefore, in order to accept the Scottish Government’s proposed response to this element of the recommendation ESS would require Scottish Ministers to commit to the following:

- i) Agreeing to make a clear statement setting out how “normal local climatic conditions (taking account of seasonal variation)” and/or “exceptional circumstances” are to be interpreted and, hence, how SEPA are to assess whether the conditions in which overflows spill may be considered permissible. This could be accomplished by issuing new guidance or by reference to existing or updated guidance. However, this guidance must adequately define the exceptional circumstances in which storm overflows might be permitted to spill;
- ii) Agreeing to make a clear statement confirming that the 1998 guidance will be withdrawn and clarifying how references to that guidance (e.g. in the EASR guidance) will be replaced;
- iii) A clear timetable for when this work will be completed.

2) Ensure this guidance takes into account predicted future climatic conditions (commissioning further research if required)

ESS welcomes confirmation that SEPA have adopted the guidance contained in the Urban Pollution Manual (UPM) for sewer modelling and that this make allowances for climate change for new and upgraded sewer systems. ESS also notes that your response acknowledges that future climate change is not taken account for in existing systems and

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that further work will be required to consider how this might be achieved, as part of work to align with the recast Urban Waste Water Treatment Directive.

ESS is happy, in principle, to accept the Scottish Government's response to this element of the recommendation if Scottish Ministers are able to commit to the following clarifications/ assurances:

- i) Inclusion of a clear statement in the updated guidance (as per the above response to element (1) of the recommendation) setting out how SEPA should refer to the UPM when undertaking sewer modelling and designing new or upgraded sewer systems;
- ii) A clear timescale for completion of work to align with the recast Directive. ESS accepts that if primary legislation is required to do so this will be dependent upon Parliamentary scheduling. Nevertheless, ESS would, as a minimum, require confirmation of when the Scottish Government expects to consult on revised legislation and to introduce draft legislation to the Scottish Parliament.

3) Provide up to date information on BTKNEEC requirements

ESS welcomes clarification that the Water Industry Investment Group considers BTKNEEC as part of its oversight of the investment programme and that, consequently, whether improvements to unsatisfactory overflows are feasible and value for money is part of their decision making process. ESS accepts that the Investment Group is a suitable forum for considering BTKNEEC for overflows that have been identified as failing, including spilling in "normal climatic conditions".

As you will be aware, we have been working with Scottish Water on their response to recommendation 6 from our report ("*Scottish Water should publish a comprehensive and accessible plan for all proposed improvement work ...*") to ensure that information about which overflows are scheduled to be improved (and by when) is transparent. ESS is broadly content with the progress made in respect of this recommendation and has recently engaged with Scottish Water to clarify what additional action it would require for this recommendation to be considered completed. Given the clarification of how BTKNEEC is considered as part

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of the Investment Group's decisions ESS considers that the proposed response to this element of recommendation 3 should be aligned with Scottish Water's response to recommendation 6 to make it clear to the public how this happens in practice and, where relevant, which overflows it has been decided not to invest in because it is not considered to be technically feasible or value for money.

ESS is therefore happy to accept in principle the proposed response to this element of the recommendation if Scottish Ministers are able to commit to the following clarifications/ assurances:

- i) Inclusion of a clear statement in the updated guidance (as per the above response to element (1) of the recommendation) setting out how and when BTKNEEC is taken into consideration by the Water Industry Investment Group and what, if any, guidance should be referred to when interpreting this element of the legislation;
- ii) Confirmation that how BTKNEEC is considered as part of individual investment decisions taken at the Investment Group will be required to be publicly and transparently reported (e.g. through direction from Scottish Ministers to Scottish Water and WICS).

I hope that this response is helpful in setting out ESS' position on your proposed approach to delivering against the recommendation from our storm overflows report and what additional action, information or assurance ESS would need to be able to accept the Scottish Government's proposed approach.

As required by the Continuity Act, ESS is committed to trying to secure agreement with public authorities on the remedial action necessary to address concerns that it has raised concerning the effective implementation of environmental law. However, it is now two years since our report was published and the ESS Board have asked me to stress to you their determination to bring this matter to a resolution as soon as possible. I would therefore be grateful if you could respond to this letter by 13 November 2026 confirming whether the Scottish Government is able to commit to the additional actions and assurances that I have outlined.

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This will enable us to consider your response and to provide an update to the ESS Board at their meeting on 4 December 2026. If you are unable to commit to these additional actions then ESS will consider whether to use our formal enforcement powers to secure the necessary remedial action.

Yours sincerely,

A black rectangular box redacting the signature of the Head of Strategy and Analysis.

Head of Strategy and Analysis

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