



**Enforcement Policy
February 2015**

Introduction

The Drinking Water Quality Regulator for Scotland (DWQR) is the independent regulator of drinking water for Scotland. The Water Industry (Scotland) Act 2002 (The 2002 Act) established in statute the post of Drinking Water Quality Regulator, who is appointed by Scottish Ministers to ensure that the drinking water quality duties imposed on Scottish Water are complied with.

DWQR regulates Scottish Water which is the sole supplier of drinking water for domestic customers from public supplies in Scotland, supplying 97% of the population. The remainder of water is taken from private water supplies which are the responsibility of their owners and users. The monitoring and enforcement of drinking water quality standards in private supplies is the responsibility of local authorities. DWQR has a supervisory role in overseeing the activities of local authorities in the fulfilment of their duties.

The 2002 Act vests specific powers in the DWQR in relation to the monitoring and enforcement of drinking water quality standards in Scotland:

- Power to obtain information
- Power of entry or inspection
- Power of enforcement action
- Emergency powers to require a water supplier to carry out works to ensure quality of water supplied is safe for public consumption
- Power to require information from local authorities

The DWQR through exercising powers set out in Section 7(3) of the 2002 Act may authorise any person (an "authorised person") to exercise, on their behalf, any function of the Regulator.

This Enforcement Policy sets out the general principles we will follow in relation to the Regulator's powers for enforcement of the legislation relating to the wholesomeness of public drinking water supplies in Scotland. This policy must be read in conjunction with the relevant legislation and is not intended to offer an authoritative interpretation of what is already set out in legislation.

The legislation which is relevant for this Policy is:

- The Water (Scotland) Act 1980 (as amended)
- The Water Industry (Scotland) Act 2002 (as amended)
- The Cryptosporidium (Scottish Water) Directions 2003
- The Water Quality (Scotland) Regulations 2010
- The Public Water Supplies (Scotland) Regulations 2014

The Drinking Water Quality Regulator will keep this policy under review and update it as and when required to reflect any changes in drinking water quality legislation.

Better Regulation

In line with the principles of better regulation, we recognise it is appropriate to provide advice and guidance to Scottish Water about our enforcement policy. We will wherever and whenever possible strive to work with Scottish Water to avoid having to take enforcement action. However, there are times when conformity with the law needs to be sought by formal enforcement action. The effective use of enforcement powers is important to secure

compliance with the legislation, to protect public health and, where necessary, to ensure that Scottish Water is held to account.

The legislation sets out the enforcement options that are available to us. These range from advisory letters and warning letters, to enforcement and prosecution. The nature and extent of breaches of the law will vary and have different consequences. We will have due regard to the significance of the risk to public health of these breaches when determining the enforcement action to take. Any action will be proportionate to the risks posed to the consumers of public drinking water and the seriousness of the contravention. Scottish Water will be expected to offer us its full co-operation and its actions will be taken into account when we are considering any form of enforcement or prosecution.

In carrying out our enforcement activities we aim to be:

Proportionate

Proportionality will generally involve taking account of the degree of risk of adverse consequences in particular, inadequate public health protection and loss of consumer confidence in public drinking water. Sometimes, however, our precautionary principle dictates that enforcement action may be necessary even though the level of risk is uncertain. In these circumstances our decisions will be guided by the best available evidence as to the likelihood and impact of contravention of a water quality duty arising from those risks in the relatively near future.

Targeted

Targeting enforcement action means prioritising and directing our work effectively. This means concentrating on the activities which create the most significant risk, either because the nature of the activity is inherently high-risk or because of a lack of appropriate controls or appropriate approach in other less high-risk activities. We will determine risk by assessing the nature of the activity, the controls in place, as well as the possible likelihood and impact of any contravention. We will focus on identifying evidence of systemic risks or poor risk management.

Consistent

We aim to be consistent in: the advice we provide; in the use of our enforcement powers; and in reporting cases to the Procurator Fiscal. Consistency is not always a simple matter of uniformity and, therefore, we will take account of other factors appropriate to the circumstance.

Transparent

We want to help Scottish Water to understand at the outset what we expect and what they should expect from us. This means making clear why we have taken, or intend to take, enforcement action. It also involves ensuring that Scottish Water is clear on what remedial actions are required as well as any rights of appeal.

Accountable

We are accountable to consumers and Scottish Ministers for our actions, while remaining independent in the decisions that we take. Our work is subject to external scrutiny by the Scottish Parliament and the Auditor General for Scotland. DWQR is an ISO:9001 (Quality Management System) accredited organisation and as such we are audited on an annual basis to ensure compliance with our own procedures and to ensure that these are subject to management review and continual improvement.

Enforcement Options

With respect to this policy, enforcement means any action taken to ensure compliance with the legislation that we have a duty to enforce.

Enforcement can be initiated where non compliance has occurred or is likely to occur. Non compliance may be highlighted in a number of ways:

- By assessment of data and information supplied by Scottish Water
- During a technical audit or inspection
- During an investigation following a drinking water quality incident
- Following a consumer complaint

In general, we will seek to secure compliance with legislation through co-operation, discussion and offering advice. This process of co-operation and discussion, for example involving advisory letters, may result in Scottish Water giving a legally binding Undertaking to Scottish Ministers under its general powers of Section 25 of the Water Industry (Scotland) Act 2002, setting out the steps that Scottish Water will take to secure compliance with the legislation. Such Undertakings are appropriate in cases where an asset is inadequate to supply water compliant with a particular standard and provides a visible commitment from Scottish Water that the necessary improvement will be made.

Scottish Water can also demonstrate a visible commitment to water quality improvements through the development and agreement of programmes of work included in the 'Technical Expression'. This is an agreed regulatory contract setting out Scottish Water's quality investment commitments for the current investment period.

Where resolution is not possible using the approach described above then we will seek a solution to the problem by taking the most appropriate enforcement option. The options which are available to us are:

- **Advisory letters**
- **Recommend to Scottish Ministers the requirement for a Direction**
- **Notification of Contravention and request for an Undertaking**
- **Enforcement Notice**
- **Emergency Notice**

Use of Enforcement

The circumstances in which we may use the various enforcement options available to us are described below. This is not to be interpreted as an escalating process and the choice of enforcement option will depend upon the extent to which the drinking water quality duty has been contravened and the risk to public health.

Advisory letters

We can send an advisory letter or make recommendations in a written report reminding Scottish Water of the need to comply with the law without recourse to the powers provided by Part 2 of the 2002 Act and Regulation 22 of the Public Water Supplies (Scotland) Regulations 2014, and without prejudice to formal enforcement action or criminal investigation. This will often be used as an initial approach when a relatively minor contravention is noted. Continued failure to initiate timely improvements may be followed up by formal enforcement action.

Recommend to Scottish Ministers the use of a Direction

Scottish Ministers may under their powers set out in Section 56 of the 2002 Act give Scottish Water a Direction of a general or specific character as to the exercise of its functions. Scottish Water must comply with any direction given. If DWQR considers that Scottish Water is consistently failing to fully comply with any of the duties set out in the Public Water Supplies (Scotland) Regulations 2014, then DWQR may recommend to Scottish Ministers the requirement for a Direction. It is most likely that this will occur in relation to duties involving the provision of information or in relation to sampling requirements.

Notification of Contravention and request for an Undertaking

When we have evidence that Scottish Water has contravened a drinking water quality duty and that contravention is likely to recur we may notify Scottish Water of the contravention in writing and request them to give a legally binding commitment (an Undertaking) to take all such steps as are necessary to comply with drinking water quality legislation and to avoid the need to serve an Enforcement Notice.

Enforcement Notice

When we have evidence that Scottish Water has contravened a drinking water quality duty and the contravention is likely to recur *and* Scottish Water does not appear willing to take timely steps to rectify the situation, we may serve an Enforcement Notice on Scottish Water under Section 10 of the 2002 Act. Such an Enforcement Notice must set out specific actions to be taken by Scottish Water within specified timescales. Failure to complete such actions by the due date is a criminal offence under Section 12 (5) of the 2002 Act and is reportable to the Procurator Fiscal.

Alternatively we may serve a notice using the powers set out in Regulation 22(2) of the Public Water Supplies (Scotland) Regulations 2014. It is likely that we will use this notice when the action to be taken by Scottish Water is of a very short duration and the contravention of a less serious nature.. In most instances, should a notice be necessary it will be made under our powers of Section 10 of the 2002 Act.

Before serving an Enforcement Notice we will explain the breach of drinking water quality legislation and our reasons for proposing an Enforcement Notice to Scottish Water. If following discussion we decide to initiate enforcement action we will write to Scottish Water to notify them formally and explain the matter. This letter may offer a meeting to discuss the matter first and to hear any proposals for alternative remedies. In certain circumstances, where the contravention is serious and of an urgent nature, DWQR may decide to serve an immediate Enforcement Notice in accordance with Section 13 of the 2002 Act.

Once an Enforcement Notice has been served, Scottish Water may, by summary application made within 14 days of the date of service, appeal to the Sheriff against the notice. The Enforcement Notice is of no effect until the appeal is withdrawn or finally determined by the Sheriff. On an appeal the Sheriff may make such order as the Sheriff thinks fit, and the decision of the Sheriff on such an appeal is final. Scottish Water may not appeal a Regulation 22(2) Notice.

Emergency Notice

When we reasonably believe that Scottish Water has contravened a drinking water quality duty and that as a result of that contravention there is a significant risk to public health that requires urgent action, we may serve an Emergency Notice on Scottish Water under Section

13 (2) of the 2002 Act. Such an Emergency Notice must set out specific actions to be taken by Scottish Water to reduce or remove the risk. Failure to complete such actions by the due date is a criminal offence under Section 13 (5) of the 2002 Act and is reportable to the Procurator Fiscal.

Prosecution

Where a water quality issue is very serious and the DWQR considers that it is appropriate to do so, a case for the prosecution of Scottish Water may be prepared instead of, or as well as, the serving of an Enforcement Notice. The decision to prepare a case for prosecution under Section 76C of the Water (Scotland) Act 1980 (as amended) for supplying water unfit for human consumption is a serious matter and requires careful consideration of the potential implications and consequences of doing so. The purpose of prosecution is to secure punishment for a criminal offence, and to further promote compliance to protect public health. The evidence gathered during any investigation will be assessed and a report recommending prosecution will be sent to the relevant Procurator Fiscal, who will take the decision as to whether prosecution is appropriate. Under Scots law, the decision to proceed with a prosecution is one for the Procurator Fiscal alone.

Investigation and Report

A criminal investigation is carried out for the purposes of gathering evidence to be used for prosecution. Where we suspect that a criminal offence has been committed, we will use the following criteria to determine whether or not to carry out an investigation:

- Whether the offending behaviour has ceased or is continuing;
- The impact or potential impact on consumers;
- Scottish Water's response to previous advice and guidance;
- The risk of other similar offences being committed in relation to the same or other public drinking water supplies under the control of Scottish Water; and
- The likelihood that the failure to comply with regulatory requirements was intentional as opposed to a simple error or misunderstanding.

The investigation and any subsequent report must be carried out and prepared in accordance with the Crown Office publication - *Reports to the Procurator fiscal – A guide for specialist reporting agencies, Seventh Edition 2006*.

Any investigation will also serve to identify the parties who are potentially criminally liable. This will usually be Scottish Water although consideration will also be given to whether contractors or employees of the regulated business may be criminally liable.

The Drinking Water Quality Regulator will assess the findings of the investigation and decide whether the submission of a report to the Procurator Fiscal is appropriate.

Following the submission of our report the decision whether or not to prosecute is taken by the Procurator Fiscal on the basis of the public interest. We fully expect our views as the regulating authority to be given sufficient weight but the final decision is for the Procurator Fiscal.

Consultation

In developing this policy we have sought comments and taken the views of Scottish Government, Scottish Water, Consumer Focus Scotland, and the Water Industry Commission for Scotland.