



## **Enforcement Policy December 2023**

## 1. Introduction

The Drinking Water Quality Regulator for Scotland (DWQR) is the independent regulator of drinking water for Scotland. The Water Industry (Scotland) Act 2002 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.

The DWQR is also the competent authority for oversight and enforcement of the Network and Information Systems (NIS) Regulations 2018 for the supply of drinking water in Scotland. Scottish Water is designated as an Operator of Essential Services under the NIS Regulations.

The DWQR regulates Scottish Water, which is the sole supplier of Scotland's public drinking water, supplying 96% 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. The DWQR has a supervisory role in overseeing the activities of local authorities in the fulfilment of their duties.

The legislation which is relevant for this Policy is:

Water (Scotland) Act 1980 (as amended)

The Water Industry (Scotland) Act 2002 (as amended), ("the 2002 Act")

The Public Water Supplies (Scotland) Regulations 2014 (as amended), ("the 2014 Regulations")

The Network and Information Systems (NIS) Regulations 2018 (as amended), ("the NIS Regulations")

The **2002 Act** vests specific powers to 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 may authorise any person (an “authorised person”) to exercise, on their behalf, any of their regulatory functions. using the exercising powers set out in Section 7(3) of the 2002 Act,

The **NIS Regulations** give specific powers to the DWQR in relation to:

- Power of inspection
- Power to serve information and enforcement notices
- Power to serve penalty notices

This Enforcement Policy sets out the general principles which the DWQR will follow in relation to the use of powers for enforcement of the legislation relating to the wholesomeness of public drinking water supplies in Scotland or compliance with the NIS Regulations. This policy must be read in conjunction with the relevant legislation and is not intended to offer an authoritative interpretation of what is set out in legislation.

## **2. Better Regulation**

In line with the principles of better regulation, DWQR recognises it is appropriate to provide advice and guidance to Scottish Water about my enforcement policy. DWQR will wherever and whenever possible strive to work with Scottish Water to ensure that Scottish Water understands its legal responsibilities and complies with these

voluntarily. 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 the provision of the essential service, and where necessary, to ensure that Scottish Water is held to account.

The legislation sets out the enforcement options that are available. 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. DWQR will have due regard to the significance of the risk to public health and the essential service from these breaches when determining the enforcement action to take. Any action will be proportionate to the risks posed to the consumers of the public supply and the seriousness of the contravention. Scottish Water will be expected to offer its full co-operation and its actions will be taken into account when we are considering any form of enforcement.

In carrying out enforcement activities DWQR aims to be:

a) 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, the precautionary principle dictates that enforcement action may be necessary even though the level of risk is uncertain. In these circumstances decisions will be guided by the best available evidence as to the likelihood and impact of contravention of a duty arising from those risks in the relatively near future.

b) Targeted

Targeting enforcement action means prioritising and directing 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. Risk will be determined by assessing the nature of the activity, the controls in place, as well as the possible likelihood and impact of any contravention. The focus will be on identifying evidence of systemic risks or poor risk management.

c) Consistent

DWQR aims to be consistent in: the advice provided; in the use of enforcement powers; and in reporting cases to the Procurator Fiscal. Consistency is not always a simple matter of uniformity and, therefore, other factors appropriate to the circumstance will be taken into account.

d) Transparent

DWQR aims to help Scottish Water to understand at the outset what is expected and what they should expect from the regulator. This means making clear why DWQR has taken, or intends 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.

e) Accountable

DWQR is accountable to consumers and Scottish Ministers for actions taken and those of the team, while remaining independent in the decisions taken. DWQR must be able to justify decisions taken within the context of the regulatory framework within which we operate. Our work is subject to external scrutiny by the Scottish Parliament, The Scottish Public Services Ombudsman and the Auditor General for Scotland. DWQR is an ISO:9001 (Quality Management System) accredited organisation and as such are audited on an annual basis to ensure compliance with internal procedures and to ensure that these are subject to management review and continual improvement. Information on DWQR's regulatory activities is set out in our Annual Report and details of individual notices are placed on the website where appropriate.

### 3. Enforcement Options

With respect to this policy, enforcement means any action taken to ensure compliance with the legislation that DWQR has 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, such as:

- By assessment of data and information supplied by Scottish Water
- During audit or inspection
- During an investigation following a drinking water quality or supply incident
- Following a consumer complaint
- Following notification or awareness of a significant risk to water quality

In general, DWQR will seek to secure compliance with legislation through co-operation, discussion and offering advice.

Where there is or has been a breach of regulation (or a likely breach) and it is not possible to conclude whether the breach is likely to reoccur **written recommendations** can be made. This is most likely to be during the assessment of a water quality incident and will be included in the assessment letter. Scottish Water's response to recommendations will be tracked and form part of the record of its regulatory performance.

An **advisory letter** may be used to remind Scottish Water of the legislation covered by this policy, 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.

Scottish Water can also demonstrate a visible commitment to water quality improvements through the development and agreement of programmes of work in **Letters of Commitment** or through delivery of projects in its Management

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

- **Information Notice**
- **Enforcement Notice**
- **Emergency Notice**
- **Penalty Notice**

## **4. Use of Enforcement**

The circumstances in which the various enforcement options available may be used 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 duty has been contravened and the risk to public health.

### **4.1 Information Notice**

Provisions for the use of information notices are set out in the 2002 Act and the NIS Regulations.

Section 8 of the 2002 Act allows the DWQR or any authorised person, by notice, in writing to require the provision of water quality data or such documents that are considered to be relevant. This notice can be given to Scottish Water, an employee of Scottish Water, or any other individual who may hold relevant information. The notice must specify information required, the form and manner in which it is to be provided and the timescale.

Under the provisions of NIS Regulation 15, DWQR may serve an information notice on Scottish Water to provide information that is reasonably required to assess the

security of Scottish Water's network and information systems and operating policies, including information from inspections. This notice must describe the information required, the reasons why it is required, and how Scottish Water shall provide it to DWQR along with timescales.

## 4.2 Enforcement Notice

Provisions for the use of enforcement notices are set out in the 2002 Act, the 2014 Regulations and the NIS Regulations.

When DWQR has evidence that Scottish Water has contravened a **drinking water quality duty** and the contravention is likely to recur, DWQR 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, a notice may be served using the powers set out in Regulation 22(2) of the Public Water Supplies (Scotland) Regulations 2014.

DWQR may serve an enforcement notice using Regulation 17(1) of the NIS Regulations if there are reasonable grounds to believe that Scottish Water has failed its **NIS duties**. The notice must be in writing and set out the reasons for serving the notice; the detail of the alleged failure of duties; the actions that Scottish Water must take and the timescales for that action.

Before serving any enforcement notice DWQR will write to Scottish Water to explain the breach of duties and the reasons for proposing an enforcement notice, enclosing a copy of a draft of the proposed notice. This letter will offer Scottish Water the opportunity to make representations regarding the notice and provide any proposals for alternative remedies. If following the representations DWQR decides to take no further action, Scottish Water must be informed as soon as reasonably practical.



There are two appeal routes available to Scottish Water, depending upon the legislation under which the notice was served. Once a section 10 of the 2002 Act 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. For a NIS Regulation 17 notice, Scottish Water may appeal to the First-Tier Tribunal should it disagree with the grounds upon which the enforcement notice is served. Scottish Water may not appeal a Regulation 22(2) Notice.

### 4.3 Emergency Notice

When DWQR reasonably believes 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, DWQR 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. There is no appeal mechanism for an emergency notice.

### 4.4 Penalty Notice

The NIS Regulations contain provisions for a penalty notice which may be served on Scottish Water if it has failed to comply with a **NIS Enforcement Notice**. The notice must specify the reason for the notice, the size of the penalty imposed and details of the appeal mechanism. The sum imposed may be up to £17 million but must be appropriate and proportionate to the reason for the failure of a regulatory duty. Scottish Water may appeal to the First-Tier Tribunal should it disagree with the grounds upon which the Penalty notice is served.

## **5. Criminal Investigation**

The DWQR is classed as a specialist reporting agency by the Crown Office for the purpose of investigation and reporting to the Procurator Fiscal criminal offences relating to Scottish Water's failure to comply with certain duties. The 2014 Regulations, the 2002 Act and the Water Scotland Act 1980 all contain a number of criminal offences.

The decision to investigate and report a case to the Procurator Fiscal 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.

### **5.1 Investigation and Report**

A criminal investigation is carried out for the purposes of gathering evidence to be used for prosecution. Where DWQR suspect that a criminal offence has been committed, the following criteria will be used 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 will 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.

DWQR 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 DWQR's report the decision whether or not to prosecute is taken by the Procurator Fiscal on the basis of the public interest.