This briefing gives a short overview of some of the key responsibilities related to flooding in light of changes brought in by the Flood Risk Management (Scotland) Act which was passed by the Scottish Parliament on 13 May 2009. Parts 1, 2, 3, 5, 8 and some of part 6 came into force on 26 November 2009. It also provides information about flooding and flood risk management based on enquiries frequently received in SPICe.
CONTENTS

1. THE FLOOD RISK MANAGEMENT (SCOTLAND) ACT 2009 ................................................................. 3

2. WHO IS RESPONSIBLE FOR FLOOD PROTECTION IN THE EVENT OF A FLOOD? .................. 3
   Land or property owner .................................................................................................................. 3
   Local authorities ......................................................................................................................... 4
   The Scottish Government ......................................................................................................... 4

CIVIL LAW REMEDIES ................................................................................................................. 5
   Common law of nuisance ........................................................................................................... 5
   Law of support .......................................................................................................................... 5
   Alternative dispute resolution ................................................................................................. 5

3. NEW DEVELOPMENT WITH A RISK OF FLOODING .................................................................. 6

4. WHAT MONEY HAS BEEN SPENT ON FLOOD PREVENTION SCHEMES IN THE PAST? .......... 7
   Table 1. Flood prevention grant payments made to local authorities by the Scottish Government .... 8
   Table 2. Total project value of the flood prevention schemes ..................................................... 9

5. HOW IS FUNDING FOR FLOOD PROTECTION ALLOCATED TO LOCAL AUTHORITIES NOW? ...... 9

6. WHAT FUNDING IS AVAILABLE TO HELP AFTER A FLOOD EVENT? ..................................... 10

7. HOW IS FLOOD WARNING MANAGED IN SCOTLAND? ............................................................ 10
   Table 3. Payments under the Bellwin scheme for weather related damage ............................... 11
   Current flood warning ............................................................................................................. 12
   Future flood warning ............................................................................................................. 12

SOURCES ........................................................................................................................................... 13

RELATED BRIEFINGS ....................................................................................................................... 16
1. THE FLOOD RISK MANAGEMENT (SCOTLAND) ACT 2009

The Flood Risk Management (Scotland) Act 2009 (FRMSA) was passed by Parliament on 13 May 2009 and received Royal Assent on 16 June 2009. Parts 1, 2, 3, 5, 8 and some of part 6 came into force on 26 November 2009. The rest is likely to come into force in the second half of 2010. The Act makes provision in the following areas:

- Part 1 creates a general duty for Scottish Ministers, SEPA and responsible authorities to exercise their functions with a view to reducing overall flood risk (section 1(1)). Responsible authorities include local authorities, Scottish Water and other public bodies designated by Scottish Ministers.
- Part 2 provides definitions such as “flood” and “flood risk”.
- Part 3 provides for the assessment of flood risk, the preparation of flood hazard and risk maps and plans for flood risk management districts. This is required by the EC Floods Directive. Provision is also made for Scottish Water to assess flood risk from sewerage systems.
- Part 4 sets out provisions to replace the Flood Prevention (Scotland) Act 1961. These provisions give local authorities broad powers to take forward a range of flood risk management measures.
- Part 5 provides SEPA with a new statutory framework related to flood warning.
- Part 6 sets out new powers of entry and compensation provision to support local authorities and SEPA in their flood risk management related duties.
- Part 7 relates to reservoirs and transfers responsibility for enforcement of reservoir safety from local authorities to SEPA. It introduces a system to report incidents and creates a new requirement to prepare flood plans for reservoirs. A Reservoir Safety Bill is expected to be introduced in the Scottish Parliament in the 2010/11 session.

2. WHO IS RESPONSIBLE FOR FLOOD PROTECTION IN THE EVENT OF A FLOOD?

SEPA provides summary information on who is responsible for different aspects of flooding in Scotland on its website. Key responsibilities are set out below.

**Land or property owner**

SPICe frequently receives enquiries seeking clarification on where responsibility lies when water from a neighbouring property floods a constituent’s property or land. The core principle of who is responsible has not changed with the FRMSA. Property owners and landowners have primary responsibility for protection of their land and property from flooding.
Local authorities

Local authorities have more general duties and powers to act in their area to reduce overall flood risk. Section 1 of the FRMSA requires local authorities (as a responsible authority) to act with a view to reducing overall flood risk. This came into force on 26 November 2009. However, broader powers for local authorities to protect properties against flooding under Part 4 of the Act will come into force in the second half of 2010.

Part 4 sets out local authority functions and provides discretionary powers allowing local authorities to carry out a broad range of flood management measures in any part of the catchment, at any time, including when a flood is likely to “occur imminently” (section 56 (1) b (i)).

Section 56 (1) states that a local authority may do anything which it considers

a) will contribute to the implementation of current measures described in any relevant local flood risk management plan,

b) is necessary to reduce the risk of flood in its area which is likely to

   i) occur imminently, and

   ii) have serious adverse consequences for human health, the environment, cultural heritage or economic activity.

Section 56 (2) gives examples of the type of things a local authority might do. These include:

- carry out operations related to a flood protection scheme
- carry out any other flood protection work
- carry out temporary work
- enter into agreements of arrangements with people
- make contributions towards expenditure incurred by any other person doing something that could be done by the local authority under part 4 of the Act

The Scottish Government has provided guidance to local authorities on their duties under the Act (Greig, 2009).

In summary, local authorities must act with a view to reduce flood risk in general, and may (when Part 4 of the FRMSA comes into force) take any specific actions they consider appropriate to reduce flooding at any time.

The Scottish Government

The Scottish Government takes a more strategic role in flood risk management. In an oral question to the Minister for Environment on 12 November 2009 Gil Paterson asked “the Scottish Government what strategy it has in place to support local authorities in dealing with flood damage during the winter months.” The Minister for Environment, Roseanna Cunningham, answered that:

“The overall aim of the Government's flood risk management strategy is to reduce flood risk by investment in flood protection schemes and flood warning arrangements, which
will increase the resilience of people and communities. That will allow them to recover more quickly and easily from the consequences of flooding. Flooding will never be avoided completely, which is why resilience is so important” (Scottish Parliament, 2009b).

CIVIL LAW REMEDIES

Responsibilities related specifically to flooding are set out above. However, in some instances civil law remedies could apply, although legal advice would be required on the applicability of civil law to specific cases. Each case will be determined on the basis of its own facts.

Common law of nuisance

The common law of nuisance places certain restrictions on what land owners may do on their land. If a landowner uses their property in such a way as to interfere with a neighbour’s comfortable enjoyment of property this may give the neighbour the right to raise a court action under the law of nuisance.

The main legal remedies available to the person bringing the court action are 1) interdict and 2) damages. An interdict is a court order which prevents an individual from doing something. A useful tool is an interim interdict which, as its name suggests, can be obtained on an interim/temporary basis to prevent an individual from doing something whilst the main court action is being decided. An award of damages provides monetary compensation for any harm suffered by the person bringing the action.

Proceedings have been raised which apply the law of nuisance to cases where damage had been caused to property by flooding from neighbouring land. See for example, Viewpoint Housing Association Ltd V Edinburgh City Council Court Of Session (Outer House), 05 July 2007, and GB & AM Anderson v White, Court of Session (Outer House) 18 September 1998. The extent to which the neighbouring property owner contributed to or failed to take reasonable measures to prevent or limit the damage is likely to be a critical factor in determining the outcome of any case. Legal advice should be sought on the relevance of a particular case to the common law of nuisance.

Law of support

Another area of law of potential relevance to flooding is the law of support. Under the rights and duties of the law of support a landowner must not withdraw support which his or her land provides to neighbouring property, for example, by excavations on his or her own land. If this rule is breached it can theoretically form the basis of a court action. Legal remedies again include interdict and damages.

Alternative dispute resolution

In respect of the laws of nuisance and support, it should be noted that civil court actions can be expensive and there is no guarantee of success. Some individuals will qualify for civil legal aid but even then there is still the possibility that they will have to contribute to the costs of the case.

Because of the expense and the unpredictability of court actions mediation is sometimes a useful alternative to resolve disputes, as the service is sometimes provided free of charge. However, there is no requirement for parties to participate or to be bound by the outcome of the
process. Mediators in a particular geographical area can be located via the Scottish Mediation Network’s website.

3. NEW DEVELOPMENT WITH A RISK OF FLOODING

Scottish Planning Policy

Scottish Planning Policy 7 (SPP7) was superseded by the Scottish Planning Policy (SPP) in February 2010. The SPP explicitly references the Flood Risk Management (Scotland) Act 2009 and retains the core elements of SPP7 by aiming to prevent development which would have a significant probability of being affected by flooding or which would increase the probability of flooding elsewhere. It states that:

- “Development which would have a significant probability of being affected by flooding or would increase the probability of flooding elsewhere should not be permitted.”

- “Development on the functional flood plain will not only be at risk itself, but will add to the risk elsewhere. Built development should only take place on functional flood plains where it will not affect the ability of the flood plain to store and convey water, where the development will not be at risk of flooding and where the development will not increase the risk of flooding elsewhere.”

SPP also indicates that

- ‘decisions on new development should, amongst other considerations, prevent further development which would be at risk from flooding’

- ‘new development should be avoided in areas with increased vulnerability to the effects of climate change, particularly areas at significant risk of flooding…’

Scottish Planning Policies (SPP) are not legislative documents; they are statements of Scottish Government planning policy on nationally important land use and other planning matters.

Planning authorities should take SPP into account when drafting plans or making planning decisions. SPP are material considerations in any planning decision, i.e. they must be considered by planning authorities when making decisions. However, SPP do not have to be slavishly followed. SPP are only one of a number of material considerations that a planning authority must consider in reaching a decision. Other material considerations may include the views of objectors to a planning application. The weight attached to possibly conflicting material considerations is a matter for the decision maker.

Therefore, it is possible for a planning authority to authorise a development in a flood plain despite SPP guidance, although there would have to be other positive factors supporting the decision for approval. However, such a decision must fully consider the aims of the FRMSA and any flood risk management plan, as well as SPP.

SEPA’s role in advising on new developments

SEPA has a duty to provide advice to planning authorities on the risk of flooding if requested to do so. In addition, regulation 25 of The Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008 requires local planning authorities to consult SEPA before granting planning permission for development:
which involves carrying out works or operations to the bed or bank of a river or stream; or

where the development is likely to result in a material increase in the number of buildings at risk of being damaged by flooding.

Section 42 of the Flood Risk Management (Scotland) Act 2009 will, once commenced, amend the Town and Country Planning (Development Management Procedure) Regulations (Scotland) 2008 so that planning authorities will require applicants to provide an assessment of flood risk where a development is likely to result in a material increase in the number of buildings at risk of being damaged by flooding.

However, where SEPA has been consulted about a development that may be affected by flooding and has advised against the granting of planning permission, and the planning authority subsequently decides to grant approval, then Scottish Ministers must be informed. This gives Scottish Ministers the opportunity to call-in the application for their own decision.

4. WHAT MONEY HAS BEEN SPENT ON FLOOD PREVENTION SCHEMES IN THE PAST?

Table 1 below provides details of flood prevention grant payments made to local authorities by the Scottish Government between 1998/99 and 2007/08. Under the Flood Prevention (Scotland) Act 1961, local authorities were able to put forward flood prevention schemes through a statutory process. Once the statutory process for the flood prevention scheme was completed and the scheme was confirmed by the Minister, the local authority applied for grant-aid from the Scottish Government. This grant was based on the estimated total scheme costs. Grant was paid out at a rate of 50% to September 2004 and 80% thereafter and spread out over the time period that the flood prevention scheme was developed and constructed.

It should be noted that scheme costs can rise through the life time of a project. For example, the work programme can change through bad weather delays, inflation, or contractors could hit rock when excavating causing delays to construction etc. On the whole, the Scottish Government stick to the grant offer made at the outset. Occasionally, if the local authority could provide relevant evidence that extra costs were justified Scottish Government may have revised the grant offer to take account of extra costs. This is decided on a case by case basis.
<table>
<thead>
<tr>
<th>Location</th>
<th>98/99</th>
<th>99/00</th>
<th>00/01</th>
<th>01/02</th>
<th>02/03</th>
<th>03/04</th>
<th>04/05</th>
<th>05/06</th>
<th>06/07</th>
<th>07/08</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aberdeen</td>
<td>150,000</td>
<td>93,315</td>
<td>27,000</td>
<td>-27,000</td>
<td></td>
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</tr>
<tr>
<td>Aberdeenshire</td>
<td>204,970</td>
<td>33,101</td>
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<tr>
<td>Argyll and Bute</td>
<td>250,500</td>
<td>854,499</td>
<td>228,136</td>
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<tr>
<td>Dumfries and Galloway</td>
<td>559,531</td>
<td>78,424</td>
<td>19,629</td>
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<tr>
<td>East Ayrshire</td>
<td>2,131,815</td>
<td>534,339</td>
<td>1,215,181</td>
<td>9,210,556</td>
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<tr>
<td>East Dunbartonshire</td>
<td>2,764,585</td>
<td>1,949,928</td>
<td>250,000</td>
<td>1,366,337</td>
<td>145,835</td>
<td>92,862</td>
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<tr>
<td>East Lothian</td>
<td>2,506,634</td>
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<tr>
<td>Edinburgh</td>
<td>1,400,000</td>
<td>1,030,697</td>
<td>2,201,431</td>
<td>12,342,658</td>
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<tr>
<td>Falkirk</td>
<td></td>
<td>641,279</td>
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<tr>
<td>Fife</td>
<td>38,377</td>
<td>28,523</td>
<td>50,116</td>
<td></td>
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<tr>
<td>Glasgow</td>
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</tr>
<tr>
<td>Highland</td>
<td>128,121</td>
<td>23,578</td>
<td></td>
<td></td>
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<tr>
<td>Inverclyde</td>
<td>100,396</td>
<td>39,118</td>
<td>15,502</td>
<td></td>
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<tr>
<td>Moray</td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>North Ayrshire</td>
<td>150,084</td>
<td>321,908</td>
<td>22,938</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Perth and Kinross</td>
<td>4,550,455</td>
<td>2,964,556</td>
<td>439,393</td>
<td>1,962,628</td>
<td>1,846,225</td>
<td>612,747</td>
<td>487,459</td>
<td>770,696</td>
<td>254,484</td>
<td></td>
</tr>
<tr>
<td>Renfrewshire</td>
<td>170,272</td>
<td>803,498</td>
<td>812,343</td>
<td>274,150</td>
<td>29,294</td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>South Lanarkshire</td>
<td></td>
<td></td>
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<td></td>
<td></td>
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<tr>
<td>West Lothian</td>
<td></td>
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<tr>
<td><strong>TOTAL government payments</strong></td>
<td><strong>166,498</strong></td>
<td><strong>4,574,033</strong></td>
<td><strong>3,163,352</strong></td>
<td><strong>4,157,988</strong></td>
<td><strong>5,119,070</strong></td>
<td><strong>5,623,199</strong></td>
<td><strong>7,805,970</strong></td>
<td><strong>4,708,236</strong></td>
<td><strong>9,011,698</strong></td>
<td><strong>32,116,492</strong></td>
</tr>
</tbody>
</table>

Source: Scottish Government, pers comm, 2009
In response to a parliamentary question (S3W-11510) the figures presented in table 2 were provided on the total project value of the flood prevention schemes under the Flood Prevention (Scotland) Act 1961. These figures are the cost of new flood prevention schemes taken when the Minister confirmed the scheme and when the work started.

**Table 2. Total project value of the flood prevention schemes**

<table>
<thead>
<tr>
<th>Financial Year</th>
<th>Total Project Value (£)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999-2000</td>
<td>125,752.00</td>
</tr>
<tr>
<td>2000-01</td>
<td>12,967,040.00</td>
</tr>
<tr>
<td>2001-02</td>
<td>1,934,230.80</td>
</tr>
<tr>
<td>2002-03</td>
<td>10,969,307.00</td>
</tr>
<tr>
<td>2003-04</td>
<td>4,026,898.00</td>
</tr>
<tr>
<td>2004-05</td>
<td>1,354,107.00</td>
</tr>
<tr>
<td>2005-06</td>
<td>-</td>
</tr>
<tr>
<td>2006-07</td>
<td>67,635,745.72</td>
</tr>
<tr>
<td>2007-08</td>
<td>89,556,070.00</td>
</tr>
</tbody>
</table>

Source: Scottish Parliament 2008b

**5. HOW IS FUNDING FOR FLOOD PROTECTION ALLOCATED TO LOCAL AUTHORITIES NOW?**

During the Stage 1 debate on the Flood Risk Management (Scotland) Bill held on 22 January 2009, the then Environment Minister, Michael Russell, MSP set out the formula for allocation of flood prevention/coast protection resources included within the general capital grant to local authorities. He stated:

“The formula is entirely clear. It is not a formula that has been imposed by the Government. It was negotiated with COSLA and has been agreed with COSLA. The formula is in three parts. First, existing flood schemes that were under way when the formula came into effect at the start of the last financial year were honoured. Secondly, schemes that had been published—that is schemes that were in the process of going through—were honoured. Thirdly, the rest of the money was divided, not on a crude population basis, but on the basis of properties at risk according to the SEPA flood map. That is the formula that operates now and local authorities, through COSLA, acceded to it; indeed, they suggested it.
The formula is not set in stone, however, and, in any new funding round it is possible that it will be developed or changed. It is the outcomes that are more important than anything else” (Scottish Parliament, 2009a).

The data on properties at risk referred to in this statement were taken from the *Impact of Flooding in Scotland Report* (Scottish Executive Geographic Information Service, 2007) which is a Scottish Government in-house GIS analysis using the *SEPA Indicative Flood Map* (SEPA, 2007). This report includes maps showing the properties at risk of coastal and fluvial flooding by local authority.

In his statement on 26 November 2009 about the local government settlement, the Cabinet Secretary for Finance and Sustainable Growth announced acceptance of all of the recommendations of the joint review with COSLA on the distribution methodology for the local government settlement (Scottish Government/COSLA, 2009). This included the recommendation that there would be no change to the previous approach for flood prevention funding which would continue to give priority to known commitments.

### 6. WHAT FUNDING IS AVAILABLE TO HELP AFTER A FLOOD EVENT?

In a written answer to a question about assistance to communities that have suffered infrastructure damage due to storm events, John Swinney stated that:

> “As local authorities have a general duty to deal with emergencies there is no automatic entitlement to special financial assistance. In exceptional circumstances, however, local authorities can apply under the Bellwin Scheme for additional revenue funding to assist with the immediate and unforeseen costs in dealing with the aftermath of emergency incidents” (Scottish Parliament, 2008a).

The Bellwin Scheme operates under Section 155(2) of the Local Government and Housing Act 1989 and allows Scottish Ministers to give additional revenue support to local authorities to assist with the immediate, and unforeseen costs in dealing with the aftermath of emergency incidents. When there is an emergency which creates immediate demands on local government, the Scottish Ministers will decide whether the Scheme should be triggered. Costs eligible to be claimed under the scheme are subject to a threshold which is set individually for each local authority. [Current threshold levels](#) can be found on the Scottish Government website.

Table 3 shows weather related payments made under the Bellwin scheme to local authorities since 2001/02.

### 7. HOW IS FLOOD WARNING MANAGED IN SCOTLAND?

Under the Flood Risk Management (Scotland) Act 2009, SEPA’s flood warning responsibilities have been formalised and strengthened providing a statutory basis for its flood warning activities. Under the Act, SEPA:

- must, where it considers that a flood is occurring or likely to occur in the near future, make available relevant warnings (section 74)
- will assess the future need for the provision or alteration of flood warning. In particular, the provision of systems where earlier or more accurate flood warning will deliver a reduction in
the potential adverse consequences of flooding for human health, environment, cultural heritage and economic activity (Sections 75 and 76)

- will consult with local authorities and category 1 responders [local authorities, emergency services, health boards] with respect to any alteration to the provision of flood warnings (Section 77).

**Table 3. Payments under the Bellwin scheme for weather related damage**

<table>
<thead>
<tr>
<th>Year</th>
<th>Local authority</th>
<th>Reason</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001/02</td>
<td>Renfrewshire</td>
<td>Final payment after very strong winds 26/27 December 1998</td>
<td>340,170</td>
</tr>
<tr>
<td></td>
<td>West Dunbartonshire</td>
<td>Interim payment after very strong winds 26/27 December 1998</td>
<td>111,754</td>
</tr>
<tr>
<td></td>
<td>City of Edinburgh</td>
<td>Flooding and Subsidence at Ferniehill both in 2000</td>
<td>797,633</td>
</tr>
<tr>
<td></td>
<td>East Ayrshire</td>
<td>Final payment after very strong winds 26/27 December 1998</td>
<td>15,017</td>
</tr>
<tr>
<td>2002/03</td>
<td>Midlothian</td>
<td>Flooding in 2000</td>
<td>89,542</td>
</tr>
<tr>
<td></td>
<td>South Lanarkshire</td>
<td>Heavy Snowfalls February 2001</td>
<td>324,165</td>
</tr>
<tr>
<td></td>
<td>West Dunbartonshire</td>
<td>Final payment after very strong winds 26/27 December 1998</td>
<td>293,760</td>
</tr>
<tr>
<td></td>
<td>City of Edinburgh</td>
<td>Flooding and Subsidence at Ferniehill both in 2000</td>
<td>45,795</td>
</tr>
<tr>
<td></td>
<td>Scottish Borders</td>
<td>Heavy Snowfalls February 2001</td>
<td>28,741</td>
</tr>
<tr>
<td>2003/04</td>
<td>Midlothian</td>
<td>Flooding in 2000</td>
<td>9,951</td>
</tr>
<tr>
<td>2004/05</td>
<td>Moray</td>
<td>Flooding in November 2002</td>
<td>415,918</td>
</tr>
<tr>
<td></td>
<td>Shetland Isles</td>
<td>Landslides September 2003</td>
<td>196,265</td>
</tr>
<tr>
<td>2005/06</td>
<td>Perth and Kinross</td>
<td>Flooding 18 August 2004</td>
<td>154,251</td>
</tr>
<tr>
<td></td>
<td>Eilean Siar</td>
<td>Storm damage 10/11 January 2005</td>
<td>440,707</td>
</tr>
<tr>
<td></td>
<td>Orkney Islands</td>
<td>Storm damage 10/11 January 2005</td>
<td>81,798</td>
</tr>
<tr>
<td></td>
<td>Highland</td>
<td>Storm damage 10/11 January 2005</td>
<td>190,143</td>
</tr>
<tr>
<td></td>
<td>Moray</td>
<td>Flooding 16/17 November 2002</td>
<td>42,555</td>
</tr>
<tr>
<td>2006/07</td>
<td>Orkney</td>
<td>Final payment storm damage 10/11 January 2005</td>
<td>9,089</td>
</tr>
</tbody>
</table>

NB: There were no payments made under Bellwin in 2007-08 or 2008-09

Source: Scottish Government, pers comm. 2009
Current flood warning

Through its Floodline service, SEPA provides flood warnings to flood management partners (police and local authorities) and members of the public. SEPA uses weather forecasts, rainfall data, river level data and tidal forecasts to make a daily assessment of the likelihood of flooding. When it looks as if flooding is likely, they issue a Flood Watch for a general area.

In areas where formal flood warning schemes are operated, SEPA issues flood warnings when certain river levels are exceeded at key locations. These flood warning levels are set by looking at the historical record of flooding on a river and agreeing flood warning thresholds with local flood management partners.

Future flood warning

SEPA is due to launch the Floodline Warnings Direct service in spring 2011. This will aim to deliver messages, free of charge, to registered landlines and mobiles, about flooding in areas covered by flood warning schemes.

SEPA is also developing a national flood warning strategy which is due to be completed by September 2010. The strategy will support the current flood warning service and include future provision of an effective flood warning service to reduce the impact of flooding.
Sources

GB & AM Anderson v White, Court of Session (Outer House) 18 September 1998.


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RELATED BRIEFINGS

SB 08-62 Flood Risk Management (Scotland) Bill: Stage 1 (November 2008)

SB 09-22 Flood Risk Management (Scotland) Bill: Stage 3 (April 2009)

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