

# **FLOOD RISK MANAGEMENT (SCOTLAND) BILL**

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## **POLICY MEMORANDUM**

### **INTRODUCTION**

1. This document relates to the Flood Risk Management (Scotland) Bill introduced in the Scottish Parliament on 29 September 2008. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 15–EN.

### **POLICY OBJECTIVES OF THE BILL – GENERAL**

2. The provisions in this Bill will create a framework that will ensure that all persons and organisations involved in flood risk management can coordinate their efforts to deliver sustainable approaches to managing all forms and consequences of flooding. By protecting and working with the environment, sustainable flood risk management is intended to provide the maximum possible social and economic resilience against flooding for current and future generations.

3. To deliver this framework, the Bill makes substantive provision in five policy areas:

- coordination and cooperation in flood risk management;
- assessment of flood risk and preparation of flood risk management plans, including transposing the EC Floods Directive (2007/60/EC) (the Directive)<sup>1</sup>;
- amendments to local authority and SEPA functions for flood risk management;
- a revised statutory process for flood risk management measures; and
- creating a more uniform approach to the enforcement of the Reservoirs Act 1975 (the 1975 Act).

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<sup>1</sup> Directive 2007/60/EC of the European Parliament and of the Council on the assessment and management of flood risks. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:288:0027:0034:EN:PDF>

## **BACKGROUND**

### **Flooding and flood risk management in Scotland**

4. Flooding is a natural process that helps shape our landscape. However, flooding can also threaten health and safety, and cause substantial damage to property and infrastructure. Although flooding cannot be entirely prevented, it can be managed so as to reduce its social and economic consequences, and to safeguard the continued functioning of services and infrastructure.

5. Climate scenarios for Scotland tell us that over the course of this century our climate will become wetter and stormier. These trends could increase our susceptibility to flood risks and have wider implications for how we need to assess and manage flood risk. Our management and use of the water environment, such as straightening rivers, draining land for agricultural production and building in flood prone areas, can also increase our susceptibility to flooding and its impacts.

6. A wide range of legislation currently underpins flood risk management in Scotland, and the statutory responsibility for this function is widespread and at times unclear. The main piece of legislation is the Flood Prevention (Scotland) Act 1961 (the 1961 Act), which is now outdated and does not reflect the way that government and local services are now delivered in Scotland. The 1961 Act has also been criticised for restricting the range of flood risk management measures that can be adopted and delaying implementation of flood protection schemes. It also lacks a clear framework for coordinating measures across catchments.

### **The EC Floods Directive**

7. The Directive came into force on the 26<sup>th</sup> of November 2007. The aim of the Directive is to reduce the adverse consequences of floods on human health, the environment, cultural heritage and economic activity. To achieve this, the Directive establishes a framework for the assessment and management of flood risks. The framework set out by the Directive fits in well with the Scottish Government's own priorities for establishing a sustainable, risk-based approach to flood risk management. The Directive must be transposed by the 26<sup>th</sup> November 2009.

8. The basic requirements of the Directive are to:

- produce preliminary flood risk assessments (deadline – December 2011);
- produce flood hazard maps and flood risk maps (deadline – December 2013); and
- produce flood risk management plans (deadline – December 2015).

9. The Directive recognises the importance of adopting a catchment-focused approach to managing all sources of flooding. The Directive also recognises the benefits that can be gained from coordinating flood risk management with other aspects of land and water management, including River Basin Planning undertaken for the Water Framework Directive<sup>2</sup>. The Water Framework Directive was implemented in Scotland through the Water Environment and Water Services (Scotland) Act 2003.

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<sup>2</sup> Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for Community action in the field of water policy. <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:327:0001:0072:EN:PDF>

10. The Directive gives Member States the freedom to set their own objectives for flood risk management. This allows Member States to adopt objectives and measures that are suited to local and regional requirements and circumstances. The Directive also allows Member States to use and build on existing tools, information and plans.

## **BILL CONTENT – GENERAL**

11. The Bill is separated into the following parts:

- *Part 1* sets out general duties which Scottish Ministers, SEPA, and responsible authorities must comply with when exercising their respective functions for flood risk management. These include a duty to exercise functions with a view to reducing flood risk and to collaborate when doing so and a duty to take account of guidance and directions in relation to flood risk management.
- *Part 2* defines some of the principal expressions used in the Bill, including “flood” and “flood risk”.
- *Part 3* sets out arrangements for the production of flood risk assessments and flood risk management plans. The aim is to create a nationally consistent and catchment focused approach to flood risk management planning that is underpinned by local coordination and delivery of measures. The provisions set out in Part 3 of the Bill also fulfil the Scottish Government’s obligation to transpose the Directive.
- *Part 4* sets out provisions to replace the 1961 Act. These provisions will equip local authorities with broad powers to allow them to take forward a full range of flood risk management measures. The provisions will also underpin the exercise of these powers with a streamlined and local authority based statutory process that provides for efficient use of local resources and timely introduction of flood management measures.
- *Part 5* updates SEPA’s responsibilities for flood warning and flood risk assessment. These provisions replace the provisions set out in the Agriculture Act 1970 and the Environment Act 1995. The provisions provide SEPA with a new statutory framework for exercising these important flood risk management functions.
- *Part 6* sets out new powers of entry and compensation provisions to support local authorities and SEPA in exercising their statutory responsibilities under the Bill.
- *Part 7* amends the Reservoirs Act 1975 to create a more uniform approach to the enforcement of this Act that will ultimately enhance the safe operation of Scotland’s reservoirs. This includes provision to transfer responsibility for enforcement of the 1975 Act from local authorities to SEPA, and a power to establish a new system for reporting incidents that affect safety at reservoirs.
- *Part 8* makes general provision for the making of orders and regulations under the Bill. It also makes provision about the application of the Bill to the Crown and commencement of the Bill.

12. The Bill is enabling in nature and provides for regulations in a number of areas to be made in due course. This is particularly the case in relation to the content and form of flood risk management plans and assessments of flood risk. This approach will allow the Scottish

Government to supplement the Bill with further, more detailed, provisions that have been developed after thorough consultation and are suited to Scotland's long term needs.

13. The Bill does not make specific provision for emergency responses to major flooding events – this remains under the remit of the Civil Contingencies Act (2003). However, the expectation is for flood risk assessments and management plans produced under this Bill to provide information that will help emergency responders prepare and react to flood events.

## **CONSULTATION – GENERAL**

### **Flooding Advisory Committees and Groups**

14. In October 2002, an *Ad Hoc* Committee of Ministers<sup>3</sup>, chaired by the Deputy First Minister, was set up to consider the arrangements for addressing flood risk and how advice and support is provided to those at risk from, and affected by, flooding. In February 2003, Cabinet agreed a Statement of Commitments and an action plan in the form of the National Flooding Framework.

15. The National Flooding Framework aimed to address the problems of flooding through four areas of action: Awareness, Avoidance, Alleviation, and Assistance. The *Ad Hoc* Committee also recommended that a National Technical Advisory Group on Flooding Issues (NTAG)<sup>4</sup> be set up to provide technical advice to local authorities and other parties on flood prevention schemes.

16. NTAG included representatives from the Scottish Government, local authorities, the Scottish Environment Protection Agency (SEPA), Scottish Water, Scottish Natural Heritage (SNH), the Association of British Insurers, industry, environmental non-government organisations, academia, the Environment Agency and the Department for Environment, Food and Rural Affairs (DEFRA). The main aims of the group were to:

- offer advice to the Scottish Government on producing technical guidance for local authorities to take forward flood prevention schemes;
- offer advice to the Scottish Government on what sustainable flood management comprises;
- offer advice on the production of a Second Generation Flood Map; and
- provide a forum for expert discussion on the impacts of climate change on flooding, the links between flood prevention schemes and planning and the social impacts of flooding

17. In April 2005 the Flooding Issues Advisory Committee (FIAC)<sup>5</sup> was set up to continue the work of NTAG and to offer advice on taking forward the National Flooding Framework.

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<sup>3</sup> National Flooding Framework, Recommendations:- Scottish Government, (2003):  
<http://www.scotland.gov.uk/Topics/Environment/Water/Flooding/national-framework>

<sup>4</sup> National Technical Advisory Group:  
<http://www.scotland.gov.uk/Topics/Environment/Water/Flooding/advisory-groups/ntag>

<sup>5</sup> Flooding Issues Advisory Committee:  
<http://www.scotland.gov.uk/Topics/Environment/Water/Flooding/advisory-groups/fiac>

## **Flooding Summit**

18. The Scottish Government commenced the Bill process with a Flooding Summit<sup>6</sup> on 10<sup>th</sup> September 2007 in Perth. The Summit was attended by over 150 delegates representing a wide range of stakeholder groups including local authorities, Scottish Water, SEPA, the Forestry Commission Scotland, SNH, environmental non-government organisations, National Farmers Union Scotland, flood risk management professionals, academia, and police and fire rescue services

19. The Summit demonstrated unanimous support for adopting a sustainable approach to flood risk management and provided a platform for taking forward outputs from the National Flooding Framework. The outcomes from the Summit were used to start the process of reviewing flooding legislation. A report was produced summarising the issues raised at the Summit and published on the Scottish Government web site<sup>7</sup>, with notification sent to all attendees and interested parties.

## **Flooding Bill Advisory Groups**

20. In November 2007, the Scottish Government set up the Flooding Bill Advisory Group and three sub-groups: Flood Risk Assessment and Mapping, Flood Risk Management Planning, and the Statutory Process. The role of these groups is to advise the Scottish Government on flood risk management issues at a strategic level and to assist with developing new legislation in this area, including advising on transposing the Directive.

21. The Flooding Bill Advisory Groups<sup>8</sup> are informal forums which bring together professionals from a wide range of flood risk management stakeholders and practitioners. They include representatives from central and local government, SEPA, Scottish Water, SNH, relevant professional bodies, the Association of British Insurers, the Forestry Commission Scotland, agriculture/land use managers, academia, environmental non-government organisations, developers and people who have experienced flooding.

## **The Future of Flood Risk Management in Scotland – A consultation**

22. A consultation – *The Future of Flood Risk Management in Scotland*<sup>9</sup> – summarised the Scottish Government's proposals for reforming Scotland's flooding legislation. The consultation was published in February 2008, with the consultation period running from 14 February to 23 April 2008. The consultation was made available on the Scottish Government's web site, and a wide range of stakeholders were invited by email or letter to respond to the consultation.

23. 145 organisations and individuals responded. 30 responses were received from members of the public with a further 14 from the private sector and 12 from consultants. A significant number of responses were also received from statutory consultees (7), professional organisations (6) and

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<sup>6</sup> Flooding Summit – Papers:

<http://www.scotland.gov.uk/Topics/Environment/Water/Flooding/FloodingSummit#top>

<sup>7</sup> Flooding Summit – Summary:

<http://www.scotland.gov.uk/Resource/Doc/1057/0053650.pdf>

<sup>8</sup> Flooding Bill Advisory Group:

<http://www.scotland.gov.uk/Topics/Environment/Water/Flooding/advisory-groups/fbagsection>

<sup>9</sup> The Future of Flood Risk Management in Scotland – Consultation:

<http://www.scotland.gov.uk/Publications/2008/02/13095729/0>

emergency services (2). A summary of the responses to the consultation was placed on the Scottish Governments website.<sup>10</sup>

### **Consultation workshops**

24. The Scottish Government hosted three stakeholder workshops in Glasgow, Aberdeen and Dunfermline, as an open forum for discussion on the legislative proposals. The workshops were attended by over 50 delegates and provided the opportunity for the policy proposals to be further explored, particularly by organisations not previously represented at the advisory groups. Each workshop had a specific theme, which explored a variety of questions relating to the Bill.

### **Public meetings**

25. Also as part of the public consultation process, five public meetings were held in different towns across Scotland that have first hand experience of flooding: Rothes, Perth, Newton Stewart, Newmilns and Dumfries. The first meeting in Rothes was attended by Richard Lochhead, Cabinet Secretary for Rural Affairs and the Environment and subsequent meetings were chaired by Michael Russell, Minister for Environment. Representatives from the Scottish Government Flooding Policy Team, SEPA, Scottish Water, SNH and each host local authority participated in the open question and answer session. The meetings were promoted with advertisements in the local press, Ministerial interviews and flyers. Local councillors, community council representatives, senior council officials and flood action groups were invited to attend and express their views on the proposals for updating flood risk management in Scotland.

### **Rural Affairs and Environment Committee**

26. The Rural Affairs and Environment (RAE) Committee held an inquiry to examine Scotland's current and future vulnerability to flooding, and to consider how flooding should best be managed in the future. The Committee published its report on Friday 16 May 2008. The Scottish Government considered the report fully in conjunction with the responses to the consultation document and those from the associated workshops and Town Hall meetings. The Committee's recommendations helped to inform the Scottish Government's proposals for a sustainable risk-based approach to flood management.

### **Summary of the outcomes of the consultation**

27. The general consensus across the consultation was that the proposals contained within the Bill are a significant step towards ensuring more effective and sustainable flood management across Scotland. Consultees were particularly vocal in their support for a more streamlined statutory process, the development of a flood management process that couples national and local priorities and for enshrining the principles of sustainable flood management in legislation. More detail is provided on responses to particular issues at relevant points below.

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<sup>10</sup> The Future of Flood Risk Management in Scotland – Report on Consultation:  
<http://www.scotland.gov.uk/Publications/2008/08/07162000/0>

## **PART 1: GENERAL DUTY, DIRECTIONS AND GUIDANCE**

### **Policy objectives**

28. The provisions set out in Part 1 of the Bill create the statutory framework within which the Scottish Ministers, SEPA and responsible authorities must operate when exercising their respective functions for flood risk management.

29. The Bill places a duty on the Scottish Ministers, SEPA, local authorities, Scottish Water and other responsible authorities to exercise their flood risk related functions with a view to reducing overall flood risk, and to do so to secure compliance with the Directive. Provision is made to identify responsible authorities in Part 2 of the Bill. “Flood risk related functions” are functions under the Bill and, where the Scottish Ministers decide it is appropriate, may include functions set out in other legislation. For example, functions under the Coast Protection Act 1949 and the Sewerage (Scotland) Act 1968 will be relevant to flood risk management. Applying the new duty to act with a view to reducing flood risk to “flood risk related functions” will ensure that all efforts to reduce flood, including the exercise of certain powers under other legislation, are coordinated through flood risk management plans.

30. SEPA, by being given the role it is given in Part 3, is identified as the competent authority for the Directive, and this role will form one of SEPA’s key flood risk related functions. SEPA will be responsible for preparing assessments, plans and documents to fulfil the requirements of the Directive. In fulfilling this role, SEPA will be expected to work closely and collaboratively with local authorities, Scottish Water and stakeholders to ensure that work to assess and manage flood risk is undertaken in a coordinated and consistent fashion across Scotland.

31. Although ultimate responsibility for avoiding or managing flood risk would still lie with land and property owners, the clear expectation is for certain public bodies to take a proactive role in managing and, where achievable, lowering overall flood risk. This new duty will, for the first time, place flood risk management on the same footing as other general duties on local authorities, such as the provision of education and other services.

32. To ensure that flood risk management is underpinned by partnership working, the Bill also places a duty on the Scottish Ministers, SEPA, local authorities, Scottish Water and other responsible authorities to cooperate so as to coordinate their respective functions for flood risk management. To assist in the pursuit of sustainable flood risk management, the Bill also places a series of general duties on the Scottish Ministers, SEPA, local authorities, Scottish Water and other responsible authorities, including:

- to exercise their functions with a view to managing flood risk;
- promotion of sustainable flood risk management ;
- acting with a view to raising public awareness of flood risk; and
- acting to contribute to sustainable development.

33. Part 1 of the Bill also confers on the Scottish Ministers a power to give direction and guidance to SEPA and the responsible authorities, thereby allowing the Scottish Ministers to provide continued support to the implementation of the Bill and flood risk management in Scotland.

## **PART 2: PRINCIPAL EXPRESSIONS**

### **Policy objectives**

34. The current statutory responsibilities for flood risk management in Scotland are unclear. Part 2 of the Bill allows the Scottish Ministers to identify “responsible authorities” who will have a clearly defined role in flood risk management. These responsible authorities are provided with specific duties for flood risk management in Part 1 and elsewhere in the Bill.

35. Local authorities and Scottish Water are identified as responsible authorities in the Bill. Additional responsible authorities will be designated by the Scottish Ministers, and may include National Park authorities, British Waterways and the Forestry Commission Scotland. The Scottish Government envisages that these “responsible authorities” will be bodies directly involved in flood risk management and will act to support local authorities and SEPA in their respective roles for flood risk assessment and management. The Scottish Government will consult further on which authorities should be so designated and what their functions will be.

36. Part 2 also defines “flood” and “flood risk”. The definition of “flood” ensures that the Bill covers all forms of flooding except where flooding is caused solely by a failure of the sewerage system infrastructure, for example a collapsed or blocked sewer. Scottish Water already has statutory responsibilities for maintaining the sewerage network. Other forms of sewerage flooding, including where a sewerage system is overloaded by intense rainfall, are covered by the Bill. This means that flood risk management must consider flooding from rivers, the sea, groundwater, and surface water flooding as a result of intense rainfall, including where sewerage and drainage systems are overloaded by intense rainfall.

37. The inclusion of a definition of “flood risk” is intended to promote common understanding of this term and its important role in managing floods. In summary, “flood risk” is defined as the likelihood of flooding coupled with the potential adverse consequences of flooding, whether they are to human health, the environment, cultural heritage or economic activity. In referring to human health, the intent is to cover all aspects of how flooding affects health, ranging from personal damage or loss of life, to the distress caused as a consequence of flooding.

## **PART 3: FLOOD RISK ASSESSMENT, MAPS AND PLANS**

### **Policy objectives**

38. Many elements come together to deliver flood risk management, including assessing flood risks, issuing flood warnings, undertaking structural (e.g. building flood walls or creating natural areas of flood storage) and non-structural (e.g. avoiding flood risk through development control) flood management measures and raising awareness of flood risk. The Bill creates a framework in which SEPA and local authorities, alongside other public, private and voluntary sectors, can work collectively to assess flood risks and put in place plans to coordinate and execute measures to manage those risks.

39. Part 3 (and schedule 1) of the Bill makes provision for preparing plans to manage flood risks, including new arrangements for assessing and mapping flood risks, and establishing objectives and measures to manage those risks. These provisions encompass five main policy aims:

- to deliver a nationally consistent and coordinated approach to flood risk assessment and management;
- to utilise and build on local knowledge and expertise in all aspects of flood risk management;
- to improve understanding of flood risks, particularly in relation to surface water flooding (pluvial flooding);
- to create a clear instruments for collaborative working and public participation; and
- to transpose the Directive.

40. The Bill includes a series of enabling provisions, and the intention is to use regulations, ministerial directions, and guidance to supplement the provisions set out in Part 3. This will include regulations on the form and content of flood risk management plans and on the assessment of significant flood risk. This approach will allow the Scottish Government to put in place a detailed set of provisions that are appropriate to Scottish circumstances and have been developed after thorough consultation.

#### *Flood risk management planning*

##### The need for flood risk management planning

41. Flood risk management requires coordination of a range of actions, including flood risk assessment, flood warning and the creation of structures to reduce flood risk. As things that affect one part of a river or coastline often have consequences elsewhere, flood management actions are most effective when they are coordinated across catchments and along coastlines.

42. Some catchment focused flood management planning does occur in Scotland, but it is typically on an ad hoc or voluntary basis. Something more comprehensive and transparent is required to deliver sustainable approaches to flood risk management that ensure the needs of current and future generations are protected.

43. Flood risk management is most effective when it is coordinated with other aspects of water and land management. This ensures that opportunities for using public funding to deliver multiple benefits, for instance simultaneously reducing the risk of flooding while also improving water quality and enhancing water resources, can be identified and realised.

##### Flood risk management planning – an overview

44. The provisions set out in Part 3 will establish a system for flood risk management planning that is aligned with Scotland's flood risk management needs, while also incorporating all the elements needed to fulfil the requirements of the Directive.

45. The intention is to develop a flood risk management planning process that will allow promotion of coordinated sets of actions that balance long-term and nationally focused objectives with local information and priorities. To deliver this framework, the Bill establishes a tiered, but fully integrated, system of flood risk management planning. The process is founded on the following sets of plans:

- district flood risk management plans (district plans) will set the national and strategic framework for flood risk management in Scotland. These plans will coordinate and determine national priorities, and set the framework in which measures to manage flood risk will be delivered or planned for at a local level. These plans would also fulfil the reporting requirements of the Directive. SEPA will take the lead on this work, but it will need to do so in close partnership with other local authorities and other responsible authorities, and with due regard to local information and priorities; and
- local flood risk management plans (local plans) will supplement the district plans and will ensure that the objectives and measures set out in district plans are translated into locally targeted and coordinated actions to manage flood risks. Local plans must be consistent with the district plans, but may include additional, locally relevant information, including additional details of particular measures. Local authorities will take the lead on this work, but they will need to do so in close partnership with SEPA and other responsible authorities. All local plans must be accompanied by an implementation strategy setting out how the measures described in the local plan will be delivered.

46. The Bill provides for both sets of plans to be developed in tandem, and the expectation is for a two-way interaction between each set of plans. For instance, all district level planning will need to be undertaken in consideration of locally derived information, including information on flood risk and the suitability of measures; equally, all local planning will need to reflect national and strategic objectives set out in the district plans. Advisory groups will be a critical tool in ensuring coordination of plans. Advisory groups will also ensure that the plans are not only developed by those responsible for undertaking flood risk management, but are also shaped by policy makers, regulators, businesses and communities alike. The Scottish Government believes this approach creates clear responsibilities for local authorities in the planning process, while also creating a national, strategic role for SEPA.

47. The district plans will meet the requirements for the flood risk management plans which have to be produced to comply with the Directive. The local plans will supplement the district plans but are not intended to form part of the plans required by the Directive. Relying on a single authority to lead on the production of the district plan provides for an efficient approach to fulfilling the requirements of the Directive.

48. The intention is to use regulations to set out further details on the form and content of flood risk management plans, and the procedures to be followed in the preparation of these plans. This approach will allow the Scottish Government to put in place a detailed set of provisions that have been developed after thorough consultation.

49. Although the Bill identifies SEPA as the lead authority for producing flood risk assessments, maps and district plans, SEPA's key new role will be as a coordinator and facilitator. The detailed plans and assessments that will underpin the work of SEPA will be produced by the local authorities, and to a lesser degree other responsible authorities, who will also be responsible for delivering the measures to address flood risk. SEPA will be expected to work closely and collaboratively with local authorities, Scottish Water and stakeholders to ensure that work to assess and manage flood risk is undertaken in a coordinated and consistent fashion across Scotland.

50. In summary, the district plans will include:

- **a preliminary flood risk assessment** (termed “flood risk assessment” in the Bill) that is undertaken to identify current and future flood risks, and provide a baseline of information to inform the next steps in the production of the plan. The assessment culminates in an appraisal of where the most significant flood risks are likely to occur (termed “potentially vulnerable areas” in the Bill). This information will be crucial to prioritising efforts to map and manage flood risks.
- **flood hazard and flood risk maps.** Flood hazard maps will outline the likely extent of different flood scenarios. The flood risk maps will summarise the potential impacts of these flood events, including the number of people affected and the implications for economic activity.
- **a set of objectives and measures** for tackling flooding issues in potentially vulnerable areas. Each plan will coordinate measures across catchments and all measures will be subject to cost-benefit analysis. It will not be possible to address all flood risks in one six year planning cycle; therefore, the district plan will organise sets of objectives and measures across planning cycles. This approach will provide a road map for the long term (25+ years) management of flood risks as well as targeted sets of actions across particular planning cycles.

51. The local plans, which will supplement the district plans, must include:

- summaries of the (geographically) relevant information from the district plan, including summaries of flood risks, and objectives and measures to manage these risks; and
- supplemental locally relevant information, including additional details of measures or schemes that are being taken forward.

52. Each local plan must be accompanied by an implementation strategy setting out how the measures described in the plan will be taken forward, including an implementation timetable and a summary of who will be responsible for funding and undertaking each measure.

#### Geographic boundaries of flood management plans

53. The intention is to use catchments as the basic unit of management for organising objectives and measures to manage flood risks. This is in line with the RAE Committee’s recommendation that the catchment be the fundamental unit for flood risk management. The district plans will be geographically coincident with the river basin districts designated under the Water Environment and Water Services (Scotland) Act 2003 (the 2003 Act). This will create two principal flood risk management districts for Scotland – a Scotland district and a cross border district with England and Wales (Solway and Tweed). Although these are large scale planning units, the intention is for all objectives and measures identified in the district plan to be coordinated across the catchments that are contained within the district.

54. The flood risk management plans covering the cross border district will need to be coordinated with the competent authority for the Directive in England and Wales. The intention is to adopt a similar approach to the one established under the 2003 Act for cross border river basin plans. The intention is therefore to liaise with DEFRA to develop separate regulations to specify cross border arrangements.

55. SEPA, in close consultation with local authorities, will be responsible for identifying where local plans are required and the geographic boundaries of these plans. In determining the geographic boundaries of local plans, the Scottish Government expects SEPA to identify appropriate, catchment (and coastline) focused units, which are developed in regard to factors like:

- where flood risks exist,
- natural drainage characteristics (i.e. catchments); and
- administrative arrangements, including the boundary of local authority districts.

#### Advisory groups

56. Securing participation and engagement in the flood management planning process is possibly the most important aspect of flood management planning. The Bill requires the creation of advisory groups, which will provide SEPA and local authorities with an important tool to ensure that a fully collaborative approach is adopted. These groups will act as standing consultative panels on flood management planning. To secure a nationally coordinated set of advisory groups, the Bill gives SEPA responsibility for establishing these groups and setting out their membership and remit.

57. The Bill requires establishment of a national advisory group to oversee production of the district plans. This group would be led by SEPA. The Bill also requires establishment of sub-district advisory groups. These groups would be led by local authorities and would be responsible for coordinating production of local flood risk management plans and coordinating contributions to the district plan. The sub-district groups will provide a critical link between the district and local plans, thereby ensuring that the district plans can take account of local priorities and circumstances, and that local plans remain consistent with agreed national priorities. Wherever possible, the intention is to use or update existing groups to fulfil these advisory group roles.

58. The Scottish Government's policy preference is to put in place a flexible system whereby the remit and structure of these groups is a matter for SEPA to determine, within the context of Ministerial guidance and in close consultation with local authorities. The Scottish Government also expect SEPA and local authorities to use a range of other methods to discharge their participation and consultation duties, such as public meetings, bilateral meetings with stakeholders and other forms of local consultation.

#### Flood risk assessments

59. The Bill confers a duty on SEPA to carry out a flood risk assessment (by December 2011) and, based on the outcomes of this assessment, to identify those areas of the country that are potentially vulnerable to flood risks. This assessment meets the requirements of the preliminary flood risk assessment set out in the Directive (Article 4). The flood risk assessment must be based on readily available or derivable information and must consider all forms and sources of flooding, other than floods solely from sewerage systems, which are excluded from the definition of "flood" in Part 2 of the Bill. Scotland has a lot of information on flood risk that can be drawn on for this purpose. The flood risk assessment therefore provides an opportunity to collate this information to create a national picture of flood incidents and flood risks. The intention is for SEPA to hold and manage this information, and to set up mechanisms to share this information with the responsible authorities and stakeholders.

60. In addition to improving understanding of past flood events, the assessment must also consider climate change scenarios. This will provide valuable information for long-term planning and the promotion of actions to improve resilience to flooding. Ultimately, the assessment will provide a source of valuable information that can be used to inform flood mapping exercises, and the establishment of objectives and measures to manage flood risks.

61. A number of organisations hold information that will be relevant to this assessment, including local authorities and Scottish Water. Advisory groups will play a key role in coordinating the collation and production of information to inform the content of the flood risk assessment, including advising SEPA on locally important issues.

62. Using the information obtained through the preliminary flood risk assessment, SEPA will be required to identify those areas of the country believed to be at the most significant risk of flooding. This assessment will determine where efforts to map and manage flood risks should be targeted. The Bill includes provision for the Scottish Ministers to develop regulations to set out details on the preparation of this assessment, including consultation arrangements.

63. The Scottish Government believes that the assessment of potentially vulnerable areas will have an important role in targeting future investment in flood risk assessment and management. Accordingly, the Bill sets out provision for the Scottish Ministers to approve the assessment.

#### Assessing the contribution that natural features and processes can make to managing flood risk

64. A sustainable approach to flood risk management requires consideration of the widest possible range of options for managing flood risks. Natural flood management, which can usefully be regarded as efforts to work with, or restore, natural flooding processes, is increasingly being recognised as an important tool in the flood risk management armoury. Although evidence on the contribution that natural flood management measures can make to flood management is currently limited, the Scottish Government believes that these approaches should be considered within the flood risk management planning process.

65. The Bill gives SEPA responsibility for undertaking a national appraisal of where alteration, restoration or enhancement of natural features could contribute to managing flood risks. Although this assessment is not a direct requirement of the Directive, the Scottish Government believes that this information will form an important component of future flood risk management decisions. To ensure that outputs of the assessment can be integrated into flood risk management decisions, the assessment must be completed every 6 years and the outputs from the assessment must be considered when setting objectives and measures to manage flood risk. SEPA will be expected to collaborate with other organisations in undertaking this assessment and to publish and disseminate the outputs of this assessment.

#### Flood risk and hazard mapping

66. Maps are a powerful tool for communicating information on flood risk, and SEPA, in its role as lead authority for the Directive, will be responsible for producing flood hazard and flood risk maps (by December 2013), where:

- flood hazard maps show the likelihood and extent of different flood scenarios, including information on depth or level of flooding; and

- flood risk maps show the impact of flooding, including the indicative number of inhabitants affected and the type of economic activity affected.

67. The intention is for SEPA to lead on work to improve mapping and understanding of flood risks. However, other organisations, particularly local authorities and Scottish Water, are also expected to provide assistance and to contribute information. For instance, some local authorities have already undertaken work to map pluvial flooding, and Scottish Water is well placed to develop assessments and maps of sewerage flooding. The expectation is that this work will continue, but that it will now be undertaken in close liaison with SEPA to ensure that these efforts are coordinated. Advisory groups and wider consultations with stakeholders and the public are also expected to play a crucial role in ensuring flood risk maps reflect local experiences of the impacts of flooding. For instance, local experience can provide information on water levels and detail as to the chronology of a flood event.

68. The maps must include information on river, coastal, groundwater and surface water (pluvial) flooding. The Bill provides for an opt-out to be exercised by SEPA when mapping sewerage flooding. The intention is for this opt-out to be reserved for situations where technical constraints mean that mapping of these flooding scenarios would be impractical or impossible. Where an opt-out is exercised, effort would instead be focused on obtaining the information necessary to undertake a robust and reliable assessment of sewerage flooding in a subsequent planning cycle. This approach will ensure that mapping efforts focus on the provision of high quality and reliable information. Provision has also been made for the Scottish Ministers to direct SEPA to include information on sewerage flooding in flood maps.

69. The Bill does not set out details of which flood scenarios (e.g. return periods) must be mapped. The intention is for the Scottish Ministers to specify what should be considered as a low, medium or high probability flood. This approach creates flexibility for periodically reviewing and updating what flood scenarios should be mapped. The Bill also includes provision for the Scottish Ministers to set out details of further matters to be included in any flood maps in regulation. Examples of additional information, beyond the requirements of the Directive, that could be considered for inclusion in maps include flood duration periods, and information on risks to strategic assets or cultural interests. As information, technology and expertise in flood risk assessment and mapping evolves, this provision will also ensure that the form and content of maps can be updated to present the most reliable and informative information on flood hazards and flood risks.

70. The flood risk and flood hazard maps must be made publically available. The intention is for information from these maps to be used to update SEPA's "indicative river and coastal flood map", which is currently accessible through SEPA's website. This will ensure that the public have continued access to high quality information on the likelihood and potential impacts of flooding. The Scottish Government also expects that these maps will provide local authorities with information to support their development planning and development management decisions and, in particular, in the pursuance of actions to avoid flood risks.

#### Flood risk management plans – objectives and measures to manage flood risk

71. The main purpose of flood risk management planning is to identify and coordinate objectives and measures to manage flood risk. The district and local planning process, as described

in paragraphs 44 to 52, will provide for the preparation of an integrated set of flood risk management plans that balance local information and priorities with long-term and nationally focused objectives. SEPA will be responsible for preparing plans (district plans) that fulfil the Directive requirements (by December 2015).

72. The Directive does not set specific targets or objectives for flood risk management. SEPA, in consultation with local authorities and other responsible authorities, will therefore be responsible for identifying objectives and measures for inclusion in the district plan. These objectives and measures will also form the basis of all local flood management plans. It is therefore important that all decisions on objectives and measures have full regard to local circumstances and priorities, and to the information gathered through the flood risk assessment and mapping exercises. To ensure this level of coordination is achieved, the local plans will be developed in tandem with the district plans. The network of advisory groups is also expected to play a vital role in ensuring that the district plan reflects both local and national priorities.

73. The intention is to use regulations to set out further details on the structure and content of district and local flood management plans. The Bill sets out factors that must be taken into consideration in setting objectives and measures to manage flood risk. The list, which has been drawn from the requirements set out the Directive, is not intended to be exhaustive, and there is provision for SEPA and the Scottish Ministers to identify further factors for consideration. The list of factors set out in the Bill includes:

- impacts of climate change;
- the costs and benefits (flooding or otherwise, for instance coincident environmental benefits) of implementing proposed measures;
- the wider management of Scotland's water and land resources;
- development plans;
- conservation objectives; and
- environmental objectives established under the 2003 Act.

74. The Scottish Government wants to avoid placing particular emphasis on any individual approach to flood risk management. This is because any number of measures could have a role in flood management depending on particular circumstances. Accordingly, the Bill does not identify particular measures for inclusion or consideration in flood management plans; instead, the Bill requires consideration of all structural and non-structural measures, where structural measures involve the carrying out of operations on land and non-structural measures are all other measures (e.g. awareness raising, flood warning and development planning). This is to ensure that consideration is given to all forms of flood risk management, ranging from building flood defences to improving flood warning or restoring lost flood plains.

75. The district and local plans will provide a basis for short and long-term planning. In addition to focusing on measures relating to a particular 6 year planning cycle, the flood risk management plans will also set out long-term (25+ years) objectives. The intention is for this information to contribute to the development of the spending plans of the bodies involved in implementing measures.

76. All objectives and measures must be attainable and suited to local circumstances. The clear intention is therefore for local authorities to work in partnership with SEPA and other bodies to identify realistic and deliverable objectives and measures for inclusion in flood risk management plans. To ensure that all measures are deliverable, each local plan must be accompanied by an implementation strategy that sets out how the measures contained within it will be delivered. These implementation strategies must be agreed by all bodies involved in delivering the measures.

77. The Bill requires local authorities to produce and publish interim reports that review the local flood risk management plans and the progress that has been made towards implementing measures. In addition to providing valuable interim information on progress and any problems experienced in implementing a local flood risk management plan, this exercise will also allow local authorities and SEPA to consider any new information on flood risks and how the respective plans may need to be amended or adapted to address these risks.

78. A coordinated approach to managing surface water runoff will be vital to the successful management of flood risk. The Bill creates a framework for collaborative working between all bodies involved in surface water management. Flood risk management plans, and the network of advisory groups, will provide the framework in which objectives and measures to manage surface water (including sewerage) flooding can be identified and coordinated. The intention is for local authorities to lead on the identification of measures to tackle surface water flooding, with Scottish Water, SEPA and others contributing through the exercise of their flood risk related functions (as described in Part 1).

79. Consultation responses indicated that the proposed hierarchical approach to flood risk management planning was well received. 16 out of the 20 relevant local authority responses felt that the proposals were a sufficient basis for flood risk management planning. All non-governmental organisations, the public, the private sector representatives and consultants provided a consistently positive view of the proposals. Only a small number of local authorities (4) and 2 statutory consultees were not in favour. The inclusion of surface water and sewerage flooding in the flood risk management planning process was seen as a positive step.

#### Coordination with the 2003 Act and development planning

80. The coordination of flood risk management planning with other planning processes will be necessary to the continued promotion of integrated water and land management. Furthermore, the Directive requires Member States to take steps to coordinate actions with the Water Framework Directive, focusing on opportunities for improving efficiency, information exchange and for achieving common synergies and benefits. To ensure flood risk management plans work in concert with other aspects of water management, the Bill includes provision for close coordination of flood risk management plans with river basin management plans prepared under the Water Environment and Water Services (Scotland) Act 2003, (the 2003 Act) which implemented the Water Framework Directive in Scotland. An important aspect of this coordination will be identifying opportunities to deliver coincident environmental and flood management benefits.

81. The establishment of environmental objectives and measures through river basin planning allows less stringent or alternative objectives to be set where there are overriding social or economic implications. This is an important mechanism for ensuring the needs of flood risk

management are balanced against protection of the water environment and the needs of other water users.

82. Planning decisions remain one of the most powerful tools available for managing flood risks. There will need to be a two way interaction between development planning and flood risk management planning. The Bill requires consideration of development planning when setting objectives to manage flood risk, and the intention is for flood risk management plans to include measures to avoid flood risk. The Bill also requires all public bodies and office holders to have regard to flood risk management plans when exercising their relevant functions, including development planning. The expectation is for subsequent planning legislation to include a specific provision requiring local authorities to have regard to flood risk management plans when preparing development plans. This will emphasise the important links between the flood risk management planning process and development planning. It is anticipated that a review of the Scottish Government's planning guidance on flooding will be considered in light of the provisions set out in the Bill.

#### *Approving flood risk management plans*

83. The Bill provides for the Scottish Ministers to approve the district plans prepared by SEPA. The Scottish Ministers will therefore have the final say on the content of the plans and, importantly, the objectives and measures that are set out therein. The Scottish Ministers will be able to consider any objections made to the plan as submitted, and conduct further investigations of their own before coming to a decision.

84. Final ministerial approval will be an important safeguard, but it does not mean difficult decisions – or any party making its views known – can be postponed until the end of the process. The Directive's strict timetable also rules out a cumbersome approval process.

85. In approving the plan, the Scottish Ministers will be agreeing delivery of a nationally prioritised set of objectives and measures to manage flood risks. As local plans will be based on, and consistent with, the objectives and measures set out in the district plan, we do not envisage a regular role for the Scottish Ministers in approving local plans. Provision has been made to require local authorities and other bodies contributing to the delivery of measures in a local plan to agree the content of that plan and for the lead local authority to publish the plan. The Scottish Ministers will have a role in determining the content of a local plan only where those bodies are unable to reach agreement.

86. The Scottish Ministers will be ultimately responsible for ensuring production and delivery of flood management plans, and they may have a role in addressing any problems that are inhibiting delivery of plans and/or measures. Local authorities will be required to produce interim reports (every 3 years) setting out progress towards delivering the agreed flood risk management measures set out in the local plans. This information will provide the Scottish Ministers with advance warning of issues that could inhibit delivery of plans and of the actions that may need to be taken to address any problems or barriers.

87. Respondents to the consultation were supportive of a role for the Scottish Ministers in approving district plans, with 71% agreeing that the Scottish Ministers should have the power to

approve, reject or modify plans. The majority went on further to say that the Scottish Ministers must justify their decisions and have the necessary technical support to make such decisions. It was also suggested that where plans are to be modified it must be done in consultation with the organisation who has prepared the plans. The Bill makes provision for the Scottish Ministers to seek further information and carry out further investigation and consultation prior to determining whether to approve a plan. The Scottish Ministers must also state the reasons for their determination. The Scottish Government believes this creates the necessary accountability and transparency in the approval process.

#### Implementation of measures set out in flood risk management plans

88. Although ultimate responsibility for avoiding or managing flood risk would still lie with land and property owners, by placing a duty on the Scottish Ministers and certain public bodies to act with a view to reducing overall flood risk, the clear expectation is for these public bodies to implement measures to manage and, where achievable, lower flood risk.

89. The Bill requires local authorities to produce a strategy that sets out how the measures contained in a local plan will be delivered. This strategy forms part of the local plan and must include a timetable of works, and a summary of who will be responsible for undertaking and paying for the works. The implementation strategy must be agreed by all organisations involved in implementing the works before the strategy can be finalised and published.

90. The implementation strategy will serve two purposes: first, it will ensure that the objectives and measures set out in the district and local plans are realistic and supported by a clear pathway to implementation; and second, it will provide a clear requirement for all bodies involved in delivering flood risk management to come together to negotiate and coordinate their efforts to deliver the measures set out in flood risk management plans.

91. The identification of Scottish Water as a responsible authority under the Bill would place them under new statutory duties for flood risk management, which would mean that the duty to act with a view to reducing overall flood risk would need to be considered in the development of Scottish Water's investment plans. In practice, this would mean that Scottish Water's investment programme (termed Quality and Standards) would need to take account of flood risk management alongside the protection of public health, environmental improvement, and in its approach to the maintenance improvement and extension of the existing sewerage and drainage network. Scottish Water's investment programme is developed to achieve a set of outcomes set by the Scottish Ministers. The Direction containing the present outcomes covers the period 2006-14. The consideration of the outcomes for the period post 2014, to cover a further period of at least 8 years, will begin in the near future and will be undertaken in full consultation with stakeholders. This will take full account of the new duty in relation to flood risk management.

92. The Bill sets a deadline for finalising local plans, including implementation strategies, of no later than 6 months after the district plan has been approved by the Scottish Ministers. This means that work to agree how measures will be implemented will need to be undertaken in tandem with work to identify objectives and measures for inclusion in the district plans. In adopting this approach, the Scottish Government is sending a strong signal that the implementation strategy is a critical aspect of the flood risk management planning process that must directly inform the establishment of objectives and measures to manage flood risks.

93. Where agreement on the content of a local plan (including the implementation strategy) cannot be reached by the organisations involved in delivering measures, the Bill provides for the Scottish Ministers to intervene and, where deadlocks can not be broken, to determine the content of the plan. This role for the Scottish Ministers will be an important safeguard, but the clear intention is for those responsible for delivering measures to work proactively to agree how measures will be implemented.

94. Although the expectation is for all agreed measures to be followed through to implementation, the Scottish Ministers have the power to make directions that could act as an enforcement mechanism in relation to the general duty to act with a view to reducing flood risk. In exceptional circumstances, the Scottish Ministers could therefore direct a local authority to implement a particular measure or set of measures that has been agreed through the flood management planning process. While in practice it is unlikely that the Scottish Ministers would need to rely on the direction-making power for this purpose, its existence gives the Scottish Ministers a means to exert pressure over responsible authorities and SEPA to carry out their functions under the Bill.

#### Participation, information and consultation

95. Consultees on the Bill proposals were split on their views on public participation, with some indicating that community and stakeholder engagement was not necessary, while other respondents called for active participation. The Scottish Government believes that a participative process is essential, however there are a range of issues to consider in relation to how SEPA and local authorities can make participation work in practice. For example, SEPA and local authorities will need to ensure that all those with an interest have a voice and it will need to strike the right balance between stakeholder views in drawing up the plans. SEPA and local authorities will also need to use existing consultative arrangements and networks creatively to avoid consultation fatigue.

96. Securing engagement in the flood management planning process from the wider stakeholder community beyond the public sector – in private and voluntary sectors and in communities – is crucial to the success of flood risk management.

97. Many such groups and individuals will have relevant knowledge and expertise to contribute to flood risk management and this needs to be drawn on. More than that, the objectives, and the measures that are put in place to meet them are more likely to be realistic and achievable if they incorporate the aspirations of stakeholders and have been developed in partnership with them. So SEPA and local authorities will need to engender real participation from stakeholders as well as consulting them.

98. The Bill places a requirement on SEPA and local authorities to seek and have regard to the views of a wide variety of interest groups and stakeholders and to report within their respective flood management plans how they have done so. SEPA will also be required to ensure representation from a full range of stakeholder interests in the establishment of advisory groups. The policy intention is for all those with an interest to have an opportunity to become involved in and have their say about flood risk management. These provisions send a strong signal to SEPA and local authorities about the importance of consultation and participation.

99. Comprehensive flood risk management planning has never been attempted in Scotland before, and it is difficult to predict what problems might arise in taking forward the participation agenda or what the solutions might be. It is envisaged that the Ministerial guidance and direction making powers, as well as regulations, will be used to guide SEPA and local authorities on how they should carry out their participation duties.

### **Alternative approaches – Part 1, Part 2 and Part 3**

#### *Sewerage flooding and definition of a flood*

100. Sewerage systems in large towns and cities in Scotland are generally combined sewer systems. Domestic sewage is mixed with the rainwater from roofs and paved surfaces and transported in pipes to a waste water treatment works. These combined systems are designed with release points, known as combined sewer overflows, which operate during heavy rainfall to discharge a mixture of dilute sewage and rainfall to burns and rivers to protect households from sewer flooding.

101. Since the 1960s all new developments have been built with separate sewerage systems where the domestic sewage is transported in a foul sewer and rainfall is transported in a separate surface water sewer. This avoids the environmental problem of sewer overflows and greatly reduces the risk of overloading causing sewerage flooding.

102. The inclusion of sewerage flooding in the definition of a “flood” ensures that sewerage flooding is considered in flood risk assessments and flood risk management.<sup>11</sup> An alternative approach that was considered by the Scottish Government was to omit sewerage flooding from the definition of a “flood” and to give Scottish Ministers power to determine under what circumstances sewerage flooding should be incorporated in flood risk assessments and plans. This approach would be consistent with the Directive, which provides for an opt-out to be exercised in relation to sewerage flooding.

103. The Scottish Government concluded that this approach created a risk that sewerage flooding would be treated separately to other forms of flooding, or worse, that sewerage flooding would receive less attention than other forms of flooding. In view of the technical challenges that mapping sewerage flooding represents, the Bill does however allow SEPA to exercise an opt-out when mapping sewerage flooding. The intention is for this opt-out to be reserved for situations where technical constraints mean that mapping of these flooding scenarios would be impractical or impossible. Where an opt-out is exercised, effort would instead be focused on obtaining the information necessary to undertake a robust and reliable assessment of sewerage flooding in a subsequent planning cycle.

#### *Flood risk management planning*

104. The Directive prescribes specific tasks that must be undertaken by Member States, including preliminary flood risk assessments, flood hazard and flood risk mapping, and preparation of flood risk management plans. There is therefore no scope to depart from those requirements. The principal area of flexibility is over the legal and administrative arrangements that are put in place to deliver these requirements.

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<sup>11</sup> Other than flooding caused solely by a failure of the sewerage system infrastructure – see paragraph 36.

105. The two main questions that the Scottish Government considered in drawing up its proposals for flood risk management planning were:

- whether it was better to create a new authority to take the process forward, or to give that responsibility to an existing authority; and
- if the responsibility was given to an existing authority, who should fulfil the role of the lead authority.

106. The Scottish Government has carefully considered all potential approaches to implementing the Directive, and has concluded that setting up a new flood risk management authority would not be the most efficient means of implementing the Directive's requirements and taking forward the Scottish Government's other proposals for modernising flood risk management. As should be clear from the descriptions above, flood risk management is a cross cutting exercise, and no single authority, however carefully constructed, would be able to take the process forward by itself. Moreover, to set one up would entail considerable institutional upheaval as a whole range of relevant powers and functions would have to be transferred from existing authorities such as local authorities, SEPA and Scottish Water to the new authority. The Scottish Government believes that the identification of responsible authorities with general duties for managing flood risk, coupled with refinement of existing areas of responsibility, provides for a collaborative and partnership driven approach that is underpinned by clear lines of responsibility.

107. It is clear however that there needs to be a lead authority for implementing the Directive and coordinating the flood risk management process. The Scottish Government considered identifying all local authorities as lead authorities for the Directive. Although local authorities have existing functions for flood risk management and a wealth of planning expertise and experience, the Scottish Government concluded that this approach would not provide sufficient strategic direction and national consistency in flood risk management. The need for strategic coordination in flood risk management was a key output from the Scottish Government National Flooding Framework. It was also a recommendation in the RAE Committee's report of its inquiry into flood risk management. Furthermore, the Pitt report for England and Wales, which was commissioned after the devastating floods of summer 2007, emphasised the need for strategic leadership and coordination in flood risk management.

108. Under this option, each flood risk management plan would be developed without a national framework or set of national priorities, and although a national group could be established to ensure a degree of coordination between plans, it would not result in the level of national prioritisation and direction that would be possible under the Bill proposals.

109. Consideration was also given to identifying the Scottish Ministers as the competent authority for the Directive. This would mean that all legal responsibilities for mapping and planning measures under the Directive would rest with the Scottish Ministers. In fulfilling these responsibilities, Scottish Ministers could enter into agreements with other authorities and/or organisations to exercise functions on behalf of the Scottish Ministers, both in terms of the provision of data and the preparation of the maps and plans. Alternatively, the Scottish Ministers could contract out work to fulfil Directive requirements to consultancies. Final responsibility for delivery would nevertheless still remain with the Scottish Ministers. The Scottish Ministers would also be responsible for all consultation exercises and for ensuring coordination with the Water Framework Directive objectives and other planning processes.

110. Fulfilling the Directive requirements would be challenging for the Scottish Ministers. The Government would need to rely on SEPA, local authorities and Scottish Water, as well as other sub-contractors to undertake much of the work. The Scottish Government would therefore be acting in a strategic coordinating role, in much the same way as SEPA would under the Bill proposals. This would be an entirely new role for the Scottish Government in relation to flood risk management, and the Scottish Government would need to recruit staff with specialist expertise in flood risk assessment and management, or sub-contract this work out.

111. Although there are recent precedents for identifying Scottish Ministers as the competent authority for an EC Directive – the EC Environmental Noise Directive and the EC Directive on ambient air quality assessment and management – the nature and complexity of flood risk management, which relies on multiple organisations coordinating their work and continued stakeholder engagement, means that the Scottish Ministers would have to form a more hands on approach than the one created under these Directives.

112. As most of the experience and expertise required to fulfil the Directive and implement measures would remain local authorities, SEPA and Scottish Water, the Scottish Government would need to rely heavily on this experience in all aspects of fulfilling the Directive requirements, including relying on SEPA and local authorities to validate flood risk assessments, and maps and relying on local authorities to identify appropriate measures to manage flood risk. The Scottish Government also believes that this type of hands-on role for Scottish Ministers could conflict with other elements of the Bill, which aim to ensure that new responsibilities lie with organisations that have similar existing responsibilities or expertise.

113. The Scottish Government therefore decided that responsibility for the Directive should lie with an existing public sector organisation and that this organisation should have a national remit for implementing the Directive.

114. Of all the existing public sector organisations that could take on the role of lead authority for the Directive, the Scottish Government believes that SEPA is best suited to the task. SEPA already has much of the necessary environmental, technical and planning experience, particularly through its work as competent authority for the Water Framework Directive. SEPA has both a national perspective and the operational capacity across the country to work closely with individual local authorities and other responsible authorities to put the Directive's requirements into practice.

115. SEPA is also accountable through its regional and national boards and to the Scottish Ministers, and although SEPA is an environmental regulator, it has a statutory duty to consider the social and economic implications of its decisions when discharging its regulatory functions. It is imperative that flood risk management does not conflict with environmental regulation, and the Scottish Government believes that SEPA's existing statutory responsibilities will ensure that the correct balance is struck between flood risk management and environmental protection.

116. The Bill also provides for local authorities to have a proactive role in assessing and understanding flood risks, and organising and implementing measures to manage these risks. The Scottish Government believes that the approach offered by the Bill will ensure that the national and catchment focused approach to flood risk management planning is underpinned by local co-

ordination and delivery of measures by those bodies with direct experience of carrying out flood risk management in Scotland.

117. Consultees on the Bill proposals were asked if there should be a single lead authority with a national remit for implementing the Directive, and if it should be SEPA. 78% supported identifying a single national body, with 91% of those agreeing that the role should be fulfilled by SEPA. An analysis of local authority responses indicated that 79% of local authorities supported the proposal for SEPA to act as lead authority for the Directive. The overwhelming majority of respondents indicated that SEPA's role should be supported by a strong role for local authorities in the planning process and in implementation of flood risk management works.

118. Taking on these new roles will be challenging for SEPA, local authorities and the other responsible authorities, and they will need to develop and expand their expertise in catchment planning, flood risk assessment and participatory working. The Scottish Government is committed to supporting these organisations so that they can discharge their new duties effectively, and will work to ensure that they are adequately resourced to do so.

#### *Implementation of flood risk management plans*

119. Unlike the Water Framework Directive, the Floods Directive does not set out specific targets for Member States to achieve. The Directive focuses on the preparation of plans, while leaving the setting of flood management objectives, and methods to achieve these objectives, to individual Member States. The Scottish Government recognises how important it is for flood risk management plans to be translated into on-the-ground actions to manage flood risks.

120. The Scottish Government carefully considered alternative options for securing implementation of measures set out in flood risk management plans. This included relying solely on local accountability to ensure that local authorities, SEPA and other responsible authorities implemented the measures set out in flood risk management plans. The Scottish Government believes that this approach would not adequately address the risk that flood management measures would be overlooked by other local priorities, particularly in localities that have not experienced a recent flooding event.

121. The Scottish Government also considered placing a duty on local authorities, SEPA, Scottish Water and other responsible authorities to deliver, so far as is practicable, the measures set out in the relevant flood risk management plan. However, this would not be in line with the concordat with local government. The concordat states that while the Scottish Government must set the direction of policy and the over-arching outcomes, it will stand back from micro-managing service delivery, thus reducing bureaucracy and freeing local authorities and their partners to meet the varying local needs and circumstances across Scotland. The Government does not specify that a local authority must implement the specific detail of its transport, housing or education policies. Instead, the duty is on local authorities to provide such services. If there was a duty on local authorities to deliver the measures in a flood risk management plan, this could be seen as superseding all those other areas where local authorities have to provide a service, but where no similar duty to implement exists. The Bill will therefore set the framework to facilitate co-operation between all the bodies involved in flood risk management, but will leave local authorities and others free to deliver the policy in line with local needs.

122. The Scottish Government did recognise that, if there was no onus on local authorities to deliver flood risk management measures, there was a risk that they would be overtaken by other local priorities. The Bill will, therefore place a general duty on the Scottish Ministers, SEPA, local authorities, Scottish Water and other responsible authorities to exercise their flood risk functions with a view to reducing overall flood risk. Although ultimate responsibility for avoiding or managing flood risk would still lie with land and property owners, the clear expectation is for local authorities and others to contribute to managing and, where achievable, lowering flood risk. Furthermore, by linking this duty to the Directive, the Bill creates a framework for coordinating these actions through flood risk management plans. This is in line with other general duties on local authorities as regards provision of education and other services.

#### **PART 4: FLOOD RISK MANAGEMENT: LOCAL AUTHORITY FUNCTIONS**

##### **Policy objectives**

123. Current local authority responsibilities for flood risk management are set out in the 1961 Act, as amended by the Flood Prevention and Land Drainage (Scotland) Act (1997). The 1961 Act gives local authorities discretionary powers to mitigate flooding of non-agricultural land in their areas through the carrying out of certain operations and sets out a statutory procedure for the promotion of these operations. As well as this statutory procedure, there is a separate legislative procedure that local authorities must complete in order for a flood prevention scheme to be granted planning permission.

124. It is the Scottish Government's view that the 1961 Act is outdated and does not align with the provisions set out elsewhere in the Bill. Ultimately, this risks undermining the sustainable approach to flood risk management that the Bill seeks to establish. Problems with the 1961 Act include a focus on "preventative measures" and restrictions on the types of flood management measures that can be adopted. Furthermore, the statutory process for confirming and implementing flood prevention schemes set out in the 1961 Act has been seen to be protracted, particularly when combined with the planning process. Local authorities felt it delayed the undertaking of important flood risk management works. The need to streamline the system of approval was upheld by the Rural Affairs and Environment Committee's Report of its Inquiry into Flooding and Flood Management.

125. To ensure local authorities can deliver sustainable approaches to flood management, the Bill repeals the 1961 Act and replaces it with new provisions that aim to:

- equip local authorities with a range of powers that will allow them to take forward a full suite of flood risk management measures;
- create a streamlined statutory process that allows efficient use of local resources and delivers deemed planning permission; and
- to create clear links between the exercise of local authority functions and flood risk management plans.

*General power to undertake flood risk management measures*

126. Delivery of sustainable flood management will require consideration and implementation of a wide range of flood management measures. The Bill therefore gives local authorities a general power to manage flood risk in their area. This general power places no restriction on what types of measures a local authority can take to manage flood risk, or where they can take place. This will ensure that local authorities can carry out a wide range of flood management measures, including engineering works and measures that promote natural flood management in any part of a catchment.

127. To ensure that these measures are undertaken with full regard to the measures identified in the flood risk management plans described in Part 3 of the Bill, the exercise of local authority powers to undertake measures to manage flood risk is limited to actions that will contribute to the delivery of objectives set out in the relevant flood risk management plan. This limitation would not apply in the case of emergency works or to measures that will not hinder delivery of objectives set out in the relevant flood risk management plan.

128. To ensure that flood risk management measures can be taken forward in the most efficient manner possible, the Bill does not place restrictions on how local authorities should take forward particular measures. For example, a local authority could enter into agreements with landowners, acquire land with appropriate compensation to the land owner, or make a financial contribution to any person undertaking works that would otherwise be undertaken by the local authority. Local authorities may also compulsorily acquire land in connection with a flood protection scheme. The overall intent is to ensure that local authorities have a flexible range of powers which they can exercise to deliver flood risk management measures in an efficient and timely manner. The provisions dealing with compensation to landowners are covered in Part 6.

*Duty to assess watercourses*

129. The Bill provides for the continuance of the current duty on local authorities to assess the watercourses in their area from time to time to ascertain whether the condition of any watercourse is likely to cause flooding of land – as with the rest of the Bill, there is now no distinction between agricultural and non-agricultural land. The information generated by these assessments will be used to identify where maintenance is required to reduce that flood risk. This will in turn inform the local flood risk management plan. The intention is for local flood risk management plans to include a maintenance schedule for watercourses considered to be at risk of flooding.

130. The Bill does not replicate the duty in the 1961 Act that required local authorities to maintain watercourses. This is because, as mentioned previously, the Bill places a new general duty on the Scottish Ministers, SEPA, local authorities and other responsible authorities to exercise their flood risk related functions with a view to reducing overall flood risk, and to do so to secure compliance with the Directive. To then place a specific duty on local authorities to maintain watercourses, could mean, for example, that by removing an obstruction to flow at one location, the local authority could cause further flooding downstream, which could conflict with its general duty to reduce overall flood risk. The intention is that such considerations would be taken into account in the development of flood risk management plans and that appropriate measures, for instance a schedule of maintenance works, are identified and implemented.

131. Furthermore, in some locations, the set of measures to reduce overall flood risk may include the abandonment of existing works which are no longer needed or the restoration of a watercourse to its natural condition to allow flooding in areas where it will cause least damage, thereby protecting other areas at greater risk. In such circumstances, it may be inappropriate to continue to maintain the existing arrangements. The expectation is that flood risk management plans will identify where the cessation of maintenance could deliver wider flood management benefits. The Bill therefore places a restriction on the exercise of local authority powers for undertaking maintenance works to areas where the work will not hinder delivery of the objectives and measures set out in the relevant flood risk management plan. This will help deliver a coordinated response to flood risk management. The Scottish Government expects local authorities to work closely with SEPA and other responsible authorities to coordinate their actions in this area, including developing and sharing maintenance schedules or plans.

132. The Bill does not replicate the provisions in the 1961 Act that require local authorities to produce biennial reports on the measures taken to prevent or mitigate flooding in their area. Instead, it creates a system of reporting that is tied closely to the flood risk management planning process. Under sections 32 and 33, local authorities are required to publish a report on a local flood risk management plan every six years, with an interim report after three years. These reports will include a review of the flood risk management plans and an update on the progress that has been made to implement measures. The intention is for these reports to also fulfil a similar function to that currently provided by the biennial reports. A research review found that the biennial reports were seen as useful, but there were concerns about the widely differing quality of the reports between local authorities as the 1961 Act did not specify the form or content of such reports. The Bill includes a provision for regulations to set out the form and content of the new reports. This will ensure that these reports are broadly similar across the country. Under the new system, the information will be updated every three years instead of two.

#### *Statutory process for taking forward flood protection schemes*

133. The Scottish Government accepted that the system for approving flood protection schemes (termed flood prevention schemes under the 1961 Act) needed to be simplified. As the intention is to reduce, where possible, the time taken to implement flood protection measures, the Bill does not require local authorities to complete this process in order to proceed with flood risk management measures. Where the local authority can proceed by agreement to carry out new works on land, they can do so without the need to follow a statutory process under the Bill, but they would still need to fulfil other relevant statutory consents. This provides for greater flexibility than was available under the 1961 Act, which always required the local authority to complete a statutory process for approving a flood protection scheme.

134. Where agreement to carry out works on land can not be reached, the Bill sets out a new local authority led approval process for taking forward a “flood protection scheme”. Completion of the process will enable local authorities to use coercive powers, and will also result in deemed planning permission without the need for an entirely separate planning process. It will be for local authorities to decide whether the benefits of going through the new approval process, in terms of the additional powers it provides, outweigh the disadvantages in a situation where other consents might not be required.

135. Although the new process is local authority led, the Scottish Government believes that there is a continuing role for Scottish Ministers to call-in any proposals for which there are outstanding objections from affected parties, including those from other responsible authorities. This role for Scottish Ministers will help ensure that the rights of those entitled to object under planning law and those entitled to object under the 1961 Act are maintained.

136. In order to secure approval for a flood protection scheme, a local authority must complete the steps set out in schedule 2 of the Bill. These are similar to those set out under the 1961 Act. Local authorities must give notice of a proposed flood protection scheme in newspapers and to those whose land will be affected by the proposed scheme or by the work needed to implement the scheme. Local authorities must also give notice to a number of identified organisations, including SEPA, SNH, and any local authority in whose area any of the proposed operations are to be carried out. Most flood protection schemes will take forward measures that have been identified in a flood risk management plan and will therefore have already been through a thorough consultation process. However, the exact detail of the scheme, such as the position of a wall, site of a wetland or the finish that will be used, is unlikely to have been contained in the plan. It is therefore important that other responsible authorities have the opportunity to comment on the specific detail of the proposed scheme. Local authorities must also make a copy of the scheme documents available for public inspection.

137. In proposing a flood protection scheme, the local authority must set out how the scheme will contribute to the implementation of the relevant local flood risk management plan. There is scope for local authorities to carry out work outwith flood risk management plans as long as this work will not impact on the delivery of the plan. In these circumstances, the local authority must state the reasons why the carrying out of this work will not affect the implementation of the plan.

138. Any objections to the proposed scheme must be made within 28 days, a reduction from 3 months under the 1961 Act. If no objections are received, then the local authority must either confirm or reject the proposed scheme. This means that for non-contentious schemes, local authorities will have completed the process with deemed planning consent, at least 2 months earlier than under the current system.

139. Where objections are made, the 1961 Act was silent on the timescale between the end of the objection period and the referral of the scheme to a public local inquiry. The new procedures streamline the process by carrying deemed planning consent, and by considerably shortening the time taken to get approval for non-contentious measures, where no objections have been received. However, there is an important balance to be struck between allowing individuals and organisations, which may be directly affected, to object to proposals without allowing the approval process to be unreasonably extended. It is equally important that the outcome is the right decision and that there is adequate time for the merits of proposals, and any counter proposals, to be properly considered in all the circumstances. The intention is therefore to create a framework which includes periods for a local authority to negotiate with objectors before coming to a preliminary decision. Once a preliminary decision has been made the Bill then provides different routes for dealing with unresolved objections.

140. Where there are unresolved objections from people whose property would be directly affected by the scheme or from other responsible authorities, National Park authorities, SEPA or

Scottish Natural Heritage, the Scottish Ministers may exercise their option to call in the proposed scheme for Ministerial consideration, and to cause a public local inquiry held. They will have 28 days to make that decision; the only situation in which the Scottish Ministers must call in the scheme is if the outstanding objection is from another local authority or a National Park Authority,. If they decide not to call it in, then local authorities will have a duty to give the objectors a hearing. Where Scottish Ministers are not involved, local authorities may also give a hearing to the objectors. If, as a result of a hearing or public local inquiry, any modifications to the original proposal are under consideration by either the local authority or the Scottish Ministers, then the modifications must be notified to the relevant objectors and any other person affected by any modification, who would have a further period to object to the proposed modification.

141. Only after this process has been completed can either local authorities or Scottish Ministers, as appropriate, make a decision to confirm or reject a scheme. On confirmation of a scheme, Scottish Ministers must then direct that planning permission shall also be deemed to be granted.

142. The new procedures streamline the process by carrying deemed planning consent, and by considerably shortening the time taken to get approval for non-contentious measures, where no objections have been received. A shorter implementation time is also provided by the fact that local authorities do not have to use the statutory process if they are confident that they can implement the required flood protection scheme by agreement. However, despite the fact that the statutory process in the 1961 Act is seen as a delaying factor in the implementation of schemes, it cannot be dispensed with completely. Flood protection schemes can have impacts on individuals, communities and on the environment and require careful and thorough planning. Most work will have to take place on private land and the procedures set out in the Bill safeguard property rights by giving property owners an opportunity to object when proposals might adversely affect their property and a right to a public hearing. Although the new process has been shortened where possible, it is important that any flood protection scheme properly balances the interests of an individual and the wider community.

143. The Bill enables the Scottish Ministers to specify by regulations further information to be included in a flood protection scheme including any assessment of environmental impacts. The Bill also allows the Scottish Ministers to amend schedule 2 to modify the procedures. The Bill provides for the Scottish Government issuing guidance to local authorities in relation to their flood risk related functions. These provisions will ensure that the procedures followed by local authorities can be reviewed and amended over time.

#### *Amendments to the Land Drainage (Scotland) Act 1958*

144. The Land Drainage (Scotland) Act 1958 (“the 1958 Act”) allows owners of agricultural land to apply to the Scottish Ministers for an “improvement order” authorising drainage works to improve drainage or prevent or mitigate flooding or erosion of agricultural land. The 1958 Act also allows the Scottish Ministers to give grants to fund improvements and, where a grant was paid, imposes an ongoing obligation on the owners to maintain the works. There have been no new improvement orders or variations to such orders since the 1980s, when the decision was taken to stop providing grants.

145. The 1961 Act only dealt with protection of non-agricultural land. The 1958 Act has therefore been seen as providing an equivalent means of protecting and funding the protection of agricultural land. There are many similarities between the procedures for making orders under the 1961 and 1958 Acts as well as the possible content of orders. The Bill repeals the 1961 Act and provides local authorities with new powers to protect land from flooding. These new powers are not intended to distinguish between agricultural and non-agricultural land so they will overlap with existing powers under the 1958 Act.

146. To ensure that there are no conflicts between the new Bill provisions and the existing provisions within the 1958 Act, the Bill repeals those elements of the 1958 Act which allow improvement orders to be made for the purposes of preventing or mitigating flooding. The intention is to leave the rest of the 1958 regime for making improvement orders in place, so that it is still open to land owners to seek an order for the purposes of improving drainage or mitigating erosion.

147. The Bill allows existing 1958 Act improvement orders to remain in force. Provision has however been made to ensure that individual improvement orders (whether they were originally for drainage, flood prevention or erosion purposes) can be revoked, partially revoked or varied if it becomes apparent that they conflict with the measures to be taken by a local authority in implementing a local flood risk management plan.

### **Alternative approaches**

148. The Scottish Governments consultation on the Bill set out two possible approaches to simplify the processes for approving flood protection schemes. The first was for ministerial confirmation to continue as under the 1961 Act, but that it should also carry deemed planning permission, and the second was for a local authority based confirmation procedure that would also deliver deemed planning consent. The Rural Affairs and Environment Committee recommended that there should be different approval processes for different scales of flood management measures, and that the Scottish Ministers should continue to approve proposals for strategic flood prevention schemes.

149. In the responses to the consultation a clear majority (56%) considered it appropriate to take forward a local authority led approach to the approval of flood risk management measures, rather than retaining the existing process of Ministerial confirmation. In contrast only 14% felt that such an approach was inappropriate (the remainder gave an unclear or nil response).

150. The Scottish Government considered this area carefully in the light of the Committee's recommendations and the responses to the consultation. The main objective was to simplify radically the current approval processes in order to:

- reduce the time taken to get approval,
- reduce the number of unnecessary public inquiries
- remove the possibility of two public inquiries being held – one on planning and one on a flood protection scheme.

151. The Scottish Government have already taken one step in simplifying the process by transferring funding for flood risk management to the block grant to local authorities from April 2008. Now that the Scottish Ministers no longer award central grant to a flood protection scheme, Ministerial confirmation has lost a significant part of its purpose. In order to reduce the time taken to proceed with flood protection schemes, the Bill removes the requirement that exists in the 1961 Act for local authorities to complete an approval process for a flood protection scheme. Instead, local authorities will have the option to choose to complete the statutory process if they feel they need the additional powers it will provide. The removal of the need to complete the statutory process, combined with the removal of the central grant to local authorities, means there was even less reason to require Ministerial approval of all schemes. For that reason, and taking into account the responses to the consultation, the Bill will establish a new local authority led approval process for flood protection schemes.

152. The Scottish Government was mindful of the Committee's concerns about the Scottish Ministers being completely removed from the approval process, and so the Bill will enable the Scottish Ministers to get involved where it is appropriate. However, the current system of Ministerial approval and automatic referral to a public local inquiry for unresolved objections is problematic. Many unresolved objections are made on tenuous grounds unrelated to the property interest involved, or are based on a factual misunderstanding of the scheme proposal, which discussion is unable to correct. While retaining the right of objectors to be heard, the Bill will provide a mechanism which is more flexible and responsive to individual circumstances. The overall aim is to reduce the number of unnecessary inquiries, which are not only expensive but also result in major delays in securing benefits from particular schemes.

153. The process established under the Bill ensures that the scheme is subjected to public scrutiny and provides a further incentive to local authorities, and other responsible authorities, to ensure that flood protection schemes has been considered carefully, and the right options identified. The Scottish Government should only have to get involved in those schemes where it is likely to be difficult to reach local agreement.

## **PART 5: SEPA: OTHER FLOOD RISK MANAGEMENT FUNCTIONS**

### **Policy objectives**

154. The Bill establishes a collaborative framework for taking forward flood risk management. To make best use of this collaborative approach, this framework must include clear responsibilities on different organisations for specific aspects of flood risk management.

155. In summary, Part 5 of the Bill addresses the following policy objectives:

- updating SEPA's other responsibilities for flood risk assessment, including the provision of advice to local authorities; and
- clarifying and extending SEPA's role in flood warning.

### *Provision of advice to planning authorities on flood risk*

156. SEPA's current role in providing advice to local (planning) authorities, as set out in the Environment Act 1995, is maintained under the provision set out in the Bill. The duty also covers

provision of advice to National Park authorities which are treated as planning authorities. However, the definition of flood risk from Part 1 of the Bill now applies in relation to this function. This means that SEPA will now be required to advise on both the likelihood of flooding and, where information is available, on the potential impacts for human health, the environment, cultural heritage and the economy in relation to planning policies and proposals. This is an extension to SEPA's current role, which is to advise solely on the likelihood of flooding. As the lead authority for flood risk assessment, SEPA will be expected to develop new skills and expertise in the field of risk assessment. The ultimate aim is for SEPA to provide information that is both relevant and helpful to local authorities in making planning decisions.

#### *Other assessment of flood risk*

157. The Bill provides SEPA with powers to undertake other forms of flood risk assessment beyond those set out in Part 3 of the Bill. This provision is similar to the current provision set out in the Environment Act 1995. This provision ensures that SEPA's flood risk assessment work is not restricted to the assessments set out in Part 3, which is closely linked to the requirements of the Directive. Examples of additional flood risk assessments which could be undertaken in the future include: mapping exercises for areas not identified as being potentially vulnerable to flood risks and production of basic inundation maps for reservoirs. To ensure that any supplemental flood risk assessment work does not cut across the assessments produced under Part 3 of the Bill, SEPA is required to take into account all assessments, maps and plans prepared under Part 3 of the Bill.

#### *Flood warning*

158. The Bill requires SEPA to make flood warning information available for all floods it believes will occur in the near future. Discretion is left to SEPA to determine what information should be used and how best to make the information publicly available. This could include placing warnings on its website or directly issuing warnings to individuals, businesses or organisations, through, for example, emails or text messages. This will ensure that SEPA has flexibility to tailor its flood warning service to local requirements and to the information which is available. SEPA is also given discretion over when to release a flood warning for floods it believes will occur in the near future. This ensures that SEPA can balance the need for early warning with the need to provide accurate flood warning information. This discretion does not apply where SEPA become aware of a flood that is occurring. In these instances, SEPA must provide a flood warning at the earliest possible opportunity. Examples of when this could occur include flash floods and some extreme flooding scenarios where the failure of infrastructure is involved.

159. Flood warning is a powerful flood risk management tool that can save lives and help avoid damage to homes and businesses. The Bill provides SEPA with a power to undertake a full national appraisal of where improvements to flood warning could help reduce flood risk. This could include improvements to flood monitoring equipment, improvements to datasets (e.g. weather radar) or improvements to how flood warnings are issued to the public.

160. The Bill also sets out arrangements for SEPA to provide and operate flood warning systems. For the purposes of the Bill, a flood warning system is any system providing a warning of flooding, including systems relying on radar or other meteorological information and systems using gauged flow or water level information. These provisions replace the current provisions set out in the

Agriculture Act (1970). These powers would not be exercised in isolation, and SEPA would be required to consult local authorities and the police on its assessments and proposals.

### **Alternative approaches**

161. The only practicable alternative considered was whether the Scottish Government's policy objectives could be met through existing legislation. The Scottish Government recognises the vital role that flood warning plays in managing flood risk and protecting communities and businesses from the damaging effects of flooding. By amending SEPA's functions for flood warning and assessments of flood risk, the Bill will ensure that SEPA is equipped with a modern legislative framework in which to exercise all of its flood risk functions.

### **PART 6: POWERS OF ENTRY AND COMPENSATION**

162. The Bill places new duties on local authorities and SEPA to assess and manage flood risks. To support the undertaking of this work, the Bill provides local authorities and SEPA with powers of entry.

163. Local authorities need rights of entry to allow them to carry out flood protection works either as part of a flood protection scheme or otherwise, to carry out maintenance of such works or to carry out investigations to assess whether or in what manner they should carry out any of their functions under Part 4 of the Bill. SEPA could require access to land to verify the accuracy of information used for flood risk assessments and mapping exercises. Checking the accuracy of information obtained from modelling and other desk-based work is nearly always required to improve the quality of these kinds of assessments. If this information could not be checked it could affect the accuracy of the information obtained and hence the quality of the decisions about managing flood risks. SEPA may also require access to fulfil its flood warning functions; for instance, access may be required to carry out work to install, alter and maintain apparatus. If this work could not be carried out then SEPA might not be able to comply with its duty to provide flood warnings, potentially resulting in an increase in the adverse consequences of flooding.

164. Except in urgent cases, the person intending to exercise a power to enter land must give at least 24 hours notice of intended entry to the occupant of the land. Where the person exercising the power intends to enter a house (including its' garden) or to take heavy equipment onto land, then seven days' notice is required. Where entry is refused, the land is unoccupied or entry is necessary to take emergency action, a warrant can be obtained from a sheriff or a justice of the peace. The Bill provides for the payment of compensation for any damage caused by a local authority to the value of a person's land or their enjoyment of their property as a consequence of the construction or maintenance of a flood protection scheme or other flood protection work or any investigatory work or by SEPA in installing any works or apparatus for flood warning. Claims must be made within the periods prescribed in the Bill and any disputes are to be settled by the Lands Tribunal for Scotland.

## **PART 7: RESERVOIRS**

### **Policy objectives**

165. The safe operation and management of reservoirs is extremely important to protecting individuals, communities and businesses from the risks of extreme flood events, which include partial or full dam failure.

166. The Reservoirs Act 1975 (the 1975 Act) sets out safety requirements to prevent escapes of water from reservoirs. The 1975 Act imposes duties on persons who own, operate or use reservoirs (referred to in the Act as “undertakers”). These duties regulate maintenance and inspection as well as structural changes to large raised reservoirs and, in most cases, require the involvement of a “qualified civil engineer”. “Relevant authorities” then have duties to maintain registers of information about large raised reservoirs, to secure that undertakers comply with their duties under the 1975 Act and to report to the Scottish Ministers. Under the current system, local authorities act as the relevant authorities and fulfil the enforcement duties of the 1975 Act.

167. Although the current system has operated effectively for a number of years, the Scottish Government believes the system of enforcement can be improved through more uniform and efficient application of legislative powers throughout Scotland. The Bill therefore sets out arrangements to transfer enforcement responsibilities from local authorities to SEPA. This transfer of responsibility will ensure that one body assumes full responsibility for the reservoir enforcement regime. This will promote greater resilience to the risk of dam breaches as one body would take responsibility for, and accumulate knowledge on, all reservoirs in Scotland. The concentration of enforcement duties within Scotland in one body will provide not only a more focussed approach on matters affecting the safety of reservoirs, but also an opportunity for the Scottish Ministers to receive advice and a national overview from a single public body.

168. In order to explore and assess practice and methods of enforcement, an initial scoping exercise was carried out during 2005 to ascertain the views of the current enforcement authorities and other stakeholders engaged in water supply. The vast majority of responses (84%) were in favour of a transfer of enforcement responsibilities to a single national body. A minority of responders suggested a possible negative outcome of this proposal could be a potential loss of local knowledge. However, it was also acknowledged in the same replies that this knowledge could be built up and maintained within any new body. A similar level of support for a single enforcement authority was demonstrated (90%) during the consultation exercise for the Bill.

169. Incident reporting provides the basis for sharing important information on problems identified with particular reservoirs. By providing information on potential problems and issues, reliable incident reports can benefit all those involved in the safe operation of reservoirs, ultimately enhancing the protection of individuals, communities and businesses from the risks of extreme flood events. Current levels of compliance with the voluntary post incident reporting regime are variable.

170. To improve reservoir safety, the Bill includes provision for regulations on incident reporting. These regulations would allow the Scottish Ministers to set out detailed provisions in relation to the preparation and enforcement of incident reports, including:

- defining what constitutes an incident;
- requiring undertakers to report, to the enforcement authority, incidents occurring at a reservoir; and
- creating offences and penalty charges.

### **Alternative approaches**

171. The alternative to the Bill proposals is to retain the current enforcement regime or to establish a new authority for reservoir safety in Scotland. Currently, the enforcement of the Act in Scotland is the responsibility of the 32 Scottish local authorities. The biennial reports they submit indicate varying staffing and financial resource allocation to reservoir responsibilities amongst these authorities. This can be partly attributed to geography and topography; for example Highland Council has some 125 reservoirs which fall within the ambit of the Act, whilst Glasgow City Council has only 2. However, the enforcement role is considered an onerous burden which is disproportionate to the reservoirs located within many local authority areas. For example, two local authorities have responsibility for the enforcement of the Act for 21 reservoirs, some 1-2% of the total number of reservoirs in Scotland. However, both authorities experienced significant and lengthy problems in trying to establish ownership of one reservoir within each of their areas. The Scottish Government have therefore concluded that a single enforcement authority will provide a more efficient and nationally consistent approach to the enforcement of 1975 Act that will ultimately enhance the safe operation of Scotland's reservoirs.

172. The creation of a new body for reservoir safety would have similar drawbacks to those identified earlier for the creation of a new flooding authority, in that it would be very resource intensive. Creating yet another public body to take on a role that could be carried out by an existing organisation would also be contrary to the Scottish Government's stated aim of having fewer, better structured arms length bodies at a national level, which receive clear and integrated strategic direction from Government, while at the same time given room to deliver.

### **PART 8: GENERAL**

173. Part 8 deals with ancillary provision, details relating to orders and regulations, minor and consequential modifications, Crown application and other technical matters. Minor and consequential modifications are set out in schedule 3, and include amendments to the Land Drainage (Scotland) Act 1958 (the 1958 Act).

### **EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, AND SUSTAINABLE DEVELOPMENT ETC.**

#### **Impact on equal opportunities**

174. Copies of the Scottish Government's consultation paper on The Future of Flood Risk Management in Scotland were sent to all the main national equality groups and no equalities issues were raised during these consultations.

175. The Bill should not be considered in isolation from existing statutory obligations in relation to equal opportunities. Public authorities have relevant statutory obligations under the Race

Relations Act 1976, the Sex Discrimination Act 1975 and the Disability Discrimination Act 1995. All three Acts make discrimination in service provision unlawful. The Race Relations Act 1976 also places a general duty on public authorities to work towards the elimination of unlawful discrimination and promote equality of opportunity and good relations between people of different racial groups. The Commission for Racial Equality produces codes of practice to provide practical guidance to public authorities on how to fulfil that duty. SEPA and the other responsible authorities will be obliged to carry out their flood risk management functions, including the provision of information to interested parties, in accordance with this legislation and in accordance with the Access to Environmental Information Regulations as well as the Freedom of Information (Scotland) Act 2002.

### **Impact on human rights**

176. The Scottish Government considers that the provisions within the Bill are compatible with the European Convention on Human Rights. While provisions on matters such as powers of entry and compulsory purchase affect Convention rights under Article 8 (private and family life) and Protocol 1 Article 1 (peaceful enjoyment of possessions), the Bill strikes a proper balance between the rights of affected individuals and the public interest in management of flooding. Part 4 of the Bill includes provisions which allow for the determination of the civil rights and obligations of individuals but the provisions on hearings (including public local inquiries in appropriate cases) and appeals are considered to be compatible with Article 6 (right to a fair trial). The Bill includes important provisions to protect individuals that may be affected by the exercise of any powers and duties under the Bill, including provisions on hearings, processes for obtaining warrants in connection with powers of entry and financial compensation in connection with the undertaking of flood protection measures.

### **Impact on island and rural communities**

177. The purpose of the Bill is to improve flood risk management for the whole of Scotland, including rural, island or urban settings. As such, communities and businesses in island or rural communities will benefit from this in the same way as those in other parts of Scotland.

### **Impact on local government and other Scottish public authorities**

178. Currently, Scotland's 32 local authorities are responsible for flood risk management measures within their areas. A key aim of this Bill is to empower local authorities to develop and implement local solutions for local needs through efficient use of local resources and timely introduction of flood management measures.

179. The Directive requires the appointment of a competent authority for the implementation of the Directive. SEPA will undertake this role nationally and, in doing so, will ensure that the national and catchment focused approach to flood risk management planning are underpinned by local co-ordination and delivery of measures. The Scottish Government is committed to resourcing SEPA adequately so that it can carry out these new duties effectively. There are likely to be cost implications for local authorities in terms of collating or providing information to SEPA and in preparing local flood risk management plans. The financial implications of the Bill are discussed in more detail in the Financial Memorandum

180. Part 7 of the Bill transfers responsibility for enforcement of the Reservoirs Act 1975 from each of the 32 local authorities to a single national enforcement authority, namely SEPA. As before, resources will be provided to SEPA for this new role. Local authorities will benefit from this transfer given that their funding for this is currently managed within a central budget rather than them receiving additional monies.

181. Other public sector authorities, including Scottish Natural Heritage and the Forestry Commission Scotland, will need to devote limited resources to becoming involved in the flood risk management planning process. Some of them, notably Scottish Water, will incur compliance costs and these are discussed in more detail in the Financial Memorandum. However, all public sector authorities will benefit from being able to access better information on flood risk.

### **Impact on sustainable development**

182. The Scottish Government is committed to building a sustainable future and has published its Economic Strategy aimed at creating a more successful country with opportunities for all of Scotland to flourish. Increasing sustainable economic growth, which is defined as building a dynamic and growing economy that will provide prosperity and opportunities for all, while ensuring that future generations can also enjoy a better quality of life, is the central tenet of this strategy.

183. To delivery this Economic Strategy, the Scottish Government has identified five Strategic Objectives which map a Scotland that is *wealthier and fairer, smarter, healthier, safer and stronger*, and *greener*. The alignment of the Scottish Government's work with these Strategic Objectives will help us to deliver the sustainable development that will increase the prosperity of Scotland.

184. This Bill will have an important role to play in driving forward the *Greener Scotland* objective which focuses on living as part of nature within environmental limits, adapting our society to a greener approach and protecting and, where possible, enhancing the planet's environment, resources and biodiversity. This will be achieved through the provisions that ensure objectives and measures to manage flood risk are coordinated with the environmental and conservation objectives.

185. The *Healthier Scotland* objective, to ensure that public services are high quality, continually improving, efficient and responsive to local people's needs, will be met through the overall aim of the Bill which is to provide a framework in which all persons and organisations involved in flood risk management can coordinate their efforts to reduce the adverse consequences of flooding to health, as well as to the environment, cultural heritage and economic activity. Furthermore, the Bill sets out provisions for ensuring stakeholder engagement in the flood risk management planning process, for instance through advisory groups.

186. The *Healthier Scotland* objective to simplify and refocus Scotland's public sector, to better serve people and businesses, by making partnerships work across organisational boundaries fits in with Parts 1 and 2 of the Bill which require SEPA, local authorities, Scottish Water and other responsible authorities to cooperate in the exercise of their flood risk related functions. Furthermore, updates to SEPA's responsibilities for flood warning and flood risk assessment and the appointment of a single reservoir safety enforcement authority for Scotland, will further promote the protection of communities from the risk of flooding.

*This document relates to the Flood Risk Management (Scotland) Bill (SP Bill 15) as introduced in the Scottish Parliament on 29 September 2008*

187. The Bill sets out provisions to deliver a nationally consistent and catchment focused approach to flood risk management, which is underpinned by local co-ordination and delivery of measures by the bodies experienced in implementing flood risk management measures in Scotland. This links in with the *Safer, Stronger Scotland* objective which seeks to ensure that people live in well designed, sustainable places that are either urban or rural. Flood risk management measures can also contribute to the regeneration of areas, leading to thriving communities and sustainable economic growth.

*This document relates to the Flood Risk Management (Scotland) Bill (SP Bill 15) as introduced  
in the Scottish Parliament on 29 September 2008*

# **FLOOD RISK MANAGEMENT (SCOTLAND) BILL**

## **POLICY MEMORANDUM**

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