

FLOOD RISK MANAGEMENT (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Flood Risk Management (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and the Policy Memorandum for the Bill.
2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill provisions

3. The Bill contains a large number of provisions aimed at providing 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, the environment, cultural heritage and economic activity.
4. The Bill has 8 parts:
 - Part 1 creates general duties which the 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 provides for the preparation and review of the flood risk assessments, flood hazard and flood risk maps and flood risk management plans which are required by the EC Floods Directive¹ ("the Directive"). It also provides for local flood risk management plans to be prepared and reviewed. It requires advisory groups to be created to advise on the preparation of these documents and it imposes a duty on

¹ Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks

public authorities, including the Scottish Ministers, to have regard to flood risk management plans and local flood risk management plans where relevant.

- Part 4 sets out provisions to replace the Flood Prevention (Scotland) Act 1961. These provisions will equip local authorities with broad powers to allow them to take forward a full range of flood risk management measures.
- Part 5 replaces SEPA's powers to provide flood warning systems and carry out flood risk assessments under the Agriculture Act 1970 and the Environment Act 1995. The provisions provide SEPA with a new statutory framework for exercising these 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 transfer responsibility for enforcement of the Act from local authorities to SEPA. It inserts a new section into the Act to enable provision to be made, by regulations, to introduce a new system for reporting incidents which could affect safety at reservoirs. It also inserts a new section about the application of that Act to the Crown.
- 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.

5. Further information about the Bill's provisions is contained in the Explanatory Notes and Financial Memorandum published separately as SP Bill 15–EN, and in the Policy Memorandum published separately as SP Bill 15–PM.

Rationale for subordinate legislation

6. The Bill contains a number of delegated powers provisions which are explained in more detail below. In deciding whether these provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has carefully considered the importance of each matter against the need to:

- ensure sufficient flexibility to respond to changing circumstances and to make changes quickly in the light of experience without the need for primary legislation;
- allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation; and
- ensure that the bodies involved in flood risk management are regulated through flexible measures which can be applied in an appropriate manner based upon the relevant bodies' success, or otherwise. This is with respect to self policing and its application of voluntary codes of practice and other appropriate systems.

General subordinate legislation provision

7. Section 83 (orders and regulations) contains the general subordinate legislation provisions. Subsection (1) provides that any power conferred on the Scottish Ministers to make orders or regulations must be exercised by statutory instrument and allows different provisions to

be made for different purposes. Subsection (1) also permits the powers to be used to make incidental, supplemental, consequential, transitional, transitory or saving provisions. Subsection (2) provides that all of these powers are subject to negative resolution procedure except those listed in subsection (3), which are subject to affirmative procedure, and the commencement provisions (section 86(1)) where no procedure is required. Subsection (3) provides for orders made under sections 52(4) and 82(1) to be subject to affirmative procedure, in the latter case only where the power is used to amend primary legislation.

8. Section 83 does not apply to the subordinate legislation power that is to be inserted into the Reservoirs Act 1975 by section 77 of the Bill. That power includes an express provision which applies affirmative procedure.

9. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

DELEGATED POWERS

10. The Bill confers a number of powers on the Scottish Ministers which are set out below.

Section 1((3)(a)(ii), (3)(b)(ii), (3)(c)(ii) and (3)(d)(ii) – Power to specify “flood risk related functions” for the Scottish Ministers, SEPA, local authorities and other responsible authorities

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

11. Section 1 imposes a duty on the Scottish Ministers, SEPA and responsible authorities (defined in section 5) to exercise their flood risk related functions with a view to reducing overall flood risk. Subsection (3) defines “flood risk related functions” for the Scottish Ministers (subsection (3)(a)), SEPA (subsection (3)(b)), local authorities (subsection (3)(c)) and other responsible authorities (subsection (3)(d)). In each case the definition includes functions under the Bill and such other functions as the Scottish Ministers may specify by order. The powers to specify functions are contained in subsection (3)(a)(ii), (3)(b)(ii), (3)(c)(ii) and (3)(d)(ii). The effect of specifying additional flood risk management functions will be to apply the general flood risk management duty in section 1 to functions under other legislation. As regards responsible authorities, the power should be read together with section 5 of the Bill.

Reason for taking power

12. It is important that all bodies who exercise functions which can impact on flood risk can be involved in the new flood risk management process and that they should also try to reduce overall flood risk when exercising those functions. For example, local authority functions under the Coast Protection Act 1949, Scottish Water’s functions under the Sewerage (Scotland) Act 1968 and road drainage functions of the Scottish Ministers or local authorities in their capacity as

roads authorities under the Roads (Scotland) Act 1984 could be as relevant to flood risk management as the functions conferred on local authorities or Scottish Water under the Bill. Applying the new duty to act with a view to reducing flood risk to other ‘flood risk related functions’ will ensure that all efforts to reduce flood risk, including the exercise of certain powers under other legislation, are coordinated through flood risk management plans. It would be difficult to identify all flood risk related functions on the face of the Bill, as it is likely that such functions will change over time as other legislation is amended or replaced, as the roles of different organisations evolve and as understanding of flood risk improves. The powers to specify different functions for different organisations therefore allows flexibility to take these changes into account and reflects the process of designation of responsible authorities and of their functions under the Water Environment and Water Services (Scotland) Act 2003 (“the WEWS Act”).

Choice of procedure

13. Orders made under these powers will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The principles of exercising flood risk related functions with a view to reducing overall flood risk and so as to secure compliance with the Directive are provided for in the primary legislation. Any order made under this power will support these principles. When read with the Section 5 power to designate ‘responsible authorities’, this power could bring other bodies and functions into the flood risk management regime. However, designation of a responsible authority’s functions would be for the limited purpose of reducing overall flood risk and ensuring compliance with the Directive. The negative resolution procedure is considered appropriate given the limited nature of the enabling power.

Section 5(c) – Power to designate ‘responsible authorities’

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

14. Section 5(c) allows the Scottish Ministers to designate public bodies and office holders as “responsible authorities” by order. Responsible authorities will have to comply with the general duty in Part 1 of the Bill. They will also have duties under Part 3 to assist SEPA in preparing the flood risk assessments, maps and plans required by the Directive and to assist local authorities in the preparation and completion of local flood risk management plans. When designating responsible authorities under this section, the Scottish Ministers must comply with their general duty under section 1 of the Bill.

Reason for taking power

15. Part 2 of the Bill allows the Scottish Ministers to identify “responsible authorities” (in addition to local authorities and Scottish Water) 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. Local authorities and Scottish Water are identified as responsible authorities on the face of the Bill because of the important role they already play in flood risk management, and the fact that they will need to begin work immediately on providing information to SEPA for the purposes of carrying out a preliminary

flood risk assessment. Whereas the flood risk management responsibilities of local authorities and Scottish Water are clearly understood, placing all the duties of a “responsible authority” on other organisations, such as the Forestry Commission, that have a more peripheral input to flood risk management would place an unnecessary burden on them at this stage. It may be appropriate in the future to identify other responsible authorities, but this could not be done without extensive consultation with those organisations that might be affected.

Choice of procedure

16. Orders made under this power will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered to offer an appropriate balance between flexibility and the need for scrutiny for a provision of this nature. The principles involved and the key responsible authorities which will be involved from the outset are already specified in the Bill. The power would clearly only be used to designate bodies whose work had a real impact on management of flood risk.

Section 8(1)(b) – Power to create flood risk management districts

Power conferred on: Scottish Ministers

Power exercisable by: order made by statutory instrument

Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

17. Section 8(1)(b) provides the Scottish Ministers with powers to designate areas as flood risk management districts. If the power is not exercised then the flood risk management districts will be the same areas as the river basin districts which have already been designated under section 4(1) of the WEWS Act. If the Scottish Ministers choose to designate a flood risk management district, that district must comprise one or more coastal areas or river basins. This requirement derives from Article 3(2)(b) of the Directive.

Reason for taking power

18. These districts will provide the geographical basis for the flood risk assessments, flood maps and flood risk management plans to be produced under the rest of Part 3 of the Bill. Although it is likely that the districts will be the same as river basin districts, the power allows flexibility to provide for different districts if that proves necessary in light of experience gained over time which may suggest the best units over which to manage flood risk.

Choice of procedure

19. Such an order will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The core provisions relating to flood risk management districts and the default position that these will be the same as river basin districts are set out on the face of the Bill. Any provision for different districts would be likely to be based on detailed technical material.

Section 9(4)(a)(iii) – Power to prescribe information to be shown in the maps prepared as part of flood risk assessments

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

20. Section 9(4)(a)(iii) provides for the Scottish Ministers, through regulations, to require SEPA to show additional information in the maps they prepare as part of the flood risk assessment for each flood risk management district.

Reason for taking power

21. Flood risk assessments are a requirement of Article 4 of the Floods Directive and must include maps, descriptions of floods which occurred in the past and assessments of the potential adverse consequences for future floods. This power will enable the list of matters to be included in the maps produced as part of assessments to be added to where future experience of flooding or developments in risk management techniques suggest further material would be useful.

Choice of procedure

22. Such regulations will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered to offer an appropriate balance between flexibility and the need for scrutiny for a provision of this nature, given that the main matters to be included in these maps are already specified in the Bill.

Section 11 – Power to make further provision about the preparation of flood risk assessments

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

23. Section 11 enables the Scottish Ministers to make more detailed provision, by regulations, as to the preparation (section 9), or the review or updating (section 10) of flood risk assessments, including the criteria to be applied and the methods and procedures to be followed.

Reason for taking power

24. Sections 9 and 10 already contain provision relating to preparation and review of risk assessments. However, it may be necessary to supplement these provisions following further consultation with stakeholders or experience gained from preparation of the first assessments or first reviews.

Choice of procedure

25. These regulations will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered to offer an appropriate balance between flexibility and the need for scrutiny for a provision of this nature. These regulations would be likely to be technical and administrative in nature. It is thought unlikely that this power would be contentious as the principle of flood risk assessments is already provided for within the Bill.

Section 15 – Power to prescribe form and content of documents identifying potentially vulnerable areas and local plan districts

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

26. Section 15 enables the Scottish Ministers to make more detailed provision, by regulations, as to the form and content of documents about potentially vulnerable areas and local plan districts, consultation by SEPA in relation to the preparation of such documents, arrangements for making documents available to the public, the process to be followed in preparing, reviewing or updating documents and any other matters in relation to these documents.

Reason for taking power

27. Preparing flood risk assessments will culminate in an appraisal of where the most significant flood risks, or potentially vulnerable areas as set out in the Bill, are likely to occur. This information will be crucial to prioritising efforts to flood map and manage flood risks. Preparing flood risk assessments will also culminate in an appraisal of the boundaries of the area or catchment that will form a local plan district. The identification of the local plan districts are a key milestone in the development of flood risk management plans. These powers ensure that stakeholders, local authorities in particular have an opportunity to be consulted before any decisions on boundaries are made. The type of provision which would be made under this power might well be lengthy and detailed, and would require further consultation with stakeholders.

Choice of procedure

28. Such regulations will be subject to annulment in pursuance of a resolution of the Scottish Parliament. Given the detailed and technical provisions which may be required, and the possibility that they will therefore need to be readily adjustable from time to time, the negative procedure is thought to be the most appropriate.

Section 18(1)(b)(iv) – Power to require further elements to be shown in flood hazard maps

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

29. Section 18(1)(b)(iv) gives the Scottish Ministers powers to require SEPA to include any further elements deemed appropriate for the preparation of flood hazard maps, by regulations.

Reason for taking power

30. Flood hazard maps are a requirement of Article 6 of the Floods Directive and will show flood hazards for all potentially vulnerable areas in a flood risk management district. Giving Scottish Ministers this power creates flexibility for them to specify additional elements that should be shown as information, technology and expertise in flood risk mapping evolve. This provision will, therefore, ensure that the form and content of maps can be updated to present the most reliable and informative information on flood hazards.

Choice of procedure

31. Such regulations will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered to offer an appropriate balance between flexibility and the need for scrutiny for a provision of this nature, given that the key provisions relating to flood hazard maps and elements to be included in them are already specified in the Bill.

Section 18(8)(a) – Power to define flooding probabilities to be shown in flood hazard maps

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

32. Section 18(8)(a) gives the Scottish Ministers powers to specify the levels of probability of floods which SEPA will require to show in flood hazard maps.

Reason for taking power

33. Flood hazard maps are a requirement of Article 6 of the Floods Directive and will show flood hazards for all potentially vulnerable areas in a flood risk management district. Flood hazard maps will show the areas which could be flooded and information about the flood water according to probability definitions which will be technical in nature. A consequence of climate change that could, and is very likely to, affect Scotland is an increased risk of flooding which may result in a change to the probabilities that should be used as a basis for mapping.

34. Giving Scottish Ministers this power creates flexibility for periodically reviewing and updating the flood scenarios that should be mapped by order. As information, technology and expertise in flood risk mapping and the effects of climate change evolve, this provision will

ensure that maps can be updated to present the most reliable and informative information on flood hazards.

Choice of procedure

35. Such an order will be subject to annulment in pursuance of a resolution of the Scottish Parliament. As with the previous power, the negative resolution procedure is considered to offer an appropriate balance between flexibility and the need for scrutiny for a provision of this nature, given that the key provisions relating to flood hazard maps are already specified in the Bill.

Section 19(2)(f) – Power to specify additional matters which must be shown in flood risk maps

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

36. Section 19(2)(f) provides the Scottish Ministers with powers to make regulations to require SEPA to show additional information in flood risk maps.

Reason for taking power

37. Flood risk maps will show the potential adverse consequences of the floods shown in flood hazard maps. Giving Scottish Ministers these powers creates flexibility for periodically reviewing and updating details of further matters to be included in any flood maps. As information, technology and expertise in flood risk mapping evolve, this provision will also ensure that the content of maps can be updated to present the most reliable and informative information on flood risks.

Choice of procedure

38. Such regulations will be subject to annulment in pursuance of a resolution of the Scottish Parliament. As with previous powers, the negative resolution procedure is considered to offer an appropriate balance between flexibility to tackle future developments and the need for scrutiny for a provision of this nature, given that detailed provision about the main matters to be included in these maps is already contained in the Bill.

Section 22 – Power to prescribe methods and procedures to be followed in preparation, review or updating of flood hazard maps and flood risk maps

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

39. Section 22 enables the Scottish Ministers to make more detailed provision, by regulations, as to the preparation, review or updating of flood hazard and flood risk maps, including the criteria applied, and the methods and procedures to be followed.

Reason for taking power

40. Any provision made under this power would be likely to be detailed and technical in nature, and would require further consultation before being finalised. There should be flexibility to adjust provision made in the light of experience of the preparation of these maps, and developments in flood risk management techniques.

Choice of procedure

41. Such regulations will be subject to annulment in pursuance of a resolution of the Scottish Parliament. These regulations would probably be technical in nature and may require adjustment from time to time to accommodate evolving developments in flood risk management. Negative procedure is thought to be appropriate, particularly as the Bill already contains detailed provision about the preparation of these maps, which any regulations would supplement.

Section 23(5)(b) – Power to specify additional matters for inclusion in flood risk management plans

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

42. Section 23(5)(b) gives the Scottish Ministers power, by regulations, to specify additional matters that should be included in flood risk management plans.

Reason for taking power

43. SEPA are required to prepare and submit flood risk management plans for the potentially vulnerable areas in each flood risk management district, which must be submitted to Scottish Ministers. As the process of flood risk management planning evolves, the Scottish Ministers may wish to use experience of the process to require new elements to be included. This power will allow the Scottish Ministers to act should this be required.

Choice of procedure

44. Such regulations will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The principles relating to flood risk management plans and the core list of matters to be included in them are included in the Bill, and any regulations would provide supplementary detail only.

Section 29(6) – Power to make further provision in relation to local authorities preparing local flood risk management plans

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

45. Section 29(6) allows the Scottish Ministers to specify, in regulations, further matters to be included in local flood risk management plans by local authorities. Local authorities are required to prepare local flood risk management plans that will supplement the flood risk management plans produced by SEPA for the flood risk management district. The plans will cover the local plan districts identified by SEPA under section 13.

Reason for taking power

46. 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. The intention is to use regulations to specify aspects of the content of local plans. This approach will allow the Scottish Government to put in place a detailed set of provisions that have been developed after thorough consultation.

Choice of procedure

47. Such regulations will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The required content of local plans is largely set out in section 29. Any additional provision would deal only with supplementary and detailed matters.

Section 35(1) – Power to make further provision in relation to the preparation of flood risk management plans

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

48. Section 35(1) enables the Scottish Ministers to make regulations that make further provision on most aspects of the preparation of flood risk management plans, local flood risk management plans and interim and final reports on local plans. This includes provision on consultation, submission and approval of plans. Regulations may cover the form of plans, the procedures to be followed regarding preparation, submission, approval, review and modification

of plans, consultation by SEPA and lead authorities in the preparation of their plans, and the form, content, preparation and publication of reports under sections 32 and 33.

Reason for taking power

49. As this new process is implemented, additional provision may be required to deal with developments in flood events, technology or management techniques. These regulation making powers reflect the potential for these scenarios and provide the Scottish Ministers with a degree of flexibility.

Choice of procedure

50. Such regulations will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The Bill currently sets out fairly extensive provisions on these plans, which could only be supplemented and not altered under this power. Any additional provision would be largely procedural in nature.

Section 44(1) – Power to give effect to Community obligations etc.

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

51. Section 44(1) provides that the Scottish Ministers may, by regulations, provide that the provisions of Part 3 of the Bill are to have effect with such modifications as the regulations may specify but only for the purpose of giving effect to any Community obligation of the United Kingdom or of exercising any related right.

Reason for taking power

52. This power is provided to allow for the possibility that new Community legislation may be enacted which is best implemented by amending relevant provisions of Part 3. It will ensure that the Scottish Ministers have the ability to fully meet their obligations in transposing any future instrument dealing with similar matters to the current Directive.

Choice of procedure

53. Such regulations will be subject to annulment in pursuance of a resolution of the Scottish Parliament. They could be made only to implement a binding Community obligation of the Scottish Government relating to flood risk assessment and planning.

Section 48(2) – Power to specify boundaries of coastal areas

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

54. Section 48(2) allows the Scottish Ministers to specify, by order, the boundaries of any coastal area for the purposes of Part 3. Under section 83(1)(b) different provision can be made for different areas around the coast.

Reason for taking power

55. This power is provided because it is impossible for the purposes of Part 3 to define the landward boundaries of any coastal area at risk of flooding from the sea as local features and circumstances have to be taken into account. The power will ensure that the Scottish Ministers can assign a coastal area to the appropriate flood management district under section 8 and that SEPA can ensure that flood hazard maps under section 18 show the appropriate information relevant to each coastal area.

Choice of procedure

56. Such regulations will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered to offer an appropriate balance between flexibility and the need for scrutiny for a provision of this nature, given that any provision made under this power would relate to a point of detail and would be based on complex technical material.

Section 52(2)(b) – Power to make further provision for documents required in making flood protection schemes

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

57. Section 52(2)(b) empowers the Scottish Ministers to require, by regulations, the inclusion of maps, plans and other specifications in a flood protection scheme.

Reason for taking power

58. The development of flood protection schemes is highly technical and can require a substantial number of documents to be produced. The type of provision which is envisaged here is likely to be too detailed and technical for inclusion in the Bill. Examples of things that may be covered by regulations include the scale required for different types of plan as well as detailed descriptions of works. This power will also allow the Scottish Ministers the opportunity in future to review and update what is specified in light of experience of the new process in operation. Due to the potential for future changes, it will be simpler to achieve this through regulations as opposed to primary legislation.

Choice of procedure

59. Such regulations will be subject to annulment in pursuance of a resolution of the Scottish Parliament. Regulations to specify additional information required would be highly detailed and technical in nature and, therefore, are considered inappropriate for inclusion within primary legislation. The negative resolution procedure is considered to offer an appropriate balance between flexibility and the need for scrutiny for a provision of this nature, given that the key provisions relating to a flood protection scheme are specified in the Bill and these would simply be supplemented by any additional specifications laid out under these Regulations.

Section 52(4) – Power to amend flood protection scheme making process

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

60. Section 52(4) allows the Scottish Ministers to, by order, amend the process within Schedule 2 for making a flood protection scheme.

Reason for taking power

61. Although the statutory process for the development of flood protection schemes in the Bill will ensure consistency of practice, this power allows the procedure to be changed if necessary to ensure that processes are relevant, up to date and operate effectively. The Scottish Ministers need the flexibility to respond to feedback on the operation of the new process by amending the procedure if necessary without having to resort to primary legislation.

Choice of procedure

62. The power under this section is a power to amend primary legislation. It is, therefore, considered appropriate that any order made under these powers should be subject to the level of parliamentary scrutiny that the affirmative procedure provides.

Section 53(7) – Power to prescribe form and content of notices of variation or revocation of orders under the Land Drainage (Scotland) Act 1958

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

63. Section 53(7) enables the Scottish Ministers to prescribe the form and content of notices of the variation or revocation of an improvement order to be registered in the Land Register of Scotland or the Register of Sasines, whichever is appropriate.

Reason for taking power

64. This Bill repeals those elements of the 1958 Act which allow improvement orders to be made for the purposes of preventing or mitigating flooding, so as to ensure that all matters falling within flood protection schemes are dealt with under Part 4. The intention is to leave the rest of the 1958 Act regime for making improvement orders in place, but to require an improvement order to be varied or revoked where necessary in consequence of the effects of a flood protection scheme. The improvement order will have been recorded in the Register of Sasines or registered in the Land Register, so any notice of revocation or variation should also be recorded/registered.

65. The power to specify the form and content of such a notice by order is being taken as this is a matter of technical detail, and the form and content may require to be adjusted over time in response to any changes in conveyancing law or practice.

Choice of procedure

66. Such an order will be subject to annulment in pursuance of a resolution of the Scottish Parliament. This power is thought unlikely to be contentious as the principle of varying and revoking improvement orders is already provided for within the primary legislation.

Section 60 –Repeal of power under section 6A(3) of the Flood Prevention (Scotland) Act 1961

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

67. Section 60 repeals the Flood Prevention (Scotland) Act 1961, including section 6A(3). This subsection enables the Scottish Ministers to alter by subordinate legislation the intervals at which local authorities are required to publish reports about flooding in their areas.

Reason for repealing power

68. The provisions of the 1961 Act relating to these reports will be superseded by sections 32 and 33 of this Bill.

Choice of procedure

69. The power being repealed is subject to the negative procedure but the repeal is being effected by primary legislation.

Section 77 – Power to make provision for reporting incidents relating to reservoir safety

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

70. Section 77 inserts a new section 12ZA into the Reservoirs Act 1975. This enables the Scottish Ministers to make provision in regulations for the reporting of incidents which may affect the safety of large raised reservoirs. In summary, these regulations may define what constitutes an incident, provide for the determination of whether an incident has occurred, require undertakers to report incidents occurring, require guidance issued by the Scottish Ministers or enforcement authority to be consulted, make provision for the publishing of reports, create offences and penalties and ensure remedial action is taken following an incident.

Reason for taking power

71. Incident reporting provides the basis for sharing important information on problems identified with particular reservoirs. Current levels of compliance with the voluntary post incident reporting regime are variable. This power would allow Scottish Ministers to set out detailed provisions in relation to the elements of incident reporting as summarised in paragraph 70 above and section 77(2) of the Bill.

72. The power is being taken in order to introduce a compulsory system of incident reporting, but to do so after SEPA has been installed as single enforcement authority and has researched the matter and issued its own consultation on the subject.

Choice of procedure

73. As these regulations would establish a scheme from scratch, impose penalties and deal with SEPA enforcement powers, it is considered appropriate that regulations made under this power should be subject to the level of parliamentary scrutiny that the affirmative procedure provides.

Section 82(1) – Ancillary provision

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament, unless the order amends an Act, in which case affirmative resolution

Provision

74. Section 82(1) enables the Scottish Ministers, by order, to make incidental, supplemental, consequential, transitional, transitory or saving provision, if appropriate.

Reason for taking power

75. Any body of new law may give rise to a need for a range of ancillary provisions.

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

76. Without the power to make incidental, supplemental and consequential provision it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with minor matters which require to be dealt with to give full effect to the original Bill. That would not be an effective use of either the Parliament's or the Government's resources.

Choice of procedure

77. Where an order changes primary legislation it is submitted that the affirmative procedure is appropriate. In any other situation, the negative procedure is considered appropriate for these powers.

Section 86(1) – Commencement

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: no Parliamentary procedure

Provision

78. This section provides that all of the provisions of the Bill, except certain provisions containing definitions and order-making powers, shall come into force on a day set by the Scottish Ministers by order.

Reason for taking power

79. The decision on when and to what extent the Bill is commenced is an administrative issue for the Scottish Ministers.

Choice of procedure

80. As the decision on commencement is a matter for the Scottish Ministers, and as is usual, the Scottish Government considers that the commencement powers should not be subject to any Parliamentary procedure.

Schedule 2, paragraph 1(1)(f)(vii) – Power to specify those who should receive notification of proposed flood protection schemes

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

81. Paragraph 1(1)(f)(vii) enables the Scottish Ministers to specify, by order, additional consultees to whom a local authority should send direct notification of a proposed flood protection scheme.

Reason for taking power

82. As the planning process, and the operation of the statutory process itself, is embedded, this power will provide flexibility in terms of bodies it would be useful to notify. This will be informed by experience of using the new processes.

Choice of procedure

83. Such an order will be subject to annulment in pursuance of a resolution of the Scottish Parliament. This power is thought unlikely to be contentious as the principle of flood protection scheme consultation is already provided for within the primary legislation. The main appropriate consultees are also specified within the Bill.

Schedule 2, paragraph 13 – Power to make provision about consideration to be given to likely environmental effects of proposed flood protection schemes

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

84. Paragraph 13 enables the Scottish Ministers, by regulations, to make provision about the consideration to be given, before a flood protection scheme is confirmed, to the likely environmental effects of the operations proposed in the scheme.

Reason for taking power

85. This power will ensure that a detailed specialist regime for environmental assessment can be created which can then be adapted in response to things such as scientific developments or changes in other environmental assessment regimes.

Choice of procedure

86. Such an order will be subject to annulment in pursuance of a resolution of the Scottish Parliament. This power is thought unlikely to be contentious as the principle of assessing environmental effects is already provided for within the primary legislation. The corresponding power in connection with planning applications, contained in section 40 of the Town and Country Planning (Scotland) Act 1997, is subject to negative procedure under section 275(3) of that Act.

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

Schedule 2, paragraph 14(1) – Power to make further provision relating to procedures for flood protection schemes

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

87. Paragraph 14(1) enables the Scottish Ministers to make regulations containing further procedural provisions relating to flood protection schemes.

Reason for taking power

88. This power will ensure that the procedures followed by local authorities can be developed over time once experience of operating the new process in practice is gained.

Choice of procedure

89. Such regulations will be subject to annulment in pursuance of a resolution of the Scottish Parliament. This power is thought unlikely to be contentious as the principle of flood protection schemes and the key steps in the process are already provided for within the primary legislation.

*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

DELEGATED POWERS MEMORANDUM