FLOOD RISK MANAGEMENT (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This Memorandum has been prepared by the Scottish Government to assist the Subordinate Legislation Committee in its consideration, of the Flood Risk Management (Scotland) Bill. This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

3. In deciding whether to adopt negative or affirmative resolution procedure, careful consideration has been given to the degree of parliamentary scrutiny that is felt to be required for the regulations, balancing the need for the appropriate level of scrutiny with the need to avoid using up parliamentary time unnecessarily.

4. During the Stage 2 proceedings, new powers were introduced and a number of the delegated powers were modified. These changes give Parliament a greater role in scrutinising some of the subordinate legislation made under the Bill and respond positively to the comments made in both the Subordinate Legislation Committee and the Rural Affairs and Environment Committee. The procedure applicable to one power has been altered from negative resolution procedure to affirmative resolution procedure. Outlined below are descriptions of the relevant powers which have been added or modified and explanations of and as to why the additions, amendments or alterations have been made and are considered appropriate.
This document relates to the Flood Risk Management (Scotland) Bill as amended at Stage 2 (SP Bill 15A)

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

PART 2 - PRINCIPAL EXPRESSIONS

Section 5– Power to designate ‘responsible authorities’

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

Provision

5. Section 5(1)(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.

6. Subsection (2) was inserted during Stage 2. It places a new duty on Scottish Ministers to consult SEPA, responsible authorities, Scottish Water, public bodies and office-holders who may be designated under the order being made and such other persons considered appropriate before making an order under Section 5. This amendment responded to a recommendation of the Subordinate Legislation Committee.

Reason for taking power and choice of procedure

7. These remain the same as in the original Delegated Powers Memorandum.

PART 3 – FLOOD RISK ASSESSMENT, MAPS AND PLANS

Section 15A(1)(c) – Power to specify the content of Scottish Water assessments of flood risk from sewerage systems

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

Provision

8. Section 15A was inserted during Stage 2. It requires Scottish Water to prepare assessments of where floods are likely to originate from sewerage systems. Subsection (1)(c) provides for the Scottish Ministers to specify in regulations additional information which must be included in these assessments.
Reason for taking power

9. The assessment produced by Scottish Water for each potentially vulnerable area will contribute to the assessment of flood risk for that area. The core requirements as to the content of the assessment are specified in Section 15A(1) and SEPA is given a power under subsection (4) to determine the form of the assessment. The intention is to use regulations to supplement the requirements set out in the Bill by specifying more detailed aspects of the content of the assessment. This approach will allow the Scottish Ministers to put in place a detailed set of provisions that have been developed after thorough consultation.

Choice of procedure

10. 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 of a provision of this nature, given that the key requirements relating to the content of the assessments to be prepared by Scottish Water are already specified in the Bill.

Section 15B(2)(c) – Power to specify the content and the form of local authority maps of bodies of water and SUDS

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

Provision

11. Section 15B was inserted during Stage 2. It requires local authorities to prepare maps of relevant bodies of water and sustainable urban drainage systems in their areas. Subsection (2)(c) provides for the Scottish Ministers to specify in regulations additional information which must be included in these maps. Regulations may also specify the form of maps.

Reason for taking power

12. Maps prepared by local authorities under this section will supplement the maps prepared by SEPA. The core requirements as to the content of the maps prepared by local authorities are specified in section 15B(1). The intention is to use regulations to specify more detailed aspects of the content of the maps of bodies of water such as whether SUDS shown on maps are publicly or privately owned. This approach will allow the Scottish Ministers to put in place a detailed set of provisions that have been developed after thorough consultation.

Choice of procedure

13. These regulations 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 of a provision of this nature, given that the key requirements relating to the content of the maps to be prepared by local authorities are already specified in the Bill.
Section 56(1B)(b) – Power to specify the content and the form of local authority schedules of clearance and repair works

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

Provision

14. Section 56 was amended and moved to Part 3 of the Bill at Stage 2. It now requires local authorities to prepare schedules of clearance and repair works for their areas. Subsection (1B)(b) provides for the Scottish Ministers to specify in regulations additional information which must be included in these schedules. Regulations may also specify the form of schedules.

Reason for taking power

15. It is considered appropriate to delegate this power to subordinate legislation. The intention is to use regulations to supplement the requirements set out in the Bill by specifying more detailed aspects of the content of the schedules. In addition, information required in these schedules may need to change from time to time, for example to react to changes in other areas of the law dealing with circumstances affecting the form and contents of the schedules (such as health and safety legislation). This approach will allow the Scottish Ministers to put in place a detailed set of provisions that have been developed after thorough consultation.

Choice of procedure

16. These regulations will be subject to annulment in pursuance of a resolution of the Scottish Parliament. Negative procedure is considered to offer an appropriate balance between flexibility and the need for scrutiny of a provision of this nature, particularly because the key requirements relating to schedules of clearance and repair works are already specified in the Bill.

Section 15C(1)(c) – Power to specify the content of SEPA maps of artificial structures and natural features

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

Provision

17. Section 15C was inserted during Stage 2. It requires SEPA to prepare maps of artificial structures and natural features which, if removed, would significantly increase the risk of flooding from a body of surface water. Subsection (1)(c) provides for the Scottish Ministers to specify in regulations additional information which must be included in these maps.

Reason for taking power

18. The maps prepared by SEPA of artificial structures and features will contribute to the assessment of flood risk for that area. The core requirements as to the content of these maps are specified in section 15C(1)(a) and (b). The intention is to use regulations to supplement the
requirements set out in the Bill by specifying more detailed aspects of the content of the maps. This approach will allow the Scottish Ministers to put in place a detailed set of provisions that have been developed after thorough consultation.

Choice of procedure

19. These regulations will be subject to annulment in pursuance of a resolution of the Scottish Parliament. As with the powers in sections 15A(1)(c), 15B(2)(c) and 56(1B)(b), the negative resolution procedure is considered to offer an appropriate balance between flexibility and the need for scrutiny of a provision of this nature, given that the key provisions relating to the content of the maps to be prepared by SEPA are already specified in the Bill.

Section 15C(2)(c) – Power to specify the form of SEPA maps of artificial structures and natural features

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

Provision

20. Section 15C requires SEPA to prepare maps of artificial structures and natural features which, if removed, would significantly increase the risk of flooding from a body of surface water. Subsection (2)(c) provides for the Scottish Ministers to specify the form of these maps in regulations.

Reason for taking power

21. The key requirements about the preparation of these maps are set out in Section 15C. The intention is to use regulations to specify the form of the maps. This approach will allow the Scottish Government to put in place a detailed set of provisions that have been developed after thorough consultation. This will enable the Scottish Ministers to ensure the maps are in a form which can be integrated with other maps produced under this Bill.

Choice of procedure

22. These regulations will be subject to annulment in pursuance of a resolution of the Scottish Parliament. These regulations would probably be largely technical in nature and may require adjustment from time to time. Negative procedure is thought to be appropriate as the key requirements in relation to these maps are already specified in the Bill.
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

23. 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. Subsection (6A) inserted at Stage 2 requires Scottish Ministers to consult SEPA, responsible authorities and such other persons considered appropriate before making regulations under subsection (6). This amendment responded to a recommendation of the Subordinate Legislation Committee.

Reason for taking power and choice of procedure

24. These remain the same as in the original Delegated Powers Memorandum.

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: affirmative resolution of the Scottish Parliament

Provision

25. Section 44(1) confers a power on the Scottish Ministers to, by regulations, modify Part 3 of the Bill for the purpose of giving effect to any Community obligation or exercising any related right. Section 83(3) was amended at Stage 2 to make the power subject to affirmative rather than negative procedure.

Reason for taking power

26. This remains the same as in the original Delegated Powers Memorandum.

Choice of procedure

27. The Subordinate Legislation Committee recommended in its Stage 1 report to the Rural Affairs and Environment Committee that this power should be subject to affirmative rather than negative procedure. The Scottish Ministers accepted the recommendation that regulations made under the power should be subject to the level of parliamentary scrutiny that affirmative procedure provides.
PART 4 - FLOOD RISK MANAGEMENT: LOCAL AUTHORITY FUNCTIONS

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
28. Section 52(4) allows the Scottish Ministers to, by order; amend the process within schedule 2 for making a flood protection scheme. New subsection (5), inserted at Stage 2 requires the Scottish Ministers to consult local authorities, such representatives of local authorities as they consider appropriate, SEPA, Scottish Natural Heritage, Scottish Water, National Park Authorities and such other persons as are considered appropriate before amending schedule 2 so as to modify the procedure for making flood protection schemes. This amendment responded to a recommendation of the Subordinate Legislation Committee.

Reason for taking power and choice of procedure
29. These remain the same as in the original Delegated Powers Memorandum.

Section 53C (1) – Power to make provision about the keeping of registers

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

Provision
30. Section 53A requires local authorities to keep registers of flood protection schemes, which are to be made available to the public. Section 53C provides for the Scottish Ministers to specify the contents of these registers, the time by which information must be entered into a register, the circumstances in which information can or must be removed from a register and the time by which notice must be given by one local authority to another under section 53A(6). Regulations may also make further provision about the availability of registers, including the form and manner, in which registers are made available, require local authorities to make their registers available to persons specified and require them to inform such persons of any changes to registers. Regulations may also require the person specified to make available information from local authorities’ registers for public inspection.

Reason for taking power
31. Development work will need to take place with local authorities and others to establish detailed provisions for the registers, especially in a situation where a scheme requires to be registered by more than one local authority. Work also requires to be done on the feasibility of any mechanism to enable all local authority registers to be searched centrally, or to enable a register to be searched alongside other searches relating to the same property. Once registers are established, the Scottish Ministers may wish to amend their form, contents, timing and accessibility from time to time to reflect e.g. developments in information technology or changes
to the content of scheme documents. Regulations are considered more appropriate to make such changes and can be brought forward in shorter timescales than primary legislation.

Choice of procedure

32. These regulations will be subject to annulment in pursuance of a resolution of the Scottish Parliament. These regulations would probably be largely technical in nature and may require adjustment from time to time. Negative procedure is thought to be appropriate as the key requirements in relation to these registers are already specified in the Bill.

PART 7 - RESERVOIRS

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

33. Section 77 inserts a new section 12ZA into the Reservoirs Act 1975 which enables the Scottish Ministers to make provision in regulations for the reporting of incidents which may affect the safety of reservoirs. The power was extended at Stage 2 to allow incident reporting requirements to be imposed in relation to all reservoirs which meet criteria set in or under regulations made by the Scottish Ministers, instead of only in relation to “large raised reservoirs”. The consultation requirements in subsection (3) have been amended accordingly, so as to require Scottish Ministers to consult undertakers of all reservoirs to which they consider the regulations will apply. Subsection (3A) has been inserted to allow the power to be exercised to make different provision for different purposes.

34. The power has also been amended to allow regulations to confer powers of entry on the enforcement authority in connection with its incident reporting functions under the regulations.

Reason for taking power

35. The reasons for taking a power to introduce a compulsory incident reporting regime are the same as in the original Delegated Powers Memorandum. The reason for amending the power is to allow a new incident reporting system to be tailored according to the level of risk presented by different reservoirs, whether or not they are currently “large raised reservoirs” under the 1975 Act. The amended power would allow the Scottish Ministers to set risk based criteria for determining whether reservoirs required incident reports and to impose different levels of incident reporting requirements for classes of reservoir which presented different levels of risk.

Choice of procedure

36. The reasons for choosing affirmative procedure are the same as in the original Delegated Powers Memorandum.
Section 77A – Power to make provision for preparing reservoir flood plans

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

**Provision**

37. Section 77A inserts a new section 12C into the Reservoirs Act 1975. This enables the Scottish Ministers to make provision in regulations for the preparation of flood plans in relation to reservoirs. A reservoir flood plan would set out action to be taken by the reservoir undertaker in order to control or mitigate the effects of flooding which could result if water escaped from the reservoir. In summary, the regulations may: establish criteria for determining which reservoirs need flood plans; require undertakers to produce plans for reservoirs which meet the criteria; specify the form and content of plans; provide for the approval, registration or publication of plans; impose duties on undertakers to implement plans in an emergency; create offences; and confer enforcement powers on SEPA.

38. Before making regulations the Scottish Ministers would have to consult SEPA, the Institution of Civil Engineers and undertakers whose reservoirs would be expected to require a flood plan.

**Reason for taking power**

39. Flood plans will set out the actions to be taken by undertakers of reservoirs in order to control or mitigate the effects of flooding likely to result from any escape of water from the reservoir. This power would allow Scottish Ministers to set out detailed requirements in relation to the preparation of flood plans as summarised in paragraph 33 above and new section 12C(3) which will be inserted in the 1975 Act by section 77A of the Bill.

40. The power is being taken in order to require flood plans to be prepared for reservoirs in Scotland which meet criteria specified in regulations, but to do so after SEPA has been installed as single enforcement authority and has researched the matter and Scottish Ministers have carried out a full consultation on the subject.

**Choice of procedure**

41. This power could be used to impose new and potentially onerous obligations on reservoir undertakers, create criminal offences and confer enforcement powers on SEPA. It is therefore considered appropriate that regulations made under the power should be subject to the level of parliamentary scrutiny that affirmative procedure provides.