RESERVOIRS (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 Reservoirs (Scotland) Bill. This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or substantially 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, balancing the need for the appropriate level of scrutiny with the need to avoid using up Parliamentary time unnecessarily.

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

Section 1(4) - Power to specify whether individual structures or combinations of structures are to be treated as a controlled reservoir

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

Provision
5. Section 1(2) defines a “controlled reservoir” as being a structure designed or used for collecting and storing water, artificial or partly artificial lochs and other artificial areas which are capable of holding 10,000 cubic metres of water above the natural level of any part of the surrounding land. Section 1(3) makes related provision for combinations of structures that could collectively release 10,000 cubic metres. Section 1(4) enables Scottish Ministers to make provision by order for a structure or combination of structures to be treated as a controlled reservoir notwithstanding that the requirements of subsections (2) or (3) are not met.

Reason for taking power
6. This remains the same as in the original Delegated Powers Memorandum.

Choice of procedure
7. 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 accept this recommendation that regulations made under the power should be subject to the level of Parliamentary scrutiny that affirmative procedure provides. An amendment to section 107 has been made to effect this change.

Section 1(6)(a) - Power to substitute a different volume of water to the 10,000 cubic metres of water currently specified

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

Provision
8. Section 1(6)(a) allows the Scottish Ministers, by order, to set a different volume threshold for controlled reservoirs from the 10,000 cubic metres currently specified. A Scottish Government amendment inserted a new subsection (7) at Stage 2. The new subsection requires the Scottish Ministers to consult the Institution of Civil Engineers before making an order under subsection (6)(a).
Reason for taking power

9. The reasons for taking the power are the same as set out in the original Delegated Powers Memorandum. The Subordinate Legislation Committee recommended in its Stage 1 report to the Rural Affairs and Environment Committee that this power should be exercised after consultation with the Institution of Civil Engineers. The Scottish Ministers accepted this recommendation that orders made under the power should be subject to consultation with the Institution.

Choice of procedure

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

Section 13A(1) – Fees: registration and administration

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Provision

11. A Scottish Government amendment inserted section 13A at Stage 2. It partially replaces the power in section 14(4) which enabled the Scottish Ministers to make provision in regulations as to SEPA determining and charging fees to reservoir managers for registration. It is now a wider power which enables SEPA to charge a fee in relation not only to registration, but also to annual or recurring fees relating to the performance of its functions under this Part.

12. Subsection 13A(1) enables the Scottish Ministers to provide in regulations the power for and the way in which SEPA can determine and charge fees. Subsection (2) requires the Scottish Ministers to have regard to the cost of the exercise of SEPA’s functions in respect of the fees being charged when making such provision. Regulations made under this section must make provision about how SEPA is to determine and charge fees and must require SEPA to set out its fees in a published charging scheme after it has consulted those people it considers likely to be affected by the scheme. The regulations may also set out the maximum amount of the fee, the circumstances in which the fees are payable, for different fees to be imposed in respect of different reservoirs, how they may be collected and recovered and any other matters the Scottish Ministers consider appropriate.

Reason for taking power

13. The power will enable SEPA to charge reservoir managers a reasonable fee for both registration and an annual subsistence fee in order to cover their administrative costs. The power to charge an annual fee for ongoing administration costs was omitted in error from the Bill at introduction. The costs to reservoir managers of such fees, however, was taken into account in the Financial Memorandum.

Choice of procedure

14. 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.
Section 14(4) – Power to make provisions as to SEPA preparing and publishing guidance on registration

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision
15. Section 14(4) allows Scottish Ministers, by regulations, to make provision for SEPA to publish guidance on registration and to consult the Institution of Civil Engineers (ICE) before so doing. However, the power to provide for regulations to determine and charge fees to reservoir managers in relation to registration has been deleted from this section. It has been replaced by the wider power to charge for both registration and an annual fee to cover SEPA’s administrative costs in section 13A, as noted above.

Reason for taking power
16. The power will ensure that reservoir managers and others have a clear understanding of the registration process as a result of the guidance that would be prepared by SEPA in consultation with the ICE.

Choice of procedure
17. Such regulations will continue to 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.

Section 22A(7) – Appeal to the Scottish Ministers following SEPA’s review

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision
18. Section 22A was inserted at Stage 2. Section 22A provides for reservoir managers to be able to appeal to the Scottish Ministers against decisions made by SEPA in a review of the risk designation given to a reservoir. Section 22A sets out the time period by which appeals under this section must be made and provides that the risk designation given prior to the appeal applies until the conclusion of the appeal. Subsection (4) requires the Scottish Ministers to consult with ICE and to have regard to matters set out in Section 21 before determining an appeal. Subsection (5) sets out how the determination must be notified to the reservoir manager and SEPA. Subsection (6) sets out when a fee charged in relation to the review under section 22 must be returned to the reservoir manager.

19. Section 22A(7) allows the Scottish Ministers, by regulations, to make further provision in relation to appeals following a review by SEPA of a decision relating to a reservoir’s risk classification.
Reason for taking power

20. The risk designation assigned to a controlled reservoir will determine the level of supervision and inspection needed, and consequently the level of cost associated with maintaining that reservoir. Giving Scottish Ministers these powers creates flexibility for reviewing and updating details of the appeal process for risk designations to make sure that it is fair and transparent.

Choice of procedure

21. 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 allowing for an appeal to Scottish Ministers against SEPA’s decisions on risk designations is provided for within the primary legislation.

Section 53(1) – 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

22. Section 53 was amended at Stage 2. Section 53(1) 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 manager 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 reservoir owners 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 reservoir owners to implement plans in an emergency; create offences; and confer enforcement powers on SEPA. Before making regulations, the Scottish Ministers would have to consult SEPA, the ICE and reservoir managers whose reservoirs would be expected to require a flood plan.

23. At Stage 2, subsection (3) was amended to enable reservoir managers to produce a single flood plan for 2 or more controlled reservoirs in a cascade.

Reason for taking power

24. This remains the same as set out in the original Delegated Powers Memorandum. The reason for amending this power is to enable reservoir managers of reservoirs to produce a single flood plan for two or more reservoirs which are connected in so far as water can flow between them. This will avoid unnecessary duplication and reduce costs on the reservoir manager.

Choice of procedure

25. The reasons for the choice of procedure remain the same as set out in the original Delegated Powers Memorandum.
Section 54(3) – Power to specify where a reservoir is low risk, the form by which information on repairs is to be recorded

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

Provision

26. This section was amended at Stage 2. Section 54(3) enables the Scottish Ministers to specify the form by which any information about repairs to a low risk reservoir should be recorded. A new paragraph was inserted which enables the Scottish Ministers to specify the form of any flood plan produced under section 53 to be recorded.

Reason for taking power and choice of procedure

27. These remain the same as set out in the original Delegated Powers Memorandum.

Section 55(2) - Power to specify emergency response information to be displayed at each reservoir site

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

Provision

28. Section 55 was amended at Stage 2. Section 55(2) allows the Scottish Ministers to specify what emergency response information should be displayed at, or near, a controlled reservoir. Section 55(3) explains that such information may include the name of the reservoir, the registration number of the reservoir, the reservoir manager’s name address and information for the purposes of an emergency. As a result of a Stage 2 amendment, this section now provides that, for high and medium risk reservoirs, this may include a requirement for SEPA’s contact details to be displayed (rather than the supervising engineers details, as was the case in the Bill as introduced).

Reason for taking power and choice of procedure

29. These remain the same as set out in the original Delegated Powers Memorandum.

Section 67(7) – Power to make provision for reservoir managers of controlled reservoirs to apply for reviews and appeals against enforcement notices

Power conferred on: Scottish Ministers
Power exercisable by: Order made by Statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

30. Section 67(7) was inserted at Stage 2 and allows the Scottish Ministers to make provision by order to enable reservoir managers of controlled reservoirs to apply to SEPA for a review of SEPA’s decision to issue an enforcement notice, or to appeal against an enforcement notice to
the Scottish Ministers. An enforcement notice is a notice requiring a reservoir manager to comply with their duty under section 34(1) (compliance with a direction in a safety report) or their duty under section 46(1) (compliance with a direction in an inspection report). Section 67(8) requires any such order to specify the time period for such a review or appeal to be made. It also allows Scottish Ministers to make further provision relating to reviews and appeals in the order.

Reason for taking power

31. This power would give reservoir managers a right of review and a right of appeal against enforcement notices. The intention is that the order would set out the details of the process for applying for reviews to SEPA or making any such appeals.

Choice of procedure

32. The power under this section would enable the Scottish Ministers to confer on reservoir managers a right of appeal against enforcement notices. This is similar to appeal rights under orders made under sections 71(1), 76(1), 77(1) and 80(1). It is therefore considered appropriate that any order made under these provisions should be subject to the level of parliamentary scrutiny that the affirmative procedure provides.

Section 71(1) – Power to make provision for SEPA to give stop notices to reservoir managers of controlled reservoirs

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Provision

33. Section 71 was amended at Stage 2. Section 71 allows the Scottish Ministers to make provision by order to enable SEPA to issue stop notices to reservoir managers of controlled reservoirs. A stop notice is a notice prohibiting a reservoir manager from carrying on an activity that SEPA reasonably believes is a risk to public safety. Certain procedural requirements are set out in section 72. The Scottish Ministers are required by section 84 to consult such organisations as appear to them to be representative of persons substantially affected by the making of the proposed order.

34. Section 71 was amended at Stage 2 so that it now allows stop notices to be issued to reservoir managers where the activity they are carrying out is either (a) an offence under Part 1; or (b) not an offence but is considered by SEPA to present a significant risk of causing an uncontrolled release of water from the reservoir. Before issuing a non-offence notice, SEPA will be required to consult with the Institution of Civil Engineers and the notice must include steps to remove or reduce the risk. SEPA are also required to notify Scottish Ministers of each occasion where they have issued a stop notice in these circumstances. In addition, Stage 2 changes to sections 72 and 73 clarify that any appeals made under the order made under Section 71(1) can be made to Scottish Ministers.

Reason for taking power and choice of procedure

35. These remain the same as set out in the original Delegated Powers Memorandum.
Section 76(1) – Power to make provisions for SEPA to accept an enforcement undertaking from a reservoir manager

Power conferred on: Scottish Ministers
Power exercisable by: Order made by Statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

36. Section 76 allows the Scottish Ministers to make provision as to the acceptance by SEPA of an enforcement undertaking from a reservoir manager. An enforcement undertaking is an undertaking given to SEPA by a reservoir manager that the reservoir manager will take certain specified actions. The acceptance of such an undertaking will have the following consequences unless the reservoir manager fails to comply with the enforcement undertaking: the reservoir manager may not be convicted of the offence to which the enforcement undertaking relates; SEPA may not impose on the reservoir manager a fixed monetary penalty, and may not impose on the reservoir manager any further enforcement measure. By virtue of section 85, any order made under section 76(1) must require SEPA to issue guidance about the use of the powers conferred by the order. Before making an order under section 76(1) the Scottish Ministers would have to consult stakeholders.

37. Section 76 was amended at Stage 2 to enable an order under section 76(1) to make provision for reservoir managers to apply for a review by SEPA before an appeal can be made to the Scottish Ministers.

Reason for taking power and choice of procedure

38. These remain the same as set out in the original Delegated Powers Memorandum.

Section 80(1) – Power to make provisions about the imposition of further enforcement measures on reservoir managers

Power conferred on: Scottish Ministers
Power exercisable by: Order made by Statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

39. Section 80 allows the Scottish Ministers to make provisions about the imposition on reservoir managers of one or more further enforcement measures in relation to offences. Certain procedural requirements are set out in section 81. The Scottish Ministers are required by section 84 to consult such organisations as appear to them to be representative of persons substantially affected by the making of the proposed order. By virtue of section 85, any order made under section 80(1) must require SEPA to issue guidance about the use of the powers conferred by the order. Section 87(2) enables Ministers to permit SEPA to publicise enforcement action it has taken, including the use of further enforcement measures in accordance with an order made under section 80(1).

40. The power in section 80 was amended at Stage 2 so that any fine imposed by SEPA under this section cannot exceed the maximum fine for which a person convicted of the offence may be liable on summary conviction.
Reason for taking power and choice of procedure
41. These remain the same as set out in the original Delegated Powers Memorandum.

Section 83 – Power to make provision regarding non-compliance monetary penalties

Power conferred on: Scottish Ministers
Power exercisable by: Order made by Statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision
42. Section 83(1) allows the Scottish Ministers to make provision under section 80(1) regarding non-compliance penalties payable if a reservoir manager fails to comply with a restraint notice, a restoration notice or an undertaking given under s.81(5). Section 83(2)(b) allows the Scottish Ministers to set criteria in relation to the calculation of the amount of the penalty.

43. The power in section 83 was amended at Stage 2 so that any fine imposed by SEPA under this section cannot exceed the maximum fine for which a person convicted of the offence may be liable on summary conviction. In addition, Stage 2 changes were made to (a) section 83(3)(b) to clarify that appeals required for non-compliance penalties are to be made to Scottish Ministers, and (b) section 83(5) to clarify technicalities of the recovery process for non-compliance penalties.

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

Section 87(1) – Power to require SEPA to publish information

Power conferred on: Scottish Ministers
Power exercisable by: Order made by Statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision
45. Section 87(1) was amended at Stage 2 to allow the Scottish Ministers by order to require (rather than merely enable) SEPA to publish such information as may be specified in the order about cases where SEPA have taken action to address non compliance by reservoir managers. Such cases may include those where SEPA has had to step in to appoint engineers or arrange for measures in the interest of safety to be undertaken, and those where they have issued stop notices, imposed fixed monetary penalties or imposed further enforcement measures. The amendment is intended to clarify the issue about the scope of the power raised by the Committee at Stage 1.

Reason for taking power and choice of procedure
46. These remain the same as set out in the original Delegated Powers Memorandum.
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SUPPLEMENTARY DELEGATED POWERS MEMORANDUM