

FLOOD RISK MANAGEMENT (SCOTLAND) ACT 2009

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

BACKGROUND – EC FLOODS DIRECTIVE

3. The flood risk assessment and management provisions of the Act (Part 3) make provision and enable provision to be made for or in connection with implementing the EC Floods Directive¹ (“the Directive”).
4. The purpose of the Directive (set out in Article 1) is to establish a framework for the assessment and management of flood risks, aiming at the reduction of the adverse consequences for human health, the environment, cultural heritage and economic activity associated with floods.
5. The Directive applies to all forms of flooding by defining “flood” to include all temporary covering by water of land not normally covered by water. This includes flooding from rivers, lochs, groundwater and the sea as well as flooding from surface water runoff but Article 2 of the Directive allows Member States to choose whether to exclude floods from sewerage systems. The Directive requires Member States to:
 - produce preliminary flood risk assessments (deadline – December 2011)
 - produce flood hazard maps and flood risk maps (deadline – December 2013)
 - produce flood risk management plans (deadline – December 2015)
6. The Directive gives Member States the freedom to set their own objectives for flood risk management, and allows member states to utilise existing tools, information and plans.

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

BACKGROUND – THE FLOOD PREVENTION (SCOTLAND) ACT 1961

7. Part 4 of the Act replaces the Flood Prevention (Scotland) Act 1961 (“the 1961 Act”) and makes provision for a revised statutory process for flood protection schemes (known as flood prevention schemes under the 1961 Act). The 1961 Act gave local authorities the power to carry out measures for the prevention or mitigation of flooding of non-agricultural land including:

- cleansing any watercourse or embankment;
- repairing any watercourse or embankment;
- maintenance of any watercourse or embankment;
- improvement, alteration or reinstatement of a watercourse, work or apparatus;
- construction of a new watercourse, work or apparatus.

8. These powers were permissive and discretionary only, i.e. the authority could exercise the powers but did not have to. Additionally, no work other than maintenance could be carried out under the 1961 Act without the promotion of a flood prevention scheme by the local authority. Flood prevention schemes were confirmed under the 1961 Act by the Secretary of State and then since devolution by the Scottish Ministers and financially supported by the Scottish Government if they complied with the approved cost/benefit ratio.

9. The Flood Prevention and Land Drainage (Scotland) Act 1997 amended the 1961 Act by placing statutory duties on local authorities including:

- requiring the local authority to assess all watercourses from time to time to ascertain whether or not they are likely to cause flooding of non-agricultural land;
- requiring the local authority to carry out works to reduce the likelihood of flooding of non-agricultural land caused by the condition of a watercourse;
- requiring local authorities to liaise with adjacent authorities in order to warn them of flood risk from watercourses;
- requiring local authorities to prepare biennial reports.

THE ACT – OVERVIEW

10. The Act makes provision in relation to five main areas: (i) coordination and cooperation within the domain of flood risk management; (ii) assessment of flood risk and preparation of flood risk maps and flood risk management plans, including implementing the EC Floods Directive; (iii) amendments to local authority and SEPA functions for flood risk management; (iv) a revised statutory process for flood protection schemes; and (v) amendments to the enforcement regime for the safe operation of reservoirs.

11. The Act is separated into eight Parts:

- *PART 1* creates general duties which Scottish Ministers, SEPA, and responsible authorities must comply with when exercising their functions in relation to flood risk management. These include a duty to exercise those functions with a view to

reducing flood risk and to collaborate when doing so and a duty to take account of guidance and comply with directions in relation to flood risk management.

- *PART 2* defines some of the principal expressions used in the Act, 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 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 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 1961 Act. These provisions give local authorities 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 Act.
- *PART 7* amends the Reservoirs Act 1975 (“the 1975 Act”) to transfer responsibility for enforcement of the 1975 Act from local authorities to SEPA. It inserts two new sections into the 1975 Act to enable provision to be made, by regulations, to introduce a new system for reporting incidents which could affect safety at reservoirs and to create new requirements to prepare flood plans for 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 Act. It also makes provision about the application of the Act to the Crown and commencement of the Act.

THE ACT – SECTION BY SECTION

PART 1 – GENERAL DUTY, DIRECTIONS AND GUIDANCE

Section 1 – General duty

12. Section 1(1) places a general 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, in particular, to do so to secure compliance with the Directive. “Flood risk” is defined in section 3.

13. “Responsible authorities” are defined in section 5 and include local authorities, Scottish Water and any other public bodies and office holders designated by the Scottish Ministers. “Flood risk related functions” are defined in subsection (4) and include functions

under the Act and any other functions relevant to flood risk management which the Scottish Ministers may specify by order.

14. Because the definition of “flood risk related functions” includes functions under the Act, the general duty to act with a view to reducing overall flood risk applies to the Scottish Ministers when designating responsible authorities and specifying new flood risk related functions and to SEPA, the Scottish Ministers and responsible authorities when they are involved in the preparation of flood risk assessments, flood maps and flood risk management plans under Part 3 of the Act. It also applies to local authorities and to the Scottish Ministers when considering flood protection schemes and to SEPA and the Scottish Ministers when dealing with flood risk assessment and flood warning functions under Part 5 of the Act.

15. Where the exercise of their flood risk related functions affects a flood risk management district, subsection (2)(a) requires the Scottish Ministers, SEPA and responsible authorities to act with a view to achieving the objectives set out in the flood risk management plan for that district. Flood risk management districts are established under section 8 and sections 27 to 33 make provision for flood risk management plans to be prepared, approved and reviewed for those districts.

16. Subsection (2)(b) requires the Scottish Ministers, SEPA and the responsible authorities to take into account social, environmental and economic considerations when exercising their flood risk related functions. This would appear to be consistent with the principle of proportionality in European law which requires that the means of achieving a particular objective should correspond to the importance of, and be necessary for the achievement of, that objective.

17. Subsection (2)(c) requires the Scottish Ministers, SEPA and the responsible authorities to act in the way best calculated to manage flood risk in a sustainable way, to promote sustainable flood risk management, to act in the way best calculated to contribute to sustainable development, and to take steps to raise public awareness of flood risk. These duties apply in so far as is consistent with the purposes of the function in question.

18. Subsection (2)(d) requires the Scottish Ministers, SEPA and the responsible authorities to adopt an integrated approach by co-operating with each other so as to coordinate the exercise of their respective functions for flood risk management, so far as is practicable. This provides flexibility for these bodies to take action in isolation where it is sensible to do so, e.g. in emergency situations. Subsection (3) clarifies that they may enter into agreements with each other for the purposes of co-operation.

Section 2 – Directions and guidance

19. Subsection (1) enables the Scottish Ministers to direct or issue guidance to SEPA and responsible authorities on how they must exercise their flood risk related functions. Subsection (2) then requires SEPA and responsible authorities to comply with such directions and take account of any such guidance. The Scottish Ministers must comply with their general duties under section 1 when giving directions or issuing guidance. Before giving a direction they must also consult the person to whom the direction is to be given, as well as SEPA or any responsible authorities as Scottish Ministers consider appropriate.

20. Subsection (3) enables the Scottish Ministers, for example, to direct that specified functions must be exercised so as to satisfy technical standards set by SEPA.

21. Subsection (5) requires Scottish Ministers to give guidance to SEPA and responsible authorities on acting in the way best calculated to manage flood risk in a sustainable way and on having regard to the social, environmental and economic impact of exercising flood risk functions.

22. Subsection (6) requires this guidance to be given no later than 18 months after commencement of the relevant provision. Subsection (7) requires Scottish Ministers to review and where necessary update the guidance no later than every 6 years. Before issuing or updating guidance given under subsection (5), they must consult SEPA and the responsible authorities, and such other persons as they consider appropriate.

PART 2 – PRINCIPAL EXPRESSIONS

Section 3 – “Flood” and “flood risk”

23. In section 3, the definition of “flood” and “flood solely from a sewerage system” determine what types of floods are covered by the Act. The cumulative effect of these definitions is that all forms of flooding are covered by the Act except where the source of the flood is solely from a sewerage system. A flood solely from a sewerage system is a flood containing sewage which is caused solely by a blockage or a failure in a sewerage system and which is not connected with external hydraulics. Floods that are caused by a sewer being overloaded by higher than usual rainfall are covered by the Act. An example of a flood that is not covered by the Act would be where flooding is caused by a sewer collapsing or becoming blocked, and where that collapse or blockage is not a result of external hydraulics, e.g. higher than usual rainfall or river levels.

24. “Flood” means the temporary covering by water from any source of land not normally covered by water. This reference to land includes buildings because “land” is defined for the purposes of references in Acts of the Scottish Parliament in the Interpretation Order² and this definition includes buildings and other structures.

25. This section also defines the term “flood risk”. The definition mirrors the definition in Article 2 of the Directive and states that flood risk is the combination of the probability of flooding and the potential adverse consequences of flooding to human health, the environment, cultural heritage and economic activity.

Section 5 – Responsible authorities

26. Section 5 identifies local authorities and Scottish Water as “responsible authorities” and allows the Scottish Ministers to designate other public bodies and office holders as responsible authorities by order. Responsible authorities have to comply with the general duty in Part 1 of the Act. They also have duties under Part 3 to assist SEPA in preparing the

² The Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (S.I. 1999/ 1379)

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. Before designating new responsible authorities under this section, the Scottish Ministers must consult SEPA, existing responsible authorities, the proposed new responsible authorities and such other persons as are deemed appropriate. When designating responsible authorities the Scottish Ministers must also comply with their general duty under Part 1 of the Act.

PART 3 – FLOOD RISK ASSESSMENT, MAPS AND PLANS

Section 7 – General purpose of Part 3

27. Section 7 sets out the purpose of Part 3. Article 17.1 of the Directive requires legislation implementing the Directive to contain an express reference to it. This section achieves that and in a way that is consistent with the reference in section 1(1) of the Water Environment and Water Services (Scotland) Act 2003 (“the 2003 Act”) to the Directive that Act implements.

Section 8 – Flood risk management districts

28. This section provides for the creation of flood risk management districts. 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. The districts will either be the same as the river basin districts designated under the 2003 Act, or they will be other areas as designated by the Scottish Ministers. The districts designated under the 2003 Act were identified for the purposes of protecting the water environment and preparing river basin management plans.

29. If the Scottish Ministers choose to designate a flood risk management district, that district must comprise one or more coastal areas or river basins and it must be identified by reference to a map prepared for the purpose of the order and laid before the Scottish Parliament.

30. Subsection (4) requires SEPA to make copies of the order defining the flood risk management district and the maps of the district available for public inspection. Where a flood risk management district is a river basin district, what must be made available for public inspection are the order under the 2003 Act designating it as a river basin district and the related map.

31. The provisions in this section enable the Scottish Ministers to implement Article 3.2(b) of the Directive.

Section 9 – SEPA to prepare flood risk assessments

32. This section requires SEPA to prepare a flood risk assessment for each flood risk management district identified under section 8. It implements Article 4 of the Directive. The deadline for preparation of these flood risk assessments is 22nd December 2011, which is the deadline set by the Directive.

33. A flood risk assessment is to be based on available and readily derivable information (subsection (3)). Information on the maps that must be produced to accompany this work is set out in subsection (4)(a).

34. Subsection (4)(b) requires each flood risk assessment to include a description of any past floods that had a significant adverse impact where similar future floods are still probable and would have a significant adverse impact. The description must also include information on the extent and conveyance route of flood waters.

35. Subsection (4)(c) requires each flood risk assessment to include a description of past floods which would have significant adverse consequences if similar floods were to occur now. The past floods mentioned under this paragraph may not have had significant adverse impacts or there may be no information available about their impacts. This allows consideration to be given to things like changes in land use, for example, a flood in the past may have had little impact if the area affected was undeveloped; however, if that area is now developed, it may be that a similar flood event could have adverse consequences.

36. Each flood risk assessment also must include an assessment of the potential adverse consequences of future floods. Subsection (4)(d) contains a list of issues which should be taken into account when carrying out this assessment. This is based on the list in Article 4(2)(d) of the Directive and also includes reference to natural features and characteristics of any river basin or coastal area.

37. Subsection (5) allows SEPA to include other information in a flood risk assessment where it considers appropriate.

Section 10 – Flood risk assessment: review

38. This section requires SEPA to review and, where appropriate, update the flood risk assessment by 22nd December 2018, or by an earlier date specified by the Scottish Ministers, and then every 6 years thereafter. The 22nd December deadline and the requirement to review every 6 years come from Article 14 of the Directive. Subsection (2) provides that a revised flood risk assessment must comply with the same requirements as an original flood risk assessment prepared under section 9.

Section 11 – Flood risk assessments: regulations

39. Section 11 enables the Scottish Ministers to make more detailed provision, by regulations, as to the preparation, review or updating of flood risk assessments, including the methods and procedures to be followed.

Section 12 – Flood risk assessments: availability for public inspection

40. Section 12 requires SEPA to make copies of the current flood risk assessment available for public inspection. This section should be read with sections 53 and 54, which require the arrangements for making copies available to be publicised and set detailed requirements publishing this and other matters.

Section 13 – SEPA to identify potentially vulnerable areas and local plan districts

41. This section provides for the identification of areas within flood risk management districts where significant flood risks exist or are likely to occur. These areas are referred to as “potentially vulnerable areas”. Flood risk and flood hazard maps must then be produced for such areas under section 21 and flood risk management plans produced under section 27 will set objectives to manage flood risks for the areas.

42. The section also provides for the identification of geographic areas around potentially vulnerable areas for the purpose of preparing local flood risk management plans under section 34. These areas are referred to as “local plan districts” and they must consist of one or more river basins, sub-basins or coastal areas. “River basin” has the same meaning as in the 2003 Act and “sub-basin” is defined in section 55(1). The Scottish Ministers may specify the boundaries of coastal areas under section 55(2).

43. Subsections (1) to (3) require SEPA to prepare and submit to the Scottish Ministers a document identifying potentially vulnerable areas and local plan districts. Subsection (4) sets out the information on which SEPA must base its identification of potentially vulnerable areas and local plan districts. It also requires the areas to be identified with reference to maps.

44. The document must be submitted by SEPA by a date set by the Scottish Ministers under subsection (2), and after any consultation required by regulations made under section 15.

45. The Scottish Ministers may then approve the document (as submitted or with modifications) or reject it and direct SEPA to resubmit it. Subsections (6) to (8) set out arrangements in connection with the consideration, approval or rejection of the document by the Scottish Ministers.

46. This section enables the Scottish Ministers to implement Article 5 of the Directive.

Section 14 – Potentially vulnerable areas and local plan districts: review

47. This section requires SEPA to review and, where appropriate, update the document which identifies potentially vulnerable areas and local plan districts. This review must be carried out by a date specified by the Scottish Ministers and then every 6 years or such lesser period as the Scottish Ministers direct. Subsections (2) to (4) provide that an updated document must comply with the same requirements and that it will be subject to the same approval process as the original document prepared under section 13.

Section 15 – Potentially vulnerable areas and local plan districts: regulations

48. 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.

Section 16 – Scottish Water to assess flood risk from sewerage systems

49. This section requires Scottish Water to prepare assessments about sewerage flooding for the potentially vulnerable areas identified under section 13 and for other areas identified by SEPA. SEPA must consult Scottish Water and other responsible authorities before identifying other areas for which assessments are required.

50. Each assessment must identify where floods are likely to originate from sewerage systems in the area and must estimate the volume of sewage which is likely to be released in the event of such floods. It must also include any other information specified by the Scottish Ministers in regulations. Before making such regulations, the Scottish Ministers must consult SEPA, Scottish Water and any responsible authority they consider appropriate.

51. Subsections (4) to (6) provide for SEPA to determine the form of the assessment so as to ensure that the data can be integrated with other information on flood risk. SEPA must consult Scottish Water and other responsible authorities before making this determination.

52. Subsections (2) and (8) enable the Scottish Ministers to set the dates by which assessments must be prepared, reviewed, and, where appropriate, updated. Assessments must be then be reviewed and, where appropriate, updated every 6 years.

Section 17 - Local authorities to prepare maps of bodies of water etc

53. This section requires local authorities to map relevant bodies of water and sustainable urban drainage systems in their areas. Subsection (2) provides for local authorities to choose the scale of these maps and it also enables the Scottish Ministers to specify the form and content of maps in regulations.

54. “Relevant body of water” is defined in subsection (5). The definition includes most bodies of surface water as well as underground stretches of watercourses. It excludes stretches of coastal water, sewers and drains which drain into sewers, and watercourses which are wholly underground. Section 55 applies the definitions of “body of surface water” and “watercourse” from the 2003 Act. “Sustainable urban drainage system” is defined in section 59(1) of the Sewerage (Scotland) Act 1968.

55. The first maps must be prepared by a date set by the Scottish Ministers. They must then be reviewed by local authorities from time to time and updated where appropriate.

56. Subsection (4) provides that the maps must be made available for public inspection. This requirement should be read with section 53, which contains detailed provisions about making documents publicly available.

Section 18 – Local authorities to assess bodies of water

57. This section requires local authorities to assess relevant bodies of water (other than canals) in their areas, in order to find out whether any of them are in a condition which gives rise to a risk of flooding. They must carry out this assessment from time to time, or when directed to do so by Scottish Ministers.

58. Where a local authority identifies that there is a risk of flooding and it considers that clearance and repair works would reduce that risk it must prepare a schedule of those works. This requirement should be read with section 59, which imposes a duty on local authorities to carry out works described in schedules of clearance and repair works.

59. Subsection (2) defines “clearance and repair works”. Subsection (3) requires schedules of clearance and repair works to indicate when the next assessment is to take place. It also enables the Scottish Ministers to specify the form and contents of schedules in regulations. Subsection (4) requires schedules of clearance and repair works to be made available for public inspection. This requirement should be read with section 53.

60. Subsection (5), as read with subsection (6), requires a local authority to warn another local authority where a body of water in the area of the first authority is likely to flood land in the area of the second, unless it appears that the second authority is already aware of that risk.

Section 19 - SEPA to prepare maps of artificial structures and natural features

61. This section requires SEPA to prepare maps showing artificial structures and natural features that, if removed, would significantly increase the risk of flooding from a body of surface water. Section 55 applies the definition of “body of surface water” from the 2003 Act, which includes rivers, canals, lochs and the sea. SEPA is responsible for determining whether the removal of a structure or feature could significantly increase flood risk but in doing so it must consult relevant local authorities.

62. Maps have to show whether structures or features were constructed by local authorities under the 1961 Act or under Part 4 of the Act. They must also include other information specified by the Scottish Ministers in regulations. Maps must be prepared at the appropriate scale (as defined in section 55) and in a form specified in regulations made by the Scottish Ministers.

63. The first maps must be prepared by a date set by the Scottish Ministers and must then be reviewed by SEPA from time to time and updated where appropriate. They must also be made available for public inspection. This requirement should be read with section 53.

Section 20 – SEPA to assess possible contribution of alteration etc. of natural features and characteristics

64. This section requires SEPA to assess whether alteration or restoration of natural features and characteristics of any river basin or coastal area could contribute to managing flood risks within a flood risk management district. Subsection (2) contains examples of “natural features and characteristics” for the purposes of the Act.

65. When carrying out this assessment, subsection (4) requires SEPA to consider the flood risk assessment prepared under section 9, any relevant flood hazard or flood risk maps prepared under section 21 and any relevant flood risk management plan prepared under section 27. Subsection (4)(b) requires that the assessments refer to maps which show where the alteration (including enhancement) or the restoration of natural features and characteristics could contribute to the management of flood risk in the district. Subsection (5) requires this map to be prepared at a scale which SEPA considers will assist in the identification of measures for inclusion in flood risk management plans (under section 27(4)(b)) and the inclusion of information in local flood risk management plans.

66. The first assessment must be carried out by 22nd December 2013, or by another date set by the Scottish Ministers. The assessment must be reviewed and, where appropriate, updated by a date set by the Scottish Ministers and then every six years after that. This assessment is not required by the Directive but the section allows the review dates to be set so as to coincide with the other work required under Part 3 to assess and manage flood risks. Current assessments and maps are to be made available for public inspection; sections 53 and 54 again apply in relation to the detail of doing that.

Section 21 – SEPA to prepare flood hazard maps and flood risk maps

67. This section requires SEPA to prepare maps showing flood hazards and flood risk 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, while flood risk maps will show the potential adverse consequences of such floods. Together with sections 22 and 23, this section implements Article 6 of the Directive. Section 22 sets out what flood hazard maps must show and section 23 does the same for flood risk maps.

68. The first maps must be prepared by 22nd December 2013, which is the date set by Article 6 of the Directive.

Section 22 – Flood hazard maps

69. This section sets out what flood hazard maps must show and what they can exclude. The section also allows information to be presented in a single map or through multiple maps.

70. Subsection (1) sets out what must be shown in flood hazard maps and implements Article 6.3 and 6.4 of the Directive. Paragraph (a) requires maps to show areas which could be flooded by low, medium and high probability floods and subsection (9) enables the Scottish Ministers to define those probabilities in subordinate legislation in terms of a return period (expressed as a number of years) or an annual probability of occurrence (expressed as a percentage). Paragraph (b) requires maps to show flood extent, depths or level and water flow for each of type of flood covered by paragraph (a). These elements largely duplicate Article 6.4 of the Directive. The Scottish Ministers may specify further elements to be shown in regulations.

71. Subsections (2) to (6) allow information about certain kinds of floods to be excluded in different circumstances. These optional exclusions are permitted under Articles 2 (floods from sewerage systems), 6.3 (high probability floods), 6.6 (floods in coastal areas) and 6.7 (floods from groundwater sources) of the Directive.

72. Subsection (2) allows information about high probability floods to be omitted from flood hazard maps where SEPA considers that the floods concerned would be unlikely to have significant adverse consequences for the area which could be flooded. Areas which may be unlikely to experience significant adverse consequences as a result of flooding may be unpopulated areas which are regularly flooded and where the land affected is of low agricultural value.

73. Subsections (3)(a) and (4) allow information about high and medium probability coastal floods to be omitted from flood hazard maps where SEPA considers that the coastal area concerned is adequately protected from such floods. SEPA can still choose to map high and medium probability coastal floods even if it considers that appropriate flood protection is in place. It can also be directed to do so by the Scottish Ministers. These provisions do not apply to low probability coastal floods so these must be mapped.

74. Subsections (3)(b) and (5) allow information about high and medium probability flooding from groundwater to be omitted from flood hazard maps if SEPA considers it appropriate to do so. SEPA can also be directed by the Scottish Ministers to include information about groundwater flooding. These provisions do not apply to low probability groundwater floods so these must be mapped.

75. Subsections (3)(c) and (6) allow information about floods from sewerage systems to be omitted from flood hazard maps. This information may be included where SEPA considers that it is practicable to map such floods and it must be included if the Scottish Ministers direct SEPA to include it. The opt-out applies to those floods from a sewerage system which otherwise would have to be mapped. Floods that are caused by a sewer being overloaded by higher than usual rainfall are covered by the Act.

76. Where information is omitted from a flood hazard map under subsections (2) to (6), subsection (7) requires SEPA to include a statement in the map, explaining that information has been omitted. This general statement will therefore set out what mapping opt-outs have been exercised and what information is not shown on any particular map.

77. Subsection (8) requires the Scottish Ministers to consult SEPA before giving a direction under subsections (4)(b), (5)(b) or (6)(b) to include information about coastal flooding, flooding from groundwater or flooding from sewerage systems in flood hazard maps.

Section 23 – Flood risk maps

78. This section requires flood risk maps to show the potential adverse consequences of the floods shown in flood hazard maps. As with flood hazard maps, information on flood risk may be presented in a single map or through multiple maps.

79. Flood risk maps must show the potential adverse consequences of floods by reference to various matters listed in subsection (2). These matters include those set out in Article 6.5 of the Directive. The list of matters is not exhaustive, and the Scottish Ministers may make

subordinate legislation under subsection (2)(f) requiring SEPA to show additional information in flood risk maps.

80. Subsection (3) allows SEPA to decide whether to include additional information in flood risk maps. This can be information on floods containing transported sediments and debris, other sources of pollution or any other available and readily derivable information. Floods that are caused by a sewer being overloaded by higher than usual rainfall are covered by the Act.

Section 24 – Flood hazard maps and flood risk maps: review

81. This section requires SEPA to review and, where appropriate, update the flood hazard and risk maps by 22nd December 2019 and every 6 years thereafter. The 22nd December deadline and the requirement to review every 6 years come from Article 14 of the Directive.

82. Subsection (2) requires SEPA to have regard to the likely impact of climate change on the occurrence of floods when undertaking a review, as required by Article 14.4 of the Directive.

83. Subsection (3) requires updated maps to comply with the same content requirements as the original maps prepared under section 21.

Section 25 – Flood hazard maps and flood risk maps: availability for public inspection

84. Section 25 requires SEPA to make copies of the current flood hazard and flood risk maps available for public inspection. This section should be read with sections 53 and 54 which contain detailed requirements for making documents available for inspection and publicising matters.

Section 26 – Flood hazard maps and flood risk maps: regulations

85. Section 26 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. Section 94 contains detailed provisions about how regulations are to be made.

Section 27 – SEPA to prepare flood risk management plans

86. This section requires SEPA to prepare and submit to the Scottish Ministers a flood risk management plan for the potentially vulnerable areas (identified under section 13) in each flood risk management district (established under section 8). There must be one plan per district. Together with section 28 and schedule 1, this section implements Article 7 of the Directive.

87. Subsection (2) requires SEPA to submit the plan by a date set by the Scottish Ministers. Article 7.5 of the Directive requires Member States to complete flood risk management plans by 22nd December 2015 so subsection (3) requires the Scottish Ministers

to set a submission date which they consider early enough to enable them to approve the plan by that deadline.

88. Subsection (4) requires SEPA to set objectives for managing flood risk and to identify measures to achieve those objectives in a way that it considers most sustainable. This should be read with section 28, which sets out matters which SEPA must take into account when setting objectives and identifying measures for the purpose of flood risk management plans.

89. Subsection (5) and schedule 1 set out what a flood risk management plan must include. The Scottish Ministers can also make regulations specifying any other matters for inclusion in plans.

90. Subsections (6) and (7) allow SEPA to include maps, diagrams and other illustrative information in plans.

Section 28 – Flood risk management plans: objectives and measures

91. All flood risk management plans must contain objectives and measures to manage flood risk. This section sets out matters which must be taken into account by SEPA when setting those objectives and identifying those measures.

92. Subsection (1)(a) lists matters which SEPA must take into account so far as is relevant when identifying objectives and measures. Most of these are closely based on matters listed in Article 7.2 and 7.3 of the Directive. Some matters mentioned in those Articles are not mentioned separately in this section because information about them will already be included in the flood risk assessment and maps prepared under sections 9 and 21. Also, some matters are dealt with elsewhere in the Act, for example, in section 1 (general duty).

93. Subsection (1)(b) requires SEPA, when considering the best means of achieving a particular objective, to consider both structural and non-structural flood risk management measures. Subsection (2) defines structural measures as measures that involve flood protection work (as defined in section 95). It also gives a non-exhaustive list of non-structural measures, including flood warning, awareness raising, the preparation and review of development plans and the carrying out of research, monitoring and other methods of gathering information relevant to managing flood risk.

94. Subsection (3) requires SEPA, when considering structural measures, to consider measures that seek to manage flood water by altering natural features and characteristics. Subsection (4) requires SEPA, when considering measures under subsection (3), to consider measures which consist of carrying out any alteration or restoration of natural features and characteristics identified as being capable of contributing to the management of flood risk in an assessment done under section 20.

Section 29 – Flood risk management plans: guidance

95. This section requires the Scottish Ministers to issue guidance to SEPA on setting objectives and identifying measures under sections 27 and 28. Subsection (2) requires the guidance to pay particular attention to the consideration of measures to alter (including enhance) or restore natural features and characteristics.

96. Subsection (3) requires the guidance to be issued no later than 22nd December 2012. Subsection (4) requires the guidance to be reviewed and where necessary updated no later than every 6 years. Subsection (5) requires Scottish Ministers to consult SEPA and the responsible authorities, and such other persons as they consider appropriate before issuing the guidance.

Section 30 – Flood risk management plans: publicity of drafts etc. and consultation

97. Sections 30 to 32 set out the formalities for consultation, submission and approval of flood risk management plans. They all contain detailed requirements for publicising and making documents available for inspection, which should be read with sections 53 and 54.

98. Section 30 sets requirements for publishing and consulting on draft flood risk management plans before they are submitted to the Scottish Ministers for approval. The section is very similar to section 11 of the Water Environment and Water Services (Scotland) Act 2003, which deals with publication and consultation on draft river basin management plans. This similarity is relevant because section 48 requires SEPA to co-ordinate the preparation of flood risk plans with river basin management plans.

99. Subsection (1) requires SEPA to publish a statement about its preparation of a flood risk management plan a minimum of 3 years before the plan is to become effective. SEPA can determine the manner in which the statement is to be published (subsection (3)). Subsection (4) requires SEPA to consult on the statement. Subsection (6) allows anyone to make representations to SEPA about a statement under subsection (1) and subsection (7) requires SEPA to take those into account when preparing the draft flood risk management plan.

100. Subsection (2) requires SEPA to publish a draft of the flood risk management plan a minimum of 1 year before the plan is to become effective. SEPA can determine the manner in which the draft plan is to be published (subsection (3)).

101. Subsection (4) requires SEPA to consult specific persons on the statement and a draft plan and publicise the arrangements for making these documents publicly available, and the opportunities to make representations about them. SEPA must make copies of the statement or draft plan available, free of charge, for at least 3 months and must consult the persons set out in subsection (5). These include every responsible authority, including Scottish Water, together with persons and bodies which are category 1 responders under Part 2 of Schedule 1 to the Civil Contingencies Act 2004, Scottish Natural Heritage, National Park Authorities and any other persons SEPA considers appropriate. SEPA is also required to take any steps it

considers appropriate to encourage the persons identified under subsection (5) to participate in the production of the plan.

102. Subsection (6) allows anyone to make representations to SEPA about a statement under subsection (1) or a draft plan. Subsection (8) requires SEPA, when preparing a flood risk management plan for submission to the Scottish Ministers, to take into account any views or representations received on the draft flood risk management plan.

Section 31 – Flood risk management plans: submission for approval

103. This section sets requirements in connection with the submission of a flood risk management plan to the Scottish Ministers. Subsection (1) requires SEPA, when it has submitted a flood risk management plan to the Scottish Ministers, to publicise that fact, to make copies of the plan available for public inspection free of charge, and to publicise arrangements for making such copies available. Some of these requirements are specified in sections 53 and 54.

104. Subsection (2) requires that a flood risk management plan submitted to the Scottish Ministers by SEPA is accompanied by a statement of the action taken by SEPA to publicise and consult on the draft plan to comply with the requirements set out in section 30. The statement must also include a summary of the representations received about the draft plan and of any consequential adjustments made to the plan.

105. If, having considered the statement from SEPA under subsection (2), the Scottish Ministers decide that more consultation or other action is needed under section 30, subsection (3) allows them to return the plan to SEPA. In doing so they may direct SEPA to undertake further consultation and take such further action under section 30 as they may specify and to resubmit the plan with such modifications as SEPA considers appropriate. The Scottish Ministers may specify the timescale in which the plan should be resubmitted. Subsection (4) requires the Scottish Ministers to state their reasons for returning the plan to SEPA.

106. Subsection (5) provides that the requirements in this section – about publicising submission of a plan, making copies available, attaching a statement about consultation and about return of the plan to SEPA – also apply to resubmitted plans.

Section 32 – Flood risk management plans: approval and publication

107. This section sets requirements in connection with the consideration and approval of flood risk management plans, by the Scottish Ministers. Subsection (1) provides that once a flood risk management plan has been submitted to them, the Scottish Ministers may approve the plan or reject it. They may approve the whole of the plan or part of it and may do so with or without modifications. Subsection (3) requires the Scottish Ministers to state their reasons for such a decision.

108. Subsection (2) allows the Scottish Ministers to seek further information or undertake such other investigations and consultation as they consider appropriate before determining whether to approve or reject a plan.

109. Subsection (4) provides for the circumstances in which the Scottish Ministers reject a plan. Where a plan is rejected, they must return the plan to SEPA and direct it to resubmit the plan with any modifications they may specify, together with any further changes that SEPA considers appropriate. The Scottish Ministers may direct the timescale in which a plan must be resubmitted.

110. Subsection (5) requires SEPA, when a flood risk management plan has been approved, to publicise the approved plan as it thinks fit. It must also make copies of it available to the public and for public inspection. SEPA must also publicise the publication of the approved plan and the arrangements for making copies of it available for public inspection. These requirements should be read with sections 53 and 54. Subsection (6) allows SEPA to charge a reasonable price for copies of the plan.

Section 33 – Flood risk management plans: review

111. Subsection (1) requires SEPA to review and update each flood risk management plan and to submit the updated plan to the Scottish Ministers by a date set by the Ministers. Article 14.3 of the Directive requires plans to be updated by 22nd December 2021 so subsection (2) requires the Scottish Ministers to set a submission date which they consider allows enough time for plans to be considered and approved in time to meet that deadline. Plans must then be reviewed and updated every 6 years, or earlier if the Scottish Ministers so direct.

112. Subsection (3) provides that a revised plan must contain the matters set out in Part 2 of schedule 1, in addition to the matters included in Part 1 of that schedule. The terms of Part 2 of schedule 1 largely mirror the terms of Part B of Annex 1 of the Directive.

113. Subsection (4) provides that objectives and measures must be set in the same way when plans are reviewed and updated as they were set for the original plan. It also provides for the same requirements on publication, consultation, submission and approval to apply to a revised plan in the same way as they do to an original plan. This gives Ministers the same control of the review process as they have for the original plan.

Section 34 – Local authorities to prepare local flood risk management plans

114. This section requires local authorities 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 local plans are to cover the local plan districts identified by SEPA under section 13.

115. Subsection (1) requires the lead authority for each local plan district to prepare a local flood risk management plan for the purposes of supplementing the relevant flood risk management plan prepared by SEPA under section 27. “Lead authorities” are local authorities identified in accordance with subsection (9).

116. Subsection (2) sets out that a local flood risk management plan must comprise two parts: a supplementary part and an implementation part.

117. Subsection (3) sets out what the supplementary part must include. It must include a summary of the objectives, measures and other information included in the flood risk management plan that is relevant to the local plan district, and such maps, information about how implementing the measures may alter or restore natural features and characteristics and further information about measures as the lead authority considers relevant to flood risk management with the local plan district. The plan must also include information on the publicity and consultation steps undertaken in relation to the plan, and any changes made to the plan in light of views and representations received.

118. Subsection (4) states that the implementation part must include a description of how the current measures are to be implemented, and then goes on to set out further details of what must be included. “Current measures” are measures that are identified in the flood risk management plan for implementation in the 6 year planning cycle to which the local plan relates. Subsection (4)(a) requires the implementation part to include a detailed timetable setting out when measures currently being implemented will be completed and a timetable for the implementation of measures that are yet to be commenced. Subsection (4)(b) requires it to include a description of who is, or is to be responsible for implementing each measure and the arrangements for funding the measure. Subsection (4)(c) also requires it to include a description of how the bodies responsible for implementing measures will co-ordinate their functions. This must pay particular attention to how those functions will be coordinated to implement measures which relate to the alteration or restoration of natural features and characteristics and to surface water run-off or urban drainage. Subsection (4)(d) allows the lead authority to include any other information they consider relevant to the implementation of the measures.

119. Subsection (5) also allows the implementation part to include information about how other measures identified in the district plan, which are not current measures, are to be implemented. This allows for inclusion of measures that would be implemented outside of the current plan, for instance in a subsequent 6 year plan.

120. Subsection (6) allows the Scottish Ministers to specify, in regulations, further matters to be included in local flood risk management plans. Subsection (7) requires the Scottish Ministers to consult SEPA, responsible authorities and such other persons as they consider appropriate before making such regulations.

121. Subsection (8) requires that a local flood risk management plan which is prepared by a lead local authority must not be inconsistent with anything in the relevant flood risk management plan prepared by SEPA.

122. Subsection (9) makes provision for identification of a lead authority for each local plan. Where a local plan district falls entirely within a local authority’s area, subsection (9)(a)(i) provides for that local authority to be the lead authority for that local plan. Where a local plan district falls within two or more local authority areas, subsection (9)(a)(ii) provides for one of the authorities whose area is within the local plan district to be identified as the lead authority. This lead authority should be agreed between the local authorities whose areas lie partly within the local plan district but where agreement cannot be reached, the Scottish Ministers may determine the lead authority.

Section 35 – Local flood risk management plans: publicity and consultation

123. Subsection (1) requires the lead authority to publish a draft of the supplementary part of the local flood risk management plan at least one year before the beginning of the period covered by the relevant flood risk management plan, or by such other date as the Scottish Ministers may direct. This is the same as the deadline for publication of draft flood risk management plans under section 30(2). Subsection (2) gives the lead authority discretion to determine the manner in which the draft plan is to be published.

124. Subsection (3) requires the lead authority to publicise the arrangements for making the draft publicly available, and the opportunities to make representations about it. The lead authority is also required to make copies of the supplementary part available for inspection for at least 3 months. These requirements should be read with sections 53 and 54. Subsection (4) allows any person to make representations to the lead authority about the draft supplementary part.

125. Subsection (5) requires the lead authority to consult specific persons on the draft of the supplementary part and the implementation part of the plan and to take steps to encourage those persons to participate in preparing the plan. Subsection (6) lists the persons who must be consulted. The list includes every responsible authority with functions exercisable in the local plan district, Scottish Natural Heritage, National Park Authorities, category 1 responders which have functions exercisable in or in relation to the district and any other persons the lead authority consider appropriate. Responsible authorities are defined in section 5 and include Scottish Water and local authorities. Category 1 responders are defined in section 95 by reference to the Civil Contingencies Act 2004.

126. Subsections (7) and (9) make provision for the coordination of the consultation exercises for local flood risk management plans and flood risk management plans prepared by SEPA under section 27. Subsection (7) requires the lead authority to co-ordinate its consultation exercise, as set out in subsections (1) to (6) with the consultation undertaken by SEPA in relation to the flood risk management plan, as set out in section 30(2) to (4). Subsection (9) requires the lead authority to inform SEPA of any views received on the local plan which it considers relevant to the flood risk management plan.

127. Subsection (8) requires the lead authority to take into account any views or representations received on both the supplementary part and on the implementation part before finalising a local flood risk management plan.

Section 36 – Local flood risk management plans: completion and publication

128. Section 36 makes provision for the completion and publication of local flood risk management plans.

129. Subsection (1) provides that a local flood risk management is finalised once the relevant flood risk management plan has been approved by the Scottish Ministers and the lead authority, SEPA and every responsible authority with flood risk related functions for the local plan district have agreed to the content of the local plan. If these bodies fail to reach agreement it is for the Scottish Ministers to determine the content of the local plan.

130. Subsections (2) to (4) set out arrangements for the Scottish Ministers to determine the content of local plans. Subsection (2) requires the lead authority to notify the Scottish Ministers where the local plan is not agreed by the “local plan deadline” or the lead authority does not believe that it will be agreed by that deadline. Subsection (7) provides for the “local plan deadline” to be 6 months after the relevant flood risk management plan is approved under section 32 or another date set by the Scottish Ministers.

131. Where the Scottish Ministers are notified that a local plan has not been, or will not be, agreed by the local plan deadline, subsection (3) requires them to determine the content of that plan. Subsection (4) requires them to take into account any representations made by SEPA or any of the responsible authorities with flood risk related functions for the local plan district. This will include the lead authority.

132. Subsections (5) and (6) set out arrangements for publicising the finalised local flood risk management plan. These require the lead authority to publish the plan, to publicise the publication, to make copies available to the public and for public inspection and to provide copies to SEPA and the Scottish Ministers. The requirements to publicise matters and make plans available for inspection should be read with sections 53 and 54.

Section 37 – Local flood risk management plans: interim report

133. This section requires the lead authority to review progress towards implementing the local flood risk management plan. This interim review must be undertaken between two and three years after the local flood risk management plan has been finalised under section 36 and the lead authority must produce and publish a report on the conclusions of the review.

Section 38 – Local flood risk management plans: final report

134. This section requires the lead authority to prepare and publish a final report on progress made towards implementing measures in the local flood risk management plan. This report must be produced between 5 and 6 years after the local flood risk management plan has been finalised or by a date set by the Scottish Ministers. This allows for continued coordination between local and district flood risk management plans.

135. Reports under this section will assess progress in the previous 6 years but will not plan how to implement measures for the next 6 years. It is possible that the boundaries of local plan districts could change when these and potentially vulnerable areas are reviewed under section 14 so, rather than reviewing and updating existing local flood risk management plans, new local flood risk management plans will be produced under section 34 to supplement the updated flood risk management plan produced for each 6 year period under section 33. This allows for any changes in local plan districts to be taken into account when planning for the next 6 years.

Section 39 – Local flood risk management plans: joint working

136. This section requires local authorities to co-operate with each other to assist in preparing the relevant local flood risk management plan, and interim and final reports where a local plan district covers more than one local authority area. This should be read with

section 34(9), which provides for the identification of lead authorities, and section 44, which allows lead authorities to seek information and assistance in preparing and reviewing local plans.

Section 40 – Regulations relating to flood risk management plans and local flood risk management plans

137. This section 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. Section 94 sets procedural requirements for making such regulations.

Section 41 – Duty to have regard to flood risk management plans and local flood risk management plans

138. Subsection (1) requires the Scottish Ministers and every public body and office holder to have regard to the flood risk management plan approved by the Scottish Ministers when exercising any functions that could affect the flood risk management district, and to have similar regard to a local flood risk management plan, so far as the exercise of any functions affects a local plan district (for example, to have regard to flood risk management plans when exercising planning functions). Subsection (2) requires the Scottish Ministers to have regard to flood risk management plans and local flood risk management plans when determining any funding to be allocated to SEPA or any responsible authorities for the purpose of flood risk management.

Section 42 – Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008

139. This section amends regulation 24 of the Town and Country Planning (Development Management Procedure) Regulations 2008 (S.S.I. 2008/432) by inserting an obligation on a planning authority to require an applicant for planning permission to provide a flood risk assessment where a development is likely to result in a material increase in the number of buildings at risk from flooding.

Section 43 – Power of SEPA to obtain information, documents and assistance

140. This section provides for SEPA to obtain information and assistance from the Scottish Ministers and responsible authorities (identified under section 5) and to obtain information from other persons to enable it to carry out its functions under Part 3 of the Act. It does not require disclosure of information or documents protected by the law on confidentiality (see section 46(3)).

141. Subsection (1) requires the Scottish Ministers and responsible authorities to provide SEPA with information and assistance so that SEPA can prepare and review flood risk assessments (sections 9 and 10), maps of artificial structures and natural features (section 19), assessments of possible contribution of alteration etc. of natural features and characteristics (section 20), flood hazard and flood risk maps (sections 21 and 24) and flood

risk management plans (sections 27, 28 and 33). This duty only applies where SEPA's requests for information or assistance are reasonable.

142. Subsections (2) and (3) require responsible authorities to gather and provide SEPA with information which could contribute to improving understanding of flood risk. This may include information about the contribution that altering or restoring natural features and characteristics could make to managing flood risk and information about urban drainage and flooding caused by surface run-off water or a sewerage system. Again, the duty only applies where SEPA's requests for information about flood risk are reasonable.

143. Subsection (5) enables SEPA to serve a notice on any person (other than the Scottish Ministers or the responsible authorities) in order to obtain information or documents from them that it reasonably requires to prepare and review flood risk assessments, flood hazard and flood risk maps and flood risk management plans. Section 46(1), (2) and (4) sets further requirements about the content of information notices. Section 46(5) contains interpretation provisions in relation to "documents".

144. Subsection (6) allows the Scottish Ministers to decide whether requests from SEPA are reasonable where there are differences of opinion between SEPA and a responsible authority or any other person who has been asked to provide information, assistance or documents.

Section 44 – Power of lead authorities to obtain information, documents and assistance

145. This section provides for lead authorities to obtain information and assistance from SEPA and the responsible authorities, and to obtain information from other persons to enable them to prepare and review local flood risk management plans (section 34) and interim and final reports (sections 37 and 38). As with section 43, it does not require disclosure of information or documents protected by the law on confidentiality (see section 46(3)).

146. Subsections (1) and (2) require SEPA and the responsible authorities with flood risk related functions exercisable in a local plan district to provide the lead authority with such information and assistance as it may reasonably seek in connection with preparing and reviewing local flood risk management plans and interim and final reports.

147. Subsection (3) enables lead authorities to serve a notice on any person (other than SEPA, a responsible authority or the Scottish Ministers) in order to obtain information or documents from them that it needs to prepare and review local flood risk management plans and interim and final reports. Section 46(1), (2) and (4) provides more detail about the form and content of and procedures in relation to such notices.

148. Subsection (4) allows the Scottish Ministers to decide whether requests from lead authorities are reasonable where there are differences of opinion between lead authorities and SEPA, responsible authorities or any other person who has been asked to provide information, assistance or documents.

Section 45 – Power of local authorities to obtain information

149. This section provides for local authorities to obtain information from SEPA and responsible authorities to enable them to prepare and review maps of relevant bodies of water (section 17) and assessments and schedules of clearance and repair works in relation to those bodies of water (section 18).

150. Subsection (3) allows the Scottish Ministers to decide whether a request from a local authority is reasonable where there is a difference of opinion between the local authority and SEPA or the responsible authority who has been asked to provide the information.

Section 46 – Power to obtain information, documents and assistance: supplementary

151. Subsections (1), (2) and (4) set further requirements about the content of notices served under sections 43(5) and 44(3) and what may be done with documents produced in response to a notice.

152. Subsection (3) protects from disclosure, information and documents that would be treated as confidential and protected from disclosure in proceedings in the Court of Session.

Section 47 – Power to obtain information, documents and assistance: offence

153. This section makes it an offence to refuse or fail to provide information, assistance or documents when requested to do so by notice under section 43(5) or 44(3). It is not an offence if the person has a reasonable excuse for not providing what was requested. The section also makes it an offence to intentionally alter, suppress or destroy a document that has been requested under those provisions.

154. Subsection (2) describes the penalties that are attached to this offence. The statutory maximum referred to in subsection (2)(a) is currently £10,000.

Section 48 – Consistency and co-ordination with characterisations and plans under the 2003 Act

155. This section sets out arrangements for coordinating flood risk assessment and management work under Part 3 of the Act, with river basin planning work required under Part 1 of the Water Environment and Water Services (Scotland) Act 2003, as required by Article 9 of the Directive. Subsection (1)(a) requires SEPA to secure appropriate consistency in the information in flood risk assessments, flood hazard and risk maps and flood risk management plans with information in characterisations of river basin districts and river basin management plans prepared under Chapter 2 of Part 1 of the 2003 Act. “Appropriate consistency” does not require the information contained in all documents under the Act to be entirely consistent with all documents under the 2003 Act so it will allow SEPA to decide, for example that documents do not need to be entirely consistent with documents from previous 6 year cycles.

156. Subsections (1)(b) and (2) require SEPA to coordinate the preparation and review of flood hazard and risk maps with characterisations of river basin districts prepared under the

2003 Act, and to coordinate preparation of flood risk management plans with river basin management plans prepared under the 2003 Act. SEPA is also required to coordinate the steps it takes to make maps and plans produced available for public inspection.

157. In addition to co-ordination under subsection (1)(b), subsection (1)(c) allows SEPA to choose to integrate flood hazard and flood risk maps with characterisations of river basin districts, and flood risk management plans with river basin management plans prepared under the 2003 Act.

158. Subsection (3) requires lead authorities to secure appropriate consistency between local flood risk management plans and characterisations of river basin districts and river basin management plans prepared under the 2003 Act.

Section 49 – District flood risk advisory groups

159. This section provides for the establishment of district flood risk advisory groups. Subsection (1) requires each flood risk management district to have at least one advisory group.

160. Subsections (2) and (3) provide that the function of these groups is to advise SEPA on the preparation and review of flood risk assessments (sections 9 and 10), documents identifying potentially vulnerable areas and local plan districts (sections 13 and 14), assessments in relation to alteration of natural features and characteristics (section 20), flood risk and flood hazard maps (sections 21 and 24) and flood risk management plans (sections 27 and 33).

161. Subsection (4) requires SEPA to have regard to any advice given by advisory groups on these matters.

162. Subsections (5) and (6) allow SEPA to determine the remit, membership and procedures for each district advisory group. It may determine a group's remit by reference to the geographic area and any other particular aspect of flood risk management.

163. When determining the number, remit and membership of groups, subsection (7) requires SEPA to try and ensure appropriate representation of the persons specified in section 30(5)(a) to (d) (responsible authorities, category 1 responders, Scottish Natural Heritage and National Park authorities) and other persons with an interest in flood risk management.

Section 50 – Sub-district flood risk advisory groups

164. This section provides for the establishment of sub-district advisory groups to advise SEPA on the preparation and review of flood risk assessments, documents identifying potentially vulnerable areas and local plan districts, assessments in relation to alteration of natural features and characteristics, flood risk and flood hazard maps and flood risk management plans. These sub-district groups are also to advise lead authorities on the preparation of local flood risk management plans and interim and final reports.

165. Subsection (1) requires SEPA to divide each flood risk management district into geographical “sub-districts” and subsection (2) then requires a sub-district advisory group to be established for each such sub-district.

166. Subsection (3) and (4) set out the functions of sub-district advisory groups. Each sub-district advisory group is to advise SEPA on any matter relating to flood risk assessments, identification of areas at significant flood risk, flood risk hazard/risk maps and flood risk management plans. Each sub-district advisory group must also advise local authorities on any matter which relates to the preparation of a local flood risk management plan.

167. Subsection (5) requires SEPA to have regard to advice from a sub-district advisory group when preparing, reviewing or updating any flood risk assessment (section 9), assessment of vulnerable areas and identification of local plan districts (section 13), flood hazard or risk map (section 21), or flood risk management plan (section 27). Subsection (6) requires lead authorities to have regard to any advice given by a sub-district advisory group when preparing local flood risk management plans and interim and final reports.

168. Subsection (7) makes provision for SEPA to determine the remits, membership and procedures of a sub-district advisory group after consultation with local authorities whose areas form part of the sub-district. When determining the remits and membership of groups, subsection (8) requires SEPA to try and ensure appropriate representation of responsible authorities, Scottish Natural Heritage and National Park authorities, category 1 responders and other persons with an interest in flood risk management for the sub-district.

Section 51 – Power to give effect to Community obligations etc.

169. Subsection (1) provides that the Scottish Ministers may by regulations provide that the provisions of Part 1 of the Act 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. A related right includes the right of the UK to derogate from a Community obligation or to make a more onerous provision in respect of an obligation (subsection (2)).

Section 52 – Annual report on implementation of Directive

170. The Scottish Ministers are required to make an annual report to the Scottish Parliament, as soon as practicable after the end of each calendar year, on the action taken during the year by the Scottish Ministers, SEPA and the responsible authorities under Part 3 of the Act (including action for securing compliance with the requirements of the Directive) and on the action taken to implement measures identified in flood risk management plans approved under section 32.

171. The report may be a freestanding report under the Act or incorporated into the Scottish Ministers’ annual report into the report on implementation of the Water Framework Directive under section 26 of the Water Environment and Water Services (Scotland) Act 2003.

Section 53 – Availability of documents for public inspection

172. This section applies whenever SEPA or a lead authority must make documents available for public inspection under this Part of the Act. The Act requires a number of documents to be made available for public inspection, including flood risk assessments (section 12), local authority maps of bodies of water and schedules of clearance and repair works (sections 17 and 18), SEPA maps of artificial structures and natural features (section 19), assessments and maps about the possible contribution of alteration or restoration of natural features and characteristics (section 20), flood hazard and flood risk maps (section 25), flood risk management plans, drafts of those plans and statements relating to their preparation (sections 30 to 32), local flood risk management plans, drafts of some parts and reports in relation to those plans (sections 35 to 38). This section requires the documents to be made available free of charge and at all reasonable times and it allows SEPA or the lead authority to choose the most appropriate means and formats for encouraging inspection by members of the public. This gives them the choice to provide documents in print or electronic form or both. The arrangements put in place for making a document available for public inspection must also be publicised under section 54, unless the document concerned is a local authority map of bodies of water under section 17 or a schedule of clearance and repair works under section 18.

Section 54 – Publicity of matters

173. This section applies whenever SEPA or a lead authority is required to publicise something under this Part of the Act, for example in relation to the matters mentioned in paragraph 172. Subsection (1) requires them to publicise information by placing a notice in the “appropriate newspapers” and also allows them to publicise it by any other means they consider appropriate. “Appropriate newspapers” are defined in subsection (2).

Section 55 – Interpretation of Part 3

174. This section defines the various terms used in Part 3 (and only there). Schedule 4 contains an index of terms used across the Act and a list of provisions where their respective meanings can be found.

PART 4 – FLOOD RISK MANAGEMENT: LOCAL AUTHORITY FUNCTIONS

Section 56 – General power to manage flood risk

175. Subsection (1) enables a local authority to do anything which it considers will contribute to the implementation of current measures described in any relevant local flood risk management plan. It may also do anything it considers necessary to reduce an imminent risk of flooding which would be likely to have serious adverse consequences, or which it considers will otherwise manage flood risk in its area without affecting the implementation of the area’s local flood risk management plan (for instance, because it will be possible to carry it out in addition to the measures identified in the plan).

176. Subsection (2) provides various illustrations of what a local authority may do under subsection (1), without restricting the generality of the power contained in that subsection.

177. Subsection (3) provides that work which meets the criteria in subsection (1) may be carried out within or outwith the local authority's area.

Section 57 – Limits of general power

178. Subsection (1) prevents a local authority from doing anything under section 56 which it would otherwise be unable to do because of a “limiting provision”. Subsection (2) defines a limiting provision, which must be contained in an Act or other form of legislation.

179. Subsection (3) provides that a limiting provision must contain a positive restriction on the powers of the local authority, rather than merely failing to confer a power on it to do a thing.

Section 58 – Limits of general power: statutory undertakings

180. Section 58 prohibits a local authority from exercising its general power to manage flood risk in a way which damages any works or property belonging to a statutory undertaker, or interferes with the carrying on of its statutory undertaking, unless the undertaker consents. However, consent is not required if it is withheld unreasonably and it is for the Scottish Ministers to determine whether consent has been withheld unreasonably in the event of a dispute, their decision being final. “Statutory undertaker” and “statutory undertaking” are defined in section 71.

Section 59 - Duty to carry out clearance and repair works

181. Section 59 imposes a duty on local authorities to undertake the clearance and repair works described in the schedule prepared under section 18, as long as the works contribute to the implementation of measures described in the relevant local flood risk management plan (as defined in section 71) or do not affect the implementation of those measures.

Section 60 – Flood protection schemes

182. This section defines a flood protection scheme as being a scheme by a local authority for the management of flood risk within the authority's area. Subsection (2) sets out what a proposed flood protection scheme must contain. The Scottish Ministers are empowered to lay down requirements to include maps, plans and other specifications in regulations. In addition, a scheme must state how the measures included in it will contribute to the implementation of any relevant local flood risk management plan and, if they will not contribute, demonstrate how this will not affect delivery of such a plan (for example, because there is no such plan or because it will be possible to carry out the scheme as well as the measures contained in the plan). Further provision about the making of a flood protection scheme is made within schedule 2, which may also be amended by the Scottish Ministers by order. The Scottish Ministers may only make such an order after consultation with those persons and bodies listed in subsection (5).

Section 61 – Orders under the Land Drainage (Scotland) Act 1958

183. This section makes provision for flood protection schemes to vary improvement orders made under the Land Drainage (Scotland) Act 1958.

184. The 1958 Act allowed owners of agricultural land to apply to the Scottish Ministers for improvement orders authorising drainage works in order to improve drainage or prevent or mitigate flooding or erosion of agricultural land. The Flood Prevention (Scotland) Act 1961 gave local authorities power to protect non-agricultural land from flooding. That Act is repealed by section 70 of the Act and the general power for local authorities to manage flood risk under section 56 covers both agricultural and non-agricultural land. Paragraph 1 of schedule 3 amends the 1958 Act so that new improvement orders cannot be made for the purposes of preventing or mitigating flooding. That amendment does not prevent new orders being made under the 1958 Act for the purposes of improving drainage or preventing or mitigating erosion. Existing improvement orders under the 1958 Act will remain in place but this section allows them to be varied where they affect any land on which operations are proposed to be carried out under a flood protection scheme.

185. Subsection (2) sets out the changes which can be made to improvement orders. Flood protection schemes can revoke improvement orders completely, they can reduce the size of improvement areas or they can remove all or any part of the drainage or protective works covered by an improvement order. Schemes can also amend, reapportion or remove the obligations on authorised persons to maintain drainage or protective works covered by the improvement order. This should be read with subsections (3) and (4) which restrict the changes which can be made to maintenance obligations. “Authorised persons” are defined in section 2(2) of the 1958 Act as the owners of agricultural land situated in the improvement area covered by the improvement order.

186. Subsections (3) and (4) restrict the changes which can be made to maintenance obligations under improvement orders. Subsection (3) prevents flood protection schemes from altering maintenance obligations under improvement orders so as to oblige the authorised persons to maintain things done by local authorities under schemes. Where proposed scheme operations will alter drainage or protective works under an improvement order, subsection (4) requires the scheme to remove the obligations on authorised persons to maintain the parts of the drainage or protective works which are altered.

187. The commencement of a flood protection scheme triggers the variation or revocation of the improvement order. Subsection (6) requires a notice 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. Subsection (7) enables the Scottish Ministers to prescribe the form and content of such notices by regulation.

Section 62 - Registers of flood protection schemes

188. Section 62 places a duty on each local authority to create and update a register of flood protection schemes relevant to the local authority area. A relevant scheme is one proposed by a local authority or one for which it has received notification from another local authority under paragraph 1(1)(f)(iii) of schedule 2.

189. Subsection 2(a) sets out the details pertaining to each scheme that must initially be included in the register. Subsection 2(b)(i) specifies that the register must include a note of whether any preliminary decision to confirm, confirm with modifications or reject the scheme has been taken by the local authority, and whether any final decision to confirm, confirm with modifications or reject has been taken by the local authority or the Scottish Ministers. Subsection 2(b)(ii) requires the register to show whether the scheme has been referred to the Scottish Ministers because of an objection from a relevant objector, and whether that objector is a local authority or a National Park Authority. Subsection 2(b)(iii) requires the register to show whether the Scottish Ministers or local authority have notified relevant objectors and anyone else affected by the scheme of any proposed modifications.

190. Subsection (4) enables a local authority to remove details of proposed schemes that were rejected by the local authority or by the Scottish Ministers. Subsection (5) requires a local authority to amend the register to reflect any decision by a sheriff to quash any part of a scheme on appeal.

191. Subsection (6) requires a local authority to inform any other local authority that it has notified about a proposed scheme about any information entered in its register relating to the proposed scheme.

192. Subsection (7) requires the local authority to make the register available for public inspection, and allows it to make a reasonable charge for doing so.

Section 63 - Registers of flood protection schemes: information about schemes under 1961 Act

193. Section 63 requires each local authority to place details of flood prevention schemes made by it under the Flood Prevention (Scotland) Act 1961 on its register of flood protection schemes.

Section 64 - Registers of flood protection schemes: regulations etc

194. Section 64 enables the Scottish Ministers to make further regulations on the content of a register, the time by which information must be entered into a register, the circumstances under which information should be removed from a register and the date by which one local authority must notify another of information about a flood protection scheme that should be entered in its register.

195. Subsection (2) also provides for regulations to make further provision about the availability of registers, including the form and manner in which they should be made available and the sharing of registers with specified third parties, who may themselves be required by regulations to make information from a register available to the public.

Section 65 – Deemed planning permission for scheme work

196. Section 65 inserts a new section 57(2B) into the Town and Country Planning (Scotland) Act 1997. This provides that once a flood protection scheme is confirmed

(whether by the local authority or the Scottish Ministers), the Scottish Ministers are to direct that any necessary planning permission is deemed to be granted, subject to any planning conditions which Ministers may specify.

Section 66 – Acquisition of land

197. This section enables local authorities to acquire land which they require to exercise functions under this Part by agreement. It also empowers local authorities, with the authorisation of the Scottish Ministers, to acquire land by compulsory purchase in connection with operations under a flood protection scheme. In subsection (1)(b), Crown land as defined in section 91(7)(a) is excluded from the power of compulsory acquisition.

198. Subsection (2) applies the procedure contained in the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 to any compulsory purchase by a local authority in connection with a scheme.

Section 67 – Recovery of expenses

199. Section 67(a) enables a local authority to recover any expense incurred by it in repairing or reinstating flood protection work it has put in place from the owner or occupier of the land, where that person's actions have caused the damage. This includes flood prevention scheme works carried out under the Flood Prevention (Scotland) Act 1961. Section 67(b) enables a local authority to recover any expense incurred by it in carrying out clearance and repair works required under section 59 from the owner or occupier of the land, where the works are necessary as a result of that person's actions.

Section 68 – Information about ownership etc. of land

200. In order to enable it to exercise any of its functions under this Part, a local authority may require land owners or occupiers to state their interest in that land in writing. Land owners or occupiers may also be required to provide contact details for any other person known to have an interest in that land. Any person failing to comply with the requirements of a local authority under this section, or knowingly or recklessly providing false or misleading information, is guilty of an offence.

Section 69 – Damage to certain flood protection work

201. Subsection (1) creates a criminal offence which is committed by any person who intentionally or recklessly damages any flood defence work created by a local authority under this Part, or any ancillary apparatus. This includes owners and lawful occupiers of the land on which the work is located. Flood prevention scheme works carried out under the Flood Prevention (Scotland) Act 1961 are also covered by this subsection.

202. Subsection (3) provides that, where a person did not know and had no reasonable means of knowing that the works or apparatus were for defence against flooding, this is a defence to a charge in any proceedings under subsection (1).

PART 5 – SEPA: OTHER FLOOD RISK MANAGEMENT FUNCTIONS

Section 72 – Advice to planning authorities and others as to flood risk

203. This section requires SEPA to provide advice to planning authorities and National Park authorities as to flood risk. Flood risk is defined in section 3 as the combination of the probability of a flood and of the potential adverse consequences. This duty replaces SEPA's duty to advise planning authorities under section 25(2) of the Environment Act 1995, which is repealed by paragraph 7 of schedule 3.

204. Subsection (1), like section 25(2) of the 1995 Act, requires SEPA to provide advice on flood risk in a planning authority's district when requested by the authority. Section 1 of the Town and Country Planning (Scotland) Act 1997 provides that local authorities are planning authorities and that a planning authority's district is the local authority area. Where any part of the district/local authority area is a National Park, it is possible for a National Park authority³ to be made the planning authority for the Park for the purposes of the planning acts⁴ – in that case SEPA must, when requested by the National Park authority, give it advice as to flood risk in the National Park.

205. Subsection (2) requires SEPA to provide advice to a National Park authority about their park where they are not made planning authorities but are to be treated as planning authorities for the National Park for certain purposes⁵. This is a new requirement.

206. Subsection (3), like section 25(2) of the 1995 Act, requires the advice SEPA provides to be based on information SEPA holds. The advice must take into account, but is not limited to, information produced under Part 3 of the Act (flood risk assessments, flood hazard and flood risk maps, flood risk management plans and local flood risk management plans), and any information provided to SEPA by the planning authority or National Park authority.

Section 73 – Other assessment and maps of flood risk

207. This section allows SEPA to undertake other assessments of flood risk and to prepare other maps in addition to the flood risk assessments and maps it is obliged to prepare under Part 3 of the Act.

208. When carrying out assessments or preparing maps under this section, subsection (2) requires SEPA to consider any relevant flood risk assessments, flood hazard and flood risk maps and flood risk management plans prepared under Part 3.

³ National Parks and National Park authorities are established under the National Parks (Scotland) Act 2000 - an order under section 10(1)(a) of that Act may provide for a National Park authority to be the planning authority for the National Park.

⁴ The Town and Country Planning (Scotland) Act 1997; the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997; the Planning (Hazardous Substances) (Scotland) Act 1997; the Planning (Consequential Provisions) (Scotland) Act 1997.

⁵ A designation order under section 10(1)(b) of the 2000 Act can provide that a National Park authority is to be treated as the planning authority for the National Park for such purposes of Part II (development plans) of the Town and Country Planning (Scotland) Act 1997, as are specified in the order.

Section 74 – Flood warning

209. This section requires SEPA to make flood warnings available where it considers that a flood is occurring or is likely to occur in the near future.

210. Subsection (2) sets requirements as to the timing of flood warnings, the information on which they are to be based and the means by which they are to be made available. Warnings must be based on information available to SEPA (paragraph (c)). Where SEPA considers a flood is already occurring, a warning must be made available as soon as is practicable (paragraph (a)) and where a flood is considered likely to occur SEPA may choose when to issue the warning (paragraph (b)). This discretion under paragraph (b) allows SEPA to decide when it is appropriate to issue a very early warning and when it is appropriate to wait until more reliable information is available. SEPA can decide how to make warnings publicly available (paragraph (d)). This discretion allows SEPA to issue general warnings, for example online or through a phonenumber, and it also allows it to establish systems for issuing warnings to individuals or other organisations if that is considered appropriate.

Section 75 – Assessment of whether flood warning systems should be provided or altered

211. This section makes provision for SEPA to assess where provision of or improvements to any form of flood warning system could assist in providing earlier or more accurate flood warning information and where that earlier warning or improved accuracy could help reduce the adverse consequences of flooding. SEPA may choose to carry out such an assessment at any time and must do so when directed by the Scottish Ministers

212. “Flood warning system” is defined in subsection (4). The definition is similar to the one used in section 92(2)(a) of the Agriculture Act 1970, which is repealed for Scotland by paragraph 2 of schedule 3. The definition covers flood warning systems which rely on information from gauges and other monitoring equipment in rivers, coastal waters and other bodies of water and flood warning systems which rely on meteorological data and modelling software.

213. Subsection (2) requires SEPA to use information it has in making this assessment and subsection (3) and section 77(1) require SEPA to consult the relevant local authorities and chief constables in making its assessments.

Section 76 – Provision, alteration etc. of flood warning system

214. This section allows SEPA to provide, operate, alter and maintain flood warning systems and to carry out any building or engineering work required to provide and install apparatus for that purpose. “Flood warning system” is defined in section 75(4).

215. This section replaces sections 92 and 94 of the Agriculture Act 1970, which are repealed by paragraph 2 of schedule 3. SEPA’s general powers under section 37 of the Environment Act 1995 apply in relation to its functions under this section, including powers to acquire and dispose of land and other property and carry out such engineering or building operations as it considers appropriate.

216. Subsection (2) and section 77(2) require SEPA to consult the relevant local authorities and chief constables before it exercises its powers to provide a new flood warning system or to make material alterations to an existing system.

Section 77 – Consultation required by sections 75 and 76

217. This section sets out consultation requirements for the purposes of sections 75 (assessment in relation to flood warning systems) and section 76 (provision or alteration of flood warning systems).

Section 78 – SEPA’s power to obtain information about land

218. This section applies section 27 of the Environment Act 1995 to this part of the Act. This allows SEPA to obtain information about land where it requires the information for the purposes of carrying out its functions in relation to flood risk assessment and flood warning. In order to obtain such information SEPA must serve a notice on the occupier of the land or any person with an interest in the land. That notice must specify the land concerned, and that it is served under the Act. Failure to comply with a notice is an offence under section 27(3) of the 1995 Act.

PART 6 – POWERS OF ENTRY AND COMPENSATION

Section 79 – Powers of entry

219. This section creates powers for SEPA and local authorities to enter land for the purposes of carrying out some of their functions under the Act. It also gives local authorities power to enter land for the purposes of maintaining flood prevention schemes confirmed under the 1961 Act. The power to enter land includes a power to enter buildings because “land” is defined in the Interpretation Order⁶ to include buildings and other structures.

220. Subsection (1) allows any person authorised by SEPA to enter any land for the purposes of carrying out some of SEPA’s flood risk management functions under Part 3 of the Act (sections 9, 10, 13, 14, 19, 20, 21, 24, 27 and 33). This allows SEPA to survey land in order to check the accuracy of information which it is using to prepare flood risk management documents. The section also allows SEPA to enter land in order to assess flood risk (section 73) and to provide, alter and maintain flood warning systems (section 76).

221. Subsection (2) allows any person authorised by a local authority to enter any land for the purpose of preparing maps of bodies of water under section 17 or assessing those bodies of water under section 18. Where the local authority is a lead authority within the meaning of section 34 they may also enter land for the purpose of preparing a local flood risk management plan under section 34 or a report under section 37 or 38. Subsection (2) also allows them to enter land on which scheme operations, temporary works, emergency flood protection work, maintenance operations or clearance and repair works are to be carried out under Part 4 of the Act. Land may also be entered for the purposes of determining whether any function conferred by or under that Part is to be exercised.

⁶ The Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (S.I. 1999/ 1379)

Section 80 – Warrants authorising entry

222. This section enables a sheriff or justice of the peace to grant a warrant to any person entitled to exercise a power of entry under section 79 to do so. A warrant allows the person authorised to use reasonable force but does not allow the use of force against individuals (see subsections (1) and (4)(a)).

223. Subsections (2) and (3) set out the circumstances in which a warrant may be granted. These require the sheriff or justice of the peace to be satisfied by evidence on oath that there are reasonable grounds for seeking entry to the land, that permission to enter has been refused or a refusal is reasonably expected, the land is unoccupied, or where the case is urgent. Where the case is not urgent and a warrant is sought on the basis that permission to enter has been refused or a refusal is expected then the applicant (either SEPA or the local authority) must first have given notice that they intend to enter the land and the notice period must have expired. The notice periods are set out in section 81(3).

224. Subsection (5) makes it an offence to prevent or obstruct a person from exercising a power of entry under a warrant unless the person obstructing or preventing access has a reasonable excuse for doing so. The standard scale is set out in section 225 of the Criminal Procedure (Scotland) Act 1995. Level 3 is currently £1,000.

Section 81 – Powers of entry: supplementary

225. This section supplements sections 79 and 80. Subsection (1) provides that a right to enter land under section 79 (with or without a warrant under section 80) includes a right to enter adjacent land and a right to survey or examine the land.

226. Subsection (2) entitles those entering land under section 79 (with or without a warrant) to take other persons, materials and equipment onto the land. This includes vehicles. The subsection also enables them to do anything else reasonably required to fulfil the purpose of entering the land.

227. Subsection (3) sets notice periods which must be complied with except in the urgent cases defined in subsection (5). A seven day notice period applies where the power under section 79 is to be exercised without a warrant in order to enter a house or to take heavy equipment onto land (subsection (3)(a)). “Heavy equipment” and “house” are defined in subsection (7).

228. A twenty four hour notice period applies where the power under section 79 is to be exercised without a warrant, without entering a house and without taking heavy equipment onto the land (subsection (3)(b)). A twenty four hour notice period also applies to all cases where the power under section 79 is to be exercised with a warrant (subsection (3)(b)).

229. Subsection (4) requires that, except in the urgent cases set out in subsection (5), people entering land under section 79 (with or without a warrant) may only do so at a reasonable time.

230. In all cases, subsection (6) requires those entering land to be able to produce written evidence that they have been authorised to enter.

Section 82 – Compensation

231. Subsection (1) obliges SEPA to compensate anyone sustaining damage as a result of SEPA using its powers to install, provide, alter or maintain flood warning systems or its powers to enter land. “Damage” is defined in section 83(1).

232. Subsection (2) obliges local authorities to compensate anyone who has sustained damage as a result of scheme operations, subsequent maintenance by or on behalf of the local authority, clearance and repair works, the variation or revocation of an improvement order or the exercise of a right of entry.

Section 83 – Compensation: supplementary

233. Subsection (1) defines damage as the depreciation of the value of a person’s interest in land or the disturbance of a person’s enjoyment of land.

234. Subsection (2) places certain limits on the right to compensation and requires notice of any claim to be given to SEPA or the local authority within a specified period. It should be read with subsection (3).

235. Subsection (4) provides that any disputes over compensation under section 82 are to be determined by the Lands Tribunal for Scotland.

PART 7 – RESERVOIRS

236. Part 7 amends the Reservoirs Act 1975, which sets safety requirements to prevent escapes of water from reservoirs. The 1975 Act imposes duties on persons (referred to as “undertakers”) who own, operate or use large raised reservoirs. These duties regulate maintenance and inspection as well as structural changes to large raised reservoirs and, in most cases, they require the appointment of qualified civil engineers to inspect and supervise works on reservoirs and recommend safety measures. Where an engineer recommends measures under the 1975 Act, the undertaker generally has a duty to implement those measures. “Relevant authorities” (also referred to in the Act as “enforcement authorities”) then have duties to maintain registers of information about large raised reservoirs, powers and duties to secure that undertakers comply with their duties under the Act and duties to report to the Scottish Ministers. Enforcement action involves service of written notices on undertakers who have failed to appoint engineers or implement measures recommended by engineers. Failure to comply with a notice is a criminal offence and also triggers a power for the enforcement authority to carry out the work itself and recover the costs from the undertaker.

Section 84 – SEPA to be enforcement authority under the Reservoirs Act 1975

237. Sections 84 to 86 make provision for SEPA to take over from local authorities as the relevant authority and enforcement authority under the 1975 Act. Section 84 appoints SEPA as the relevant authority for the whole of Scotland.

Section 85 – Transitional arrangements

238. This section contains detailed provision about the transfer of responsibility from local authorities to SEPA. Subsection (2) requires local authorities to hand over relevant registers, records and other relevant information to SEPA within 28 days of the transfer of responsibility. Subsection (3) requires each local authority to give SEPA any assistance it may reasonably require for the purposes of taking over as enforcement authority.

239. Subsections (4) to (6) contain transitional arrangements to ensure that acts by local authorities when they were enforcement authorities remain valid and to allow SEPA to take over responsibility for ongoing legal proceedings and other work.

Section 86 – Service of documents

240. This section amends section 15 of the 1975 Act and inserts a new section 22B to provide for service of documents by SEPA in its new role as the relevant authority and enforcement authority for Scotland.

Section 87 – Extension of enforcement authority’s reserve powers

241. This section extends to Scotland amendments made to sections 8, 15 and 17 of the 1975 Act by section 75 of the Water Act 2003, which amended the 1975 Act for England and Wales. The effect of the amendments is to allow the enforcement authority to enter land under section 17 to determine whether measures recommended by engineers who were appointed by the enforcement authority under section 8 have been carried out. The enforcement authority can serve enforcement notices on undertakers who fail to implement such measures and if an undertaker fails to comply with an enforcement notice, the enforcement authority can also carry out the work itself and recover the costs under section 15.

Section 88 – Incident reporting

242. This section inserts a new section 12ZA into the 1975 Act. This enables the Scottish Ministers to make provision in regulations for reporting incidents which may affect the safety of reservoirs. The power is not limited to large raised reservoirs under the 1975 Act and instead regulations can set criteria for determining which reservoirs will fall within the incident reporting regime.

243. Subsections 12ZA(2) and (4) set out what regulations may cover.

244. Section 12ZA(3) sets consultation requirements which the Scottish Ministers must comply with before making regulations and section 12ZA(5) provides for regulations to be subject to affirmative procedure in the Scottish Parliament.

Section 89 - Flood Plans

245. This section inserts a new section 12C into the 1975 Act. This enables the Scottish Ministers to make provision in regulations for the preparation of reservoir flood plans. These

plans would set out the action which the reservoir undertaker would take to control or mitigate the effects of flooding likely to result from any escape of water from the reservoir. As with the new incident reporting power, this power is not limited to large raised reservoirs and instead the regulations can set criteria for determining which reservoirs will require flood plans.

246. Subsections 12C(3) and (5) set out what regulations may cover.

247. Section 12C(4) sets consultation requirements which the Scottish Ministers must comply with before making regulations and section 12C(6) provides for regulations to be subject to affirmative procedure in the Scottish Parliament.

Section 90 – Reservoirs Act 1975: Crown application

248. This section inserts a new section 27B into the 1975 Act. This makes provision for the 1975 Act to apply to the Crown in Scotland. The new section is similar to section 27A which was inserted into the 1975 Act by the Water Act 2003 and which makes provision for the Act to apply to the Crown in England and Wales.

249. Subsection (1) of section 27B provides that the 1975 Act binds the Crown.

250. Subsection (2) and (3) of section 27B provide that the Crown will not be criminally liable for any contravention of the 1975 Act but allows SEPA to apply to the Court of Session for a declaration that any act of the Crown is in contravention of the Act.

251. Subsection (4) of section 27B provides that any provision made by or under this Act applies to persons in the service of the Crown as it applies to other persons.

252. Subsection (5) and (6) of section 27B limit powers of entry to Crown land by requiring the consent of an appropriate authority to be obtained before the powers can be exercised. Subsection (6) defines “Crown land” and “appropriate authority” and subsection (8) provides for the Scottish Ministers to determine any questions about who the appropriate authority is in relation to any land.

PART 8 – GENERAL

Section 91 – Crown application

253. This section makes provision for the Act to apply to the Crown in Scotland.

254. Subsections (3) and (4) provide that the Crown in Scotland will not be criminally liable for any contravention of the Act’s provisions but allows the Court of Session to declare any act of the Crown in contravention of the Act’s provisions unlawful, upon application by the public body or office holder responsible for enforcing the provision in question.

255. Subsection (5) provides that any provision made by or under this Act applies to persons in the service of the Crown as it applies to other persons.

256. Subsection (6) and (7) limit powers of entry to Crown land by requiring the consent of an appropriate authority to be obtained before the powers can be exercised. Subsection (7) defines “Crown land” and “appropriate authority” and subsection (9) provides for the Scottish Ministers to determine any questions about who the appropriate authority is in relation to any land.

Section 92 – Offences by bodies corporate etc.

257. This section provides that where an offence under the Act has been committed by a corporate body, Scottish partnership or other unincorporated association and the offence was committed with the consent or connivance of a “relevant individual”, both the body and the individual can be prosecuted.

258. Subsection (2) defines “relevant individual” and includes directors and other officers of companies, partners and individuals who manage or control other unincorporated associations.

Section 93 – Ancillary provision

259. This section enables the Scottish Ministers by order to make incidental, supplementary, consequential, transitional, transitory or saving provision, if appropriate.

Section 94 – Orders and regulations

260. This section provides the procedure for the making of orders and regulations under the Act.

261. Subsection (2) provides that all orders and regulations, except a commencement order, made under the Act are subject to negative procedure unless they are listed in subsection (3). Orders and regulations which fall under subsection (3) are subject to affirmative procedure.

Section 95 – Interpretation: general

262. This section defines various terms used across the Act. Schedule 4 contains an index of terms used across the Act and defined in various provisions (see paragraph 309).

Section 96 – Minor and consequential modifications

263. This section introduces schedule 3, which contains amendments and repeals to other Acts.

Section 97 – Commencement and short title

264. This section makes the usual provision that all of the provisions of the Act, except those containing definitions and providing where procedure is required for orders and regulations, are to come into force on a day set by the Scottish Ministers by order. The section also provides for the short title of the Act.

THE ACT – SCHEDULES

SCHEDULE 1 – MATTERS TO BE INCLUDED IN FLOOD RISK MANAGEMENT PLANS

265. This schedule sets out what flood risk management plans must contain. It is closely based on the Annex to the Directive and should be read with sections 27, 28 and 33 of the Act.

Part 1 – Matters to be included in every plan

266. Part 1 of the schedule applies to the first plans produced under section 27 and to updated plans produced under section 33.

267. Paragraph 1 requires flood risk management plans to include a description of the objectives set and the measures identified by SEPA under section 27. They must also explain the priority to given to implementing each measure including an indication of the period in which the measure is to be implemented. Paragraph 5 also requires plans to include a description of how the priority given to implementing each measure was determined and how progress will be monitored.

268. Paragraph 2 requires plans to include the conclusions of the flood risk assessment, prepared under section 9. This should be presented in the form of a map of the flood risk management district showing the potentially vulnerable areas identified under section 13.

269. Paragraph 3 requires plans to include copies of the flood hazard maps and flood risk maps prepared under section 21.

270. Paragraph 4 requires plans to include a summary of flood-related measures taken under various EC directives.

271. Paragraph 5 requires plans to include a description of the reasons for identifying measures. Where an assessment under section 20 identifies an alteration or restoration of a natural feature or characteristic in the flood risk management district which could contribute to the management of flood risk but the plan does not include a measure to carry out that alteration or restoration, this paragraph also requires the plan to give reasons why such a measure has not been included.

272. Paragraph 7 requires plans to include an estimate of the cost of implementing the measures before the plan is next reviewed under section 33.

273. Paragraph 8 requires plans to include a summary of the consultation which was carried out in order to comply with section 30. They must also include any other consultation measures taken in connection with preparation of the plan. This would include consultation carried out in relation to flood risk assessments and flood risk and flood hazard maps). It may also include information about the role of the advisory groups established under sections

49 and 50 in the preparation of assessments, maps and plans. A summary of changes made to the plan in light of views and representations received must also be included.

274. Paragraph 9 requires the plan to include information on SEPA. In practice, this would include information to reflect SEPA's role as competent authority for the Directive.

275. Paragraph 10 requires the plan to include a description of how its preparation has been co-ordinated with the preparation of river basin management documents under Part 1 of the 2003 Act. This will include information about steps taken under section 48.

Part 2 – Components of the subsequent update of flood risk management plans

276. Part 2 of the schedule applies only to updated plans produced under section 33.

277. Paragraph 11 requires updated plans to include a summary of changes which have been made compared to the previous version of the plan.

278. Paragraph 12 requires an assessment of the progress made towards the achievement of the objectives set by SEPA for the management of flood risk, while paragraph 13 requires it to include information about why any measures included in the previous plan were not implemented.

279. Paragraph 14 requires a description of any other measures implemented which SEPA considers have contributed to the achievement of the objectives set by SEPA for the management of flood risk.

SCHEDULE 2 – FLOOD PROTECTION SCHEMES: PROCEDURE ETC.

Paragraph 1 – Notification

280. Paragraphs 1(1)(a) to (c) set out the requirements for newspaper advertisement of a proposed flood protection scheme by a local authority.

281. Sub-paragraphs (1)(d) to (f) require a local authority to send direct notification of a proposed scheme to those with an interest in affected land, the authorised persons in respect of any land covered by an improvement order under the Land Drainage (Scotland) Act 1958 and a number of specified consultees. Sub-paragraph (1)(f)(vii) enables the Scottish Ministers to specify additional consultees by order. Sub-paragraph (2) requires the local authority to display notice of the proposed scheme in a prominent position in the locality.

282. Sub-paragraph (3) sets out the required contents of each notice of the proposed scheme, whether published in a newspaper, sent directly to a person entitled to individual notification or displayed in the locality.

283. Sub-paragraph (4) requires notice to be given to those with an interest in land and the specified consultees, and to be displayed in the locality, no later than the date that notice is first published in local newspapers.

Paragraph 2 – Public inspection of scheme proposal

284. Paragraph 2 makes provision about the availability for public inspection of documents relating to the proposed scheme in both the area of the local authority taking forward the scheme and that of any other local authority where work would be carried out.

Paragraph 3 – Objections

285. Paragraph 3 entitles any person to object to a proposed flood protection scheme. Valid objections must be made in writing (including by electronic means so long as legible and useable) and include the name and address of the objector. These objections must be made to the local authority within 28 days from the date notice of the proposed scheme is published in local newspapers. Sub-paragraph (4) defines a “late objection” for the purposes of schedule 2.

Paragraph 4 – Decision where no valid objections received

286. Paragraph 4 places a requirement on the local authority, where no valid objections are received within the 28 day period, to either confirm or reject the proposed scheme. However, a late objection may be treated as being valid so long as the local authority is satisfied that it was reasonable for the objector to make the objection after the specified deadline.

Paragraph 5 – Preliminary decision following objections

287. Where a local authority receives a valid objection, it must make a preliminary decision under paragraph 5 to either confirm the proposed scheme, with or without modifications, or to reject the scheme. In arriving at its decision, sub-paragraph (2) sets out that the local authority must consider any valid objections (unless withdrawn) and may consider any late objections if the authority is satisfied that it was reasonable for the respondent to make the objection after the deadline. These matters are not exclusive and the local authority may consider any other factors it considers appropriate.

288. The local authority must, under sub-paragraph (3), give notice of its preliminary decision to either confirm the proposed scheme, with or without modifications, or to reject the scheme, to every person who made an objection which it considered. Any person who made such an objection is a relevant objector. Where a relevant objector falls within sub-paragraph (6), then sub-paragraph (5) requires the local authority to give the Scottish Ministers notice of its decision along with other material including the scheme documents and copies of all objections received. The relevant objectors falling within sub-paragraph (6) are: those with an affected interest in land; authorised persons under an improvement order made under the Land Drainage (Scotland) Act 1958 where land affected by the order would have work carried out on it under the scheme; and the specified consultees.

Paragraph 6 – Ministerial call-in

289. Where the Scottish Ministers receive notification of a proposed scheme under paragraph 5(5), paragraph 6 requires them to call in the proposed scheme where any relevant objector is a local authority or National Park Authority. Otherwise, the Scottish Ministers must advise the local authority within 28 days of receipt, whether or not they will call in the proposed scheme for decision by them. In reaching this decision whether to call in, the Scottish Ministers must have regard to the factors listed in paragraph 6(3).

290. Sub-paragraphs (4) and (5) allow the Scottish Ministers to extend the time in which they must decide whether or not to call in a scheme by up to 28 days, but they must make any decision to extend within the original 28 day period and must notify the local authority of the extension as soon as practicable.

Paragraph 7 – Ministerial consideration of proposed scheme

291. Paragraph 7 applies where the proposed scheme has been called in by the Scottish Ministers and requires them to hold a public local inquiry, unless all objections made by relevant objectors are withdrawn. Paragraph 7(3) applies provisions of the Local Government (Scotland) Act 1973 concerning local inquiries to inquiries held under paragraph 7. The Scottish Ministers must consider the material received by them under paragraph 5(5) as well as the report of the person who held the public local inquiry before either confirming the proposed scheme either with or without modifications, or rejecting the scheme.

292. The Scottish Ministers may not confirm a scheme with modifications unless they have notified relevant objectors and anyone else they consider to be affected of the proposed modifications at least 28 days before confirming the scheme, given them an opportunity to make objections about the proposed modifications, and considered any objections made as a result. Sub-paragraph (6) requires the Scottish Ministers to notify the local authority of their decision as soon as reasonably possible.

Paragraph 8 – Local authority hearing to consider proposed scheme

293. Paragraph 8 applies where the local authority has made a preliminary decision in relation to a proposed scheme under paragraph 5 and the proposed scheme has not been called in by the Scottish Ministers (either because it did not have to be notified to them under paragraph 5(5) or because they decided not to call it in following such notification).

294. Before making a final decision (see notes on paragraph 9), the local authority must hold a hearing to consider the proposed scheme if it has notified the Scottish Ministers under paragraph 5(5) but they have decided not to consider the scheme, or may hold a hearing in any other case.

295. Sub-paragraph (3) requires the local authority to invite each objector who has made a valid objection (unless withdrawn) or a late objection which the authority intends to consider, to the hearing. Any invitation under sub-paragraph (3) must be given not less than 28 days before the proposed hearing. Notice of the hearing must be published in a local newspaper within the relevant local authority area(s) at least 21 days before the proposed hearing.

Paragraph 9 – Final decision following preliminary decision

296. Paragraph 9 requires the local authority to make a final decision in relation to the proposed scheme by either confirming it with or without modifications, or rejecting it, unless the scheme has been called in by the Scottish Ministers.

297. Sub-paragraph (2) lists matters which the local authority is to take into account.

298. Sub-paragraph (3) prohibits a local authority from confirming a scheme with modifications unless it has notified the relevant objectors and anyone else considered to be affected of the proposed modifications at least 28 days before confirming the scheme, given them an opportunity to make objections about the proposed modifications, and considered any objections made.

Paragraph 10 – Notice of final decision

299. Paragraph 10 requires that, where a final decision of a local authority or the Scottish Ministers is made on a proposed scheme, the local authority must give notice of the decision to every person given direct notification of the scheme at the outset, every relevant objector (see paragraph 5(3) and 5(4)) and anyone else who received notification of a proposed modification to the scheme. Should it be decided to confirm the proposed scheme (with or without modifications) then notice must be given in local newspapers in the relevant local authority areas, as well as in the Edinburgh Gazette.

Paragraph 11 – Commencement of scheme

300. Paragraph 11 sets out that a scheme becomes operative 6 weeks after notice of its confirmation is published under paragraph 10(2)(d).

Paragraph 12 – Appeals

301. Any person affected by a final decision of the local authority or a decision of the Scottish Ministers to confirm a scheme may appeal that decision. Paragraph 12 states that an appeal must be made within 6 weeks of the notice of confirmation of the scheme being published in a newspaper circulating in the area of the local authority taking forward the scheme.

302. An appeal under this paragraph is to be made by summary application to the sheriff of a sheriffdom in which all or some of the proposed operations are to be carried out.

303. Sub-paragraph (5) provides that the grounds on which a decision can be appealed are that the local authority or the Scottish Ministers failed to comply with the requirements relating to improvement orders under the Land Drainage (Scotland) Act 1958 (see section 61(3) and (4)), erred in law or failed to follow a procedural requirement.

304. Sub-paragraph (6) enables the sheriff to suspend the operation of the scheme in whole or in part pending consideration of the appeal. Sub-paragraph (7) enables the sheriff to

uphold the appeal only where the interests of the appellant have been substantially prejudiced and to quash the scheme in whole or in part.

Paragraph 13 – Assessment of environmental effects

305. Paragraph 13 enables the Scottish Ministers to make regulations requiring environmental assessment of proposed schemes.

Paragraph 14 – Further provision

306. Paragraph 14 enables the Scottish Ministers to make regulations containing further procedural provisions relating to schemes.

SCHEDULE 3 – MINOR AND CONSEQUENTIAL MODIFICATIONS

307. Schedule 3 sets out minor and consequential modifications to other legislation.

SCHEDULE 4 – INDEX

308. This schedule is an index of terms used across the Act and defined in various provisions – it also contains a list of the provisions where the meanings of the terms listed there can be found.

PARLIAMENTARY HISTORY

309. The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which the proceedings at that Stage took place, and the references to the official report of those proceedings. It also shows the dates on which the Committee Reports and other papers relating to the Bill were published, and references to those reports and other papers.

INTRODUCTION	
Bill as Introduced -	SP Bill 15 - Session 3 (2009)
STAGE 1	
(a) Rural Affairs and Environment Committee	
21st Meeting 2008, 19 November 2008	Official report of 21st RAE Committee meeting
22nd Meeting 2008, 26 November 2008	Official report of 22nd RAE Committee meeting
23rd Meeting 2008, 10 December 2008	Official report of 23rd RAE Committee meeting
24th Meeting 2008, 17 December 2008	Official report of 24th RAE Committee meeting
1st Report, 2009 (Session 3) - Stage 1 report to Parliament	RAE Committee Stage 1 report
Government response to Stage 1 Report	Scottish Government response to RAE Committee Stage 1 report

*These notes relate to the Flood Risk Management (Scotland) Act (asp 6)
which received Royal Assent on 16 June 2009*

(b) Finance Committee	
27th Meeting 2008, 18 November 2008	Official report of 27th Finance Committee meeting
28th Meeting 2008, 25 November 2008	Official report of 28th Finance Committee meeting
(c) Subordinate Legislation Committee	
30th Meeting 2008, 4 November 2008	Official report of 30th Subordinate Legislation Committee meeting
33rd Meeting 2008, 2 December 2008	Official report of 33rd Subordinate Legislation Committee meeting
(d) Consideration by the Parliament	
Stage 1 Debate - 22 January 2009	Stage 1 debate - official report
STAGE 2	
Rural Affairs and Environment Committee	
7th Meeting 2008, 4 March 2009	Official report of RAE Committee stage 2 consideration - 4 March 2009
8th Meeting 2008, 11 March 2009	Official report of RAE Committee stage 2 consideration - 11 March 2009
9th Meeting 2008, 18 March 2009	Official report of RAE Committee stage 2 consideration - 18 March 2009
AFTER STAGE 2	
Subordinate Legislation Committee	
15th Meeting 2008, 5 May 2009	Official report of Subordinate Legislation Committee stage 2 consideration - 5 May 2009
STAGE 3	
Consideration by the Parliament	
Stage 3 Debate – 13 May 2009	Stage 3 debate - official report
Bill as Passed – 14 May 2009	SP Bill 15 - session 3 (2009)
Royal Assent	
16 June 2009	Flood Risk Management (Scotland) Act 2009

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