

EXECUTIVE NOTE

DRAFT : THE PRIVATE WATER SUPPLIES (NOTICES) (SCOTLAND) REGULATIONS 2006

1. The above instrument is to be made by the Scottish Ministers in exercise of the powers conferred by section 2(2) of the European Communities Act 1972. The instrument is subject to affirmative resolution parliamentary procedure.

Background

2. Water supplies in Scotland including private water supplies are governed by the Water (Scotland) Act 1980 (“the 1980 Act”) and the Private Water Supplies (Scotland) Regulations 1992 (“the 1992 Regulations”), made under the 1980 Act. The Private Water Supplies (Scotland) Regulations 2006 (“the 2006 Regulations”), laid before Parliament alongside this instrument, will supersede the 1992 Regulations and implement Council Directive 98/83/EC (“the Drinking Water Directive”) in respect of private water supplies. The Drinking Water Directive was transposed in respect of the public water supply by the Water Supply (Water Quality) (Scotland) Regulations 2001.

3. The majority of provisions required to transpose the Drinking Water Directive as regards private water supplies are contained in the 2006 Regulations. Those Regulations, in particular, transpose the standards of wholesomeness prescribed in the Directive, against which the quality of water intended for human consumption is to be assessed, and other measures required by the Drinking Water Directive to protect and maintain water quality. The Private Water Supplies (Notices) (Scotland) Regulations 2006 (“the Notices Regulations”) make provision to transpose article 8(2) of the Drinking Water Directive, in relation to Member States’ powers to require remedial action in relation to unwholesome private water supplies to restore water quality and to secure enforcement of such action. The 2006 Notices Regulations also draw upon the experiences of local authorities operating the current regulatory regime provided for in Part VIA of the 1980 Act in relation to private water supplies.

Policy objectives

4. The Notices Regulations deliver part of the Executive’s policy (mainly addressed in the 2006 Regulations) to implement the Drinking Water Directive in respect of private water supplies, to enhance existing domestic regulatory provision on such supplies, and to ensure the provision of clean and wholesome drinking water.

5. Local authorities are responsible for regulating private water supplies and their powers and duties are set out in the 1980 Act and the 1992 Regulations (the latter to be superseded by the 2006 Regulations). A key part of local authorities’ powers, when they have identified a problem due to a supply providing or at risk of providing unwholesome water, is to issue a notice under section 76G of the 1980 Act specifying remedial steps considered necessary to secure the required remediation of the supply. The Notices Regulations strengthen local authorities’ powers in this regard, modifying the 1980 Act to place a duty on local authorities to serve a notice under section 76G when the problem identified relates to larger private water supplies or supplies to public or commercial activities to which the Drinking Water Directive applies (defined as “Type A supplies” in the 2006 Regulations). The Notices Regulations continue local authorities’ power to issue a notice in respect of smaller supplies that do not serve public or commercial activities (defined as “Type B supplies” in the 2006 Regulations). The Notices Regulations make further provision to create

an offence of failing to take any step specified in a notice issued under section 76G, whether issued in relation to a Type A or Type B supply, which is punishable on conviction by a fine.

6. These enhanced functions for local authorities will provide a stronger regime to regulate private water supplies, placing an obligation on local authorities to issue a notice in respect of Type A supplies and providing a sanction to ensure that non-compliance with the steps specified in a notice issued under section 76G is punishable. This reflects both the requirements of the Drinking Water Directive and feedback from local authorities regarding barriers to the effective discharge of their functions under the current regulatory regime.

7. The provisions in the Notices Regulations, which might otherwise comprise part of the 2006 Regulations, are the subject of a separate instrument because of the powers under which they are to be made. The Notices Regulations seek to substantively amend primary legislation, namely the 1980 Act, and as such, and by virtue of paragraph 2 of Schedule 2 to the European Communities Act 1972, it is considered that the Regulations should be properly subject to affirmative parliamentary procedure. However, the provisions in the 2006 Regulations are, by virtue of section 101 of the 1980 Act, subject to negative parliamentary procedure. As a result of this procedural incompatibility, the relevant provisions of the Notices Regulations are contained in a separate instrument.

The Regulations

8. The Notices Regulations modify the application of sections 76G and 76H of the 1980 Act as they apply to private water supplies to which the provisions of the 2006 Regulations apply, by inserting a new section 76HA into the 1980 Act.

9. New section 76G(1) replaces reference to “domestic or food production purposes” with “human consumption purposes” and in so doing aligns that definition in the 2006 Regulations with its equivalent in the 1980 Act. It also imposes a duty on local authorities to issue a notice in relation to a “Type A supply”, and restates the power to issue a notice in relation to a “Type B supply”. A “Type A supply” is a private water supply that provides 10m³ or more of water a day or serving 50 or more persons, and supplies to commercial or public activities irrespective of their size. A “Type B supply” is a smaller private water supply exempt from the provisions of the Drinking Water Directive.

10. New subsection (11) is inserted in section 76H, and provides that a person who has been served a notice under section 76G and fails without reasonable excuse to comply with any of the steps specified in that notice shall be guilty of an offence, punishable on conviction by a fine not exceeding level 5 on the standard scale (currently £5,000).

Consultation

11. The Scottish Executive has undertaken two consultations¹ on the implementation of the Drinking Water Directive with respect to private water supplies and these involved a wide range of individuals, organisations and professional bodies. The first consultation, between November 2001 and February 2002, sought views on a variety of options for implementing

¹ The 2001 consultation paper and report on its findings are available at the following links: <http://www.scotland.gov.uk/consultations/environment/pwrc.pdf> and <http://www.scotland.gov.uk/library5/environment/pwsr.pdf>. The 2005 consultation paper and report on its findings are available at the following links: <http://www.scotland.gov.uk/Publications/2005/03/20902/55270> and <http://www.scotland.gov.uk/Resource/Doc/76169/0018966.pdf>

the Drinking Water Directive and setting new national standards for private water supplies. The second consultation, between March and June 2005, sought views on the draft Regulations and proposals for a Grant Scheme to assist in bringing private water supplies up to modern standards.

12. The second consultation specifically sought views on creating an offence of failing to comply with any of the steps specified in a notice under section 76G of the 1980 Act, as well as other possible offences. Respondees agreed with the need to provide local authorities with a sanction to ensure that notices were complied with, but considered that the other proposed offences were less appropriate, suggesting that improvements in water quality were best achieved through information and education, using formal enforcement action as a last resort for the most serious disregard of public health. In responding to the consultation the Executive accepted that the creation of a single offence of failing to comply with an improvement notice struck the right balance between giving local authorities effective powers and not unnecessarily criminalising private water supply users.

Financial implications

13. The Notices Regulations are required to transpose article 8(2) of the Drinking Water Directive and are necessary to ensure parity of regulation across Europe. There will be few, specific financial implications arising from the Notices Regulations and these will relate to the likely increase in the number of notices issued by local authorities under section 76G of the 1980 Act. This reflects the modifications of the 1980 Act provided for in regulation 2 of the Notices Regulations, which will require local authorities to serve notices in respect of Type A supplies. There will also be financial implications for local authorities where summary proceedings are initiated against persons failing to take the steps specified in a notice under section 76G of the 1980 Act, and for those individuals who are fined on conviction under that provision (although, it is anticipated that summary proceedings taken will be relatively few in number).

14. In terms of regulation 3 of the Private Water Supplies (Grants) (Scotland) Regulations 2006, a person in receipt of a notice under section 76G of the 1980 Act is eligible for a grant towards the costs of improvement works specified in that notice. These non-means tested grants will be available to assist individuals and businesses who are dependent on a private water supply with the costs of improving their supply further to a notice, and the availability of grants should assist in addressing instances of non-compliance with a section 76G notice on financial grounds.

Scottish Executive
April 2006