

WATER ENVIRONMENT AND WATER SERVICES (SCOTLAND) ACT 2003

EXPLANATORY NOTES

THE ACT – SECTION BY SECTION

Part 1 – Protection of the water environment

Section 1 – General purpose of Part 1

13. Subsection (1) sets out the general purpose of the provisions included in Part 1 of the Act. It provides that the purpose of Part 1 is to make provision for or in connection with protection of the water environment including making provision, or enabling provision to be made, for or in connection with implementing the Directive.
14. Subsection (2) explains what is meant by the term “protection of the water environment”. The list is non-exhaustive but it gives an indication of the scope of the provisions included in Part 1 and the scope of more detailed provisions that may in due course be included in subordinate legislation made under those provisions. The actions listed in subsection (2) are for the purpose of contributing to the achievement of the aims set out in subsection (3).
15. Subsections (2) and (3) largely mirror the terms of Article 1 of the Directive.

Section 2 - The general duties

16. Section 2 sets out the extent to which specified bodies are required to have regard to the requirements of the Directive when exercising their functions.
17. Subsections (1) and (2) should be read with subsection (8) which defines the terms “relevant enactments”, “responsible authorities” and “designated functions”.
18. The effect of subsection (4) is to require the Scottish Ministers, SEPA and the responsible authorities to take into account social and economic considerations when exercising the functions referred to subsection (3). This is 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. Subsections (3) and (4) also require Scottish Ministers, SEPA and the responsible authorities to promote sustainable flood management, to act in the way best calculated to contribute to sustainable development so far as is consistent with the purposes of the relevant enactment or designated function in question, and to adopt an integrated approach.
19. Subsection (5) places a general duty on the Scottish Ministers and all public bodies and office holders, in exercising any functions, to have regard to the desirability of protecting the water environment.

20. Subsection (6) enables the Scottish Ministers to direct or guide SEPA and the responsible authorities on how they must exercise those of their functions that are covered by this section.
21. Subsection (7) would enable Ministers, for example, to direct that specified functions must be exercised so as to satisfy technical standards set by SEPA.

Section 3 – The water environment: definitions

22. This section defines various terms that are used in this Part of the Act. Subsection (2) defines the water environment as all surface water, groundwater and wetlands. Subsection (10) specifies a number of artificial systems that are not affected by this Part. Some of the geographical limits of the definitions may (or must in the case of transitional water) be identified by reference to maps which the Scottish Ministers must deposit with SEPA (subsection (11)).
23. The cumulative effect of this section is that the water environment generally covers all water and wetlands (other than the excluded water mentioned in subsection (10)) out to 3 miles from the territorial sea base-line. Certain specific provisions of the Act (e.g. section 8 on monitoring) confer functions in relation to the territorial sea beyond that 3-mile limit.

Section 4 – Establishment of river basin districts

24. Subsection (1) places a duty on the Scottish Ministers to designate one or more river basin districts by order.
25. Subsection (2) makes it clear that river basin districts are to be made up of one or more river basins together with associated coastal and groundwater bodies. The smallest unit could be a single river basin although a district can, and is more likely to, comprise more than one river basin together with associated bodies of groundwater and coastal water. River basins and coastal and groundwater bodies are defined in section 28. “River basin” includes the transitional water at the mouth of the river.
26. Subsection (3) provides for the allocation to appropriate river basin districts of bodies of coastal water and bodies of groundwater that are not fully contained within the area of one river basin. The Scottish Ministers are to assign them to the nearest river basin district or, if another district appears more appropriate, to that one.
27. The order-making power in this section will enable the Scottish Ministers to implement Article 3(1) of the Directive.

Section 5 – Characterisation of river basin districts

28. Subsection (1), as read with subsection (2), requires SEPA to carry out, by 22 December 2004, an environmental and economic characterisation of all the river basin districts identified under section 4. Subsection (3) requires SEPA to review this characterisation by 22 December 2013 and every 6 years thereafter.
29. Subsection (4) requires SEPA to carry out any such characterisations and reviews in accordance with technical specifications in the Directive. These are specifications on the classification of bodies of water in river basin districts and how their status is to be determined and monitored.
30. Subsection (5) enables the Scottish Ministers to make more detailed provision, by regulations, as to the methods and procedures and criteria by reference to which the characterisations and reviews are to be carried out.
31. This section will enable the Scottish Ministers to implement Article 5 of the Directive.

Section 6 - Bodies of water used for the abstraction of drinking water

32. Subsection (1) enables the Scottish Ministers to implement, in part, Article 7(1) of the Directive.
33. Subsection (2) enables the Scottish Ministers to identify the boundaries of the areas on a map prepared for the purposes of the order and to be laid before the Parliament. The Scottish Ministers must send a copy of the order and map to SEPA (subsection (3)).

Section 7 – Register of protected areas

34. Subsection (1) requires SEPA, by 22 December 2004, to prepare and maintain a register of protected areas for each river basin district in accordance with regulations made by the Scottish Ministers. The duty to “maintain” the register covers keeping it under review and up to date.
35. Subsection (2) gives an indication of the matters in respect of which the regulations may make provision. It enables Ministers to specify the date by which a register is to be prepared, its form and the information which it must contain.
36. This section will enable the Scottish Ministers to implement Article 6 of the Directive. The wording in subsection (4) mirrors to some extent the terminology used in Article 6(1) and Annex IV to the Directive.

Section 8 – Monitoring

37. This section will enable the Scottish Ministers to implement the requirements of Article 8 of the Directive, and Article 7(1) in so far as that Article requires monitoring of waters used for the abstraction of drinking water to be carried out.

Section 9 – Environmental objectives and programmes of measures

38. This section concerns the setting of environmental objectives for all the bodies of water within river basin districts. “Body of water” is defined in section 28. Subsection (1) places a duty on SEPA to set these objectives and to prepare a programme of measures to be applied to achieve these objectives. Subsection (2) requires SEPA to take account of the characterisation of the river basin district concerned carried out under section 5 when setting environmental objectives and preparing a programme of measures under section 9. Subsection (3) provides for derogations to the objectives to apply in certain circumstances.
39. Subsection (4) confers power on the Scottish Ministers to make, by regulations, further provision as to the setting of environmental objectives and the preparation of programmes of measures under section 9.
40. Subsection (5) specifies that any regulations under subsection (4) making provision about setting environmental objectives may in particular include provision as to:
 - the types of environmental objective which may be set for particular descriptions of body of water,
 - the date and criteria by reference to which such objectives are to be set,
 - the methods and procedures to be followed in setting such objectives,
 - the dates by which such objectives are to be achieved; and
 - descriptions of bodies of water or circumstances in which such objectives are to apply with modifications.
41. Subsection (6) specifies that any regulations under subsection (4) making provision about programmes of measures may in particular include provision as to the types of measure which may be included in the programme of measures, the date by which

the programme is to be prepared and the methods and procedures to be followed in preparing such a programme.

42. This section will enable the Scottish Ministers to implement the requirements of Article 4 of the Directive.

Section 10 – River basin management plans

43. Subsection (1) requires SEPA to prepare and submit to the Scottish Ministers a river basin management plan for each river basin district in Scotland. The Scottish Ministers may direct SEPA as to when such a plan must be submitted.
44. Subsection (2) provides that a river basin management plan must include the matters listed in Part 1 of schedule 1 and any other matters that may be set out in regulations by the Scottish Ministers.
45. Subsections (3) and (4) provide for the incorporation of maps, diagrams and other illustrative information in river basin management plans. The plans must include such elements as directed by the Scottish Ministers and may contain others that SEPA thinks are appropriate. Where they do appear they are to be treated as forming part of the plan.

Section 11 – River basin management plans: publicity and consultation

46. Subsection (1) provides that SEPA must publish a statement about its preparation of the plan, including what consultation measures it proposes to take in that respect, a minimum of 3 years before the plan is to become effective.
47. Subsection (2) provides that SEPA must publish a summary of the significant water management issues for the relevant river basin district a minimum of 2 years before the plan is to become effective.
48. Subsection (3) provides that SEPA must publish a draft of the plan a minimum of 1 year before the plain is to become effective.
49. SEPA must consult on the statement, summary and draft plan and publicise the publication of these documents, the arrangements for making them publicly available, and the opportunity to make representations about them. Anyone may make representations to SEPA about them (subsection (7)). Subsections (8) and (9) require SEPA to take into account any views or representations received about the statement, summary or draft plan.
50. Subsection (10) provides that where SEPA is required by section 11, 12 or 13 to publicise any matter in connection with a river basin management plan, it must do so by means of a notice published in at least one national newspaper circulating in Scotland, such local newspapers in the river basin district (or part thereof) as it thinks fit, and may further publicise the matter by such electronic means as it thinks fit.

Section 12 – River basin management plans: submission for approval

51. This section makes provision in connection with the submission of a river basin management plan to the Scottish Ministers.
52. Subsection (1) requires SEPA, when it has submitted a river basin 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.
53. Subsection (2) provides that a river basin management plan submitted to the Scottish Ministers by SEPA must be accompanied by a statement of the action taken by SEPA in publishing the draft plan, making it available for public inspection and consulting the bodies and persons described in section 11(6). The statement must also include a

summary of the representations received about the draft plan and of any consequential adjustments made to the plan.

54. Subsection (3) provides that the Scottish Ministers may – having considered the statement and if they believe further work by SEPA on the issues covered by the statement is required – return the plan to SEPA. In doing so they may direct SEPA to take such further action in that regard 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.
55. 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 13 – River basin management plans: approval

56. This section makes provision for the Scottish Ministers' approval of river basin management plans.
57. Subsection (1) provides that once a river basin 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.
58. 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.
59. Subsection (4) provides for the circumstances in which the Scottish Ministers reject a plan. In that case, 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.
60. Subsection (5) requires SEPA, when a river basin management plan has been approved, to publicise the approved plan as it thinks fit. It must also make copies of it available for public inspection and for sale at a reasonable price. SEPA must also publicise the publication of the approved plan and the arrangements for making copies of it available for public inspection.

Section 14 – River basin management plans: review

61. Subsection (1) requires SEPA to review and update each approved river basin management plan, no later than 6 years, or such lesser period as Scottish Ministers may direct, from the date on which the plan was approved under section 13.
62. Subsection (2) gives the Scottish Ministers a power to direct SEPA, following a review, to prepare and submit a revised river basin management plan to the Scottish Ministers by a given date.
63. Subsection (3) provides that a revised plan must contain the matters set out in Part 2 of schedule 1, over and above the requirements in relation to content of the plan set out in section 10. The terms of Part 2 of schedule 1 largely mirror the terms of Part B of Annex VII to the Directive.
64. Subsection (4) provides that the specified provisions of the Act apply to a revised plan in the same way they do to an original plan. This will give Ministers the same control of the process as they have for the original plan.
65. This section will enable the Scottish Ministers to implement Article 13(7) of the Directive.

Section 15 – Sub-basin plans

66. This section provides for the preparation of sub-basin plans and will enable implementation of Article 13(5) of the Directive. Subsection (1)(a) requires SEPA to divide the river basin district into such geographical areas as it thinks fit and prepare a plan in respect of each of those areas in relation to water management within the area. Subsection (1)(b) allows SEPA as a responsible authority, if it thinks fit, to prepare a plan in relation to a particular aspect of water management within the district. Subsection (2) gives some examples of the sort of thing that a sub-basin plan under subsection (1)(b) might relate to, e.g. a particular type of body of water, a particular catchment area, a particular matter in relation to the water environment or a particular type of water use. This list of matters which sub-basin plans might deal with is sufficiently wide to accommodate both the geographic and the thematic sub-basin plans which SEPA is permitted to establish under subsection (1). The cumulative effect of these provisions is to require SEPA, as a minimum, to prepare sub-basin plans across the geographical extent of the river basin district. SEPA is also given the power to establish sub-basin plans to look at particular water management issues where it deems that these are necessary.
67. Subsection (4) provides that sub-basin plans must not be inconsistent with anything in the river basin management plan, which they supplement. Subsection (5) requires that sub-basin plans relating to water management issues in the district prepared under subsection (1)(b) should not be inconsistent with anything in the mandatory geographical sub-basin plans prepared under subsection (1)(a). Subsection (6) requires SEPA or the responsible authority to consult such of the persons referred to in section 11(6)(a) to (j) as it thinks fit about a proposed sub-basin plan, and must take into account any views expressed by those consulted.

Section 16 – Duty to have regard to river basin management plans

68. This section places a specific requirement on the Scottish Ministers and every public body and office holder to have regard to any relevant river basin management plan in the exercise of their functions, and to those sub-basin plans relevant to, or affected by the exercise of the functions of these bodies

Section 17 – River Basin District Advisory Groups

69. This section provides for the establishment of River Basin District Advisory Groups. Subsection (1) provides that at least one such Group must be established for each river basin district. Subsection (2) provides that the function of each of the advisory groups is to advise SEPA on any matter which relates to the preparation of river basin management plans for the district and is within the remit of the group. Subsection (5) provides that SEPA may determine the remit of an Advisory Group by reference to a particular sub-basin plan, a particular geographical area, or any other particular aspect of water management within the district.
70. Subsection (3) requires SEPA, in preparing a river basin management plan, to have regard to any advice given by an Advisory Group. Subsection (4) provides that the number of Advisory Groups, their remits, membership and procedure, are to be such as SEPA may determine. In determining the number of Advisory Groups for any river basin district and their remits and memberships, subsection (6) provides that SEPA must seek to ensure appropriate representation of the interests of the persons specified or referred to in section 11(6)(a) to (h). SEPA may pay such expenses and allowances to members of an Advisory Group as it considers appropriate.

Section 18 – Power to obtain information and documents

71. This section provides for SEPA to obtain information and assistance from the Scottish Ministers and the responsible authorities and to obtain information from other persons to enable it to carry out its functions under Chapter 2 of Part 1 of the Act.

72. Subsection (1) places a duty on the Scottish Ministers and the responsible authorities designated pursuant to section 2, to provide SEPA with such information and assistance as SEPA may reasonably seek in connection with the exercise of any of its functions under Chapter 2.
73. Subsection (2) enables SEPA to serve a notice on any person (other than the Scottish Ministers or the responsible authorities) in order to obtain information from them that it needs to carry out its functions under Chapter 2. Subsections (3) and (4) provide more detail about the form and content of such notices.
74. Subsection (5) allows the Scottish Ministers to arbitrate where there are differences of opinion between SEPA and a responsible authority or any other person about the reasonableness of SEPA's requests for information or assistance, as appropriate.
75. Subsection (6) provides that SEPA may not require the disclosure of any information that is legally privileged.
76. Subsection (7) makes it clear that persons on whom such notices are to be served must produce documents in legible form (e.g. a print out of a document held electronically).
77. Subsection (9) makes it an offence not to comply with a request for information or documents or to intentionally alter, suppress or destroy any documents requested by SEPA. Subsection (10) describes the penalties that are attached to this offence. The statutory maximum referred to in subsection (10)(a) is currently £5,000. There is no limit on the level of fines in the event of conviction on indictment.

Section 19 – General regulation-making power

78. Subsection (1) confers power on the Scottish Ministers to make regulations specifying the form and content of river basin management plans and sub-basin plans, matters to be taken account of by SEPA in preparing the plans and the detailed procedures to be followed in connection with their preparation, submission, approval and modification.
79. Subsection (2) provides that the regulation making power may, in particular, be used to specify more detailed procedures for publicity and consultation on the plans. Subsection (3) makes it clear that regulation making power is without prejudice to sections 10 to 15 and 17.

Section 20 – Regulation of controlled activities

80. Subsection (1) confers power on the Scottish Ministers to make regulations for or in connection with the control of any activity (referred to as a "controlled activity") that they consider is necessary or expedient for the purposes of protecting the water environment.
81. Subsection (2) specifies that Ministers may use this power, in particular, to make provision for the regulation of a number of specified activities (described in subsection (3)) and to make such other provision for or in connection with the basic measures and supplementary measures mentioned in paragraph 2 of Article 11 of the Directive as they consider necessary for the achievement of the environmental objectives set out in river basin management plans.
82. Subsection (3) describes certain activities which the regulations may, in particular, deal with and subsection (6) further defines them.
83. Subsections (4) and (5) enable the regulations made under this section to make provision for any of the purposes set out in schedule 2.
84. This section will enable the Scottish Ministers to implement the requirements of Article 11 of the Directive. Subsection (3)(a) relates to Article 11(3)(g) and (h) of the Directive. Subsections (3)(b) and (3)(c) relate to Article 11(3)(e) of the Directive. Subsection (3)(d) relates to Article 11(3)(i) of the Directive.

Section 21 - Controlled activities regulations: procedure

85. Subsection (1) requires the Scottish Ministers to consult various bodies (including SEPA, the responsible authorities and representatives of local government, industry, agriculture, fisheries and small business interests) before making any regulations under section 20. Subsection (1)(d) will enable the Scottish Ministers to include other interests in their consultation as they see fit.
86. Subsection (2) provides additional consultation requirements that apply in relation to the making of general binding rules pursuant to section 20 and paragraph 3(2) of schedule 2. General binding rules will be generally applicable conditions applying to particular water uses, sectors or areas and will be made by the Scottish Ministers by regulations. In addition to the consultation requirements specified in paragraph 85 above, the Scottish Ministers must consult on the rules for at least 28 days. They must give notice of the opportunities for interested parties to make representations about the proposed rules. Further, they must have regard to views expressed during the consultation period in finalising the rules (subsection (4)).

Section 22 – Remedial and restoration measures

87. Subsection (1) confers power on the Scottish Ministers to make regulations for or in connection with any remedial or restoration measures that they consider are necessary for the purposes of achieving the environmental objectives in river basin management plans. Remedial or restoration measures might include, for example, the removal of a redundant weir or lade or the clean up of historical pollution where these threaten the achievement of the environmental objectives for the body of water concerned.
88. Subsection (3) gives particular examples of the provision that could be made by the Scottish Ministers in regulations under subsection (1). They could give SEPA or any responsible authority the function of undertaking remedial or restoration measures. Or they could make provision for determining what other persons should bear responsibility for such measures and allow SEPA or a responsible body to either serve notices on the persons so identified requiring them to carry out the works themselves or to undertake the works themselves or arrange to have the works undertaken and recover the costs from the persons so identified.

Section 23 – Fixing of charges for water services

89. Subsection (1) confers power on the Scottish Ministers to make by regulations such provision in relation to charging for water services as they consider necessary or expedient for the purpose of protection of the water environment.
90. Subsection (2) provides that the regulations may, in particular, specify principles, objectives or other matters to be taken account of in the fixing of charges. Regulations under this section can amend enactments (section 36(3)) e.g. enactments conferring power to charge, for or relating to the fixing of charges, for the provision of water services. Subsection (3) requires Scottish Ministers to consult such persons as they see fit before making regulations under subsection 1. “Water services” is defined in subsection (4).
91. This section will enable the Scottish Ministers to implement the requirements of Article 9 of the Directive.

Section 24 - Planning permission :fish farming

92. This section introduces planning controls over marine fish farming in transitional water and coastal water as defined in the Act. This is achieved largely through amendments of the Town and Country Planning (Scotland) Act 1997 (“the 1997 Act”)
93. Subsection (2)(a) amends the definition of "development" in section 26(6) of the 1997 Act to include fish farming in coastal water and transitional water as defined in the

Act. Fish farms within the 3-mile limit of UK territorial waters adjacent to Scotland will require planning permission. Fish farming in inland waters is already subject to planning control under the 1997 Act.

94. The definition of “tank” in the 1997 Act is repealed and replaced by a new definition of “equipment”. The new definition of “equipment” includes tanks, cages and other structures as well as long lines, which are used in the farming of shellfish.
95. Subsection (2)(b) introduces two new subsections, (6A) and (6B), into section 26 of the 1997 Act. These provisions confer powers on the Scottish Ministers to make orders making modifications (including amendments and repeals) as they consider necessary or expedient to the definitions of "fish farming" and "equipment" in subsection (6) of section 26. Such orders are subject to affirmative resolution procedure.
96. Subsection (3) amends section 40 of the 1997 Act dealing with the assessment of the environmental effects of fish farming development. The amendment requires a planning authority, before granting planning permission in respect of a fish farming development, to consider the effect of the proposed development on the water environment as defined in the Act. This includes fish farms in inland water as well as transitional water and coastal water.
97. Subsection (4) amends section 275 of the 1997 Act relating to the Scottish Ministers' powers to make regulations and orders.
98. Subsection (5) confers power on the Scottish Ministers to make orders for the purpose of or in connection with the application of the 1997 Act to fish farming in transitional water or coastal water. This power does not provide for a general extension of planning powers to all offshore activities or extend planning authority boundaries seaward.
99. Subsection (6) makes particular provision for the Scottish Ministers to allocate, by order under subsection (5), responsibility for planning control for specified areas of transitional water or coastal water to particular planning authorities. The amendment does not change the districts of planning authorities.
100. Subsection (7) requires that the Scottish Ministers consult SEPA, every planning authority and such other persons as they see fit before making any order under subsection (5).

Section 25 – Power to give effect to Community obligations etc.

101. 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.
102. 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 26 – Annual report on implementation of Directive

103. This section requires the Scottish Ministers to provide an annual report to the Scottish Parliament, as soon as practicable after the end of each calendar year, on progress made during the year towards achieving the environmental objectives set under section 9, and on the action taken during the year by Scottish Ministers, SEPA and the responsible authorities for securing compliance with the requirements of the Directive.

Section 27 – Availability of documents for public inspection

104. This Section requires, as a minimum, that documents made available for public inspection under Part 1 of the Act should be made available in print and electronically. It also allows the information to be made available by such other means, or in such

other formats, as the person required to make it available thinks fit for the purposes of encouraging inspection of it by the members of the public.

Section 28 – Interpretation of Part 1

105. This section defines the various terms used in Part 1 of the Act. It also provides that any term used in Part 1 of the Act and in the Directive, but not defined in Part 1, has the same meaning as it has for the purposes of the Directive.