

WATER ENVIRONMENT AND WATER SERVICES (SCOTLAND) ACT 2003

EXPLANATORY NOTES

THE ACT – SECTION BY SECTION

Part 2 – Water and sewerage services

Section 29 – Duty to provide water and sewerage services

106. This section amends section 1 of the Sewerage (Scotland) Act 1968 (“the 1968 Act”) and section 6 of the Water (Scotland) Act 1980 (“the 1980 Act”) to make further provision regarding Scottish Water’s duty to provide water and sewerage services at reasonable cost.
107. The 1968 and 1980 Acts, as amended by other enactments including the Water Industry (Scotland) Act 2002, set out Scottish Water’s core duties to provide, respectively, public sewerage services and water supplies. The 1968 Act makes general provision for sewerage and trade effluent. The Act sets out the duties and powers of Scottish Water, and the rights and obligations of owners and occupiers, in relation to sewerage provision and also includes arrangements for the vesting of sewers, drains and works. The provision on trade effluent includes the right to discharge into public sewers, control of discharges and agreements in lieu of applications for consent. There are other miscellaneous and general provisions in the 1968 Act covering such matters as the powers of Scottish Water to execute works, require information and enter premises.
108. The 1980 Act consolidates previous enactments relating to water supply in Scotland. It confers functions on Scottish Water, and on the Scottish Ministers, in relation to the conservation, protection and effective use of water resources and in relation to the provision of water supplies throughout Scotland for domestic and non-domestic purposes. The 1980 Act confers order making powers on the Scottish Ministers, for example, regarding acquisition of water by Scottish Water. It also confers powers on Scottish Water relating to restriction of water supply and usage, survey and acquisition of land, acquisition of water rights, carrying out of works, breaking open of streets, laying pipes and the making of byelaws. The Act also sets out the rights and duties of owners and occupiers, including the option to take a supply of water by meter in certain circumstances. It also makes provision for offences, including the offence of polluting water, and penalties.
109. Section 1 of the 1968 Act imposes a duty on Scottish Water to provide sewerage, provided it is practicable to do so at reasonable cost (subsection (3)). Section 29(2) of the Act inserts four new subsections after subsection (3) of section 1 of the 1968 Act. New subsection (3A) allows the Scottish Ministers to specify cases or types of cases to which subsection (3) does not apply, with the effect that Scottish Water must comply with the duties set out in subsections (1) and (2) despite this requiring actions which are not practicable at reasonable cost. New subsection (3B) specifies that in determining reasonable cost for the purpose of subsection (3) the costs to be taken into account include such costs as Scottish Water considers necessary in consequence of the

connection. New subsection (3C) allows the Scottish Ministers to determine reasonable cost for the purposes of section 1 of the 1968 Act in regulations. New subsection (3D) specifies that the regulations may, in particular, make provision as regards the matters and criteria to be considered and the method of calculation to be adopted in determining reasonable cost, and that different provisions may be made for different cases or types of case.

110. Subsections (3) and (4) of section 29 insert references to regulations under the new subsection (3C) in subsections (4) and (6) of section 1 of the 1968 Act. The effect of the amendment to section 1(4) is that an aggrieved person can appeal to the Scottish Ministers on the grounds that a determination of reasonable cost has not been made properly in accordance with the regulations, whereupon the Scottish Ministers will determine the issue, following consultation with Scottish Water, and Scottish Water must give effect to that determination. The effect of the amendment to section 1(6) is that the power to make regulations under new subsection (3C) is exercisable by statutory instrument, subject to negative procedure.
111. Subsection (6) of section 29 amends section 6(2) of the 1980 Act to make Scottish Water's duty to supply water under that subsection subject to the new subsection (2A) added by subsection (7), so that Scottish Water is not required to take pipes to a connection point for buildings where an agreement is in force between Scottish Water and another person for them to carry out this action. Subsection (7) also adds new subsections (2A) to (2E) to section 6. Subsection (2B) provides that the Scottish Ministers can specify cases or types of cases where the duties in Section 6(1) and (2) of the 1980 Act apply despite requiring actions which are not practicable at reasonable cost. Subsection (2C) specifies that in determining reasonable cost for the purpose of subsection (2), the costs to be taken into account include such costs as Scottish Water considers necessary in consequence of the connection. Subsection (2D) enables the Scottish Ministers to define reasonable cost for the purposes of section 6 of the 1980 Act in regulations. Subsection (2E) specifies that those regulations, may in particular, make provision as to matters to be taken into account, the criteria to be applied and the method of calculation to be adopted in for deciding what is reasonable cost. The regulations will be made by statutory instrument and subject to negative procedure in the Scottish Parliament, in accordance with section 101(2) of the 1980 Act (as amended by the Scotland Act).
112. Subsection (8) of section 29 amends subsection (3) of section 6 of the 1980 Act so that the issues which the Scottish Ministers can be requested to determine include whether a reasonable cost has been properly determined in accordance with regulations under subsection (2D).

Section 30 – Private sewers, SUD systems and sewage treatment works etc.: vesting, takeover and connection conditions

113. This section makes detailed provision on vesting, construction standards, connection agreements and takeover conditions, by amending sections 3, 8, 12 and 16 of the 1968 Act and adding three new sections, 14A, 14B and 14C, to that Act.
114. Subsection (1) adds subsection (3) to section 3A of the 1968 Act. The new subsection specifies that a sewer or SUD system shall vest in Scottish Water only if it complies with the construction standards set out in new sections 14A or 14B so far as applicable and also to any conditions that Scottish Water has made under new section 14C. Subsection (3) also provides that vesting of a sewer or SUD system should not take effect until any security required as part of an agreement under section 14C, for example a bond, has been provided.
115. Subsection (2) adds subsection (1A) to section 8 of the 1968 Act, and repeals section 8(2). The new subsection specifies that an agreement by Scottish Water to take over a sewage treatment works, or SUD system, is subject to the works complying with the construction standards set out in new sections 14A or 14B so far as applicable

and also to any conditions that Scottish Water has made under new section 14C. Subsection (1A) also provides that the take-over of a sewage treatment works or SUD system should not take effect until any security required as part of an agreement under section 14C, for example a bond, has been provided.

116. Subsection (3) makes similar provision to the provisions in subsections (1) and (2), in respect of connecting drains or sewers or SUD systems to those of Scottish Water, by adding a new subsection (2A) to section 12 of the 1968 Act. Subsection (2A) provides that an owner can only connect their drains or sewers or SUD systems to those of Scottish Water if they meet the required construction standards and, if required by Scottish Water, the owner has entered into a connection agreement with Scottish Water and has provided adequate security.
117. Subsection (4) provides for new sections 14A, 14B and 14C to be added to the 1968 Act.
118. Section 14A relates to private sewers, SUD systems and sewage treatment works. It makes provision as to the construction standards which drains, private sewers, private SUD systems and private sewage treatment works must meet for the purposes of the new subsections 3A(3)(a)(i), 8(1A)(a)(i), 12(2A)(a) and 16A(3)(a)(i). Subsection (1) of the new section specifies that these standards are to be prescribed by the Scottish Ministers in regulations. Subsection (2) provides that the standards required by the regulations can include those specified in other enactments, e.g. those that are legally binding on Scottish Water. Subsection (3) provides that any regulations made pursuant to this section can apply different standards to different persons or cases or types of case. The Scottish Ministers must consult Scottish Water and any other persons they consider appropriate before making any such regulations (section 14A(4)), and the regulations are to be made by statutory instrument, subject to negative procedure in the Scottish Parliament (section 14A(5)).
119. Section 14B relates to sustainable urban drainage systems. Subsection (1) specifies that for the purposes of the new subsections 3A(3)(a)(i), 8(1A)(a)(i), 12(2A)(a) and 16A(3)(a)(i) the SUD system requirements are to be prescribed by the Scottish Ministers in regulations. Subsection (2) provides that subsections (3) to (5) of new section 14A also apply to regulations made under section 14B.
120. Section 14C provides for vesting conditions and vesting of sewers or SUD systems (section 14C(1)), takeover conditions and taking over of sewage treatment works or a SUD system (section 14C(2)), and for connection agreements and connecting drains or sewers or a SUD system (section 14C(3)). It also confers a regulation making power on the Scottish Ministers to prescribe conditions which must be included in these agreements, and exceptions in which the agreements are not required, or are required with modifications (Section 14C(4)). Section 14C(5) enables detailed provision to be made for financial conditions which can be made in the regulations. Any such regulations must be made by statutory instrument, subject to negative procedure in the Scottish Parliament (section 14C(7)).
121. Subsection (5) adds subsection (3) to section 16A of the 1968 Act relating to vesting of private sewers. The new subsection specifies that a sewer or SUD system shall vest in Scottish Water only if it complies with the construction standards set out in new sections 14A or 14B so far as applicable and also to any conditions that Scottish Water has made under new section 14C. Subsection (3) also provides that vesting of a sewer or SUD system should not take effect until any security required as part of an agreement under section 14C, for example a bond, has been provided.

Section 31 – Laying of water mains and communication pipes by persons other than Scottish Water

122. This section inserts three new sections, 23A, 23B and 23C, in the 1980 Act.

123. Section 23A relates to laying of mains and communication pipes by persons other than Scottish Water. It provides for Scottish Water to authorise another person to lay a main or communication pipe and clarifies the arrangements for subsequently vesting the main or pipe. It provides a power for Scottish Water to authorise another person to lay a main or communication pipe where this involves road works or crossing a third party's land (section 23A(1)), and transfers to the authorised person the requirements to give reasonable notice to interested parties and the procedure for responding to objections provided in section 23 of the 1980 Act (section 23A(2)). Section 23A(3) provides for a main or communication pipe which connects to a main which is vested in Scottish Water to vest in Scottish Water. An exception to this is provided for where Scottish Water has made a determination during the construction of the main or communication pipe, vesting the main or pipe and its management, maintenance and renewal instead in the person who has laid it (section 23A(4)), and giving notice of this determination (section 23A(5)). Where a main or communication pipe is laid by a person other than for or on behalf of Scottish Water and the consequent main does not connect to another main which is vested in Scottish Water, section 23A(6) provides that it vests in the person who laid the main.
124. However, section 23A(7) provides that, despite a main or communication pipe not connecting with a main vested in Scottish Water or a determination having been made by Scottish Water that the main or pipe should vest in the person who laid it, Scottish Water may enter into an agreement for the main or pipe to vest in it instead. Section 23A(8) provides that where the main or communication pipe which is intended to vest in Scottish Water connects to a public main, such an agreement is only valid if the main meets the constructions standards provided by section 23B, and is subject to any conditions and security Scottish Water require under section 23C.
125. Section 23B relates to construction standards for mains and communication pipes to vest in Scottish Water. It provides a regulation-making power for the Scottish Ministers to prescribe the standards referred to in section 23A which a main or communication pipe not laid by or on behalf of Scottish Water must meet for it to vest in Scottish Water. These standards can include those specified in other enactments, e.g. those that are legally binding on Scottish Water (section 23B(2)). The regulations under this section may make provision for different standards for different cases or types of case, and before making the regulations, the Scottish Ministers must consult Scottish Water and any other persons they consider appropriate (sections 23B(3) and (4)). Regulations under this section will be made by statutory instrument and subject to negative procedure in the Scottish Parliament (section 101(2) of the 1980 Act).
126. Section 23C relates to vesting conditions for mains and communication pipes. It sets out arrangements for an agreement between Scottish Water and the person who laid the main to include payments to either party, and a regulation-making power for the Scottish Ministers to make detailed provision relating to how costs and liabilities in vesting conditions should be determined.
127. Section 23C(1) provides that Scottish Water may require conditions ("vesting conditions") to be included in an agreement under section 23A(7) between Scottish Water and another person to allow a main or communication pipe to vest in Scottish Water. These conditions may include a payment from Scottish Water to the person who laid the main or pipe to cover the costs of laying it, and a liability on that person to pay Scottish Water in respect of expenses they incur, either through maintaining, repairing or renewing the mains or pipe, connecting it to a public main, or other work that Scottish Water considers necessary as a consequence of connecting the main or communication pipe. Section 23C(2) provides a regulation making power for the Scottish Ministers in relation to these vesting conditions. The regulations can specify provision which should be included in an agreement, and cases where section 23C(1) does not apply, or applies only with modifications. Section 23C(3) provides further detail as to provision which may be made in these regulations: they may provide for how a sum which Scottish Water should contribute in respect of the costs of laying

the main or communication pipe should be determined; they may set out the matters, criteria and methods of calculation for determining the liability of the person who laid the mains or pipe; when sums due under vesting conditions should be paid; and the security Scottish Water is entitled to require under section 23A(8)(b). Section 23C(4) clarifies that these regulations can make different provision for different cases or types of case. Regulations under this section will be made by statutory instrument and subject to negative procedure in the Scottish Parliament in terms of section 101(2) of the 1980 Act.

Section 32 – Vesting in Scottish Water of waterworks and mains

128. This section amends sections 21 and 23 of the 1980 Act to clarify that all waterworks constructed in accordance with section 21(1), and all water mains laid in accordance with section 23(1), whether before or after the provisions commence, are vested in Scottish Water. “Waterworks” is defined in the 1980 Act as including “streams, springs, wells, pumps, reservoirs, cisterns, tanks, aqueducts, cuts, sluices, mains, pipes, culverts, engines and all machinery, lands buildings and things for supplying, or used for supplying, water or used for protecting sources of water supply”. Where any of these waterworks is used for providing a public water supply under the Act, section 32 will ensure that it is vested in Scottish Water.

Section 33 – Sustainable urban drainage systems

129. This section amends section 59(1) (interpretation) of the 1968 Act to insert a definition of sustainable urban drainage systems and related definitions.
130. Subsection (2) introduces schedule 3, which makes modifications to the 1968 Act and the Water Industry (Scotland) Act 2002 in relation to sustainable urban drainage systems.

Section 34 – Modifications of Part III of the 1980 Act

131. This section introduces schedule 4, which makes modifications of Part III of the 1980 Act which are minor or consequential on this Part.