

# **WATER ENVIRONMENT AND WATER SERVICES (SCOTLAND) ACT 2003**

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## **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.

## **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 treatments 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.

## **Part 3 - General**

### **Section 35 – Crown application**

132. This section makes provision for the application of the Act to Crown bodies. Part 1 will, in line with the Directive and subject to subsection (3), apply equally to bodies of water on Crown held land and activities carried on by Crown bodies as it applies to other bodies of water and activities by other persons. Subsection (2) ensures that the textual amendments made to the 1968 and 1980 Acts by Part 2 apply to the Crown to the same extent as those Acts. Subsection (3) makes it clear that subordinate legislation under the Act is not required to bind the Crown.
133. Subsection (4) provides that the Crown 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.
134. 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.

### **Section 36 – Orders and regulations**

135. This section prescribes the procedure for the making of orders and regulations under the Act.
136. Subsection (2) as read with subsection (3) allows the Scottish Ministers, amongst other things, to make any changes to existing enactments or other documents (such as administrative guidance) that are necessary to bring them into line with the provisions of the Act or regulations made under the Act. Subsection (4) lists those orders and regulations made under specified provisions of the Act which are subject to negative procedure.
137. Regulations made under section 8, 19, 20, 22 or 23 can be subject to affirmative or negative procedure, at the choice of the Scottish Ministers (subsection (5)), although they must be made by affirmative procedure if they textually amend primary legislation

(subsection (6)). Regulations made under section 19 are not subject to this proviso as there are no circumstances in which those regulations will textually amend other Acts. Subsection (6) also makes clear that orders under section 4 or 24, regulations under section 25 or orders under section 37 which make textual amendments will be subject to affirmative procedure. Regulations made under paragraph 20(4) of schedule 2 which concerns the up-rating of fines for offences committed, will be subject to negative procedure.

### ***Section 37 – Ancillary provision***

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

### ***Section 38 – Commencement and short title***

139. This section provides that all of the provisions of the Act, except Part 3, shall come into force when Scottish Ministers by order appoint. Part 3 comes into force on Royal Assent. The section also provides for the short title of the Act.

### ***Schedules***

#### ***Schedule 1 – Matters to be included in river basin management plans***

140. This schedule describes matters that must be included in river basin management plans. Part 1 of the schedule describes matters that must be included in every river basin management plan. Part 2 describes the additional matters that must be included in revised river basin management plans.

#### ***Schedule 2 – Controlled activities regulations: particular purposes***

141. **Schedule 2** is in two parts. Part 1 sets out the purposes for which regulations made pursuant to section 20 of the Act may be made. Part 2 supplements Part 1.
142. **Paragraph 1** enables the regulations made pursuant to section 20 to expand on the definitions of controlled activities given in section 20(3) and to amend those definitions if desirable. The regulations may also specify controlled activities in addition to those specified in section 20(3).
143. **Paragraph 2** enables the Scottish Ministers to specify in the regulations which authority will exercise any regulatory functions conferred by them. The Scottish Ministers, SEPA or any other public or local authority may be appointed as regulators. The regulations may specify that the regulators functions are to be exercised with a view to achieving the environmental objectives set out in river basin management plans and any other purposes (for example, mitigating flood or drought). The regulations may also enable the Scottish Ministers to issue directions and guidance to any regulator in connection with the exercise of their regulatory functions. Directions must be complied with. Guidance need only be had regard to.
144. **Paragraph 3** enables the regulations to make provision for prohibiting persons from carrying on, or from causing or permitting others to carry on, any controlled activity unless it is authorised by or under and carried on in accordance with the regulations. The paragraph contemplates three types of authorisation: general binding rules (paragraph 3(2) and (3)), water use licences (paragraph 3(4(a)) and registration (paragraph 3(4)(b)), as further described below.
145. **Paragraph 3(2)** is the main provision dealing with general binding rules but paragraph 17 is also relevant because it gives some indication of the type of provision that could be made in general binding rules. It makes it clear that general binding rules may impose conditions or requirements on the carrying out of a controlled activity. They may also set standards or objectives to be complied with or achieved and require standards or

objectives set out in other enactments to be complied with or achieved. Paragraph 3(3) enables provision to be made for treating controlled activities as authorised if they are subject to general binding rules.

146. **Paragraph 4** enables provision to be made for requiring anyone who proposes to carry on a controlled activity to notify the relevant regulator first. This will enable the regulator to determine what form of authorisation (if any) is required to be obtained in respect of that activity. The regulations will specify the procedure for notifying proposed controlled activities and for the assessment of how an activity requires to be authorised.
147. **Paragraph 5** enables the regulations to make provision for or in connection with water use licences. They may prescribe the form and content of applications for water use licences and the procedure for making applications and for issuing such licences. It allows for such licences to be reviewed and varied periodically by the relevant regulator. It also allows for such licences to be suspended or revoked by the relevant regulator. It further allows for the regulations to specify requirements to be met if licences are transferred from one operator to another or surrendered. It will be possible for regulators to grant single water use licences covering a number of controlled activities.
148. **Paragraph 5(6)** should be read together with paragraph 18, which makes more detailed provision in relation to the imposition of conditions in respect of a water use licence. It provides that regulations may, in particular, provide for conditions to be imposed in the light of any specified general principles, directions or guidance given under the regulations. Paragraph 18(c) will enable provision to be made to allow a regulator to impose conditions with reference to management agreements entered into between a number of licence holders. The regulations can specify the circumstances in which any such agreements may be incorporated in a water use licence.
149. **Paragraph 6** enables the regulations to make provision for or in connection with the registration of controlled activities. For example, in some cases the regulations might permit the carrying on of a controlled activity subject only to a requirement to register the proposed carrying on of that activity with the relevant regulator. The regulations may require all notified activities to be registered irrespective of whether they are controlled by means of a water use licence or general binding rules or neither.
150. **Paragraph 7** enables the regulations to make provision allowing regulators to establish charging schemes to recover costs incurred in connection with processing and assessing notifications, registering activities and water use licensing. Paragraph 7(2) will enable the regulations to provide that any such charging schemes must be approved by the Scottish Ministers before they take effect.
151. **Paragraph 7** should be read together with paragraph 19, which makes further provision in relation to charging schemes. It provides that the regulations may require fees and charges payable under a charging scheme to be determined in the light of any specified general principles, directions or guidance given under the regulations or for them to be sufficient taking one year with another to cover expenditure specified in the regulations. The regulations may authorise any charging scheme to make different provision for different cases and that the regulations may specify different kinds of cases.
152. **Paragraph 8** allows for requirements to be placed on the regulators to publicise various matters and to maintain certain public registers in connection with their regulatory functions. For example, the regulations may specify that regulators are to maintain public registers of both applications received for authorisations and authorisations granted. The regulations may also require persons to publicise the fact that they applying for an authorisation in certain circumstances, for example, when the controlled activity they propose to carry out is likely to have a significant effect on the water environment.
153. **Paragraph 9** enables the regulations to specify the circumstances in which regulators must consult on various aspects of their regulatory functions. The regulations may, in particular, specify requirements for regulators to consult on any general guidance that

they may make in connection with their regulatory functions (such as, for example, guidance on the risk assessment methodologies used to assess notifications of controlled activities).

154. **Paragraph 10** enables the regulations to confer on regulators' functions with respect monitoring and inspecting the carrying on of controlled activities. This will enable them to ensure that authorisations are complied with. The regulations may, for example, allow regulators to enter premises, take samples or copy information and to arrange for remedial work to be carried out at the expense of those carrying out the controlled activities.
155. **Paragraph 11** enables the regulations to provide regulators with powers to issue various notices on persons. It provides a non-exhaustive list of such notices (paragraph 11(1)(a) to (f)). Paragraph 11(1)(a) provides for notices to notify. This is to cater for the situation where a person is found to be carrying on a controlled activity without an authorisation and would require that person to notify the activity to the regulator. It provides for an administrative means of bringing persons into the control regime – the alternative is likely to be a prosecution under the proposed prohibition of the carrying on of controlled activities without an authorisation.
156. **Paragraph 12** enables the regulations to specify offences and make related provision. The regulations could, for example, create an offence of non-compliance with a notice. Paragraph 12 must be read subject to paragraph 20 in Part 2 of the schedule which specifies maximum penalties and makes provision for continuing offences. Where a person has been convicted of an offence the regulations may enable the courts to deal with that person by requiring that person to take remedial action in addition to or instead of imposing any punishment. They may also enable regulators to arrange for remedial action to be taken at the expense of that person.
157. **Paragraph 14** enables the regulations to specify rights of appeals in respect of decisions made or notices served or other things done (or omitted to be done) by regulators in connection with the various regulatory regimes. Any such regulations would make detailed provision in respect of, for example, procedural matters and the making, consideration and determination of appeals.
158. **Paragraph 15** provides that the regulations may make provision along similar lines to the provisions of sections 157, 158 and 160 of the Environmental Protection Act 1990. Sections 157 and 158 of that Act deal with offences. Section 157 provides that directors, managers, secretaries of corporate bodies or other similar officers of such bodies or persons purporting to act in such a capacity or a member of a corporate body where it is managed by members are guilty of offences committed by the corporate body in question when liability for the offence can be attributed to them. Section 158 provides that where offences are committed because of acts or the default of some other person then the other person may be convicted of the offence in question. Section 160 sets out procedures and requirements for the serving of notices. It provides for notices to be left in person or sent by post. It further specifies the type of addresses notices should be sent to and, in relation to corporate bodies on whom, precisely notices can be served.
159. **Paragraph 21** defines various terms used in schedule 2.

### ***Schedule 3 – Sustainable urban drainage systems: further amendments***

160. This schedule makes modifications to the 1968 Act and the Water Industry (Scotland) Act 2002 in relation to sustainable urban drainage systems. It integrates SUD systems into existing law, in particular adding SUD systems to Scottish Water's core functions as provider of sewerage services.

**Schedule 4 – Modifications of Part III of the 1980 Act**

161. This schedule makes modifications of Part III of the 1980 Act which are minor or consequential on Part 2 of the Act.
162. The schedule amends provisions in the 1980 Act to take account of the situation where someone other than Scottish Water lays mains or pipes in pursuance of an authorisation under section 23A. Section 23A establishes that Scottish Water can grant authorisation to other persons to lay a main under, or over a road.
163. **Section 22** and paragraph 1 of Schedule 3 of the 1980 Act deal with the power of Scottish Water to break open roads for the purpose of carrying on works. The amendments to these sections apply these provisions to persons other than Scottish Water, carrying out works in pursuance of an authorisation under section 23A(1).
164. The amendments to section 23 and paragraph 4 of Schedule 3 allow Scottish Water to recover expenses from the person in whom a main is vested so far as relating to inspection and maintenance.
165. The amendments to Schedule 3, paragraph 4 ensure that an authorised person has the necessary powers to enable him to fulfil his maintenance obligations in relation to communication pipes vested in him.
166. Amendments to Schedule 4, paragraph 34 ensure that Scottish Water has the power to disconnect pipes which are connected without its consent and recover the expense from the person who made the connection.