



## **EXPLANATORY NOTES**

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### **Water Resources (Scotland) Act 2013 (asp 5)**

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# **WATER RESOURCES (SCOTLAND) ACT 2013**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

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

### **THE ACT – OVERVIEW**

3. This Act takes forward the Scottish Government's wish to ensure that Scotland makes every effort to utilise fully its abundant water resources. The Government has set out its vision of Scotland as a Hydro Nation – the first such nation in the world – a nation that manages its water environment to the best advantage, employing its knowledge and expertise effectively at home and internationally. It is developing a wide ranging programme of work to achieve this vision – the Hydro Nation agenda.
4. The Act makes provision in relation to Scotland's water resources. It provides for the Scottish Ministers and Scottish Water to further the sustainable development of the value of Scotland's water resources, and for Ministers to control large-scale abstractions from the water environment. It places new duties upon Scottish Water to develop its assets and support renewable energy, and allows its subsidiaries to borrow money directly, rather than through Scottish Water. It gives Scottish Water powers to monitor and manage the quality of water in the water environment that is likely to be used for human consumption. It provides a new mechanism for Scottish Water to deal with temporary shortages of water supplies, replacing the system of drought orders under the Natural Heritage (Scotland) Act 1991 (c. 28) with a new system of water shortage orders. It also allows Scottish Water to protect the public sewerage network from certain substances and facilitates the maintenance of communal private sewage treatment works, as well as making minor changes to the functioning of the retail market for non-domestic water and sewerage services. It also repeals section 26 of the Water Environment and Water Services (Scotland) Act 2003 (asp 3).

5. The Act is in 8 Parts:

- Part 1 places a general duty on the Scottish Ministers to take such reasonable steps as they consider appropriate for the purpose of ensuring the development of the value of Scotland's water resources. It provides for Ministers to direct designated public bodies as to their involvement in this development. It places a requirement on Ministers to report to the Scottish Parliament on the fulfilment of the duty.
- Part 2 provides for the Scottish Ministers to control large-scale water abstractions. It does so by prohibiting abstractions from the water environment that are above the specified threshold rate, unless they are exempt or are approved by the Scottish Ministers.
- Part 3 amends the Water Industry (Scotland) Act 2002 (asp 3) to alter Scottish Water's powers and duties. It provides that Scottish Water may undertake any activity that it considers will assist in the development of the value of Scotland's water resources. It also places a duty on Scottish Water to develop the commercial value of its assets and expertise, and to promote the use of its assets for the generation of renewable energy. Provision is also made for the Scottish Ministers to give grants or to lend directly to subsidiaries of Scottish Water, and for the water and sewerage undertaking established by Scottish Water to be able to borrow from the Scottish Ministers or any other person. It also alters the water meter error threshold in section 54 of the Water (Scotland) Act 1980 (c. 45).
- Part 4 gives Scottish Water certain additional powers of entry for the purpose of monitoring the quality of "raw water" in the water environment that may be used for human consumption, and for the purpose of investigating anything that may be affecting the quality of such water. It also allows Scottish Water to enter into agreements with owners and occupiers of land, as well as with local authorities, to carry out activities for the purpose of protecting or improving the quality of any such raw water.
- Part 5 provides for deemed contracts for water and sewerage services in certain circumstances, and requires the owners of commercial properties to notify licensed providers of water and sewerage services of changes in the occupancy of the premises.
- Part 6 allows Scottish Water to control inputs of certain priority substances and pollutants into the sewerage network through trade effluent consents, prohibits the passing of fats, oils and grease into the public sewer, and gives Scottish Water improved monitoring powers in relation to inputs into sewers. It also makes provision for common owners of private sewage treatment systems such as septic tanks to be able to carry out essential maintenance without the consent of all their co-owners in certain circumstances.
- Part 7 makes provision for the management of temporary water shortages. It allows Scottish Water to apply for, and the Scottish Ministers to make, water shortage orders. These orders may, among other things, authorise Scottish Water to abstract water from or discharge it to any place, relax requirements to which Scottish Water is subject, and impose water saving measures.

- Part 8 contains general provisions such as key definitions and repeals.
6. The following abbreviations are used in these notes:
- “the 1968 Act” means the Sewerage (Scotland) Act 1968 (c. 47);
  - “the 1980 Act” means the Water (Scotland) Act 1980 (c. 45);
  - “the 2002 Act” means the Water Industry (Scotland) Act 2002 (asp 3);
  - “the 2003 Act” means the Water Environment and Water Services (Scotland) Act 2003 (asp 3);
  - “the 2005 Act” means the Water Services etc. (Scotland) Act 2005 (asp 3);
  - “the Controlled Activities Regulations” means the Water Environment (Controlled Activities) (Scotland) Regulations 2011 (S.S.I. 2011/209).

## **THE ACT – SECTION BY SECTION**

### **PART 1 – DEVELOPMENT OF WATER RESOURCES**

#### **Section 1 – Duty of the Scottish Ministers**

7. This section places a duty upon the Scottish Ministers to take such reasonable steps as they consider appropriate for the purpose of ensuring the development of the value of Scotland’s water resources. Value in this context means the value of the resources on any basis (including their monetary or non-monetary worth) and extends to the economic, social, environmental or other benefits deriving from the use of the resources. The steps that Ministers take must be designed to promote the sustainable use of Scotland’s water resources.

8. Ministers are to act so far as is consistent with the proper exercise of their functions under the 2003 Act (which concerns protection of the water environment) and the Climate Change (Scotland) Act 2009 (asp 12) (which concerns the reduction of greenhouse gas emissions) and any other functions (whether or not relating to water resources or environmental matters).

9. In this context, Scotland’s water resources means wetland, inland water and transitional water as defined by section 3 of the 2003 Act. Broadly, this means all standing or flowing water on the surface of the land, and all groundwater, and includes partly saline water in the vicinity of river mouths.

#### **Section 2 – Involvement of public bodies**

10. This section enables the Scottish Ministers to give the bodies listed in section 3(1) directions as to the exercise of their functions for the purpose of securing their participation in the development of the value of Scotland’s water resources. Ministers must consult each body which will be subject to the directions before they are made.

### **Section 3 – Designation of bodies**

11. This section lists the bodies to which the Scottish Ministers may issue directions for the purpose of securing their participation in the development of the value of Scotland's water resources. Ministers may alter the list by regulations, after consultation with each body to which the alteration relates.

### **Section 4 – Report on steps taken**

12. This section requires the Scottish Ministers to report to the Scottish Parliament annually for the first three years from the date on which section 1 comes into force on how they have complied with their duty to take such reasonable steps as they consider appropriate for the purpose of ensuring the development of the value of Scotland's water resources. Ministers may prepare further reports on their compliance with the duty in section 1, covering subsequent periods of three years or more, as they consider appropriate.

## **PART 2 – CONTROL OF WATER ABSTRACTION**

### **Section 5 – Qualifying abstraction**

13. Part 2 of the Act establishes a requirement for Ministerial approval for certain abstractions from the water environment in Scotland that are above the specified rate threshold, and are not exempt under section 7.

14. Section 5 sets out the abstractions to which the provisions of Part 2 apply ("qualifying abstractions"). The requirement for Ministerial approval applies to an abstraction from any body of inland water in Scotland that is above the threshold rate set by or under section 8.

15. Inland water is defined by the 2003 Act as all standing or flowing water on the surface of the land (other than partly saline water in the vicinity of river mouths) and all groundwater within the landward limits of coastal water.

### **Section 6 – Prohibition arising**

16. This section prohibits abstractions from inland water in Scotland above the specified threshold rate that have not been approved by the Scottish Ministers (unless they are exempt from the requirement to obtain approval by virtue of section 7).

### **Section 7 – Exemption from approval**

17. This section sets out which abstractions are exempt from the requirement for Ministerial approval. The following abstractions are exempt:

- abstractions already authorised under the Controlled Activities Regulations on the day on which section 7(1) comes into force;

- abstractions by Scottish Water for the purpose of the exercise of its core functions (see section 70(2) of the 2002 Act, as amended by section 26 of this Act) in relation to premises in Scotland; and
- abstractions for the purposes of generating electricity by hydro-power, irrigating agricultural or horticultural land, operating a fish farm or maintaining a quarry or a mine.

18. Ministers may by regulations modify an exemption, or provide for an exemption in other circumstances.

### **Section 8 – The relevant threshold**

19. This section sets out the rate threshold above which abstractions from inland water in Scotland are subject (unless otherwise exempt) to the approval of the Scottish Ministers. The rate threshold is 10 megalitres per day, although Ministers may seek to alter that threshold in future by regulations. One megalitre contains one million litres.

20. The Scottish Ministers may by regulations prescribe a method of calculation of the rate of abstraction, and in doing so may provide for some or all of the water abstracted to be left out of account in specified circumstances. Those circumstances could include, for example, where the water abstracted is returned to the water environment unaltered and within a defined period of time.

### **Section 9 – Consultation on changes**

21. Before making regulations altering certain details of the abstraction control regime under section 7 or 8, the Scottish Ministers must consult Scottish Water, the Scottish Environment Protection Agency, Scottish Natural Heritage, and such other persons or organisations as they think appropriate.

### **Section 10 – Application for approval**

22. This section provides that any person may apply to the Scottish Ministers for approval of a qualifying abstraction. The details of the procedure for making such an application must be set out by the Scottish Ministers in regulations.

### **Section 11 – Factors as to approval**

23. This section sets out the factors to which the Scottish Ministers are to have regard when deciding whether to approve a qualifying abstraction. In contrast to the determination by the Scottish Environment Protection Agency of applications for the authorisation of abstractions under regulation 15 of the Controlled Activities Regulations which focuses on mitigating any adverse impacts on the water environment, Ministers must consider any economic, social and other benefits, any adverse impacts, and any relevant advice given by Scottish Water or the Scottish Environment Protection Agency in deciding whether to approve a proposed abstraction. Ministers are required to give their reasons for not approving an application.

## **Section 12 – Conditions of approval**

24. This section enables the Scottish Ministers to attach conditions to their approval of an abstraction and to set a period for which their approval has effect. They may also extend the period for which it has effect or vary the conditions attached to the approval after consulting the holder. Conditions may, in particular, impose an upper limit on the rate at which water may be abstracted, and restrict the purposes for which the abstracted water may be used. The section also provides that the holder of an approval cannot transfer it to another person without the Scottish Ministers' prior consent.

## **Section 13 – Additional requirements**

25. This section requires the holder of an approval to report, if required, to the Scottish Ministers on activities in relation to the abstraction or any associated operations. It also obliges the holder to pay any administrative fee, whether annual or otherwise, that the Scottish Ministers may fix relating to the costs of operating the abstraction control regime (other than costs relating to applications for approval, in respect of which a separate fee may be fixed under section 9). The fee fixed under this section might cover, for example, the cost of monitoring qualifying abstractions or suspected qualifying abstractions in accordance with regulations made under section 17.

## **Section 14 – Advice from other bodies**

26. This section enables the Scottish Ministers to request from Scottish Water and the Scottish Environment Protection Agency, and requires those bodies to give, advice concerning any adverse impact of the proposed abstraction upon, respectively, Scottish Water's core functions and the environment.

## **Section 15 – Suspension and revocation**

27. This section provides for the suspension and revocation of the Scottish Ministers' approval if the holder requests it, or if the holder of the approval breaches conditions of or related to the approval. The holder must be informed of the reasons for any proposed involuntary suspension or revocation, and be given the opportunity to make representations before it is imposed.

## **Section 16 – Appeal against decision**

28. This section makes provision for persons (who have sought approval for a qualifying abstraction or hold such an approval) to appeal to the sheriff against a relevant decision by the Scottish Ministers in relation to that approval. The sheriff may uphold or quash the decision, or vary it (by, for example, substituting a different period of validity of the approval, or removing or altering a condition attached to it). Any such appeal must be made within 21 days of the decision being intimated.



### **Section 17 – Monitoring and records**

29. This section provides for the Scottish Ministers to make regulations about:
- monitoring of any qualifying abstraction, or an abstraction that is suspected of being a qualifying abstraction, and related activities and associated operations,
  - keeping of records, and the extent to which records must be made available to the Scottish Environment Protection Agency and other interested persons.
30. Regulations under this section may make provision for entry onto premises, steps that may be taken at premises so entered, and criminal sanctions for failing to comply with the regulations or for obstructing persons exercising functions conferred by those regulations.

### **Section 18 – Abstraction-related offence**

31. This section provides that it is a criminal offence wilfully or recklessly to make a qualifying abstraction that is not approved or exempt, or wilfully or recklessly to breach any conditions attached to an approval as to the rate at which water may be abstracted or the purposes for which the water may be used.

32. On summary conviction, the maximum fine for this offence is the statutory maximum (currently £10,000) whereas, on conviction on indictment, it is an unlimited fine.

### **Section 19 – Corporate offending**

33. This section provides that where an organisation such as a company or partnership commits an offence under section 18 (an abstraction-related offence) and the commission of the offence is attributable to a responsible official within the organisation such as a director or partner (or a person purporting to act in such a capacity), that official may be prosecuted for the offence in addition to the organisation itself.

### **Section 20 – Procedure for regulations**

34. This section provides that regulations made under Part 2 are subject to the negative procedure (for which, see section 28 of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10)) with the exception of regulations which modify the list of exempt abstractions, modify the relevant threshold, prescribe additional circumstances in which the Scottish Ministers may suspend or revoke their approval of an abstraction, or make provision about monitoring and record keeping in relation to such abstractions, which are instead subject to the affirmative procedure (for which, see section 29 of the 2010 Act).

### **Section 21 – Controlled Activities Regulations**

35. This section provides that nothing in Part 2 of the Act affects any requirement for authorisation under the Controlled Activities Regulations. It clarifies that an abstraction may require both an authorisation under those Regulations and approval under Part 2.

36. As it is possible that the Controlled Activities Regulations might be altered or replaced in future, the section also enables the Scottish Ministers by regulations to modify this section and section 7, should that prove necessary as a result of the Controlled Activities Regulations being revoked or amended or new regulations be made regarding the same subject-matter.

### **PART 3 – SCOTTISH WATER’S FUNCTIONS**

#### **Section 23 – Value of water resources**

37. This section amends section 25 (Scottish Water’s general powers) of the 2002 Act to clarify that section 25(1) of that Act extends to allowing Scottish Water to engage in any activity that it considers will assist in the development of the value of Scotland’s water resources.

#### **Section 24 – Development of assets**

38. This section inserts a new section 50A into the 2002 Act which places a duty on Scottish Water to take reasonable steps to develop the commercial value of its assets and expertise, although only so far as it considers that this is not inconsistent with the economic, efficient and effective exercise of its functions. In complying with this duty, Scottish Water must have regard to any guidance issued by the Scottish Ministers. Assets in this section are defined as property, rights and other assets (whether tangible or intangible). For example, this might include technological expertise, water treatment works and land.

#### **Section 25 – Supporting renewable energy**

39. This section inserts a new section 51A into the 2002 Act which places a duty on Scottish Water to take reasonable steps to promote the use of its assets (both tangible and intangible) for the generation of renewable energy, although only so far as it considers that this is not inconsistent with the economic, efficient and effective exercise of its functions. In complying with this duty, Scottish Water must have regard to any guidance issued by the Scottish Ministers.

#### **Section 26 – Meaning of core functions**

40. This section amends the definition of Scottish Water’s core functions in section 70 (interpretation) of the 2002 Act. Currently, Scottish Water’s core functions are its functions under or by virtue of the 1968 Act, the 1980 Act, the 2002 Act, and any other enactment (with the exception of its functions under section 25(1) and (2) of the 2002 Act). This section alters the definition of “core functions” in the 2002 Act so that it is confined to functions of Scottish Water under the 1968 and 1980 Acts, and other functions which relate to the provision of water or sewerage services (whether under the 2002 Act or otherwise).

## **Section 27 – Subsidiaries of Scottish Water**

41. This section inserts new sections 42A and 42B into the 2002 Act. The new section 42A enables the Scottish Ministers to pay grants directly to, or lend directly to, a subsidiary of Scottish Water (as well as to Scottish Water itself). It also allows a subsidiary of Scottish Water to borrow from any other person. However, Scottish Water's consent is required to any subsidiary borrowing from the Scottish Ministers or any person other than Scottish Water itself. The section does not, however, apply to the water and sewerage undertaking established by Scottish Water under section 13 of the 2005 Act (currently 'Scottish Water Business Stream Limited'), even if that entity is a subsidiary of Scottish Water.

42. Section 42(4) and (5) of the 2002 Act provide that Scottish Water's net borrowings in each financial year must not exceed the limit to be set in a Budget Act. In light of the fact that, under new section 42A, subsidiaries of Scottish Water may now borrow, new section 42B provides that the net amount of sums borrowed by Scottish Water and any subsidiary of it must not exceed the amount specified in a Budget Act. Section 42(4) and (5) of the 2002 Act are repealed by this section.

43. A "subsidiary" for the purposes of new sections 42A and 42B of the 2002 Act is defined by reference to section 1159 of the Companies Act 2006 (c. 46), which provides that a company is a subsidiary of another company if that other company (a) holds a majority of the voting rights in it, (b) is a member of it and has the right to appoint or remove a majority of its board of directors, or (c) is a member of it and controls alone, pursuant to an agreement with other members, a majority of the voting rights in it (or is a subsidiary of a company that is itself a subsidiary of that other company).

## **Section 28 – Water and sewerage undertaking**

44. This section amends section 14 of the 2005 Act to enable the Scottish Ministers to, by order, specify the circumstances in which the undertaking established under section 13 of that Act (currently 'Scottish Water Business Stream Limited') may, with the consent of Scottish Water, borrow money from the Scottish Ministers or other persons.

## **Section 29 – Errors in metering**

45. This section amends section 54 of the 1980 Act, which makes provision regarding water meter accuracy, to alter the error threshold above which Scottish Water must refund any overpayments (or the customer make up any underpayments) resulting from the inaccuracy. The amended section provides that where a water meter registers incorrectly to any degree exceeding 2.5% (for high flow rate) or 6% (for low flow rate), a refund or payment (as appropriate) must be made. Those rates are substituted for the existing error threshold in the 1980 Act of 5%. The Scottish Ministers are required through regulations to define what constitutes high and low flow rates (and regulations may also amend either of the percentage figures).

## **PART 4 – RAW WATER QUALITY**

### **Section 30 – Steps for sake of quality**

46. This section inserts a new Part VIB into the 1980 Act. The new Part gives Scottish Water powers of entry to premises (other than a house) for the purposes of assessing or monitoring the quality of raw water, and investigating or isolating anything that appears to be affecting, or may affect, the quality of such water.

47. “Raw water” is defined by new section 76M(5) of the 1980 Act. It means water contained in (and flowing or draining into) any body of water:

- (a) identified by an order made under section 6(1) (identification of bodies of water used for the abstraction of drinking water) of the 2003 Act; or
- (b) specified by an order made under new section 76R(1) of the 1980 Act.

Essentially, raw water is water in the water environment that is intended to be abstracted and used for human consumption, excluding certain private water supplies (see new section 76M(6) of the 1980 Act).

48. Scottish Water must give at least 24 hours’ notice of the intended entry to the occupier (if any) of the premises and, if entry is refused, the taking of steps at the premises is obstructed (or refusal or obstruction is reasonably anticipated), or the premises are unoccupied, Scottish Water can apply to the sheriff for a warrant authorising entry.

49. It is an offence under new section 76Q of the 1980 Act to intentionally obstruct a person approved by Scottish Water under new section 76O of that Act in exercise of the authority to enter premises conferred by a warrant.

### **Section 31 – Agreements about activities**

50. This section inserts a new section 68A into the 1980 Act which enables Scottish Water to enter into voluntary agreements with the owners and occupiers of land, or with local authorities, for the carrying out of activities which Scottish Water considers will help protect or improve the quality of raw water. Scottish Water may also enter into agreements whereby one party agrees to refrain from carrying out activities which Scottish Water considers detrimental to the quality of raw water.

51. Since new section 68A of the 1980 Act makes provision for Scottish Water to enter into agreements with owners or occupiers of land and local authorities regarding works to protect or improve raw water quality, there is no longer any need for agreements made under section 68 of that Act to concern works for the purpose of preserving the purity of water (purity being one aspect of water quality). Section 31 also therefore consequentially amends section 68 of the 1980 Act so that agreements which may be provided for under that section are limited to those which concern drainage or the more effectual collection or conveyance of water which Scottish Water is authorised to take.

## **PART 5 – NON-DOMESTIC SERVICES**

### **Section 32 – Deemed contracts**

52. The 2005 Act established a framework whereby non-domestic customers could receive water and sewerage services from any one of a number of licensed providers operating in a competitive market, with Scottish Water effectively acting as the wholesale provider of the services. This section inserts into the 2005 Act new sections 20A and 20B, which address situations where customers are receiving services without having a contract with a particular licensed provider.

53. New section 20A of the 2005 Act provides that where water or sewerage services are provided to premises by Scottish Water as wholesale provider but, for whatever reason, there is no contract in place between a licensed provider and the occupier, a deemed contract shall exist between the occupier and whichever licensed provider is designated by the Water Industry Commission for Scotland.

54. New section 20B of the 2005 Act provides for the basis on which a provider is designated for the purposes of new section 20A, and the terms and conditions of the deemed contract, to be set out in a scheme which is to be prepared by the Water Industry Commission for Scotland.

### **Section 33 – Notification of occupancy**

55. This section inserts new sections 20C and 20D into the 2005 Act.

56. New section 20C of the 2005 Act requires the owner of premises to which water or sewerage services are provided by a licensed provider (i.e. a provider licensed under section 6 of the 2005 Act) to provide information to the provider in respect of any change in occupancy. The Scottish Ministers may by regulations add to the information to be provided, and make rules on the timing of and procedure for the provision of information.

57. New section 20D of the 2005 Act provides that if the owner fails without reasonable excuse to advise the provider that a new occupier has taken occupancy, then the owner becomes jointly and severally liable with the new occupier for relevant charges. The Scottish Ministers may by regulations make rules on the timing of when joint liability arises and associated procedures, and for exempting from liability owners who have taken prescribed steps to ensure the accuracy and completeness of information provided by them.

## **PART 6 – SEWERAGE NETWORK**

### **Section 34 – Priority substances etc.**

58. This section inserts a new paragraph (p) into subsection (3) of section 29 (decision on application for trade effluent consent) of the 1968 Act. The new paragraph allows Scottish Water to impose conditions as to the elimination or diminution of any priority substance or pollutant contained in trade effluent in a trade effluent consent granted under

section 26 of the 1968 Act. Any occupier of trade premises who discharges trade effluent into the sewers of Scottish Water contrary to conditions imposed under Part 2 of the 1968 Act commits a criminal offence under section 24(2) of that Act.

59. The section also inserts a new section 29A into 1968 Act which defines the terms “priority substance” and “pollutant” for the purposes of new section 29(3)(p) of the 1968 Act. “Priority substance” is defined by reference to Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for Community action in the field of water policy, and “pollutant” is defined by reference to the Controlled Activities Regulations. The Scottish Ministers may make consequential modifications of those definitions by regulations where the Directive or Regulations are modified.

### **Section 35 – Substances generally**

60. This section inserts a new section 46A into the 1968 Act which creates a new offence of passing, or permitting to be passed, fat, oil or grease into a public sewer or connected drain where it is liable to interfere with the free flow of the sewer’s contents or adversely affect the treatment or disposal of its contents. The offence only applies to the passing of such matter from trade premises (defined by section 59(1) of the 1968 Act as any premises used or intended to be used for carrying on any trade or industry). It does not apply in circumstances where Scottish Water has given its consent for the substance to be passed into the sewerage network under Part II of the 1968 Act.

61. The section also inserts a new section 46B into the 1968 Act, which allows Scottish Water to recover the cost of investigating or remedying any resulting damage to or blockage of the sewer or drain, or interference with the free flow of the sewer’s contents, from the owner or occupier responsible, unless Scottish Water has given its consent to the discharge under Part II of the 1968 Act.

62. The section also amends section 46 (certain matter not to be passed into drains) of the 1968 Act to bring the maximum penalties applicable to that offence on summary conviction into line with the maximum penalties provided for in the new section 46A(5).

### **Section 36 – Powers of entry**

63. This section amends section 48 (powers of entry) of the 1968 Act to provide that Scottish Water’s powers of entry under that section extend to taking entry for the purposes of:

- monitoring, inspecting, and testing sewage (in addition to taking samples away for analysis, which is already provided for by section 48 of the 1968 Act);
- installing or maintaining monitoring, testing or sampling equipment for use on the premises; and
- investigating the source of any matter or substance (other than sewage) which is passing from the premises into the public sewerage network.

### **Section 37 – Common maintenance**

64. This section inserts a new Part IIA into the 1968 Act. The new Part applies to private sewage treatment works which are owned in common by two or more persons and the discharge of the contents of which are authorised under the Controlled Activities Regulations. Private sewage treatment works such as septic tanks will usually involve some discharge to the water environment and that discharge will usually require authorisation under the Controlled Activities Regulations.

65. The term “private sewage treatment works” is defined in section 59 of the 1968 Act as meaning any works, apparatus or plant used for the treatment or disposal of sewage that is not vested in Scottish Water. It includes a septic tank, but not a SUD (Sustainable Urban Drainage) system.

66. At common law, where property is owned in common, the consent of all *pro indiviso* owners is generally required before any alterations, non-essential repairs or other works can be carried out upon it, although the grant of ownership (as recorded in the title to the property) may make different arrangements. The new Part sets out new rules regarding the maintenance of private sewage treatment works owned in common that override any conflicting provision of the common law or any contrary provision that may exist in the title deeds of the properties concerned.

67. The new Part provides that, where works need to be carried out to private sewage treatment works that are owned in common in order to comply with conditions of the works’ authorisation under the Controlled Activities Regulations, any one proprietor may carry out (or instruct) those measures without having to secure the consent of all (or a certain proportion of) the other co-proprietors. Before doing so, the owner(s) wishing to carry out the measures must serve a notice under new section 38D of the 1968 Act upon each of the other owners, who may apply to the sheriff under new section 38E for review of the notice if they are unhappy with the measures proposed.

68. The new Part also makes provision for each of the owners of the works to be liable for a share of the cost of measures taken under new section 38C(2) of the 1968 Act, based on the same proportion that each owner’s *pro indiviso* share of the property bears to the whole. New section 38F makes provision for an owner to recover the cost of measures taken, subject to the cost having been incurred and to the service of a notice.

69. Provision is made in new section 38G of the 1968 Act for liability for the cost of measures to continue notwithstanding a change in ownership of any property connected to the private sewage treatment works.

70. New section 38H of the 1968 Act provides for a definition for the Controlled Activities Regulations and related matters. The Scottish Ministers may make consequential modifications of that definition by regulations.

## **PART 7 – WATER SHORTAGE ORDERS**

### **Section 38 – Proposal for order**

71. This section makes provision for Scottish Water to propose to the Scottish Ministers that they (the Scottish Ministers) make a water shortage order. Scottish Water may only do this if it believes that there is a serious deficiency (or threat of a serious deficiency) of water supplies in an area. The section sets out the information that must be included in and accompany the proposal. The Scottish Ministers may also instruct Scottish Water about the form in which a proposal is to be presented. A water shortage order made under the provisions of the Act is an administrative order and is not a statutory instrument.

72. The provision for water shortage orders replaces the provision for drought orders in the Natural Heritage (Scotland) Act 1991 (the relevant provisions of which are repealed by section 53 of, and paragraph 1(2) of schedule 4 to, this Act).

### **Section 39 – Making of order**

73. This section enables the Scottish Ministers to make two different types of water shortage order: an ordinary water shortage order and an emergency water shortage order. In order for Ministers to make an ordinary water shortage order, Scottish Water must have made a proposal and Ministers must be satisfied that the deficiency or threat in question exists. In order to make an emergency water shortage order, Ministers must, in addition, be satisfied that there is a risk to the health, or social or economic well-being, of people in the area affected. The differences in the effect of an ordinary water shortage order and an emergency water shortage order are that an emergency water shortage order may permit Scottish Water to supply water by means other than through pipes (see section 40(4)), and an emergency water shortage order comes into force more quickly after it is made and is of shorter duration (see paragraph 8 of schedule 1).

### **Section 40 – Content of order**

74. A water shortage order may contain such provision as the Scottish Ministers consider necessary or expedient to abate a serious deficiency (or threat of a serious deficiency) of water supplies in an area. Examples of what a water shortage order may do are given. Subsection (4) provides that an emergency water shortage order may permit Scottish Water to supply water by means other than through pipes (which an ordinary water shortage order may not do).

### **Section 41 – Abstraction and discharge**

75. This section provides that Scottish Water may abstract water from any source or discharge water to any place where permitted to do so by a water shortage order, even if Scottish Water is not otherwise entitled to do so, or if the abstraction or discharge would interfere with any right (in the water) of another person (including, for example, a person who has an exclusive right to abstract that water). This provision does not, however, override any requirement for an authorisation under the Controlled Activities Regulations (see section 50(1)), so Scottish Water will still require to apply for and obtain



authorisation from the Scottish Environment Protection Agency if those regulations require it.

76. The section also provides that a water shortage order can restrict or prohibit the abstraction of the water even if the restriction or prohibition interferes with any right of any person to abstract the water.

#### **Section 42 – Scheduled provision**

77. This section introduces schedule 1, which makes further provision in relation to procedural and other matters concerning water shortage orders.

#### **Section 43 – Appeal against order**

78. This section enables a person who is aggrieved by a water shortage order to appeal to the sheriff, who may affirm the order or direct the Scottish Ministers to amend or revoke it (wholly or partly). Any appeal must be made within 14 days from the day on which notice of the order is published. The sheriff may suspend the effect of the order (or of any part of it) pending the determination of the appeal.

#### **Section 44 – Non-compliance offence**

79. This section makes it an offence for a person who is (or ought to be) aware of a water shortage order to fail, without reasonable excuse, to comply with a water saving measure or a restriction or prohibition on the abstraction of water imposed the order.

80. On summary conviction, the maximum fine for this offence is the statutory maximum (currently £10,000) whereas, on conviction on indictment, it is an unlimited fine.

#### **Section 45 – Corporate offending**

81. This section provides that, where an organisation such as a company or partnership commits an offence under section 44(1), and the commission of the offence is attributable to a responsible official of the organisation such as a director or partner (or a person purporting to act in such a capacity), that official may be prosecuted for the offence, in addition to the organisation itself.

#### **Section 46 – Recommendations issuable**

82. This section requires Scottish Water, if it considers there to be a threat of a serious deficiency of water supplies in an area, to publicise that fact and to recommend that people in the area comply with such water saving measures as it considers will assist in abating the threat. Unlike water saving measures imposed by a water shortage order, it is not a criminal offence to fail to comply with water saving measures recommended under this section.

### **Section 47 – Directions on functions**

83. This section enables the Scottish Ministers to give directions to Scottish Water regarding the exercise of its functions under a water shortage order.

### **Section 48 – Water saving measures**

84. This section introduces schedule 2, which lists the water saving measures that may be imposed in a water shortage order under section 40(2)(e) or recommended under section 46.

### **Section 49 – Serious deficiencies**

85. This section provides that references in Part 7 of the Act to a serious deficiency of water supplies means an insufficiency of water supplies available to enable Scottish Water to carry out its functions under Part II of the 1980 Act (concerning the supply of wholesome water for domestic and non-domestic purposes).

### **Section 50 – Controlled Activities Regulations**

86. This section makes it clear that, although the Scottish Ministers may permit Scottish Water to make an abstraction or take other measures in connection with a water shortage order, that permission does not absolve Scottish Water of the need to separately obtain any authorisation required under the Controlled Activities Regulations.

87. Scottish Water must apply separately for any authorisation that it may need under the Controlled Activities Regulations, and is required by section 38(3)(b) to provide to the Scottish Ministers a copy of any associated application under those Regulations when proposing a water shortage order.

88. This section confirms that any restriction or prohibition on the abstraction of water imposed by a water shortage order overrides any authorisation of that abstraction under the Controlled Activities Regulations, while the water shortage order is in effect.

### **Section 51 – Other expressions in Part**

89. This section defines various expressions used in Part 7.

## **PART 8 – GENERAL PROVISIONS**

### **Section 52 – Crown application**

90. This section exempts the Crown from criminal liability under Parts 2 (control of water abstraction) and 7 (water shortage orders) of the Act. Schedule 3 makes further provision about application to the Crown of Parts 2 and 7.

### **Section 53 – Repeal of enactments**

91. This section introduces schedule 4 which makes minor and consequential repeals.

### **Section 54 – Ancillary power**

92. This section enables the Scottish Ministers to, by regulations, make supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of or in connection with the Act.

### **Section 55 – Key definitions**

93. This section defines various expressions used throughout the Act, and sections 56 and 57 make provision in relation to commencement and the short title.

### **Section 56 – Commencement**

94. This section makes provision as to the commencement of the Act. Section 52 (which also introduces schedule 3) and sections 54 to 57 come into force on the day after Royal Assent. All other provisions are to come into force on such day as the Scottish Ministers may, by order, appoint. Any such order may include transitional, transitory or saving provision.

## **SCHEDULES**

### **SCHEDULE 1 – WATER SHORTAGE ORDERS**

95. Paragraph 1 requires Scottish Water to publish a public notice of a proposal for a water shortage order. The notice must state that representations about the proposal may be made in writing to the Scottish Ministers within 14 days of publication of the notice.

96. Paragraph 2 makes provision for owners, lessees and occupiers of premises on which a water shortage order would permit Scottish Water to carry out works to receive notice of the proposal. It also requires Scottish Water to give notice to a person whose right to abstract water would be restricted or prohibited by the order. Such persons may make representations about the proposal in writing to the Scottish Ministers within 14 days of notification being given.

97. Paragraph 3 requires the Scottish Ministers to give a person notice of a proposal where they intend to make a water shortage order that would restrict or prohibit the abstraction of water by that person, but the person has not already received notice because the restriction or prohibition was not included in the draft order.

98. Paragraph 4 makes provision for the Scottish Ministers to seek the Scottish Environment Protection Agency's advice in relation to adverse impacts upon the water environment and the need, if any, to restrict or prohibit the abstraction of water by any person.

99. Paragraph 5 requires the Scottish Ministers to consider representations made and the advice received from the Scottish Environment Protection Agency before making their decision. It also provides that they may make a water shortage order in the same terms as the draft order contained in Scottish Water's proposal, make an order in different terms to the draft order, or refuse to make an order.

100. Paragraph 6 provides for publication of the order. Where the order imposes water saving measures, Scottish Water is also required to take appropriate steps to bring the measures to the attention of persons who are subject to the measures.

101. Where a water shortage order restricts or prohibits the abstraction of water by a person, paragraph 7 requires notice to be given to that person.

102. Paragraph 8 makes provision for the coming into effect and duration of water shortage orders. Ordinary water shortage orders come into effect 3 days after notice of them is published under paragraph 6, and have effect for 6 months. Emergency water shortage orders come into effect on the day after notice of them is published, and have effect for 3 months. The Scottish Ministers can extend the duration of both types of order by up to two months.

103. Paragraph 9 makes provision for the publication of notice of any extension of a water shortage order. Where the extended order includes water saving measures, Scottish Water is also required to take appropriate steps to bring the extension to the attention of persons who are subject to the water saving measures. Where the order to be extended restricts or prohibits the abstraction of water by a person, the Scottish Ministers are required to give notice to that person.

104. Paragraph 10 enables anyone aggrieved by an extension of a water shortage order to appeal to the sheriff.

105. Paragraph 11 allows the Scottish Ministers to review a water shortage order at any time and, if they consider it appropriate following such a review, to revoke it in whole or in part. Provision is made for public notice of the revocation to be given, and for the giving of individual notice to any persons who were subject to a restriction or prohibition on the abstraction of water that has been wholly or partly removed by the revocation.

106. Paragraphs 12 to 16 give Scottish Water powers of entry, by court warrant if necessary, in relation to assessing the need for water shortage orders, implementing them, and determining whether a water saving measure, or restriction or prohibition is being complied with. It is an offence to intentionally obstruct a person who is exercising authority to enter conferred by a warrant.

107. Paragraph 17 provides for Scottish Water to pay compensation to anyone who has sustained loss or damage as a result of the abstraction or discharge of water by Scottish Water in accordance with a water shortage order, a restriction or prohibition on the abstraction of water imposed by such an order, or the exercise by an approved person of Scottish Water's powers of entry under paragraph 12(1) or powers conferred by warrant

under paragraph 13(1). Compensation is not payable if the loss or damage is attributable to any matter listed in paragraph 17(2) including, for example, where it is attributable to the fault of the person who sustained it. If the parties cannot agree whether compensation is payable or the appropriate amount of compensation, the dispute can be determined by a sheriff.

108. Paragraph 18 requires Scottish Water and the Scottish Ministers to act without undue delay when required to publish or give notice in connection with water shortage orders.

109. Paragraph 19 provides that any reference to a day on which a notice is published under paragraphs 1, 6 and 9 is to the earliest day on which both the requirement to publish it in a newspaper and the requirement to publish it on Scottish Water's website have been met.

## **SCHEDULE 2 – WATER SAVING MEASURES**

110. This schedule lists the water saving measures that may be imposed by a water shortage order under section 40(2)(e) or recommended by Scottish Water under section 46. This list includes any measure that Scottish Water or, as the case may be, the Scottish Ministers consider to be necessary or expedient to abate a serious deficiency (or threat of a serious deficiency) of water supplies.

## **SCHEDULE 3 – CROWN LAND**

111. This schedule provides that the powers of entry in Parts 2 (control of water abstraction) and 7 (water shortage orders) may only be exercised in relation to Crown land with the consent of the appropriate authority. Paragraph 2 defines “Crown land” and “appropriate authority”.

## **SCHEDULE 4 – REPEAL OF ENACTMENTS**

112. This schedule repeals section 69 (power to restrict use of hosepipes) of the 1980 Act and certain provisions of the Natural Heritage (Scotland) Act 1991 which concern drought orders. The provisions of the 1991 Act regarding drought orders are replaced by the provisions of this Act regarding water shortage orders.

113. The schedule also repeals section 26 of the 2003 Act, which requires the Scottish Ministers to report to the Scottish Parliament annually regarding compliance with the Water Framework Directive (2000/60/EC) and regarding progress towards achieving the environmental objectives for water status that member states are required to set under that Directive.

## **PARLIAMENTARY HISTORY**

114. The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which the proceedings at that Stage took place, and the references to the official report of those proceedings. It also shows the dates

*These notes relate to the Water Resources (Scotland) Act 2013 (asp 5)  
which received Royal Assent on 9th April 2013*

on which Committee Reports and other papers relating to the Act were published, and references to those reports and other papers.

<i>Proceedings and Reports</i>	<i>References</i>
<b>Introduction</b>	
Bill as introduced – 27 June 2012	<u>SP Bill 15 – Session 4, 2012</u>
<b>Stage 1</b>	
<b>(a) Infrastructure and Capital Investment Committee</b>	
12 <sup>th</sup> Meeting 2012, 20 June 2012	<u>col 993-996</u>
13 <sup>th</sup> Meeting 2012, 12 September 2012	<u>col 804-821</u>
14 <sup>th</sup> Meeting 2012, 19 September 2012	<u>col 844-872</u>
15 <sup>th</sup> Meeting 2012, 26 September 2012	<u>col 908-922</u>
16 <sup>th</sup> Meeting 2012, 3 October 2012	<u>col 951-961</u>
17 <sup>th</sup> Meeting 2012, 24 October 2012	<u>col 998-1018</u>
18 <sup>th</sup> Meeting 2012, 31 October 2012	<u>col 1027-1045</u>
19 <sup>th</sup> Meeting 2012, 7 November 2012	<u>col 1086-1100</u>
22 <sup>nd</sup> Meeting 2012, 28 November 2012	In private
Report, 2012 (Session 4) – Stage 1 Report on the Water Resources (Scotland) Bill	<u>Report</u>
<b>(b) Finance Committee</b>	
25 <sup>th</sup> Meeting 2012, 3 October 2012	In private
<b>(c) Subordinate Legislation Committee</b>	
30 <sup>th</sup> Meeting 2012, 18 December 2012	<u>col 687</u>
<b>(d) Consideration by the Parliament</b>	
Stage 1 Debate – 19 December 2012	<u>col 14948-14986</u>
<b>Stage 2</b>	
<b>Infrastructure and Capital Investment Committee</b>	
2 <sup>nd</sup> Meeting 2013, 23 January 2013	<u>col 1288-1319</u>
<b>Stage 3</b>	
<b>(a) Subordinate Legislation Committee</b>	
6 <sup>th</sup> Meeting 2013, 19 February 2013	<u>col 770</u>
<b>(b) Consideration by the Parliament</b>	
Stage 3 Debate, 27 February 2013	<u>col 17061-17112</u>
Bill as passed – 27 February 2013	<u>SP Bill 15B - Session 4 (2013)</u>
<b>Royal Assent</b>	
9 April 2013	<u>Water Resources (Scotland) Act 2013 (asp 5)</u>





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