

EXPLANATORY MEMORANDUM TO
THE RESERVOIRS (SCOTLAND) ACT 2011 (RESTRICTIONS ON DISCLOSURE OF
INFORMATION IN RELATION TO NATIONAL SECURITY ETC.) ORDER 2015

2015 No. [XXXX]

1. 1.1 This Explanatory Memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty.

1.2 This Memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

This Order contains provision which is considered necessary in consequence of the Reservoir (Scotland) Act 2011 (“the 2011 Act”). It will empower the Secretary of State to issue to the Scottish Ministers and the Scottish Environment Protection Agency (“SEPA”) a non-disclosure notice in relation to information about any controlled reservoir in Scotland which, if disclosed, would, in the opinion of the Secretary of State, be contrary to the interests of national security; empower the Secretary of State, if of the opinion that publication of a flood plan or any information in relation to a flood plan would be contrary to the interests of national security, to serve a non-publication notice on any relevant person; and update the definition of “the Scottish regime” in relation to relevant powers in the Flood and Water Management Act 2010 to take account of the enactment of the 2011 Act.

3. Matters of special interest to the Joint Committee on Statutory Instruments

None

4. Legislative Context

4.1 This Order is made in consequence of the 2011 Act which received Royal Assent on 12th April 2011. The 2011 Act makes provision for a new regime in Scotland for the regulation of the construction, alteration and management of controlled reservoirs, particularly in relation to the risk of flooding from those reservoirs. When fully commenced, this regime will replace the regime under the Reservoirs Act 1975 (“the 1975 Act”) in so far as it extends to Scotland.

4.2 The Scottish Parliament does not have the legislative competence to make provision in relation to national security matters as these are reserved to the UK Parliament by virtue of Section B8 of Schedule 5 to the Scotland Act 1998. This Order makes provision for the purposes of national security which is considered necessary in

consequence of provision made by the 2011 Act. Further details are provided in the policy background (see below).

5. Territorial Extent and Application

5.1 Except as outlined in 5.2, this instrument applies to all of the United Kingdom.

5.2 Article 14 extends to Scotland only, and article 15 extends to England and Wales and Scotland only.

6. European Convention on Human Rights

The Parliamentary Under Secretary of State for Scotland, the Rt Hon David Mundell MP, has made the following statement regarding Human Rights:

“In my view the provisions of the Reservoirs (Scotland) Act 2011 (Restrictions on Disclosure of Information in relation to National Security etc.) Order 2015 are compatible with the Convention rights.”

7. Policy background

7.1 Section 9 (controlled reservoirs register) of the 2011 Act requires SEPA to establish and maintain a register of certain reservoirs, including those in relation to which there could be an uncontrolled release of 10,000 cubic metres or more of water. Section 9(2)(h) provides that the register must include, in particular, maps showing the areas of land which, in the event of an uncontrolled release of water from the reservoirs, would be likely to be flooded. The Scottish Ministers may require other information (or documents) to be included in the register and specify how it is to be recorded.

7.2 Section 55 (flood plans) of the 2011 Act provides that the Scottish Ministers may, by regulations, make provision as to the preparation of flood plans for controlled reservoirs and such other matters in relation to those flood plans as they consider appropriate. A “flood plan” for a controlled reservoir is a plan setting out the action to be taken by the reservoir manager of the reservoir to which the plan relates in order to control or mitigate the effect of flooding likely to result from any escape of water from the reservoir. The regulations may include provision:

- as regards who is to prepare a flood plan,
- specifying what is to be included in a flood plan,
- requiring flood plans to be produced or submitted to SEPA,
- as regards the approval of flood plans by the Scottish Ministers, SEPA or engineers,
- as regards the review and updating of flood plans,
- as regards publication or distribution of copies of flood plans, or of a list of reservoirs in relation to which a flood plan must be prepared,
- in connection with the referral of flood plans to a referee,

- requiring a reservoir manager to take action set out in a relevant flood plan,
- conferring powers of entry on SEPA in connection with the regulations.

7.3 In consequence of section 9 of the 2011 Act, this Order empowers the Secretary of State to issue to the Scottish Ministers and SEPA a non-disclosure notice in relation to information about any controlled reservoir in Scotland which, if disclosed, would be, in the opinion of the Secretary of State, contrary to the interests of national security. The purpose is to prohibit the disclosure of the information by Scottish Ministers and SEPA and to exclude the information from the public register. The notice may also prohibit the Scottish Ministers and SEPA from disclosing the existence of that information. However, the Order also provides that any restrictions on the disclosure of information imposed by this Order do not apply to the extent that they would prevent the Scottish Ministers or SEPA from complying with any other duty imposed on them by virtue of: the Environmental Information (Scotland) Regulations 2004; the Freedom of Information (Scotland) Act 2002; a constable acting in the course of the constable's duties; or, a court order.

7.4 In consequence of section 55 of the 2011 Act, the Order empowers the Secretary of State, if of the opinion that publication of a flood plan or any information in relation to a flood plan would be contrary to the interests of national security, to serve a non-publication notice on any relevant person (as defined in the Order). The purpose is to prohibit the publication of the information by the relevant person, except as may be permitted by the notice. The notice may also prohibit the relevant person from disclosing the existence of that information.

7.5 The Order makes it an offence, without reasonable excuse, to fail to comply with a requirement of a non-publication notice or an associated duty not to disclose information. A person does not commit the offence if the person fails to comply with such a requirement or duty in order to comply with the duties outlined in 7.3. The offence is similar to an existing offence which has applied in England since 1 October 2004. The offence in England is in section 22(1A) (read with section 22(5)) of the Reservoirs Act 1975 (as inserted by section 79(3) of the Water Act 2003).

7.6 Additionally, the Order updates the definition "the Scottish regime" in relation to relevant powers in the Flood and Water Management Act 2010 with effect from the date on which the 1975 Act is repealed in so far as it extends to Scotland.

8. Consultation outcome

8.1 Although there has been no public consultation specific to the provisions of this Order, the UK Government departments with responsibility for the legislation which this Order affects (the Department for the Environment, Food, and Rural Affairs, the Home Office and the Ministry of Defence) have been consulted during the drafting of this Order. All the provisions of this Order have the approval of the relevant departments.

8.2 With regard to wider consultation, in February 2008, the Scottish Government launched a consultation on “The Future of Flood Risk Management in Scotland”. This sought responses on subjects relating to planning and preparing for flooding, as well as key provisions to be made in the 2011 Act (<http://www.scotland.gov.uk/Publications/2008/02/13095729/0>). It requested information on a number of matters, including proposals to transfer responsibility for enforcement of the 1975 Act from local authorities to a single enforcement authority, SEPA.

8.3 In January 2010, the Scottish Government launched “Reservoir Safety in Scotland: A Consultation Document”. This sought views on a number of subjects, including provision for incident reporting at reservoirs to the enforcement authority, and the preparation of reservoir flood plans. A Scottish Government report (<http://www.scotland.gov.uk/Publications/2010/07/20132352/0>) containing analysis of the 67 consultation responses as well as the discussions from four workshops held in Inverness, Edinburgh, Glasgow and New Galloway states that:

“...responses generally supported proposals for reservoir flood plans, incident reporting and a risk-based approach to reservoir safety. There were some concerns about some of the detail [...]. Generally, however the safety benefits of the proposed changes were accepted to be worthwhile and of value to public safety, and the vast majority of respondents supported the Scottish Government’s preferred implementation model.”

9. Guidance

This Order stands alone, guidance is not necessary.

10. Impact

10.1 This instrument has no impact of a regulatory nature on the private sector or civil society organisations and will not impose or reduce costs

10.2 There will be no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

The legislation does not apply to small business.

12. Monitoring & review

The effect of this Order is purely consequential. It does not create new policy or frameworks and therefore no monitoring or review of the effects of this Order is required.

13. Contact

Emma Lopinska at the Scotland Office (Tel: 0131 244 9016 or email: emma.lopinska@scotlandoffice.gsi.gov.uk) can answer any queries regarding the instrument.