

WATER RESOURCES (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Water Resources (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.
2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill provisions

3. The Bill 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 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 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.
4. The Bill has eight 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 to alter Scottish Water's powers and duties. It clarifies that Scottish Water has the power to do anything that it considers will assist in the development of the value of Scotland's water resources and places a duty on Scottish Water to develop the 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.
- 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, for the carrying out of activities for the purpose of 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 input 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 every co-owner, and to share the costs fairly, provided they follow the procedure for notifying their co-owners.
- 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.

5. Further information about the Bill's provisions is contained in the Explanatory Notes and Financial Memorandum published separately as SP Bill 15-EN, and in the Policy Memorandum published separately as SP Bill 15-PM.

Rationale for subordinate legislation

6. The Bill contains a number of delegated powers provisions which are explained in more detail below. The Scottish Government has carefully considered whether and in what manner

provisions should be set out in subordinate legislation rather than on the face of the Bill. In consideration of this, and in determining the appropriate level of scrutiny, the Scottish Government has had regard to:

- the likely frequency of amendment;
- the need to make proper use of valuable parliamentary time;
- the need to ensure sufficient flexibility to respond to changing circumstances; and
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament.

Delegated powers

7. The delegated powers provisions in the Bill are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of parliamentary procedure has been considered appropriate.

Section 3(2) – Designation of bodies

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

8. Section 3(2) allows the Scottish Ministers, by regulations, to modify the list of designated bodies in section 3(1). Designated bodies can be subject to directions from the Scottish Ministers for the purpose of securing their participation in the development of the value of Scotland's water resources, although only as regards the exercise of their functions. The bodies currently listed in section 3(1) are Scottish Water, the Scottish Environment Protection Agency, Scottish Natural Heritage, Scottish Enterprise, and Highlands and Islands Enterprise.

Reason for taking power

9. Ministers have a duty under section 1 of the Bill to take such reasonable steps as they consider appropriate for the purpose of ensuring the development of the value of Scotland's water resources (where "value" includes economic and other benefit). Section 3(1) of the Bill designates the main bodies that have the potential to play a significant role in furthering this agenda. However, given the breadth of the policy objective, it is conceivable that Ministers may wish to secure the participation of other public bodies. The power in section 3(2) to modify the list of bodies in section 3(1) allows flexibility to bring other public bodies within the scope of Ministers' direction-giving power in future. Section 3(3) requires the Scottish Ministers to consult bodies before designating them under section 3(2).

Choice of procedure

10. Such regulations will be subject to the negative procedure. If Parliament approves the principle that Ministers should be able to direct public bodies so that they must exercise their functions with a view to securing their participation in the development of the value of

Scotland's water resources, the question of which bodies are to be subject to this power is thought to be largely a technical issue (relating to the nature of their functions) and as such the negative procedure provides sufficient opportunity for scrutiny.

Section 7(6) – Exemption from approval

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative procedure

Provision

11. Section 6 prohibits qualifying abstractions from the water environment unless they are approved by the Scottish Ministers or exempt under section 7. Section 7 provides that the following abstractions are exempt: (a) abstractions which are authorised under the Water Environment (Controlled Activities) (Scotland) Regulations 2011 (S.S.I. 2011/209) when section 7(1) comes into force, (b) abstractions by Scottish Water for the purpose of performing its core functions in Scotland, and (c) abstractions for the sole or principal purpose of the activities listed in section 7(4). Section 7(6) allows the Scottish Ministers, by regulations, to modify the exemptions and specify other circumstances in which a qualifying abstraction is exempt.

Reason for taking power

12. Ministers wish to ensure that, where Scotland's water resources are abstracted in large quantities, sufficient benefit accrues to the people of Scotland, taking into account the social and economic impact of the abstraction. There are certain abstractions which Ministers, for policy reasons, consider that they do not require to approve, such as those which Scottish Water make for the purposes of supplying drinking water in Scotland. However, Ministers may wish to modify that list in light of experience or changing policy. The power to modify the exemptions and specify other circumstances in which a qualifying abstraction is exempt allows flexibility to add or remove certain types of abstractions in future without requiring primary legislation.

Choice of procedure

13. Such regulations will be subject to the affirmative procedure by virtue of section 18(1). The power may be used to modify primary legislation. It could, depending on how it is used, substantially alter the practical effect of the Ministerial approval regime. It could also have a substantial effect on certain stakeholders if the existing exemptions were removed. As such, the greater level of parliamentary control offered by the affirmative procedure is considered appropriate.

Section 8(1)(b) and (2) – Relevant threshold

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative procedure

Provision

14. Section 8(1)(a) sets the relevant threshold, above which an abstraction is a “qualifying abstraction” (and therefore prohibited unless approved by the Scottish Ministers or exempt) at a rate of 10 megalitres per day. Section 8(1)(b) allows Ministers to prescribe a different rate. Section 8(2) allows Ministers, by regulations, to prescribe a method of calculation for the purposes of subsection (1).

Reason for taking power

15. Ministers may wish to alter the threshold rate in order to fine-tune the application of the Ministerial approval regime in light of experience or changing policy, without requiring primary legislation to do so. Ministers may also wish to prescribe technical details of how to calculate whether the threshold rate has or has not been exceeded in certain circumstances. It is not considered appropriate to include such technical detail on the face of the Bill.

Choice of procedure

16. Such regulations will be subject to the affirmative procedure by virtue of section 18(1). The power involves modifying a threshold provided for in primary legislation and could substantially alter the practical effect of the Ministerial approval regime, depending on the extent to which the threshold was raised or lowered or changes made to how it is calculated. In the circumstances, the greater level of parliamentary scrutiny offered by the affirmative procedure is considered appropriate.

Section 9(2) – Application for approval

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

17. Section 9(2) allows the Scottish Ministers, by regulations, to make provision about the procedure in relation to an application for approval of a qualifying abstraction (under section 9(1)). An indicative list of the procedural matters such regulations may address is provided in section 9(3), and includes (among other things) the form of application, the fixing of a reasonable application fee, and the information that is to accompany it.

Reason for taking power

18. Procedural matters relating to the form of the application for Ministers’ approval of a qualifying abstraction are technical in nature, and it is not considered appropriate to make provision in that respect in primary legislation.

Choice of procedure

19. Such regulations will be subject to the negative procedure by virtue of section 18(2). They will concern technical matters relating to the procedure of applying for Ministers’ approval of a qualifying abstraction, and do not affect the substance of the policy that Ministers should

require to approve such abstractions. In the circumstances, the negative procedure is considered appropriate.

Section 12(1)(b) – Fixing subsistence fee

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

20. Section 12(1)(b) allows the Scottish Ministers, by regulations, to fix a reasonable subsistence fee (whether annual or otherwise) that the holder of Ministerial approval for a qualifying abstraction must pay.

21. Regulations under section 12(1)(b) must relate to costs attributable to the exercise of the Scottish Ministers' administrative functions under Part 2 of the Bill, and may require the fee to be paid annually or otherwise (section 12(2)).

22. Section 12(3) makes clear that a fee fixed under section 12(1)(b) must not include costs related to an application for approval.

Reason for taking power

23. The fixing of a subsistence fee is a technical detail and one that may require to be updated from time to time. As such, it is considered more appropriate to do so through subordinate legislation rather than primary legislation.

Choice of procedure

24. Such regulations will be subject to the negative procedure by virtue of section 18(2). As they will concern a technical matter, the negative procedure is considered appropriate.

Section 14(1)(c) – Grounds for suspension and revocation

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

25. Section 14(1)(a) and (b) allows the Scottish Ministers to suspend or revoke their approval of a qualifying abstraction if the holder of the approval requests it or if the holder breaches any conditions attached to the approval under section 11(1)(b) or fails to comply with any reporting or fee-paying requirements under section 12(1). Section 14(1)(c) allows the Scottish Ministers, by regulations, to prescribe other circumstances in which they may suspend or revoke their approval.

Reason for taking power

26. In order to achieve their policy aim of controlling large-scale abstractions from the Scottish water environment, the Scottish Ministers may wish to prescribe additional circumstances in which they may suspend or revoke their approval of an abstraction. It is not, however, considered appropriate to provide that Ministers may suspend or revoke an approval on such grounds as they think fit, as that would not provide sufficient transparency and certainty to abstractors. It is therefore considered appropriate to give the Scottish Ministers a power to prescribe such additional circumstances in subordinate legislation.

Choice of procedure

27. Such regulations will be subject to the negative procedure by virtue of section 18(2). If Parliament approves the principle that Ministers may suspend or revoke approvals, it is not thought necessary for it to positively affirm any additional grounds upon which an approval may be suspended or revoked, and the negative procedure is considered appropriate.

Section 16(1) and (2) – Monitoring and records

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

28. Section 16(1) allows the Scottish Ministers, by regulations, to make provision about the monitoring of actual or suspected qualifying abstractions and any related activities. Section 16(2) allows the Scottish Ministers, by regulations, to make provision about the keeping of records in connection with Part 2 of the Bill (control of water abstraction) and the making available of such records to Ministers, SEPA or others. Subsection (3) provides that regulations made under subsections (1) or (2) may confer functions on the Scottish Ministers, SEPA, or other specified persons.

Reason for taking power

29. As the abstraction control regime develops, Ministers may wish, in light of experience, to provide for a greater or lesser degree of monitoring to ensure compliance with the regime and any conditions imposed upon approved qualifying abstractions. This power will provide flexibility in designing a monitoring regime that is informed by experience of compliance with the Bill and which is proportionate and fit for purpose.

Choice of procedure

30. Such regulations will be subject to the negative procedure by virtue of section 18(2). Monitoring and record keeping are simply means to ensure compliance with the approval regime, the basic principles of which the Scottish Parliament will already have approved if it passes the Bill. The details of the monitoring regime ought not to be controversial and, as such, the negative procedure is considered appropriate.

Section 19(4) – Control of water abstraction: references to Controlled Activities Regulations

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

31. Section 19(1) to (3) concerns the interaction of the abstraction control regime created by Part 2 of the Bill with the regime for the protection of the water environment that exists under the Water Environment (Controlled Activities) (Scotland) Regulations 2011 (S.S.I. 2011/209), which also affects abstractions. Section 7(1) provides that a qualifying abstraction is exempt from the prohibition imposed by section 6 if, on the day when section 7(1) comes into force, it is subject to an authorisation under the 2011 Regulations. Section 19(4) provides that the Scottish Ministers may by regulations modify section 19(1) to (3) and section 7(1), but section 19(5) provides that such regulations may only be made if the Scottish Ministers consider them to be necessary or expedient in consequence of any amendment or revocation of the 2011 Regulations or any subsequent regulations made under the same enabling power as the 2011 Regulations (section 20 of the Water Environment and Water Services (Scotland) Act 2003). In other words, Ministers' power to modify sections 7 and 19 of the Bill (which refer to the 2011 Regulations) is only a power to modify in consequence of changes to the 2011 Regulations.

Reason for taking power

32. It is possible that the 2011 Regulations will be amended, replaced or supplemented in future. In order to ensure that references to those Regulations in the Bill can be kept up-to-date, provision has been made for Ministers to be able to modify those parts of the Bill that refer to the 2011 Regulations, where such modifications are considered by Ministers to be necessary or expedient in consequence of their revocation, amendment or replacement.

Choice of procedure

33. Such regulations will be subject to the negative procedure by virtue of section 18(2). As the power in question is confined to modifications in consequence of the revocation, amendment or replacement of the 2011 Regulations, its use is unlikely to be controversial and the negative procedure is accordingly considered appropriate.

Section 26 – Circumstances in which water and sewerage undertaking may borrow money

Power conferred on: the Scottish Ministers
Power exercisable by: order made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

34. Section 26 amends section 14 (financing, borrowing and guarantees) of the Water Services etc. (Scotland) Act 2005 to alter the persons from whom the undertaking that Scottish Water is obliged to establish by section 13 of the 2005 Act may borrow. Amended section 14(2) provides that Ministers may by order specify the circumstances in which the undertaking may

borrow from the specified persons. This replaces the existing, similar, order-making power already provided in section 14(2) of the 2005 Act.

Reason for taking power

35. Although Ministers wish to remove some of the restrictions on borrowing by the undertaking, they wish to retain the possibility of exercising control over that borrowing. The precise degree and form of control that they may wish to exercise cannot be foreseen at this time, so Ministers wish to take the power to specify by order the circumstances in which the undertaking may borrow. This is in line with the current power in section 14(2) of the 2005 Act.

Choice of procedure

36. Such an order will be subject to the negative procedure by virtue of section 34(3)(a) of the 2005 Act. This is the procedure that currently applies to section 14(2) of the 2005 Act and it is proposed to retain that procedure for the amended provision. The specification by Ministers of the circumstances in which the undertaking may borrow is a relatively technical matter for which the negative procedure is considered appropriate.

Section 27 – Assessment of raw water quality

Power conferred on: the Scottish Ministers
Power exercisable by: order made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

37. Section 27 inserts a new Part VIB into the Water (Scotland) Act 1980. The new part gives Scottish Water certain powers of entry into premises for the purposes of assessing or monitoring the quality of “raw water” and investigating anything that may be affecting its quality. “Raw water” is defined by newly inserted section 76M(5) of the 1980 Act as being water contained in bodies of water (a) identified by an order made under section 6(1) of the Water Environment and Water Services (Scotland) Act 2003 or (b) specified in an order made under newly inserted section 76R(1) of the 1980 Act. Newly inserted section 76R(1) of the 1980 Act enables the Scottish Ministers, for that purpose, to specify by order any bodies of water that are used (or intended to be used) for the abstraction of water intended for human consumption.

Reason for taking power

38. Although many of the water bodies in relation to which Scottish Water may need to exercise the powers of entry afforded to it by the Bill will already be listed in an order made under section 6(1) of the Water Environment and Water Services (Scotland) Act 2003, Ministers may wish to add to that list. In particular, the order under section 6(1) of the 2003 Act can only list water bodies that are used for the abstraction of water intended for human consumption and that provide more than 10 cubic metres per day or serve more than 50 persons, whereas Ministers may wish to specify bodies of water from which smaller abstractions are made, so that Scottish Water can exercise its powers of entry in relation to those. Ministers wish to have flexibility in specifying the water bodies in relation to which Scottish Water may exercise its new powers of entry.

Choice of procedure

39. Such an order will be subject to the negative procedure by virtue of newly inserted section 76R(4) of the 1980 Act. The listing of additional bodies of water in relation to which Scottish Water may exercise its powers of entry under new Part VIB of the 1980 Act ought not to be controversial. The power in section 6 of the 2003 Act is similarly subject to the negative procedure. The bodies that may be specified must be used (or intended to be used) for the abstraction of water intended for human consumption, so Ministers cannot specify any other water body, and the powers of entry are only for the specified purposes and require a court warrant (and therefore judicial scrutiny) if permission to enter is refused by the occupier. In the circumstances the negative procedure is thought to be appropriate.

Section 30 – Rules and procedure regarding notification of occupancy

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

40. Section 30 inserts new sections 20C and 20D into the Water Services etc. (Scotland) Act 2005. The new sections require the owner of eligible premises to notify the relevant water or sewerage services provider of changes in the occupancy of the premises. They also provide that failure to do so can result in the owner being jointly and severally liable for relevant charges. New section 20C(4) provides that the Scottish Ministers may, by regulations, make rules for timing and procedure regarding notification of changes in occupancy, and modify the information that must be notified. New section 20D(4) provides that the Scottish Ministers may, by regulations, make rules for timing and procedure in connection with owners' liability for charges, and as regards exempting owners from liability where they have taken prescribed steps to ensure the accuracy and completeness of information.

Reason for taking power

41. The detail of the timing and procedures regarding notification of changes in occupancy, and owners' liability for charges, and related matters is relatively technical in nature and is not considered appropriate for inclusion within the Bill itself, which simply establishes the basic principles of a requirement to notify and liability for charges where there is a failure to so comply. Such details are considered best left to subordinate legislation.

Choice of procedure

42. Such regulations will be subject to the negative procedure by virtue of newly inserted section 34(2A) of the 2005 Act. If the Scottish Parliament approves the basic policy of a requirement to notify and potential liability for charges, it is considered appropriate for the detail of timing and procedures to be in subordinate legislation subject to the negative procedure.

Section 31 – References to priority substances etc.

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

43. Section 31 amends section 29 of the Sewerage (Scotland) Act 1968 to enable Scottish Water, when granting its consent under section 26 of the 1968 Act to any new trade effluent discharge, to impose conditions relating to the elimination or diminution in that trade effluent of any priority substance or pollutant. Section 31 of the Bill also inserts a new section 29A into the 1968 Act, subsection (1) of which defines the terms “pollutant” and “priority substance”. New section 29A(2) empowers the Scottish Ministers, by regulations, to modify the definitions in subsection (1).

Reason for taking power

44. The terms in question are defined by reference to a definition contained in regulation 2 of the Water Environment (Controlled Activities) (Scotland) Regulations 2011 (S.S.I. 2011/209), and substances listed in an annex to the Water Framework Directive (2000/60/EC). It is possible that the 2011 Regulations or the Water Framework Directive will be amended or replaced in future. In order to ensure that these definitions can be kept up-to-date, provision has been made for Ministers to be able to modify the relevant definitions, where such modifications are considered by Ministers to be necessary or expedient in consequence of the revocation or amendment of the instruments from which the terms are derived.

Choice of procedure

45. Such regulations will be subject to the negative procedure by virtue of newly inserted section 29A(4) of the 1968 Act. If the Bill is passed in its current form, the Scottish Parliament will have approved the basic principle that Scottish Water should be able to use the trade effluent consent regime in the 1968 Act to control inputs of substances harmful to the environment (as opposed to simply being harmful to the sewer network itself). Having done so, it is considered appropriate that any changes to the substances concerned can be implemented through subordinate legislation subject to the negative procedure.

Section 34 – Common maintenance – references to Controlled Activities Regulations

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

46. Section 34 inserts a new Part IIA into the Sewerage (Scotland) Act 1968. The new Part makes provision regarding the maintenance of private sewage treatment works where those works are the subject of common ownership. The new Part makes several references to the Water Environment (Controlled Activities) (Scotland) Regulations 2011 (S.S.I. 2011/209) because the provisions allow individual owners of such works to carry out maintenance and take other measures necessary to comply with any applicable conditions imposed under the 2011 Regulations. The new Part only applies to private sewage treatment works the discharge of the contents of which is authorised under those Regulations.

47. In a similar manner to section 19(4) of the Bill, newly inserted section 38G(2) of the 1968 Act provides that the Scottish Ministers may by regulations modify section 38G(1) and sections 38A(1) and 38B(2), which all refer to the 2011 Regulations. However, newly inserted section 38G(3) provides that such regulations may only be made if the Scottish Ministers consider them to be necessary or expedient in consequence of any amendment or revocation of the 2011 Regulations or any subsequent regulations made under the same enabling power as the 2011 Regulations (section 20 of the Water Environment and Water Services (Scotland) Act 2003). In other words, Ministers' power to modify sections 38A(1), 38B(2) and 38G(1) of the 1968 Act (which all refer to the 2011 Regulations) is only a power to modify in consequence of changes to the 2011 Regulations.

Reason for taking power

48. It is possible that the 2011 Regulations will be amended, replaced or supplemented in future. In order to ensure that references to them can be kept up-to-date, provision has been made for Ministers to be able to modify those parts of the Bill that refer to the 2011 Regulations, where such modifications are considered by Ministers to be necessary or expedient in consequence of their revocation, amendment or replacement.

Choice of procedure

49. Such regulations will be subject to the negative procedure by virtue of newly inserted section 38G(4). As the power in question is confined to modifications in consequence of the revocation, amendment or replacement of the 2011 Regulations, its use is unlikely to be controversial and the negative procedure is accordingly considered appropriate.

Section 46 – Water shortage orders – references to Controlled Activities Regulations

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

50. Part 7 of the Bill makes provision for the Scottish Ministers to make water shortage orders allowing Scottish Water to take certain steps to address a deficiency of water supplies. Those steps can include abstracting water from a specified source. Abstractions of water from the water environment generally require authorisation under the Water Environment (Controlled Activities) (Scotland) Regulations 2011 (S.S.I. 2011/209). In a similar manner to section 19(4) of the Bill and section 38G(2) of the 1968 Act (inserted by section 34 of the Bill), section 46(4) of the Bill provides that the Scottish Ministers may by regulations modify section 46(1) to (3), section 35(3)(b) and, in Schedule 1, paragraphs 2(5)(b)(iii), 3(3)(b)(iii) and 7(b)(ii). These sections and paragraphs all refer to the 2011 Regulations.

51. However, section 46(5) provides that such regulations may only be made if the Scottish Ministers consider them to be necessary or expedient in consequence of any amendment or revocation of the 2011 Regulations or any subsequent regulations made under the same enabling power as the 2011 Regulations (section 20 of the Water Environment and Water Services (Scotland) Act 2003). In other words, Ministers' power to modify section 46(1) to (3), section

35(3)(b) and paragraphs 2(5)(b)(iii), 3(3)(b)(iii) and 7(b)(ii) of Schedule 1 is only a power to modify in consequence of changes to the 2011 Regulations.

Reason for taking power

52. It is possible that the 2011 Regulations will be amended, replaced or supplemented in future. In order to ensure that references to them can be kept up-to-date, provision has been made for Ministers to be able to modify those parts of the Bill that refer to the 2011 Regulations, where such modifications are considered by Ministers to be necessary or expedient in consequence of their revocation, amendment or replacement.

Choice of procedure

53. Such regulations will be subject to the negative procedure by virtue of section 46(6). As the power in question is confined to modifications in consequence of the revocation, amendment or replacement of the 2011 Regulations, its use is unlikely to be controversial and the negative procedure is accordingly considered appropriate.

Section 49 – Ancillary regulations

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative procedure if they add to, replace or omit any part of the text of an Act; otherwise negative procedure

Provision

54. Section 49 provides that the Scottish Ministers may, by regulations, make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of or in connection with the Bill.

Reason for taking power

55. Ministers may need to make provision in subordinate legislation to support the full implementation of the Bill and ensure that the policy intentions of the Bill are achieved. For example, when implementing the Bill, unforeseen issues may arise which require supplemental provision. The supplementary power would allow changes to be made without the need for further primary legislation. This is considered to be necessary to allow for flexibility to address these issues.

56. Provision may also be needed to ensure a smooth transition from the current law to that in the enacted Bill. Unforeseen issues may arise at the time of implementation which require transitional or transitory provision or the saving of repealed or amended provisions. Consequential amendments may be required that have not been identified before the Bill's introduction or during its passage.

57. Without the power, it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with a matter which is clearly within the scope and policy intentions

of the original Bill. That would not be an effective use of resources by Parliament or the Scottish Government.

Choice of procedure

58. Where regulations under this section add to, replace, or omit any part of the text of an Act (including this Bill, once enacted), section 49(2) provides that they are subject to affirmative procedure. Otherwise, they are subject to the negative procedure. It is submitted that, where primary legislation is to be changed, the higher level of parliamentary scrutiny offered by the affirmative procedure is appropriate. However, where ancillary regulations are more limited in scope and effect, such as those containing incidental, consequential, transitional, transitory or savings provisions, the negative procedure is considered appropriate, so that minor textual amendments to subordinate legislation are not subject to a disproportionate level of parliamentary consideration.

Section 51 - Commencement

Power conferred on: the Scottish Ministers
Power exercisable by: order made by Scottish statutory instrument
Parliamentary procedure: the order must be laid before the Parliament under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010

Provision

59. Section 51 provides for Part 8 of the Bill (other than section 48) to come into force on the day after Royal Assent. Section 51(2) gives the Scottish Ministers the power to appoint, by order, the day on which all other provisions come into force. Section 51(3) provides that such an order may include transitional, transitory or saving provision.

Reason for taking power

60. Exact commencement dates for the substantive provisions of the Bill have not yet been determined. This power allows the Scottish Ministers flexibility to control the commencement of the various provisions as they consider appropriate.

61. Unforeseen issues may arise at the time of commencement which require transitional or transitory provision or the saving of repealed or amended provisions. The power in subsection (3) enables such provision to be made, thereby allowing a smooth transition from the current law to that contained in the provisions being commenced.

Choice of procedure

62. As is usual for commencement orders, the power is subject to the default laying requirement under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

This document relates to the Water Resources (Scotland) Bill (SP Bill 15) as introduced in the Scottish Parliament on 27 June 2012

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