

## **WATER RESOURCES (SCOTLAND) BILL**

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### **SUPPLEMENTARY DELEGATED POWERS MEMORANDUM**

#### **Purpose**

1. This Memorandum has been prepared by the Scottish Government to assist the Subordinate Legislation Committee in its consideration of the Water Resources (Scotland) Bill. This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

#### **PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2**

3. The new or amended 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*

4. 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 direction 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.

5. Section 3(2) was amended at Stage 2 so that the Scottish Ministers may by regulations modify the list in subsection (1) not only by adding or removing an entry, but also by *updating* an entry.

*Reason for taking power*

6. The reason for taking the power as introduced was to allow Ministers to secure the participation of public bodies other than those specified in section 3(1), allowing flexibility to bring other public bodies within the scope of Ministers' direction-giving power in future.

7. The amendment will allow the Scottish Ministers to update the list of designated bodies where, for example, a body on the list changes its name.

*Choice of procedure*

8. Such regulations remain subject to negative procedure, for the reasons given in the original Delegated Powers Memorandum.

**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*

9. 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 of water 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).

10. Section 8(2) was amended at Stage 2 and a new section 8(3) added. The new provisions, although not significantly different in substance, place greater emphasis upon the fact that regulations under subsection (2) may include provision for all or some of an amount of water abstracted to be left out of account in specified circumstances.

*Reason for taking power*

11. As before, Ministers wish to be able 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*

12. This is unchanged.

### **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*

13. Section 9(2), as introduced, allowed the Scottish Ministers, at their discretion, to make provision by regulations about the procedure in relation to an application for approval of a qualifying abstraction. 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.

14. Section 9(2) was amended at Stage 2 to provide that Ministers *must* make regulations about the application procedure, removing Ministers' discretion to do so.

#### *Reason for taking power*

15. Although the exercise of the delegated power is now mandatory, the reason for taking the power remains the same, namely that procedural matters relating to the form of the application for Ministers' approval of a qualifying abstraction are technical in nature, and not considered appropriate for primary legislation. Ministers had fully intended to make regulations under section 9(2) of the Bill, as they will need to establish the application procedure and set out clearly what information applicants must supply, and in what format. However, making such regulations mandatory will give added comfort to potential applicants that the details of the application process will be set out in due course.

#### *Choice of procedure*

16. This is unchanged.

### **Section 14(1)(c) – Suspension and revocation**

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

#### *Provision*

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

18. The Bill was amended at Stage 2 so that the affirmative procedure applies to regulations made under section 14(1)(c), rather than the negative procedure. That was done by amending section 18(1).

*Reason for taking power*

19. As previously, 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 take a power to prescribe such additional circumstances in subordinate legislation.

*Choice of procedure*

20. The Scottish Government recognises that there may be significant stakeholder interest in any changes to the circumstances in which Ministers may suspend or revoke their approval of a qualifying abstraction. On reflection, it considers that the additional Parliamentary scrutiny afforded by the affirmative procedure is appropriate for regulations making such changes.

**Section 26A – Errors in metering**

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

*Provision*

21. Section 26A of the Bill was added by amendment at Stage 2. It amends section 54 (register of meter to be evidence) of the Water (Scotland) Act 1980 (“the 1980 Act”). Section 54 of the 1980 Act makes provision about water meter accuracy. It provides that, where a water meter, on being tested, is proved to register incorrectly by more than 5%, it is deemed to have registered incorrectly to that degree since the last occasion but one before the date of the test on which Scottish Water read the meter. The section provides that Scottish Water must refund any resulting overpayment to the consumer, or the consumer must pay any shortfall to Scottish Water, as the case may be.

22. The Bill amends section 54 to substitute “the relevant percentage” in place of the 5% error threshold referred to above. The amended section defines “the relevant percentage” as being 2.5% in the case of a high flow rate, and 6% in the case of a low flow rate. The Scottish Ministers must by regulations define “high flow rate” and “low flow rate” for that purpose. They may also, by regulations, amend the percentage figure in either case.

*Reason for taking power*

23. The purpose of the amendment made by section 26A of the Bill is to align the error threshold in section 54 of the 1980 Act with the maximum permissible error limits for cold water meters in use for trade set out in the Measuring Instruments (Cold-water Meters) Regulations 2006 and the Measuring Equipment (Cold-water Meters) Regulations 1988. Those UK regulations specify different error rates for high flow rates and low flow rates, and define those concepts. Ministers intend to replicate the definitions of those concepts from the UK regulations in regulations made under this section. However, the manner in which the concepts are defined in the UK regulations is lengthy and highly technical. It would not be appropriate to replicate such lengthy and highly technical definitions in primary legislation. Nor would it be appropriate to define the terms by reference in the Bill to the UK regulations, changes to which are outwith the control of the Scottish Parliament. Accordingly it is considered appropriate to take a regulation-making power for this purpose.

24. It is conceivable that the percentages for maximum permissible error rates in the UK regulations may change. To allow for this, Ministers also require the power to amend the percentage figures in section 54(4) of the 1980 Act.

*Choice of procedure*

25. Under the existing section 101 of the 1980 Act, the negative procedure will apply to regulations under amended section 54 of that Act as it applies to any other regulations under that Act. The definition of what constitutes a “high flow rate” and “low flow rate”, and the percentage figures for the meter error rate, are largely technical matters for which the negative procedure is considered appropriate.

**Section 27 – Steps for sake of quality**

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

*Provision*

26. Section 27 inserts a new Part VIB into the 1980 Act. 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. 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.

27. At Stage 2 section 27 of the Bill was amended to insert a new section 76M(6) into the 1980 Act. That new subsection excludes from the definition of “raw water” water

used or available as or for a private water supply, within such meaning as the Scottish Ministers may by order prescribe.

*Reason for taking power*

28. Ministers wish to exclude private water supplies from the scope of Scottish Water's powers of entry under new section 76M of the 1980 Act. What constitutes a private water supply is currently defined by the Private Water Supplies (Scotland) Regulations 2006. It would not be appropriate to define private water supply for the purposes of new section 76M by reference to the 2006 regulations, as they may change. However, Ministers do wish to align the concept of a private water supply as used in the Bill with the concept as used in other Scottish legislation. In order to do so, without referring to subordinate legislation in the Bill, an order-making power is considered appropriate.

*Choice of procedure*

29. Such an order will be subject to the negative procedure by virtue of new section 76S of the 1980 Act, inserted by section 27 of the Bill (as amended at Stage 2). If the Scottish Parliament agrees to the principle that private water supplies should be excluded from the scope of Scottish Water's powers of entry under this Part, the precise definition of what constitutes a private water supply for that purpose will be a technical matter for which the negative procedure is thought to offer an appropriate level of Parliamentary scrutiny.



*This document relates to the Water Resources (Scotland) Bill as amended at Stage 2 (SP Bill 15)*

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