

RESERVOIRS (SCOTLAND) ACT 2011



Hopes Reservoir, East Lothian

CONSULTATION ON THE RESERVOIRS (SCOTLAND) AMENDMENT REGULATIONS 2015

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Introduction

This consultation seeks comments on the draft Reservoirs (Scotland) Amendment Regulations 2015 (“the draft Regulations”). The draft Regulations amend the Reservoirs (Scotland) Regulations 2015 (“the 2015 Regulations”) to make further provision in relation to the risk designation of controlled reservoirs under Part 1 of the Reservoir (Scotland) Act 2011 and to clarify various provisions of the 2015 Regulations

How to Respond

We are inviting written responses to this consultation paper by 31 July 2015. We cannot guarantee that responses made after this date will be taken into account. Please send your response with the completed Respondent Information Form to:

Email: - EQCAT@scotland.gsi.gov.uk or post to:-

Claire Dodd
Managing Flood Risk
Environmental Quality Division
The Scottish Government
1-D North, Victoria Quay
Edinburgh
EH6 6QQ

If you have any queries contact: Claire Dodd on 0131 244 7386
Claire.Dodd@scotland.gsi.gov.uk

We would be grateful if you would use the consultation questionnaire provided or carefully indicate in your response to which questions or parts of the consultation you are responding, as this will aid our analysis of the responses received. The consultation can be viewed online on the consultation pages of the Scottish Government website at <http://www.scotland.gov.uk/consultations>.

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the Respondent Information Form which forms part of the consultation questionnaire, as this will ensure that we treat your response appropriately. If you ask for your response to not be published we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made under the Act for information relating to responses made to this consultation exercise.

Where respondents have given permission for their response to be made public and after we have checked that they contain no potentially defamatory material, responses will be made available to the public in the Scottish Government Library (see the attached Respondent Information Form).

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us finalise the draft Regulations. We aim to bring the Regulations into force on 1 October 2015. If you have any comments about how this consultation exercise has been conducted, please send them to the contact details above.

Background – The Reservoirs (Scotland) Act 2011

1. Large raised reservoirs are currently regulated under the Reservoirs Act 1975 ("the 1975 Act").

2. The Reservoirs (Scotland) Act 2011 ("the 2011 Act") was developed to deliver a more proportionate and risk based approach to the regulation of reservoirs in Scotland. The most significant change is the move away from a capacity-based regime, under which only reservoirs greater than 25,000 cubic metres are regulated, to a regime which is based on the risk a reservoir poses to public safety. The 2011 Act will, once fully implemented, bring some smaller previously unregulated reservoirs, that may pose a risk to public safety under a supervision and inspection regime. This will ensure the dams are safe and well maintained and reduce the risk of an uncontrolled release of water from these man-made structures. Conversely, large reservoirs which do not pose any risk will become subject to a lower level of regulation.

3. The 2011 Act also introduced a number of other amendments to the existing regulatory regime as follows:-

- SEPA will become the regulatory body for reservoirs;
- Reservoirs will be categorised according to the risk they pose as being high, medium or low risk;
- A proportionate supervision and inspection regime will apply depending on the risk designation of the reservoir.

4. The 2011 Act is being implemented in a phased approach with reservoirs over 25,000 cubic metres being brought under the new regime first from 2015 onwards and the smaller reservoirs between 10,000 and 25,000 cubic metres being brought under at a later date.

5. The next stage of work is to bring forward proposals to make further provision in relation to the risk designation of controlled reservoirs, in particular the review and appeal process for the risk designation applied to controlled reservoirs. This consultation covers that aspect and is seeking views on a draft of the Reservoirs (Scotland) Amendment Regulations 2015 ("the draft Regulations"). A copy is attached at Annex A.

6. The draft Regulations will amend the Reservoirs (Scotland) Regulations 2015 which came into force on 1 April 2015. These Regulations make provision in relation to reservoir capacity, registration and appointments to the panels of engineers. Full details of these Regulations can be found at:-

<http://www.legislation.gov.uk/ssi/2015/90/contents/made>

7. Later in 2015 we will be bringing forward further proposals to:-

- create the safety framework for the construction of new controlled reservoirs and the alteration of existing controlled reservoirs;
- create the framework for the on-going inspection of medium and high risk reservoirs to ensure they are being operated safely; and

- establish the framework for incident reporting, record keeping and the display of emergency response information

Risk Designation - Review by SEPA

8. It is a statutory obligation for reservoirs greater than 25,000 cubic metres to be registered with SEPA by 1 October 2015. Registration of existing reservoirs will be free up until 30 September as a concession to current reservoir managers. Thereafter, a registration fee will apply to any new structures or areas which become controlled reservoirs from 1 October 2015 and to any late registration of existing reservoirs.

9. After registering a controlled reservoir, SEPA will give the reservoir a provisional risk designation of high, medium or low risk by applying its reservoir risk designation methodology. SEPA will also carry out a periodic review of a reservoir's risk designation, at least once every six years. This could result in a change to the risk designation.

10. The risk methodology that SEPA will apply has been developed in conjunction with industry experts and considers the potential adverse consequences of an uncontrolled release of water from the reservoir. Essentially, risk designation involves assessing the impact of reservoir flooding against a number of different downstream receptors.

11. SEPA are proposing to begin issuing the provisional risk designations to reservoir managers from October 2015. A reservoir manager may make representations to SEPA within two months of receipt of the provisional risk designation. SEPA will confirm the risk designation for the reservoir at the end of this period after having considered any representations made by the reservoir manager.

12. If, after this process is complete, the reservoir manager disagrees with the risk designation given to their reservoir by SEPA they may apply to SEPA for a formal review of the risk designation. A fee will be payable for each application for review of the risk designation given to a controlled reservoir.

13. SEPA is currently consulting on its proposed charging scheme with the aim of bringing it into force from 1 October 2015. A copy of SEPA's charging consultation can be found at: https://consultation.sepa.org.uk/reservoirs-regulatory-unit/reservoirsregulations/consult_view.

14. Should the risk designation change from high to medium or low risk or from medium to low risk as a result of the review application, then the application fee will be returned to the reservoir manager.

15. The draft Regulations (at Annex A) add some procedural details in relation to the review process to those already set out in the 2011 Act. These are that:-

- any application for a review of a risk designation made under section 23 of the Act should be made to SEPA in writing

- When giving notice to a reservoir manager of a risk designation under the Act, SEPA must also provide information on where to send an application for a review of the risk designation and specify the information to be provided with any such application for a review.

Question 1: Do you agree with the proposed approach to the review process contained in the draft Regulations?

Question 2: If you have any concerns or comments with regard to the proposed approach please specify them.

Risk Designation - Appeals to Scottish Ministers

16. If the reservoir manager is dissatisfied with the decision following a review application to SEPA then the reservoir manager may appeal to Scottish Ministers. They must do so before the end of 12 months beginning with the date on which they were given notice of the outcome of the review.

17. There is no additional fee for making an appeal to Scottish Ministers. If the decision of Scottish Ministers results in a change to the risk designation from high to medium or low risk or from medium to low risk then the fee for the review application that was paid to SEPA will be returned to the reservoir manager.

18. The Scottish Government proposes that when an appeal is made against a risk designation it will appoint and cover the cost of, a panel engineer to make a recommendation about the risk designation. Scottish Ministers must take this recommendation into account before determining an appeal.

19. The draft Regulations add some procedural details in relation to the appeal process in addition to those already set out in the 2011 Act. These are that:

- The appeal must be made in writing
- The appeal must contain:
 - A statement of the grounds of appeal
 - A copy of the notice of SEPA's decision to which the appeal relate
 - A copy of any relevant correspondence between the person making the appeal (the appellant) and SEPA
- The appellant must send a copy of the appeal to SEPA as soon as practicable after making the appeal to Scottish Ministers
- SEPA may, within a period of 28 days beginning with the day on which it received a copy of the appeal, make representations in writing to Scottish Ministers.
- The appellant may, within a period of 17 days beginning with the day on which it received a copy of SEPA's representations, make further representations in writing to Scottish Ministers.
- When making representations on the appeal both the appellant and SEPA should send a copy to the other;
- The appellant may withdraw an appeal by notice in writing

- Before determining the appeal, the Scottish Ministers may give the appellant and SEPA an opportunity to appear before, and be heard by, any engineer appointed by Scottish Ministers to make a recommendation about the risk designation to which the appeal relates.

20. These provisions are in addition to the procedures laid down in section 24 the 2011 Act.

Question 3: Do you agree with the proposed approach to the appeals process contained in the draft Regulations?

Question 4: If you have any concerns or comments with regard to the proposed approach to the appeals process please specify them.

Amendments to regulation 8, 10 and 17 of the Reservoirs (Scotland) Regulations 2015

21. The Reservoirs (Scotland) Regulations 2015 (“the 2015 Regulations”) came into force on 1 April 2015. These Regulations make provision in relation to reservoir capacity, registration and appointments to the panels of engineers. Full details of these Regulations can be found at <http://www.legislation.gov.uk/ssi/2015/90/contents/made>.

22. The draft Regulations make minor changes to the 2015 Regulations following their consideration by Parliament. At its meeting on 17 March 2015 the Delegated Powers and Law Reform Committee considered the 2015 Regulations and commented that the meaning of regulations 10 and 17 could be clearer and were of the view that there was drafting error in regulation 8.

23. The Scottish Government gave an undertaking to the Committee address the matters reported in relation to regulations 8 and 10 at the next opportunity. Whilst the Scottish Government is of the view that regulation 17 does not need to be amended it is taking the opportunity, in light of the request from the Committee, to provide greater clarification on the issue.

24. Regulation 8 of the 2015 Regulations is intended to specify the structures which are road and railway embankments. However the expression “roads and railway embankments” was used in error. The draft Regulations provide that “road” is substituted for “roads”.

25. Regulation 10(1) of the 2015 Regulations includes the wording (“and the period of any such appointment”) in relation to additional information for engineers that must be set out in the controlled reservoirs register. As section 9(2)(f) of the Reservoirs (Scotland) Act 2011 already requires this information to be included in the register, the Committee were of the view that it is not necessary to also include it in the Regulations. The draft Regulations amends regulation 10(1) to remove the superfluous wording.

26. The Committee consider that it is important that the person on whom any statutory charge is to be imposed is clearly identified. They were of the view that Regulation 17(2) could more clearly distinguish the liability of the former manager for payment of the cessation fee from the liability of the new manager for payment of the new manager fee. The draft Regulations amend regulation 17 to provide greater clarity that the person who has ceased to be the manager pays the cessation fee and, separately, that the new manager pays the new manager fee.

Question 5: Do you have any comments or concerns about the proposed amendments to regulations 8, 10 and 17 of the 2015 Regulations?

Business and Regulatory Impact Assessment

27. No business and regulatory impact assessment (BRIA) has been prepared for these draft Regulations as the instrument will not, in itself, impose new regulatory burdens on businesses, charities or the voluntary sector.

28. An Equality Impact assessment and BRIA were prepared for the Reservoir (Scotland) Bill and were published in 2010. Both can be found at <http://www.gov.scot/Topics/Environment/Water/16922/resconsult>.

29. A BRIA was also prepared to assess the costs and benefits for proposals to commence a number of sections of the Reservoirs (Scotland) Act 2011 and the regulations which create a new national register of reservoirs to be maintained by the Scottish Environment Protection Agency (SEPA) and allow them to be categorised according to the risk designation. A copy of the BRIA can be found at <http://www.gov.scot/Topics/Environment/Water/16922/Whats-New/FinalBRIA>

Question 6: Do you agree with the conclusion that no impact on business charities or voluntary bodies is expected from the proposals?

Commencement

30. In 2014 the Scottish Government consulted on proposals for the commencement of a number of sections of the Reservoirs (Scotland) Act 2011. A copy of the consultation paper can be found at:- <http://www.gov.scot/Publications/2014/08/3171>

31. In line with the proposals set out in the 2014 consultation paper it is proposed that section 18 to 24 and 26(1) which make provision in relation to risk designation are brought fully into force on 1 October 2015.

ANNEX A

SCOTTISH STATUTORY INSTRUMENTS

2015 No.

FLOOD RISK MANAGEMENT

WATER SUPPLY

The Reservoirs (Scotland) Amendment Regulations 2015

Made - - - - 2015

Laid before the Scottish Parliament 2015

Coming into force -- 1st October 2015

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 2(3)(a), 9(3)(a), 14(1), (3) and (4), 23(8), 24(7) and 114(2)(b) of the Reservoirs (Scotland) Act 2011^(a) and of all other powers enabling them to do so.

In making these Regulations, the Scottish Ministers have had regard to the reasonable cost of the exercise of the functions in respect of which fees are to be charged by SEPA.

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Reservoirs (Scotland) Amendment Regulations 2015 and come into force on 1st October 2015.

(2) In these Regulations, “the principal Regulations” means the Reservoirs (Scotland) Regulations 2015^(b).

Amendment of regulation 8 (structures or areas which are not controlled reservoirs)

2. In regulation 8 of the principal Regulations—

(a) in paragraph (1), for “Roads” substitute “Road”; and

(b) in paragraph (2), for “roads” substitute “road”.

^(a) 2011 asp 9.

^(b) 2015/90.

Amendment of regulation 10 (controlled reservoirs register: additional information)

3. In regulation 10 of the principal Regulations—
- (a) in paragraph (1), omit “(and the period of any such appointment)”; and
 - (b) in paragraph (2), for “(and the period of any such appointment)” substitute “, and the period of any such appointment”.

Amendment of regulation 17 (transfer fees: general)

4. For regulation 17 of the principal Regulations substitute—
- “17.—(1) Subject to regulation 18, SEPA may charge—
- (a) a person who has ceased to be a reservoir manager of a controlled reservoir (“the former reservoir manager”) a fee in relation to a notice given to SEPA by that person under section 15(1) of the Act; and
 - (b) the reservoir manager of a controlled reservoir a fee in relation to a notice given to SEPA by that manager under section 15(2) of the Act.
- (2) The former reservoir manager must pay a cessation fee to SEPA.
- (3) The reservoir manager must pay a new manager fee to SEPA.
- (4) Any cessation fee or new manager fee is recoverable as a civil debt.”.

Insertion of new Part 3A (risk designation)

5. After Part 3 of the principal Regulations insert—

“PART 3A
RISK DESIGNATION

Applications for review of risk designations under section 23 of the Act

6.—(1) Applications to SEPA under section 23(1) of the Act (review of SEPA’s decisions giving risk designation) must be made in writing.

(2) When giving notice to a reservoir manager of a controlled reservoir of a risk designation under section 19(5) or 21(4) of the Act, SEPA must inform the reservoir manager—

- (a) where to send an application for a review under section 23(1) of the Act; and
- (b) the information to be provided with any such application for review.

Appeals to the Scottish Ministers following a review by SEPA of risk designation

7.—(1) Appeals to the Scottish Ministers under section 24(1) of the Act (appeal to the Scottish Ministers following SEPA’s review) must be made in writing.

- (2) The appeal must contain—

- (a) a statement of the grounds of appeal;
- (b) a copy of the notice of the decision given by SEPA under section 23(5) of the Act to which the appeal relates; and
- (c) a copy of any relevant correspondence between the person making the appeal (“the appellant”) and SEPA.

(3) The appellant must send a copy of the appeal to SEPA as soon as practicable after making the appeal to the Scottish Ministers.

(4) SEPA may, within a period of 28 days beginning with the day on which it receives a copy of the appeal, make representations in writing to the Scottish Ministers.

(5) SEPA must send to the appellant a copy of any representations made under paragraph (4) as soon as practicable after making them, together with confirmation in writing of the date on which those representations were sent by SEPA to the Scottish Ministers.

(6) The appellant may, within a period of 17 days beginning with the day on which the appellant receives a copy of SEPA’s representations under paragraph (5), make representations in writing to the Scottish Ministers in respect of SEPA’s representations.

(7) The appellant must send to SEPA a copy of any representations made under paragraph (6) as soon as practicable after making them, together with confirmation in writing of the date on which those representations were sent by the appellant to the Scottish Ministers.

(8) The appellant may withdraw an appeal by notice in writing to the Scottish Ministers.

(9) The appellant must send to SEPA a copy of any such withdrawal notice as soon as practicable after sending the withdrawal notice to the Scottish Ministers.

(10) Before determining an appeal, the Scottish Ministers may give the appellant and SEPA an opportunity to appear before, and be heard by, any engineer appointed under section 24(4) of the Act to make recommendations to the Scottish Ministers about the risk designation to which the appeal relates.”.

Authorised to sign by the Scottish Ministers

St Andrew’s House,
Edinburgh

2015

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Reservoirs (Scotland) Regulations 2015 (“the principal Regulations”) to make further provision in relation to the risk designation of controlled reservoirs under Part 1 of the Reservoirs (Scotland) Act 2011 (“the Act”) and to clarify various provisions.

Regulations 2 to 4 amend the principal Regulations to clarify regulations 8, 10 and 17.

Regulation 5 inserts new Part 3A (risk designation) into the principal Regulations to make further provision in relation to applications for a review under section 23 of the Act (review of SEPA's decisions giving risk designations) and also in relation to appeals under section 24 of the Act (appeal to the Scottish Ministers following SEPA's review of such decisions).

No business and regulatory impact assessment has been prepared for these Regulations as no impact upon business, charities or voluntary bodies is foreseen.



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