

Flood Risk Management (Scotland) Act 2009

Local Authority Functions Under Part 4 Guidance



First Edition

July 2015

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Selkirk Flood Protection Scheme – Temporary bridge works

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Executive Summary

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Local Authority Functions under Part 4 - Guidance

This guidance focuses on local authorities' powers under Part 4 of the Flood Risk Management (Scotland) Act 2009 (the "Act"), particularly section 56 and the statutory procedures for flood protection schemes. This guidance should be read in conjunction with Delivering Sustainable Flood Risk Management published by the Scottish Government in 2011.

The Act provides the local authority with general powers to manage flood risk in its area and to carry out flood protection work within or outwith its area. Further, a local authority may carry out flood protection work jointly with another local authority under the Local Government (Scotland) Act 1973. In this guidance reference to a local authority is a reference to a council or councils constituted under section 2 of the Local Government etc. (Scotland) Act 1994.

This document is in three sections:

Chapter 1 – Part 4 of the Act – General

This chapter deals with the duties and responsibilities conferred upon Local Authorities by Part 4 of the Act.

Chapter 2 – Guidance on taking forward flood protection schemes

This chapter deals specifically with the promotion of a flood protection scheme in accordance with section 60 of, and schedule 2 to the Act and the Flood Risk Management (Flood Protection Schemes, Potentially Vulnerable Areas and Local Plan Districts) (Scotland) Regulations 2010 (the "2010 Regulations").

Chapter 3 – Case studies

This chapter takes case studies from Scottish local authorities of the implementation of a flood protection scheme or works of flood protection. These are provided as examples and like the remainder of the document are for guidance only. What may have been successful or otherwise in one location or situation may not be so elsewhere.

Finally a number of appendices provide sample documentation and further explanation of various elements that may be required in promotion of a flood protection scheme or works of flood protection.

This document is a *live* document and all users will benefit from updates to case studies. All local authorities are encouraged to engage and provide appropriate information to Alan Wyper at the Scottish Government (alan.wyper@scotland.gsi.gov.uk) on scheme promotion or works of flood protection for inclusion in future updates of the document.

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1. Part 4 of the Act – General

1.1 Introduction

Part 1 of the Flood Risk Management (Scotland) Act 2009 (the “Act”) sets out a number of general duties on local authorities and other responsible authorities to exercise their flood risk related functions with a view to reducing overall flood risk and, in particular, to do so to secure compliance with the EC Directive (2007/60/EC). “Flood risk related functions” are defined in section 1(4) and include functions under the Act and any other functions relevant to flood risk management which the Scottish Ministers may specify by order. Therefore these duties apply to local authorities when they are involved in the preparation of flood risk assessments, flood maps and flood risk management plans under Part 3 of the Act, and when considering use of their functions under Part 4.

Part 4 of the Act sets out the provisions which replace the Flood Prevention (Scotland) Act 1961 (the ‘1961 Act’). The 1961 Act was both restrictive and prescriptive so the intention of the 2009 Act was to provide local authorities with broad powers to allow them to take forward a full range of flood risk management measures.

1.2 Section 56 - General power to manage flood risk

These powers are permissive; local authorities do not have a duty to use these powers.

1.3 Local Flood Risk Management Plans

56 General power to manage flood risk

(1) A local authority may do anything which it considers
(a) will contribute to the implementation of current measures described in any relevant local flood risk management plan,

Section 56(1)(a) enables a local authority to do anything which it considers will contribute in a positive way to the implementation of current measures described in any relevant local flood risk management plan (LFRMP). This could include supporting or contributing to activities carried out by others, including other responsible authorities.

This guidance has been prepared on the basis of a local flood risk management plan being in place. Until such time as the plans are in place, it is expected that local authorities would proceed as if there were a plan in place and appraise any proposed schemes or flood protection works in a similar manner.

Each local authority will have standing orders and schemes of delegation, and may have other policies that impact on the general power, which should be considered in taking forward works and schemes. For example, procurement authority limits and processes will need to be complied with, as may civil contingency plans.

1.4 Emergency works

It is considered that an emergency situation occurs when a flood is imminent and is expected to result in serious adverse consequences to human health, the environment,

cultural heritage or economic activity. In such cases, under section 56(1)(b) a local authority may do anything it considers necessary to reduce the imminent risk of flooding to avert the expected serious adverse consequences.

56 General power to manage flood risk

(1) A local authority may do anything which it considers
(b) is necessary to reduce the risk of a flood in its area which is likely to
(i) occur imminently, and
(ii) have serious adverse consequences for human health, the environment, cultural heritage or economic activity,

This may include for example: preventative actions, emergency repairs or other flood aversion activities. Local authorities also have powers of entry under section 79(2)(f) to enable them to carry out these emergency flood reduction activities.

79 Powers of entry

(2) Any person authorised by a local authority is entitled to enter
(f) any land for the purpose of carrying out flood protection work on the ground mentioned in section 56(1)(b),

It may be that these activities would normally require an authorisation under the Water Environment (Controlled Activities) Regulations (Scotland) 2011. SEPA should be consulted ahead of any such works ("CAR"). Reference should be made to 'CAR 2011 Emergency Provisions and Accelerated Determination' where the emergency works are undertaken by a category one responder under section 48 of the Water Environment (Controlled Activities) Regulations (Scotland) 2011.

1.5 Flood protection measures outwith the Local Flood Risk Management Plan

In addition to emergency measures and those in a LFRMP, local authorities may carry out other flood protection work to manage flood risk under section 56(1)(c), so long as it does not affect the implementation of measures in the LFRMP.

56 General power to manage flood risk

(1) A local authority may do anything which it considers
(c) will otherwise manage flood risk in its area without affecting the implementation of the measures mentioned in paragraph (a).

This could include works identified as beneficial since the LFRMP was published, or circumstances where funding has become available for flood protection work, perhaps from other sources which may reduce the local authority's contribution and hence make flood protection works more affordable.

1.6 Carrying out flood protection work

It is for the local authority to consider the most appropriate arrangement for carrying out any work.

Section 56(2) provides various illustrations of what a local authority may do under the Act without restricting the generality of the power contained in section 56(1).

56 General power to manage flood risk

(2) Without prejudice to the generality of subsection (1), a local authority may in particular

(a) carry out any operations to which a flood protection scheme relates (see section 60),

Section 56(2)(a) enables the local authority to take forward flood protection schemes under section 60 of the Act. The decision to take forward a scheme by a local authority will be dependent on the nature and scope of the work that needs to be undertaken, the ownership or occupation of any land required as part of the scheme, and whether agreement can be reached with all parties affected by the works.

CASE STUDY

Agreement which didn't go to plan.

A project involving fairly significant flood works was developed by Aberdeenshire Council. This was accepted in principle by the landowners with very little dissension, and planning permission and a CAR licence were subsequently received. However, it then proved extremely difficult for the council to obtain agreement with all of the landowners to either acquire ground or obtain servitude rights to construct the works. The main stumbling block was in agreeing compensation settlements.

Landowners were in no hurry to accept the level of compensation offered and without the backing of a scheme, the council was unable to control the issue or dictate timescales. As a result, the landowners pressurised the Council to

try and increase its offer in order to reach a settlement without recourse to more formal prolonged procedures.

In summary, agreements can work, however care should be taken when adopting this approach.

Agreements are most suited to situations where simple flood alleviation works are required involving a single landowner when there is reasonable certainty that the landowner will not subsequently change their mind. At the very least, this should be backed up by an early letter written by the Council and countersigned by the landowner to say that they are willing to enter into an agreement and that should they not accept the terms on offer - which will reflect current market values - within a fixed timescale (say 28 days) the proposed arrangement will be withdrawn and a formal flood scheme progressed.

When reaching an agreement with landowners and relevant stakeholders seems unlikely due to the scale and complexity of a proposed programme of flood protection works, local authorities should promote a flood protection scheme which, on confirmation, gives the authority the necessary powers under section 79(2)(e) to enter any land for the purposes of carrying out the scheme.

79 Powers of entry

(2) Any person authorised by a local authority is entitled to enter

(e) any land on which scheme operations are to be carried out, for the purposes of carrying out the operations or of executing any temporary works in relation to them,

More detailed guidance on promoting a scheme is set out in Chapter 2.

56 General power to manage flood risk

(2) Without prejudice to the generality of subsection (1), a local authority may in particular

(b) carry out any other flood protection work,

Section 56(2)(b) enables local authorities to carry out any other flood protection works. Flood protection works are defined under section 95(1) as being, any operation on land for the purpose of protecting any land from flooding including:

- a) any work of construction, alteration, restoration, enhancement, improvement, repair, maintenance, demolition or removal,
- b) any work that involves the alteration (including enhancement) or restoration of natural features and characteristics of any river basin or coastal area,
- c) the sowing or planting of vegetation or forestry,
- d) any work ancillary to an operation specified in paragraphs (a) to (c).

Local authorities would benefit from following the guidance on taking forward a scheme when undertaking flood protection works under section 56(2)(b) as many of the same principles will apply. However, there will be deviations between the two processes particularly in relation to planning permission amongst others. In certain circumstances local authorities may wish to use a Compulsory Purchase Order (CPO) to support flood protection work. Guidance on CPOs can be found [here](#).

Section 56(2)(c) enables local authorities to carry out any temporary works required for the purpose of a flood protection scheme or any other flood protection work.

56 General power to manage flood risk

(2) Without prejudice to the generality of subsection (1), a local authority may in particular

(c) carry out any temporary works required for the purposes of a flood protection scheme or any other flood protection work,

In general terms for a scheme of flood protection works, temporary works might be needed to create access for these works, storage of equipment or creation of a temporary works site near the actual works, which will all be reinstated to their former condition once the scheme or flood protection works are completed.

In terms of the construction of a scheme or flood protection works, temporary works (TW) are the parts of a construction project that are needed to enable the permanent works to be built. Usually the TW are removed after use, e.g. access scaffolds, props, shoring, excavation support, falsework and formwork. Sometimes the TW is incorporated into the permanent works, e.g. haul road foundations and crane or piling platforms may be used for hardstanding or road foundations (refer to BS5975: 2008 for further clarity on what constitutes TW).

56 General power to manage flood risk

(2) Without prejudice to the generality of subsection (1), a local authority may in particular

- (d) enter into agreements or arrangements with any other person
- (i) for the carrying out by that person or by the authority of any work which could be done by the authority under this Part, or
- (ii) relating to the management by that person of land in a way which can assist in the retention of flood water or slowing the flow of such water,

Section 56(2)(d) enables local authorities to enter into agreements or arrangements with other people or organisations such as land managers, other responsible authorities including Scottish Water and other local authorities, community groups, charitable organisations and private businesses to carry out works or to manage the flow of water.

Local authorities should ensure that any such agreements/arrangements are robust and this may mean they need to address any potential issues in advance and be legally valid.

For example, they may need to include any servitude rights that may be required in perpetuity and include financial implications of any such agreements. Local authorities should seek appropriate professional advice when entering into such agreements / arrangements.

There are also circumstances where less formal arrangements might suffice, e.g. where community group members volunteer to be local flood wardens and help deploy sandbags when a flood is imminent or other similar activities. Local authorities should take risk into consideration when entering into any

agreements/arrangements under this power to ensure a proportionate approach is undertaken.

Under section 56(d)(i) the arrangements/ agreements can include undertaking flood protection works, clearance and repair work under section 59, or any other activity that the local authority could undertake under Part 4 of the Act. The activity or work could be carried out by the authority or by other people. Local authorities can contribute towards the expenditure of the other body under section 56(2)(e) or receive contributions from any other body towards expenditure incurred under Part 4 of the Act under section 56(2)(g). For example, a local authority could contribute towards the development of a flood warning scheme by SEPA; to Scottish Water for a joint project to improve surface water management or a community group for the purchase of flood sacks. A local authority could also receive contributions towards works, for example, from a developer wishing to increase flood protection to support a development proposal.

Section 56(2)(d)(ii) also enables local authorities to enter into agreements relating to the management of land in a way which can assist with slowing the flow or retaining flood water. These activities are generally known as natural flood management (NFM).

56 General power to manage flood risk

(2) Without prejudice to the generality of subsection (1), a local authority may in particular

- (f) make payments to any other person in compensation for income lost as a result of entering into agreements or arrangements of the type mentioned in paragraph (d)(ii),

Under section 56(2)(f) the local authority can compensate the land manager for income lost as a result of entering into such arrangements. Local authorities can also work with a coordinating body (for example, as Scottish Borders Council have done with the Tweed Forum) to coordinate these types of activities. A Natural Flood Management Handbook is being prepared separately and includes guidance on how to take forward this type of work. This document will be available in the near future. Supplementary technical guidance is also being prepared and will be available at a later date.

1.7 Works outwith local authority's area

56 General power to manage flood risk

(3) Work carried out under this section may be carried out within or outwith the local authority's area.

Where works are carried out outwith an individual authority area, as per section 56(3), the local authority promoting the work should liaise closely with the neighbouring authority, and the governance of such works need to be established. The Local Flood Risk Management Plan should be referred to.

1.8 Limits of general power: statutory undertakings

57 Limits of general power

(1) The power under section 56 does not enable a local authority to do anything which it is, by virtue of a limiting provision, unable to do.

(2) In subsection (1), a "limiting provision" is one which

(a) prohibits or prevents the local authority from doing anything or limits its powers

in that respect, and

(b) is expressed in an enactment (whenever passed or made).

(3) The absence from an enactment of provision conferring any power does not of itself make that enactment a limiting provision.

Section 57 prevents local authorities from doing anything under section 56 which it would be otherwise unable to do as a result of other Acts or forms of legislation which contain a positive restriction on the powers of a local authority, e.g. the [Water Environment and Water Services \(Scotland\) Act 2003](#). In considering actions under section 56, local authorities should determine what they are unable to do as a result of other legislative restrictions and satisfy themselves that these restrictions have been adhered to.

Formerly, a local authority was limited in its use of its statutory scheme powers to work only on a diversion of public water mains or sewers as a consequence of other flood prevention work, and only with the consent of the water authority. The position with other statutory undertakings was uncertain but was usually applied in a similar way.



Inverness FPS - Construction work

58 Limits of general power: statutory undertakings

- (1) A local authority may not exercise the power under section 56 in a way which
- (a) damages any works or property belonging to a statutory undertaker, or
 - (b) interferes with the carrying on of its statutory undertaking, unless the undertaker consents.
- (2) But consent is not required if it is withheld unreasonably.
- (3) It is for the Scottish Ministers to determine any question which arises as to whether consent has been withheld unreasonably, and their decision is final.

Section 58 prohibits a local authority from exercising its general power to manage flood risk in a way which damages any works or property belonging to a statutory undertaker, or interferes with the carrying on of its statutory undertaking unless the undertaker consents. “Statutory undertaker” and “statutory undertaking” are defined in section 71 and are copied here for convenience as follows:

71 Interpretation of Part 4

In this Part

“statutory undertaker¹” means

- (a) the holder of a licence under section 6(1) of the Electricity Act 1989 (c.29),
- (b) a gas transporter within the meaning of Part 1 of the Gas Act 1986 (c.44),
- (c) the Civil Aviation Authority,
- (d) a holder of a licence under Chapter 1 of the Transport Act 2000 (c.38),
- (e) the operator of an electronic communications code network within the meaning of paragraph 1(1) of Schedule 17 to the Communications Act 2003 (c.21), and
- (f) any other person who is a statutory undertaker within the meaning of section 214(1) of the Town and Country Planning (Scotland) Act 1997 (c.8),

¹ for full details reference should be made to the relevant section of the 1997 Act but for indicative purposes this includes *persons authorised by any enactment to carry on any railway, light railway, tramway, road transport, water transport, canal, inland navigation, dock, harbour, pier or lighthouse undertaking or any undertaking for the supply of hydraulic power or water and a relevant airport operator*

“statutory undertaking”
(a) means, in relation to a person mentioned in paragraphs (a) to (e) in the definition of “statutory undertaker”, the person’s undertaking,
(b) means, in relation to Scottish Water, its core functions within the meaning of section 70(2) of the Water Industry (Scotland) Act 2002 (asp 3),
(c) otherwise has the meaning given in the Town and Country Planning (Scotland) Act 1997.

Care should be taken to check the legislation itself for any amendments since the publication of this guidance document.

Local authorities should take time in advance of developing proposals for flood protection schemes and works, to consider any potential implications on statutory undertakers. If a local authority considers consent is being withheld unreasonably in relation to proposed flood protection works, they can apply to the Scottish Ministers in the event of a dispute, their decision being final, to determine whether consent has been withheld unreasonably.

In some circumstances it may be advisable to agree enabling contracts with statutory undertakers as a matter of course, e.g. for diverting or protecting utilities. These can help resolve issues at an early stage, as time can be an issue for more urgent flood protection projects, and hence may reduce construction costs and risk.

1.9 Section 59 – Clearance and repair works

Section 59 of the Act imposes a duty on local authorities to carry out works described in the schedule of clearance

and repair prepared under section 18. Such works must contribute to measures detailed in the relevant Local Flood Risk Management Plan or do not affect the implementation of the measures in the plan.

Separate Guidance on Clearance & Repair is being prepared and will be available following publication of this guidance.

1.10 Section 60 – flood protection schemes

60 Flood protection schemes

(1) A flood protection scheme is a scheme by a local authority for the management of flood risk within the authority’s area.

A flood protection scheme is a scheme by a local authority for the management of flood risk within the authority’s area. They may also be undertaken by local authorities working jointly for the management of cross-boundary flood risk issues. A local authority may include in a scheme any work which it considers will contribute to the implementation of current measures described in any relevant LFRMP, or will otherwise manage flood risk in its area without affecting the implementation of any relevant LFRMP. The Act does not authorise the carrying out of operations in contravention of any limiting provision expressed in any other enactment and in particular those listed in section 58 without the consent of the statutory undertaker.

Specific guidance on the promotion of flood protection schemes is provided in Chapter 2.

1.11 Contents of a flood protection scheme

60 Flood protection schemes

- (2) A proposed flood protection scheme must—
- (a) contain a description of the operations the local authority proposes to carry out,
 - (b) include such maps, plans and specifications as may be specified by regulations by the Scottish Ministers,
 - (c) state how the operations will contribute to the implementation of current measures described in any relevant local flood risk management plan, and
 - (d) inasmuch as they will not so contribute, state the reasons why the local authority considers carrying them out will not affect the implementation of those measures.
- (3) Schedule 2 makes further provision about the making of flood protection schemes.
- (4) The Scottish Ministers may by order amend schedule 2 so as to modify the procedure for making flood protection schemes.
- (5) Before making an order under subsection (4), the Scottish Ministers must consult—
- (a) every local authority,
 - (b) such bodies appearing to them to be representative of the interests of local authorities as they consider appropriate,
 - (c) SEPA,
 - (d) Scottish Natural Heritage,
 - (e) Scottish Water,
 - (f) the National Park authority for each National Park, and
 - (g) such other persons as they consider appropriate.

Section 60 (2) sets out what a proposed flood protection scheme must contain, with further requirements

set out in regulation 11 of the Flood Risk Management (Flood Protection Schemes, Potentially Vulnerable Areas and Local Plan Districts) (Scotland) Regulations 2010 (the “2010 Regulations”).

Further provision about the procedures for making of a flood prevention scheme is set out within schedule 2 to the Act.

The Act establishes a framework for new statutory procedures which local authorities must apply when considering a proposed flood protection scheme. The 2010 Regulations supplement this with more detailed provision for particular aspects of those procedures. The purpose of these Regulations is to:

- establish the procedures for assessing the environmental impact of flood protection schemes.
- prescribe the documents that must form part of a flood protection scheme.
- make further provision about the procedures to be followed for the approval of flood protection schemes.

These procedures refine the provisions that existed under the 1961 Act with the aim of ensuring the procedures can continue to be followed by local authorities and the public in a fair and consistent manner across Scotland.

A flood protection scheme is promoted by the local authority, and confirmed under the Act by the local authority or, in certain circumstances, by Scottish Ministers.

The 2010 Regulations specify the maps, plans and specifications that a proposed flood protection scheme

must, as a minimum, include. This is to ensure that the public have sufficient information to be able to ascertain the extent to which their land may be affected by a proposed scheme. The mandatory requirements for inclusion in such a scheme are as follows:

- a statement of how the operations will contribute to the implementation of current measures described in any relevant LFRMP, OR a statement of the reasons why it considers carrying them out will not affect the implementation of the LFRMP
- a description of the extent and scale of the proposed operations and a description of the land which the local authority considers may be affected by those operations and any land on which the local authority would require to enter whether temporarily or otherwise for the purpose of carrying out the operations, all by reference to maps, plans and specifications, and
- an estimate of the cost of carrying out the proposed operations.

It is imperative that flexibility is built into the description of the operations and land affected, so as to allow for foreseeable changes as the scheme is progressed. This will allow the authority to make allowance for uncertainty in terms of detailed design and manage risk to the delivery of the scheme. For example, it is easier to reduce the amount of land affected when, for example, the detail design is complete. However, the assessment made at the time of describing the operations should be proportionate, transparent and fair.

The 2010 Regulations also make provisions about the making and withdrawal of objections, deemed

planning permission and the service of notices. More detailed guidance on the procedure to follow when taking forward a scheme is set out in Chapter 2.

1.12 Assessment of environmental effects

Prior to undertaking flood protection works or giving notice of a flood protection scheme, and at subsequent stages in the process the local authority has a duty to consider the environmental impact of the proposed works or scheme.

There is EU legislation in the form of Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (“the Environmental Impact Assessment Directive”) which requires that, before consent for certain public and private projects is given, an assessment is made of their effects on the environment. Flood protection works are one such project. Prior to the Act, the necessary environmental assessment for flood prevention works was carried out as part of the planning process and that remains the position where flood protection works are carried out other than as part of a scheme. Under the Act, however, confirmation of flood protection scheme carries deemed planning permission.

Part II of the 2010 Regulations ensures the necessary environmental assessments are undertaken as part of the scheme process. It ensures that the environmental impact of a proposed flood protection scheme is considered at the appropriate junctures (prior to confirming a flood protection scheme with modifications) so ensuring compliance with the EIA Directive. It makes provisions about the consideration to be given to the

likely environmental effects of the operations contained in the scheme before a scheme is promoted or confirmed under paragraph 4, 7 or 9 of the 2010 Regulations.

It ensures that an environmental statement is prepared for schemes that are likely to have a significant effect on the environment, and that the public are notified of the existence of any environmental statement and have the opportunity to make representations. The 2010 Regulations requires the 'competent authority' (which would be the local authority promoting a flood protection scheme) to consider any such representations before making decisions to confirm a scheme.

1.13 Environmental impacts and other considerations

In relation to a scheme, the 2010 Regulations require that, where a scheme is considered likely to have a significant effect on the environment, the local authority must prepare an environmental statement in consultation with the consultative bodies (as defined in regulation 2).

In the event of a local authority taking the view that a proposed flood protection scheme is NOT likely to have a significant effect on the environment, they should request a screening opinion from each of the consultative bodies in accordance with regulation 5 of the 2010 Regulations. The consultative bodies are currently SEPA, Scottish Natural Heritage, Scottish Water and any planning authority whose district is likely to be affected by the proposed scheme. The results of the determination of the screening opinions will determine how the local authority should proceed thereafter. It is expected that due to the nature of flood protection work, in

the majority of cases local authorities will need to prepare an environmental statement.

In relation to flood protection works, the necessary environmental assessments should be carried out as part of the planning process. In relation to works that may be considered permitted development and are considered not to require planning, the environmental impacts could still be significant. In these circumstances local authorities should follow the same procedure for assessing the impacts as for flood protection works that do require planning permission to ensure the requirements of the EIA Directive are met.

The details of what should be included in an environmental statement are set out in Schedule 2 to the 2010 Regulations.

It is likely that planning staff in local authorities will have experience of dealing with environmental assessments and requirements in relation to a variety of different projects. It may be beneficial for flood risk management teams to consult with planning colleagues on these matters.

In addition, it is likely that both flood protection works and flood protection schemes will require a separate authorisation, most likely as a licence from SEPA under CAR. SEPA has guidance available [here](#): Early consultation should be undertaken with SEPA as this may prevent key issues that could potentially cause delays at a later stage.

In addition, where there is a potential impact on sites designated for the protection of habitats or species, an appropriate assessment, under the Conservation (Natural Habitats &c.) Regulations 1994 (as amended in

Scotland) must be carried out by the 'competent authority' before taking forward any flood protection works or giving its consent to confirm a scheme and in both circumstances must take into account the advice of SNH. The competent authority for confirmation of a scheme under the Act is the confirming authority, which, in most cases, will be the local authority. SEPA is the competent authority for CAR.

Consents that may require applications to be made on behalf of others, e.g. a timber extraction licence under the Timber Extraction Regulations should be identified and considered.

Other statutory consents may be required where flood protection works or scheme operations may impact for example on listed buildings or on protected species where Historic Scotland and SNH have an interest. Consents from statutory undertakers for operations as part of flood protection works or schemes that affect their apparatus may also be required – see Section 1.8.

As many of the stakeholders are common to each approvals process, as many applications for consent as possible should be run in parallel so that each statutory consultee has sufficient information to make an informed contribution to the decision making process. It is, therefore, expected that the local authority will develop its preferred scheme or flood protection works in close consultation with the relevant Planning Authorities, SEPA, SNH, Historic Scotland and the statutory undertakers to identify all associated issues and concerns through early and regular engagement.

For a successful outcome, it is essential that flood protection works and schemes enjoy a broad consensus of support from the

community affected. Of course, those whose property would be directly affected by the proposals must be closely consulted however flood protection works and schemes can have wider impacts on the community and the views of other community interests and organisations should be taken into account as the proposals are developed. This engagement will involve the local authority's own staff as well as its designers, most often private consultants, and the resource needs should not be underestimated. The nature of this engagement will be influenced by the scale of the proposals, the nature of the community affected and the local authority's consultative practices.

1.14 Planning Permission

Flood protection schemes have deemed planning permission under the Act, see also Section 1.15.

Flood protection scheme operations that constitute development will, pursuant to section 57(2B) of the Town and Country Planning (Scotland) Act 1997, be deemed to have been granted planning permission under the Act.

Non-scheme flood protection works are likely to require planning permission depending on the nature, scale and location of the works. In such cases, if planning permission is required, local authorities should follow the appropriate procedure for securing planning permission. Early discussions with the planning authority should be held to establish the most appropriate way to proceed.

The views of the planning authority should also be taken into account as part of the consideration of the application for confirmation of a scheme. In most cases, the local

authority will also be the relevant Planning Authority and will have other statutory functions which may be affected, e.g. education authority and roads authority. In proposing a scheme, any local authority is deemed to have considered the impacts of the proposals on these interests and so there is no statutory requirement to serve notice on itself.

It is important to ensure the planning authority is supportive of the proposals, to avoid the use of the scheme process to raise objections of a planning nature to the work. In effect local authorities may benefit from following the normal planning guidance when taking forward schemes to ensure issues like the aesthetics of the project are properly taken into consideration and thus avoiding subsequent valid objections.

It would be particularly helpful if land identified for flood protection work (and schemes) was identified as such in the local development plan.

Where National Park Authorities may be impacted by flood protection works and schemes, contact should be made early in the process and effective engagement undertaken throughout the development of the Scheme. It may be beneficial to enter into a Memorandum of Understanding with National Park Authorities over how to proceed in these circumstances where the National Park is also the planning authority.

Confirmation of a scheme under the Act carries deemed planning permission, however a request must be submitted to Scottish Ministers for deemed planning permission to be granted (see Section 1.15). A key element to take into consideration is therefore that the Scottish Ministers may attach conditions to the deemed

planning consent, which should always have been anticipated. Local authority and National Park planning specialists are likely to be well placed to provide advice on the type of conditions that should already have been included.

1.15 Deemed planning permission for scheme work

Section 65 of the Act inserts a new section 57(2B) into the Town and Country Planning (Scotland) Act 1997.

65 Deemed planning permission for scheme work

In section 57 of the Town and Country Planning (Scotland) Act 1997 (c.8) (deemed planning permission), after subsection (2A) insert—

“(2B) On—

(a) confirming a flood protection scheme under paragraph 7(4) of schedule 2 to the Flood Risk Management (Scotland) Act 2009 (asp 6) in respect of any operation which would constitute development, or
(b) a local authority confirming such a scheme under paragraph 4(1) or 9(1) of that schedule, the Scottish Ministers must direct that planning permission for that development shall be deemed to be granted, subject to such conditions (if any) as may be specified in the direction.”.

This provides that once a flood protection scheme is confirmed (whether by the local authority or the Scottish Ministers), the Scottish Ministers are to direct that any necessary planning permission is deemed to be granted, subject to any planning conditions which Ministers may specify – see above. Regulation 14 the 2010 Regulations sets out the procedure to be followed when a local authority asks the Scottish Ministers to make a direction about deemed planning permission for a confirmed scheme. Regulation 14(2) specifies the

documentation that should be included in the written request, for deemed planning permission to be granted.

These include:

- a) a brief description of the nature and purpose of the confirmed scheme;
- b) a copy of the confirmed scheme;
- c) a summary of the scheme documents; and
- d) a summary of the environmental statement (if any).

Local authorities should also include any other material which they consider is relevant to the grant of deemed planning permission.

1.16 Orders under the Land Drainage (Scotland) Act 1958

There are a significant number of Land Drainage Orders still in place across Scotland. It can be difficult to identify if any will be affected by proposed flood protection schemes or works as land owners and occupiers may be unaware that they are still in place.

Where the proposed operations materially alter any drainage works or protective works authorised by an improvement order made under the Land Drainage (Scotland) Act 1958 (the '1958 Act'), the Scheme must include proposals to vary the improvement order so as to remove the obligation on the authorised persons of maintenance in respect of such works so altered. Where the proposed operations are to be carried out on any land affected by an improvement order, under Section 61(2) the scheme may include proposals to vary or revoke the improvement order but may not include proposals to impose any new obligations on the authorised persons

in respect of the operations described in the scheme.

A local authority promoting flood protection works or schemes should consider whether these would affect, or be affected, by improvement orders made under the 1958 Act. Given that the records of such orders in the National Archives may not be particularly detailed or easily searchable, this is likely to involve a degree of specific consultation with the local owners of agricultural land to establish whether any improvement orders are affected by proposed schemes. If for example, there is an artificial embankment which protects agricultural land from the river, there may well be a land drainage order in place. It is important to record what has been done to establish whether there is a land drainage order in place. Having established that there are, or may be, orders affected by the works, the local authority should consider the advantages of the additional powers provided for promoting a scheme, which allow orders to be varied. Further details on how an order can be varied are set out in Appendix D – Land Drainage Orders.

1.17 Repeal of the Flood Prevention (Scotland) Act 1961

By virtue of the Flood Risk Management (Scotland) Act 2009 (Commencement No. 2 and Savings Provisions) Order 2010 (<http://www.legislation.gov.uk/ssi/2010/401/contents/made>) the 1961 Act was revoked on 24 December 2010. However, under article 5 of the same Order, certain provisions relating to confirmation, powers of entry, compensation, Crown rights, interpretation and powers in the First Schedule to the 1961 Act continue to have effect as they had effect

immediately before that date in the case of any flood prevention scheme where a notice of intention to submit a scheme for confirmation was first published before 24 December 2010.



Selkirk FPS – Tree clearance

1.18 Land

1.18.1 Information about ownership etc. of land

In order to enable it to exercise any of its functions under Part 4 of the Act, a local authority may require land owners or occupiers to state their interest in that land in writing. Land owners or occupiers may also be required to provide contact details for any other person known to have an interest in that land. Any person failing to comply with the requirements of a local authority under this section, or knowingly or recklessly providing false or misleading information, is guilty of an offence.

Further consideration of those with an 'interest in land' or 'land affected' is given in Appendix E - 'Interest in Land' and 'Land affected'.

1.18.2 Powers of entry

79 Powers of entry (Part 6)

(2) Any person authorised by a local authority is entitled to enter—

- (a) any land for the purposes of preparing, reviewing or updating a map under section 17,
 - (b) any land for the purposes of assessing a body of water under section 18,
 - (c) any land for the purposes of preparing a local flood risk management plan under section 34,
 - (d) any land for the purposes of preparing a report under section 37 or 38,
 - (e) any land on which scheme operations are to be carried out, for the purposes of carrying out the operations or of executing any temporary works in relation to them,
 - (f) any land for the purpose of carrying out flood protection work on the ground mentioned in section 56(1)(b),
 - (g) any land for the purposes of maintaining flood protection work carried out
 - (i) under section 56, or
 - (ii) in accordance with a flood prevention scheme confirmed under section 4 of the 1961 Act,
 - (h) any land for the purposes of carrying out works under section 59, and
 - (i) any land for the purposes of determining whether, and if so in what manner, any function conferred by or under Part 4 is to be exercised.
- (3) In subsection (2), paragraphs (c) and (d) apply only where the local authority is a lead authority within the meaning of section 34.

Section 79(2) creates powers for local authorities to enter land for the purposes of carrying out some of their functions under Part 4 of the Act, as listed. The power to enter land includes a power to enter buildings because “land” is defined in the Interpretation Order² to include buildings and other structures. It is worth noting that section 79(1) gives similar powers to SEPA to enable them to carry out their responsibilities under the Act.

The powers of entry available to local authorities are wide, permissive and focused on the intended use under the Act. It allows them to enter land on which flood protection scheme operations, temporary works, emergency flood protection work, maintenance operations or clearance and repair works are to be carried out under Part 4 of the Act and for the purposes of maintaining flood prevention schemes constructed under the 1961 Act. Land may also be entered for the purposes of determining whether any function conferred by or under that Part is to be exercised. Any land adjacent to it, and rights to survey and examine land are also conferred under section 81(1) – see below.

If possible, the local authority should discuss access with landowners, occupiers and other people affected prior to entry, including any repair and reinstatement work that will be undertaken. The local authority should specify what the land is going to be used for. When taking access, the

² The Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (S.I. 1999/ 1379)

local authority should set out how damage will be minimised and what actions will be taken to repair any damage. It is important that a plan for such actions is prepared and that a record of any such discussions is kept, including the decision making process and any actions taken, in order to deal with any future claims for compensation. As with all projects requiring land access on a temporary basis, good pre-entry, construction and post-construction photographs and survey records should be taken and held with copies issued to all affected parties.

CASE STUDY

B712 - Merlindale Bridge Flooding

On the 30 December 2013 flow in the upper Tweed was the highest recorded since gauges were installed in 1986. One of the consequences of this high flow was that an agricultural flood bank protecting haughland upstream of Merlindale Bridge on the B712 road was overtopped along its entire length and was breached at one end. Flood waters flowed across the road affecting property alongside and downstream of the road. When the high flows subsided the road remained flooded and access to properties was cut off for a number of days. Additional flooding occurred due to the breach in the flood bank. Flooding of the road had significant safety implications and necessitated long detours for road users.

A meeting to discuss how to remedy the situation was held on site. Scottish Borders Council, SEPA, SNH, Tweed Commissioners, Community Councillor, the landowner and his agent were in attendance. The landowner’s preferred remedy was to repair the breach and upgrade the

entire agricultural flood bank to significantly reduce the risk of flooding. Scottish Borders Council said that they could not justify upgrading the entire agricultural flood bank and that their concern was to reduce the risk of flooding to the public road and the effect on residential properties. The landowner made the suggestion that access to land would not be permitted unless upgrading of the entire floodbank was considered. At this point Scottish Borders Council advised that they considered this to be an emergency situation and that they had powers under the Flood Risk Management (Scotland) Act 2009 to gain access to the site to undertake emergency works. The discussion continued and it was agreed that Scottish Borders Council would undertake an emergency repair of the breach in the flood bank and undertake an option assessment to determine the most effective solution to mitigate the flood risk to the road and residential property

This case study demonstrates the benefits of having powers of entry in the FRM Act.

If access is repeatedly refused by landowners or occupiers and all attempts to reach agreement fail, a warrant may be required.

80 Warrants authorising entry

(1) A sheriff or justice of the peace may by warrant authorise any person entitled to exercise a right conferred by section 79 to do so, if necessary using reasonable force, in accordance with the warrant.

(2) A warrant may be granted under subsection (1) only if the sheriff or justice is satisfied, by evidence on oath—

(a) that there are reasonable grounds for the exercise of the right in relation to the land concerned, and

(b) that

(i) the conditions in subsection (3) are satisfied,

(ii) the land is unoccupied, or

(iii) the case is one of urgency.

(3) The conditions mentioned in subsection (2)(b)(i) are

(a) the person applying for the warrant has given notice under section 81(3) of the person's intention to exercise the right,

(b) the notice period has expired,

(c) either:

(i) permission to exercise the right in relation to the land has been refused, or

(ii) such a refusal is reasonably expected.

(4) A warrant granted under this section:

(a) does not entitle a person to use force against an individual, and

(b) continues in force until the purpose for which the warrant was issued has been fulfilled or, if earlier, the expiry of such period as the warrant may specify.

(5) Any person who, without reasonable excuse, prevents or obstructs any other person from doing anything which is authorised by a warrant granted under this section commits an offence and is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

A sheriff or justice of the peace may grant a warrant to any person entitled to exercise a power of entry where there are reasonable grounds in relation to the land concerned. Local

authorities should ensure the warrant is served on the right person and that all the actions and decisions made are recorded.

CASE STUDY

Asbestos surveys of buildings

*In developing a scheme, several buildings were identified as needing to be demolished to make room for the flood protection works. Discussions and land negotiations, including compensation, were proving contentious as the land owner had not taken the offered opportunities to object formally to the scheme. Numerous and recorded attempts were made to make arrangements with the land owner for local authority surveyors to gain access to buildings to undertake an asbestos survey. The landowner had considered that the access was to be gained to allow a valuation survey to be undertaken, which was not the case, and refused access. The local authority therefore proceeded to seek a warrant from the Sheriff so that access could be gained to undertake the asbestos survey. No other survey was to be undertaken in gaining access. The Sheriff granted the warrant. Unfortunately, despite the warrant being issued, the land owner still refused to allow access to the buildings. Access using reasonable force in the presence of a police officer was subsequently taken to allow the asbestos survey to be undertaken. However, the land owner remained dissatisfied with the repairs made to secure his property by the council's contractor. This resulted in an agreement to pay the land owner the cost of alternative locks. **This case study provides a cautionary tale on the care that should be taken in exercising the right of entry via a warrant, particularly where reasonable force to gain access is***

required. Close collaboration with legal and estates/property colleagues, as well as Police Scotland is required. Preparations for reputational risk should also be expected and planned.

Whilst a warrant allows the person authorised to use reasonable force it does not allow the use of force against individuals (see subsections (1) and (4)(a)). Local authorities should take care when exercising reasonable force and be clear about who is going to be on site when exercising powers of entry.

Subsections (2) and (3) set out the circumstances in which a warrant may be granted. These require the sheriff or justice of the peace to be satisfied by evidence on oath that there are reasonable grounds for seeking entry to the land, that permission to enter has been refused or a refusal is reasonably expected, the land is unoccupied, or where the case is urgent. Where the case is not urgent and a warrant is sought on the basis that permission to enter has been refused or a refusal is expected then the applicant must first have given notice that they intend to enter the land and the notice period must have expired. The notice periods are set out in section 81(3).

Subsection (5) makes it an offence to prevent or obstruct a person from exercising a power of entry under a warrant unless the person obstructing or preventing access has a reasonable excuse for doing so.

81 Powers of entry: supplementary

(1) A right to enter any land conferred by section 79 includes a right to—

- (a) enter for the same purpose any land adjacent to it, and
- (b) survey and examine the land.

(2) Any person who enters any land in exercise of a right conferred by section 79 is entitled,

subject in the case of a right exercisable in accordance with a warrant to the terms of the warrant, to—

- (a) take on to the land such other persons and such materials and equipment (including vehicles) as may be reasonably required for the purposes of assisting the person, and
- (b) do anything else which is reasonably required in order to fulfil the purpose for which entry is taken.

(3) Before any such person exercises any such right, the occupant of the land concerned must be given—

(a) where—

- (i) the person exercising any such right intends to take heavy equipment onto the land concerned or entry is sought to a house, and
- (ii) the right being exercised is not being exercised in accordance with a warrant,

at least 7 days' notice,

(b) in any other case, at least 24 hours' notice.

(4) A right to enter any land conferred by section 79 may be exercised only at a reasonable time.

(5) Subsections (3) and (4) do not apply to the exercise of—

- (a) a right under section 79(2)(f), or
- (b) if the situation is urgent, a right under section 79(1)(l).

(6) A person authorised to exercise any right conferred by section 79 must, if required to do so, produce written evidence of that authorisation.

(7) In subsection (3)(a)(i)—

“heavy equipment” does not include vehicles designed solely or mainly for the carriage of passengers, “house” has the meaning given in section 194(1) of the Housing (Scotland) Act 2006 (asp 1).

(8) In this section and section 82, references to a right to enter land conferred by section 79 include references to that right exercised in accordance with a warrant granted under section 80.

Section 81 supplements sections 79 and 80 and details the notices that are required to be served, including advance notice, an explanation of what the purpose of the taking access is and a description of what persons, materials and equipment will be used. Subsection (4) requires that, except in the urgent cases set out in subsection (5), people entering land under section 79 (with or without a warrant) may only do so at a reasonable time.

Subsection (2) entitles those entering land under section 79 (with or without a warrant) to take other persons, materials and equipment onto the land. This includes vehicles. The subsection also enables them to do anything else reasonably required to fulfil the purpose of entering the land.

Subsections (3) sets notice periods which must be complied with except in the urgent cases defined in subsection (5). A 7 day notice period applies where the power under section 79 is to be exercised without a warrant in order to enter a house or to take heavy

equipment onto land (subsection (3)(a)). “Heavy equipment” and “house” are defined in subsection (7).

A 24 hour notice period applies where the power under section 79 is to be exercised without a warrant, without entering a house and without taking heavy equipment onto the land (subsection (3)(b)). A 24 hour notice period also applies to all cases where the power under section 79 is to be exercised with a warrant (subsection (3)(b)).

In all cases, subsection (6) requires those entering land to be able to produce written evidence that they have been authorised to enter.

1.18.3 Compensation

82 Compensation

(2) A local authority must compensate any person who has sustained damage in consequence of—

- (a) scheme operations carried out by or on behalf of the local authority,
- (b) the subsequent maintenance of any such operations by or on behalf of the local authority,
- (c) any other exercise of the power in section 56(1),
- (d) the carrying out of works under section 59,
- (e) the variation or revocation of an improvement order under section 61, or
- (f) the exercise of a right of entry conferred by section 79(2) (including the ancillary rights mentioned in section 81(1) and (2)).

Section 82(2) obliges local authorities to compensate any person who has sustained damage as a result of scheme operations, subsequent maintenance by or on behalf of the local authority, clearance and repair works, the variation or revocation of an improvement order or the exercise of a right of entry.

CASE STUDY

The River Ness Flood Alleviation Scheme was promoted under the Flood Protection (Scotland) Act 1961 and the Order was made in 2009. Works commenced in 2013. Development occurred in the intervening period. The issue of entitlement to compensation arose as it would appear that the developer had placed themselves in this position. A debate ensued and legal opinion was sought. The legal opinion was:-

The proper interpretation of s.11(1) of the 1961 Act is that the claim to compensation arises "in consequence of the carrying out of any flood prevention operations". It is not the making or the confirming of the Scheme which gives rise to a claim for compensation, but rather the actual carrying out of the flood prevention operations. In other words, the practical blighting effect of the making or confirmation of a flood prevention scheme does not give rise to any compensation under the 1961 Act. That may well reflect the fact that schemes may be made but unless funding is available, such schemes may never be put into effect. In that event, no compensation is payable under the 1961 Act.

It is understood that the compensation issues are identical in the 2009 Act.

It is the ‘consequence of carrying out any flood prevention operations’ that is significant. So although the order came into effect in 2009 and the development occurred after this date, compensation became applicable as the flood prevention operations occurred after the development.

This case study demonstrates that, following the making of a Scheme under the 2009 Act, the local

authority should manage developments that may occur in proximity to the Scheme.

Section 83(1) defines damage as the depreciation of the value of a person's interest in land or the disturbance of a person's enjoyment of land. See Appendix E - 'Interest in Land' and 'Land affected' for the extent to which a person's interest in land may be considered.

83 Compensation: supplementary

(1) In section 82, a person sustains damage if—
(a) the value of the person's interest in land has been depreciated, or
(b) the person has been disturbed in the person's enjoyment of land.

Compensation may be payable to businesses that are affected by the construction works. See Appendix F – Example of VOA correspondence compensation.



Flooding on the River South Esk and River Street, Brechin

83 Compensation: supplementary

(2) SEPA or, as the case may be, a local authority must pay compensation under section 82 to a person only if—
(a) the damage is not attributable to an act or omission of the person,
(b) the act or omission causing the damage would have been actionable at the person's instance if it had been done or omitted otherwise than in exercise of statutory powers,
(c) the person gives notice to SEPA or, as the case may be, the local authority of the person's claim stating the grounds of the claim and the amount claimed, and
(d) the notice is given no later than the earlier of—
(i) 2 years after the depreciation first becomes apparent or, as the case may be, the first occurrence of the disturbance, and
(ii) 10 years from the completion of the scheme operations, maintenance, exercise of a right of entry or, as the case may be, exercise of another function mentioned in section 82.

Subsection (2) places certain limits on the right to compensation and requires notice of any claim to be given to the local authority within the specified periods. It should be read with subsection (3).

83 Compensation: supplementary

(3) Subsection (2)(b) does not apply where the damage has been sustained in consequence of circumstances falling within section 82(2)(e).

Subsection (4) provides that any disputes over compensation under section 82 are to be determined by the Lands Tribunal for Scotland.

83 Compensation: supplementary

(4) Any question of disputed compensation under section 82 is to be determined by the Lands Tribunal for Scotland.

1.18.4 Acquisition of land

The Act gives local authorities significant and wide ranging powers to put in place flood protection schemes, however there may be times when the most appropriate option is to purchase a particular section of land or property, for example when constructing an embankment on agricultural land. Local authorities need to consider where ownership is best placed to be. This may require a whole life examination and consideration of factors such as future maintenance, access needs, asset management strategies and costs.

66 Acquisition of land

(1) A local authority may—
 (a) by agreement, acquire land which it requires for the exercise of its functions under this Part,
 (b) with the authorisation of the Scottish Ministers, compulsorily acquire land (other than Crown land within the meaning of section 91(7)(a)) which it requires for the purpose of carrying out scheme operations.
 (2) The Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 (c.42) applies in relation to an acquisition under subsection (1)(b) as if that provision were contained in an Act of Parliament in force immediately before the commencement of that Act.

Section 66 enables local authorities to acquire land which they require to exercise functions under Part 4 by agreement. It also empowers local authorities, with the authorisation of the Scottish Ministers, to acquire land

by compulsory purchase in connection with operations under a flood protection scheme. Subsection (2) applies the procedure contained in the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 to any compulsory purchase by a local authority in connection with a scheme.

Crown land as defined in section 91(7) is excluded from the power of compulsory acquisition.

1.18.5 Abandonment, retreat and long term management

Historically, local authorities have not normally acquired land as part of flood protection activities, but have compensated affected parties. For some work considered to be of strategic importance and likely to be by exception, an authority should consider whether acquisition of the land by agreement, or compulsorily, would more appropriately serve the public interest than acting through a combination of a statutory scheme and land management agreements.

For example abandonment of high risk properties, managed retreat from the sea or constructing or altering a reservoir for flood storage.

CASE STUDY

The Brechin Flood Prevention Scheme 2010 was confirmed under the 1961 Act, however, the consideration of acquiring land are applicable to 2009 Act schemes.

Several parcels of land were acquired through agreement with compensation only paid to other affected landowners, where acquisition was not appropriate.

The rear sections of a series of gardens are to be cut off by a retaining wall to a flood embankment. The wall reduces the overall land take but forms

part of the permanent scheme works, so it was deemed appropriate to take ownership of the land beneath the wall and flood embankment.



Other industrial use land was purchased as the land as the previous usage would be sterilised and the land acquisition cost is the equivalent to the compensation payment. Whilst the expansion of the council's land interest is not a desired outcome and the ability to maintain the flood scheme would be perfectly possible through the relevant Act, the option to acquire land resulted in a smoother agreement with the affected parties, which should not be underestimated.



1.19 General

1.19.1 Registers of Flood Protection / Prevention Schemes

Sections 62 and 63 have not yet come into effect. Further guidance will be provided at an appropriate juncture,

i.e. once regulations under section 64 are in place.

1.19.2 Damage to certain flood protection work

Local authorities should have in place a programme of operation and maintenance of flood protection schemes and works, as any damage may result in failure during a flood event.

69 Damage to certain flood protection work

(1) Any person who intentionally or recklessly damages any—
(a) barrier, embankment or other work for defence against flooding constructed or otherwise created by a local authority—
(i) in exercise of any of its functions under this Part, or
(ii) in accordance with a flood prevention scheme confirmed under section 4 of the 1961 Act, or
(b) apparatus ancillary to such work, commits an offence.

It is a criminal offence, under Section 69(1) of the Act, for any person to intentionally or recklessly damage any work for flood defence created by a local authority under this Part, or any ancillary apparatus.

This includes owners and lawful occupiers of the land on which the work is located, but excludes a person carrying out flood protection work. Flood protection schemes under the Act and any flood prevention scheme works carried out under the 1961 Act are also covered by this subsection.

69 Damage to certain flood protection work

(3) It is a defence to a charge in proceedings for an offence under subsection (1) that the person did not know and had no reasonable means of knowing that the works or apparatus were for defence against flooding.

Subsection (3) provides that, where a person did not know and had no reasonable means of knowing that the works or apparatus were for defence against flooding, this is a defence to a charge in any proceedings under subsection (1). Local authorities should raise awareness of the presence of flood protection works through signage and in correspondence relating to scheme construction to reduce the risk of people damaging works without realising the consequences of their actions.

A person who commits an offence under Section 69(1) is liable on summary conviction to imprisonment (of up to 3-6 months) or a fine, as detailed in sub-section (4).

1.19.3 Recovery of expenses

Section 67 enables a local authority to recover any expense incurred by it in repairing or reinstating flood protection work it has put in place, including any flood prevention scheme carried out under the 1961 Act, from the owner or occupier of the land, where that person's actions have caused the damage.

Recovering expenses can quite often be costly in their own right. However there may be circumstances where it is beneficial for the local authority to pursue cost recovery, particularly in seeking other parties to repair damage they have caused by their actions. Local authorities should consider the

risks before proceeding to recover expenses.

Inaction is not an action. Inaction, such as not clearing vegetation or sediment, or repairing banks and defences, is not an 'action'. Expenses in undertaking such works of clearance and repair by the local authority would need to be borne by the local authority. Actions would include depositing vegetation or debris in a body of water that might cause or contribute to a blockage and increased flood risk.

1.19.4 Duty to carry out clearance and repair works

59 Duty to carry out clearance and repair works

A local authority must carry out the works described in a schedule prepared by it under section 18 if it considers carrying out the works—
(a) will contribute to the implementation of current measures described in any relevant local flood risk management plan, or
(b) will not affect the implementation of the measures mentioned in paragraph (a).

Section 59 imposes a duty on local authorities to undertake the clearance and repair works described in the schedule prepared under section 18 of the Act, as long as the works contribute to the implementation of measures described in the relevant LFRMP or do not affect the implementation of those measures. The Scottish Government is to publish separate guidance on clearance and repair.

2. Guidance on taking forward flood protection schemes

2.1 Taking forward a flood protection scheme

In the past, schemes have not always been specified in a clear and unambiguous manner. To overcome this difficulty, the local authority should follow the Model Outline Scheme provided in Appendix A to ensure that the statutory requirements are met.

It is further advised that sound risk management principles are applied in taking forward a flood protection scheme, for which separate guidance should be sought.



2.2 General

Any scheme proposed before June 2016 must state that it will not affect the implementation of any relevant LFRMP. However, it is open to a local authority to expand this statement to

reflect its current flood risk management strategy if available.

2.2 Flood protection schemes - checklist

Things local authorities should check have been completed before proceeding with a scheme:-

Local Flood Risk Management Plan

- a scheme must state how the measures included in it will contribute to the implementation of any relevant local flood risk management plan and, if they will not contribute, demonstrate how this will not affect delivery of such a plan (for example, because there is no such plan or because it will be possible to carry out the scheme as well as the measures contained in the plan).

Local Authority Commitment – The project should be identified as a commitment in the local authority's own programme of work or financial plan. The whole life cost of the project including maintenance and insurance should be considered. The project should conform with the local authority procurement rules and others, e.g. EU. The arrangements for governance, including the need for council committee approvals and the use of officer delegated powers should be considered.

Governance

It is important that local authorities establish governance arrangements for considering and deciding upon Flood Protection Scheme submissions. No guidance is given in the Act as to how this is done, nor is there any time limit specified for determining FPS applications. Some local authorities may feel that the matter can be dealt with through their planning committees while others may prefer that it be

considered by a higher level policy committee, special committee or even by full council. Whichever route is chosen, every effort should be made to minimise the potential for a conflict of interest and to ensure that the process is as independent, fair and transparent as possible.

In Aberdeenshire Council the determining body is the Infrastructure Services Committee and the approach adopted is similar to that used for the promotion of traffic orders. The Scheme is developed under the auspices of the Flood Team but the notification process and receipt/collation of objections is by the Legal and Governance Service. Thereafter, advice on objections including possible modifications, may be sought from the Flood Team, but the report for committee on the proposals and accompanying representations is prepared by the Legal Team. Any subsequent referral to Scottish Ministers, the administration of a hearing and notification of decisions would also be arranged by the Legal and Governance Service.

The time required for assessing and determining an application is likely to be significantly influenced by the level of objection, time for discussion of potential modifications, and the complexity of the Scheme. However, for relatively straightforward schemes, the time from receipt of objections to consideration by committee should ideally not exceed 3 months.

Options Appraisal - Before proceeding with a scheme it is expected that local authorities have considered all the available options and taken into account both the costs and benefits of the proposed scheme through a robust and planned option appraisal process.

Separate guidance on the development of a preferred scheme has been provided under [The Flood Risk Management \(Scotland\) Act 2009 Flood Protection Schemes – Guidance for local authorities, Chapter 5, Project Appraisal: assessment of economic, environmental and social impacts \(The Scottish Government, 2012\).](#)

Fact gathering and checking exercise – local authorities should identify relevant stakeholders, identify any designations or legal obligations associated with proposed scheme, identify any other constraints and risks, historic events and carry out soil surveys etc. and gather other key data, and give consideration to the findings.

Environmental Impact Assessment (EIA) – As any flood protection work or scheme is likely to be taken forward to achieve a positive environmental effect in the form of reduced flood risk, it is likely that an EIA will be required. Local authorities should consider whether the work has links to other projects, because if so an expanded EIA may be required. More details on EIAs are set out later in this document, see section 1.12, and in legislation.

Consider the need for a Compulsory Purchase Order (CPO) – In certain circumstances, as an alternative to taking forward a formal scheme, local authorities may wish to use a CPO to support flood protection work, e.g. buying a property.

Build relationships with key stakeholders – local authorities should set up a stakeholder group, including statutory bodies and other key organisations and groups to help keep them fully informed on scheme proposals and get their input. Engagement with people who might be affected in both a negative or positive

way early on, to avoid conflict, access issues and drawn out legal proceedings should also be undertaken.

Exhibition - Local authorities should hold exhibitions for the public on proposals at key stages – see Appendix I for example.

Once local authorities consider they have undertaken sufficient preparatory work, they can then proceed with the development of a flood protection scheme.



Selkirk FPS – Riverbank construction work

2.3 Land

The scheme must show all land affected by the operations and, if applicable, all land on which entry will be required (whether temporarily or otherwise) for the purposes of carrying out the operations. The former includes the latter together with any other land which may be designed as a flood relief area or where the operations affect the flow of water so as to increase the extent or depth of flooding. The land should be clearly defined on the plans by distinctive types of line or marking outlining the area, or areas, concerned. The line or marking should be indicated by legend so that it is not confused with other features on the plans.

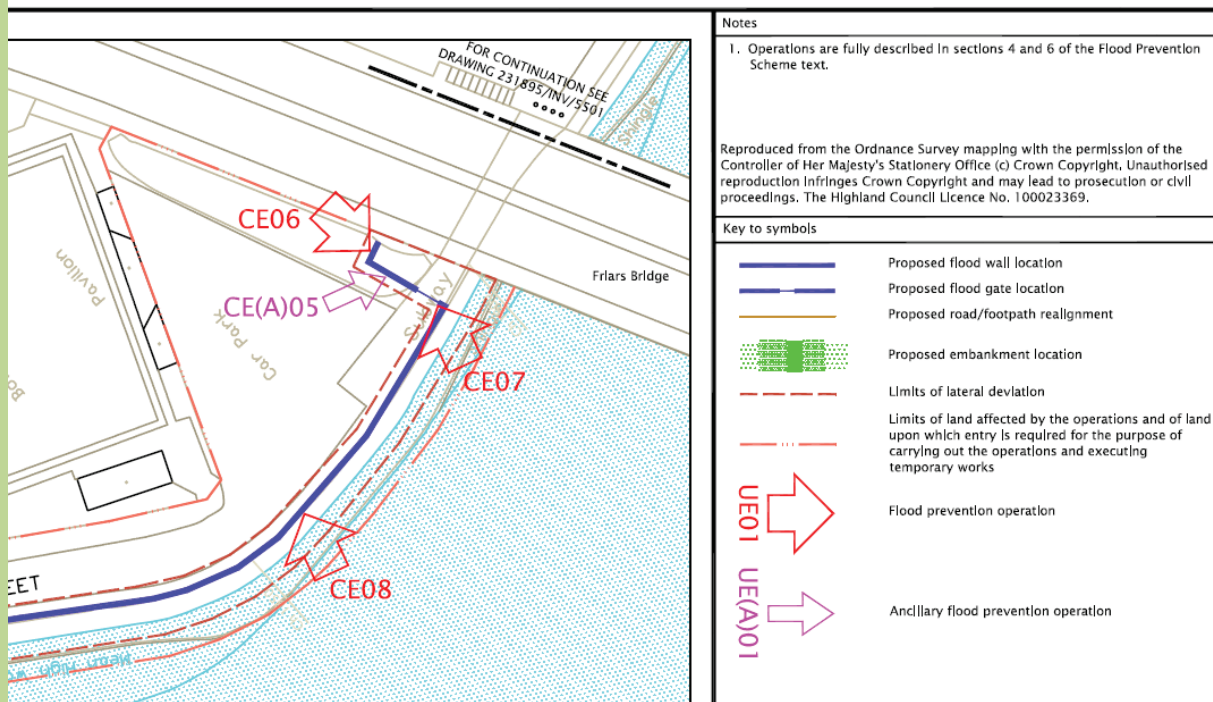
It would be prudent for any access route over private roads or land to be included in the land on which entry is required, e.g. to avoid creation of “ransom strips”. Normally, operations are permanent works but the extent of the land required for entry should take into account any temporary works required to carry them out.

Generally, the land which will be affected by the operations will coincide with the land upon which entry is required for the purpose of carrying out the operations. In most cases therefore a common limit can be used and the legend can read “Limits of land affected by the operations”, and of “land upon which entry is required for the purpose of carrying out the operations”.

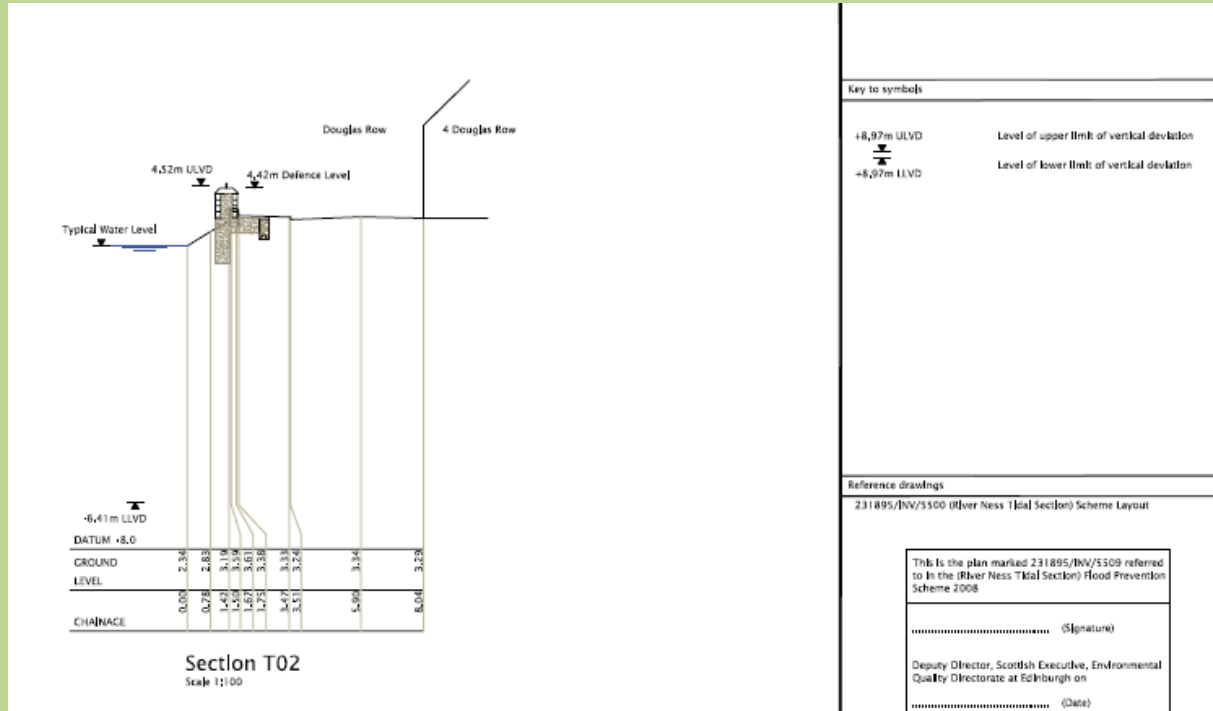
Example of Line Marking Affected Land

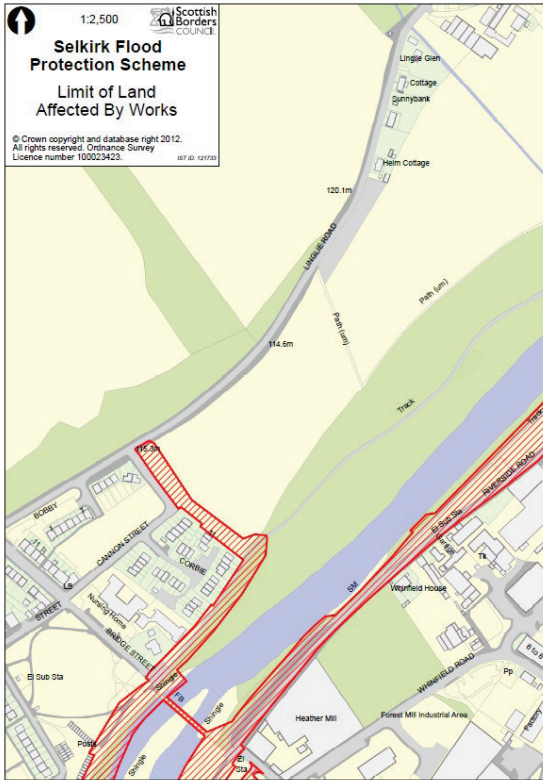
The River Ness Flood Alleviation Scheme was promoted under the Flood Protection (Scotland) Act 1961 and the plans include both horizontal and vertical limits of deviation, and also included limits of land affected by the operations.

Horizontal Limits of deviation are shown on the plans thus:-



Vertical Limits of Deviation shown thus:-





Selkirk FPS – Limit of Land Affected

It should be noted that the local authority's rights of entry on the land shown as being required for the purposes of carrying out the scheme expire once the operations, including reinstatement of the land disturbed, have been carried out. Entry onto land for the purposes of maintenance of the works can be gained by notice under sections 79(2)(g) and 81(3) (see Section 1.18.2) or otherwise by agreement with the owner of the land concerned. It would be prudent to establish future access arrangement for maintenance in advance and ideally considered as part of the scheme operations, i.e. scheme should be designed with access in mind.

2.4 Description of the operations

It is imperative that flexibility is built into the description of the operations and land affected, so as to allow for changes as the scheme is progressed. See section 1.11 for further details.

All locations, place names, features and works referred to in the text of the scheme must be shown on the plans. The use of trade names to identify properties should be avoided as businesses may cease trading or relocate to other premises and this could lead later to uncertainty about the terms of the scheme. Labelling each operation in the text of the Scheme assists with referencing the operations on the plans.

Sufficient cross-sections of the operations should be shown to illustrate the scheme.

A broad description of the operation should contain sufficient information to allow a layperson to understand the scale and nature of the proposed works and determine the impacts the operation would have on his/her interests.

Reinstatement of any land disturbed is considered an essential part of carrying out an operation and does not need to be included in the operation description. However, it would be prudent to include a note to that effect in the legend in the plans.

Where there are operations which could not be reasonably inferred by a layperson as an essential part of an operation, for example a sheet piled cut-off or environmental enhancement or mitigation measure, these should be included in the descriptions of operations as appropriate.

There is no statutory requirement to include the diversion of any apparatus of a statutory undertaker in a scheme. This work is carried out by or on behalf of the statutory undertaker under its own statutory powers, not the local authority under the Act. It may be prudent to include a note to that effect in the legend of the plans.

The operations should be depicted on the relevant plans and labelled where appropriate or shown by individual colour or hatching and referred to by legend on these plans as "Operations". This practice complies with the requirement of the Act and allows the operations to be depicted more clearly on any cross sections.

It should be noted that "plans" may include sections etc. and the word "specifications" should not be interpreted to mean exclusively documents such as technical specifications or schedules of quantities. Sufficient information can normally be shown on the scheme plans and in the scheme documents. Only sufficient information as is required for the purpose of the scheme need be shown.

The maps and plans must be at an appropriate scale to enable interested persons to identify their land and whether their land will be affected by the operations.

2.5 Variation or Revocation of an Improvement Order (where applicable)

Where relevant, the scheme must describe any drainage works or protective works in an improvement order under the [Land Drainage \(Scotland\) Act 1958](#) which would be materially altered by the operations and describe the proposals to remove the obligations on the authorised persons for maintenance of these works – see section 1.16 of this guidance. The scheme may otherwise include proposals to vary or revoke an improvement order where any operations are on land affected by an improvement order.

2.6 Cost

The estimated cost of carrying out the operations is to be contained within the text of the scheme. Only a statement of the cost is required. Detailed estimates of cost need not be included. However, it would be prudent for appropriate records to be kept of the methods used and the build-up of such a cost.

2.7 Plans

Plans mentioned in the scheme must have a signed statement on the face of the plan that "this is the plan marked *** referred to in the *named* scheme".

2.8 Signatures

It is not a requirement of the 2009 Act for local authorities to have the scheme signed or even sealed, as was the case for 1961 Act schemes, however, they may wish to continue this practice. In any case the local authority should retain a copy as a "document of record" on promoting the scheme and at subsequent stages under paragraphs 4, 5, 7 and 9 of schedule 2.

2.9 The statutory process

An overview of the statutory process for confirmation of a scheme is shown in 4.1 Appendix A – Flow chart of legal process of Flood Protection Scheme. The process begins with notification and publication of the scheme.



South West Inverness Flood Relief Channel under construction

2.10 Notification of flood protection schemes

Notification

1(1) The local authority must give notice of a proposed flood protection scheme—

(a) in at least one newspaper circulating in the local authority's area (which must, if practicable, be a local newspaper),

(b) where any of the proposed operations are to take place in another local authority's area, in at least one newspaper circulating in that area (which must, if practicable, be a local newspaper),

(c) in the Edinburgh Gazette,

The requirements for newspaper advertisements of a proposed flood protection scheme by a local authority are set out in paragraphs 1(1)(a) to (c) to schedule 2 of the Act.

Notification

1(1) The local authority must give notice of a proposed flood protection scheme—

(d) to every person known to the local authority—

(i) to have an interest in any land on which the proposed operations are to be carried out, or

(ii) whose interest in any other land may be affected by any of the proposed operations or by any alteration in the flow of water caused by any of the proposed operations,

(e) where any of the proposed operations are to be carried out on land affected by an improvement order, to each of the authorised persons,

(f) to the following persons—

(i) SEPA,

(ii) Scottish Natural Heritage,

(iii) any local authority in whose area any of the proposed operations are to be carried out,

(iv) where any of the proposed operations are to be carried out in a National Park, the National Park authority for that National Park,

(v) any responsible authority whose flood risk related functions may be affected by any of the operations or by any alteration in the flow of water caused by any of the operations (insofar as the authority has not been notified under another provision of this sub-paragraph),

(vi) any statutory undertaker whose statutory undertaking may be affected by any of the operations or by any alteration in the flow of water caused by any of the operations,

(vii) any other person specified by order by the Scottish Ministers,

Sub-paragraphs (1)(d) to (f) require a local authority to send direct notification of a proposed scheme to those with an interest in land affected,

the authorised persons in respect of any land covered by an improvement order under the Land Drainage (Scotland) Act 1958 and a number of specified persons sub-paragraph (1)(f)(vii) enables the Scottish Ministers to specify additional consultees by order. See Appendix E - 'Interest in Land' and 'Land affected' for the extent to which a person's 'interest in land' or 'land affected' may be considered.

Detailed provision is also made in Regulation 15 of the 2010 Regulations about the service of notices

(2) The local authority must also display a notice of the proposed flood protection scheme in a prominent position in the locality in which the operations are to be carried out.

Sub-paragraph (2) requires the local authority to display notice of the proposed scheme in a prominent position in the locality.

(3) A notice given under sub-paragraph (1) or (2) must—
(a) contain a general description of the effect of the proposed scheme including—
(i) a summary of the operations to be carried out, and
(ii) a summary of the benefits which the local authority considers are likely to be derived from carrying out the operations,
(b) state where and at what times the scheme documents can be inspected in pursuance of paragraph 2, and
(c) state that objections can be made about the proposed scheme to the local authority before the expiry of the period of 28 days beginning with the date notice is first published under sub-paragraph (1)(a).

Sub-paragraph (3) sets out the required contents of each notice of the

proposed scheme, whether published in a newspaper, sent directly to a person entitled to individual notification or displayed in the locality.

(4) Notices under sub-paragraph (1)(d) and (f) and sub-paragraph (2) must be given or, as the case may be, displayed no later than the date that notice is first published under subparagraph (1)(a).

Sub-paragraph (4) requires notice to be given to those with an interest in land and the specified consultees, and to be displayed in the locality, no later than the date that notice is first published in local newspapers.

See Appendix C for examples of notices

Where an environmental statement has been prepared relating to a proposed flood protection scheme, regulation 7 of the 2010 Regulations requires the above notice to include statements:

- that the scheme is likely to have a significant effect on the environment;
- that the scheme documents are accompanied by an environmental statement which is available for public inspection;
- describing the circumstances in which a public inquiry may be called; and
- setting out the nature of possible decisions that may be taken in relation to the scheme.

It also requires a copy of the scheme documents and the environmental statement to be supplied to the consultative bodies (as defined in

regulation 2) no later than the date a notice is first published.

2.11 Public inspection of scheme proposal

Paragraph 2 of schedule 2 to the Act makes provision about the availability for public inspection of documents relating to the proposed scheme, in both the area of the local authority taking forward the scheme and that of any other local authority where work would be carried out. Local authorities should advertise proposed schemes as widely as practicable. They should consider new ways of advertising such as social media in addition to more traditional and statutory routes to ensure they reach target audiences.

2.12 Publishing the Scheme

The statutory process begins when the authority first gives notice of a proposed flood protection scheme in a newspaper under the provisions of schedule 2 to the Act. The 2010 Regulations contain further provisions.

The notice must be published in at least one newspaper circulating in its area and, where any of the operations are to take place in another local authority's area, in at least one newspaper circulating in that area (The newspaper must, if practicable, be a local newspaper); and in the Edinburgh Gazette.

No later than the date of first publication in a newspaper, the local authority must also give notice to the persons listed in paragraphs 1(1)(d), (e) and (f) of Schedule 2 and display it in a prominent position in the locality, or localities, where the operations are to be carried out.

Where an environmental statement relating to a proposed scheme has

been prepared, the local authority must also supply a copy of the scheme documents and the environmental statement to SEPA, SNH, Scottish Water, any relevant planning authority and any other body designated by statutory provision as having environmental responsibilities which the local authority considers has an interest in the environmental effects of the scheme. In all cases, from the first date of publication until the date a final decision is made under paragraphs 4(1) or 9(1) or until notified by the Scottish Ministers of their decision under paragraph 7(4) of schedule 2 to the Act, the local authority must make a copy of the scheme documents, and any environmental statement, available for public inspection in a place in the authority's area and, where operations are proposed to be carried out in another local authority's area, in a place in the other authority's area.

The Notice must contain:

- a general description of the effect of the proposed scheme including:
 - a summary of the operations to be carried out; and
 - a summary of the benefits, considered likely to be derived from carrying it out;
- state where and at what times the scheme documents, and the environmental statement can be inspected; and
- state that **objections** can be made about the proposed scheme to the local authority, by writing to a named person at a specified address or by sending an e-mail to a specified electronic mailbox, before the expiry of the period of 28 days beginning with the date notice

is first published in a local newspaper;

and, where an environmental statement has been prepared:

- a statement that the scheme is likely to have a significant effect on the environment;
- a statement that the scheme documents are accompanied by an environmental statement which is available for public inspection;
- a description of the circumstances under the Act in which the Scottish Ministers may cause a public inquiry into the application; and
- a statement setting out the nature of possible decisions that may be taken in relation to the scheme.

It is in everyone's interest to ensure that those who wish to make an objection do so in a way that best allows such objections to be considered appropriately. It would therefore assist the handling of objections received, if the Notice were also to include information about the requirements of paragraph 3 of schedule 2 to the Act and regulation 12 of the 2010 Regulations about the information to be provided in an objection for it to be considered 'valid', and as a result for an objector to be considered a 'relevant objector'.

2.13 Objections

Paragraph 3 of schedule 2 entitles any person to object to a proposed flood protection scheme.

Objections

3(1) Any person may object to a proposed flood protection scheme.
(2) An objection is valid if it—
(a) is made in writing,
(b) sets out the name and address of the objector, and
(c) is made before the expiry of the period of 28 days beginning with the date notice of the scheme is first published under paragraph 1(1)(a).
(3) An objection which is made by electronic means is to be treated as being in writing if it is received in a form which is legible and capable of being used for subsequent reference.
(4) In this schedule, a "late objection" is an objection that would be a valid objection but for the fact that it was made after the end of the period specified in sub-paragraph (2)(c).

Valid objections must be made in writing (including by electronic means so long as legible and useable) and include the name and address of the objector. Regulation 12 of the 2010 Regulations also requires that any objection to a proposed flood protection scheme be accompanied by a statement of the reasons for the objection. This is to ensure that the local authority has sufficient information about the substance of any objections and can properly identify those objectors who have certain rights under the Act.

Further, under regulation 12 of the 2010 Regulations, any objection must be accompanied by a statement of reasons for the objection and, where the objector has an interest in land on which the proposed operations are to be carried out, or which may be affected by any of the proposed operations, or by any alteration in the flow of water caused by any of the operations, that person's objection must include:

- details of the land in which the objector has an interest;
- disclosure of the nature of the objector’s interest in the land ; and
- details of which aspects of the proposed operations affect the objector.

Objections must be made to the local authority within 28 days from the date the notice of the proposed scheme is published in local newspapers. Sub-paragraph (4) of schedule 2 defines a “late objection” for the purposes of schedule 2. However, under paragraph 4(2) a late objection must be treated as being valid so long as the local authority is satisfied that it was reasonable for the objector to make the objection after the specified deadline and before the preliminary decision is made.

The local authority should seek legal advice on the validity of any objection and how it should be treated if any of the prescribed information has not been provided, or not been provided timeously. It should also be satisfied that it has sufficient information to determine which objectors are persons to whom paragraph 5(6) of schedule 2 of the Act applies. Appendix E - ‘Interest in Land’ and ‘Land affected’ of this guidance provides further clarification on relevant objectors.

A late objection is an objection that would be valid but for the fact that it was made after the expiry of the period allowed. The local authority must treat ‘late objections’ as valid if they are received before a decision is made, it was reasonable for the objector to make the objection after the deadline for doing so, e.g. extended stay out of the country, and the late objection meets the requirements of paragraph 3 of schedule 2 to the Act and regulation

12 of the 2010 Regulations. The local authority should seek legal advice in such cases.

2.14 Scheme where no valid objections received

Decision where no valid objections received

4(1) Where, in relation to a proposed flood protection scheme, the local authority receives no valid objections the local authority must, after the expiry of the period referred to in paragraph 3(2)(c), either—
 (a) confirm the proposed scheme, or
 (b) reject the proposed scheme.

If no valid objections are made the local authority must, after the expiry of the objection period, proceed to either:

- confirm the proposed scheme; or
- reject the proposed scheme.

2.15 Schemes attracting objections

Preliminary decision following objections

5 (1) Where, in relation to a proposed flood protection scheme, the local authority receives a valid objection, it must make a preliminary decision to—

- (a) confirm the proposed scheme without modification,
- (b) confirm the proposed scheme with modifications, or
- (c) reject the proposed scheme.

(2) Before making the decision under sub-paragraph (1), the local authority—

- (a) must consider—
 - (i) any valid objections (unless withdrawn), and
 - (ii) any late objection if the authority is satisfied that it was reasonable for the objector to make the objection after the deadline for doing so, and
- (b) may also consider any other matters it considers appropriate.

(3) The local authority must give notice of its decision under sub-paragraph (1) to every person who made an objection which it considered.

(4) A person who made such an objection is referred to in this schedule as a “relevant objector”.

Local authorities should work with objectors to try and resolve any issues or concerns that they have.

The local authority must firstly determine whether an objection is considered to be ‘valid’. The local authority must then consider all valid objections.

The local authority should notify all persons who submitted an objection, which is not considered valid with the reasons for this. As the period of notice for objections will have expired by this time, there is no immediate

recourse for such persons to resubmit an objection.

It may be that discussions with each objector will help to resolve concerns. It may however be that sufficient agreement leading to withdrawal of an objection cannot be reached. However to save both parties time and expense at any hearing or public local inquiry the parties should seek to identify issues on which they agree so that later proceedings, whether a hearing or public local inquiry, can focus on the issues in dispute.

It may be that some minor change or a more substantial modification of the proposed scheme may satisfy an objector’s concern leading to withdrawal of their objection. The authority should carefully consider whether such a change may be deemed to be a modification that might raise another person’s concern.

CASE STUDY

Dealing with Objections

A local authority promoted a Flood Prevention Order under the 1961 Act. A number of objections were received and negotiations were entered into with the aim of making modifications to allay the concerns and enable the removal of the objection, which was successful in all but one objection. The final objection involved an objector who wished substantial mitigation measures to be implemented by the Council to enable him to remove his objection. To embody the agreements made, a legal 'minute of agreement' an undertaking by the Council in full and final settlement was entered into by both parties. Following completion of the scheme the legality of the minute of agreement was questioned, and it was established that you cannot contract out of a statute, and as such the compensation entitlement was that contained in the Act rather than that of the minute of agreement.

This case study demonstrates that when objections are received very careful consideration should be given about the lengths to which you are prepared to go to remove the objection. With hindsight in this case the objection should have remained and The Council should have progressed the Order with such an objection through the normal Order processes.

2.16 Preliminary decision following objections

If, following discussions, all objections are withdrawn, preferably received in writing but otherwise confirmed in writing by local authority then the authority can proceed to a preliminary

decision under paragraph 5(1) and a final decision under paragraph 9(1) to:

- confirm the proposed scheme without modification; or
- confirm the proposed scheme with modification(s); or
- to reject the proposed scheme.

Such decisions may be made simultaneously.

There will however be circumstances that arise, despite a local authority's best efforts, where agreement cannot be reached. In such instances, the local authority must consider all valid objections and any other matters it considers appropriate before making a preliminary decision to:

- confirm the proposed scheme without modification; or
- confirm the proposed scheme with modification(s); or
- to reject the proposed scheme.

In arriving at its decision, paragraph 5(2) sets out that the local authority must consider any valid objections (unless withdrawn) and consider any late objections if the authority is satisfied that it was reasonable for the respondent to make the objection after the deadline.

From this point onwards, a person who has made an objection that is considered 'valid' is a 'relevant objector'.

Once it has made a preliminary decision, the local authority must give notice of its preliminary decision to every person whose objection was considered 'valid'. Where that decision was to confirm with modification, under

regulation 13 of the 2010 Regulations, it must also offer every objector the opportunity to withdraw that objection in writing. Both the 2010 Regulations and the Act are silent about the period which should be given to objectors to consider their position, but it is suggested that this should not be less than 28 days and in any event the period should be declared to the objectors.

In addition, the local authority may consider any other matters it considers appropriate. Where such matters may have been identified in an objection, which is not considered to be 'valid', the local authority may still wish to consider the matters identified. There is a risk in this instance that a 'second-class' of objector is created, which should not be allowed. From this point onwards, objections must be both 'valid' and be from 'relevant objectors'.

2.17 Notice of preliminary decision to the Scottish Ministers

The local authority must, under paragraph 5(5) of schedule 2 to the Act, give the Scottish Ministers notice of its decision, along with other material including the scheme documents and other supporting information described in this paragraph.

Paragraph 5(6) of schedule 2 to the Act provides further detail on the persons deemed to be relevant objectors of which the Scottish Ministers notice require notice to be given. These are those referred to in paragraph 1(1)(e) or (f) of schedule 2 of the Act, and any person:

- (a) having any interest in any land on which the proposed operations are to be carried out, or
- (b) whose interest in any other land may be affected by any of the

operations or by any alteration in the flow of water caused by any of the operations.

However, for completeness and simplicity, and to ensure the process runs smoothly, the local authority should include all details of the objections received and any other material considered in making a preliminary decision.

For further consideration of issues see Appendix E – 'Interest in Land' and 'Land affected'.

2.18 Withdrawal of objections following a preliminary decision to confirm a scheme with modification

Where, under regulation 13(2) of the 2010 Regulations all objections are withdrawn following confirmation of a scheme with modifications, the duty of the local authority to give the Scottish Ministers notice of its decision under paragraph 5(5) of schedule 2 to the Act does not apply.

All withdrawals of objections should be made in writing and unconditional, or at the least should be confirmed in writing. Any withdrawal, especially those subject to conditions, should be referred to the local authority's legal advisors. A withdrawal made by electronic means is to be treated as being in writing if it is received in a form which is legible and capable of being used for subsequent reference.

2.19 Decisions in relation to flood protection schemes with environmental statements

Where the preliminary decision is to modify a scheme which has a significant effect on the environment, it must also follow the procedure under regulation 8 of the 2010 Regulations to give notice of the modified scheme in

the same manner as notice was given of the scheme as originally proposed in accordance with paragraphs 1(1), 2 and 4 of schedule 2 to the Act. The contents of the notice must comply with regulation 8(3). The local authority must make copies of the scheme documents and environmental statement available for public inspection and allow a period of 28 days from the date of publication of the modified scheme for making objections.

Any objections to the modified scheme are considered in the same manner as objections to the scheme as originally proposed.

Where there are no objections to be considered from objectors to which paragraph 5(6) of schedule 2 to the Act applies, there is no need to notify the Scottish Ministers of the preliminary decision under paragraph 5(5) of that schedule.

Where that paragraph applies, the local authority must notify the Scottish Ministers of its preliminary decision in writing to the Managing Flood Risk Team in the Scottish Government, together with:

- the scheme documents (and any environmental statement);
- a summary of the objections received by the local authority;
- copies of these objections; and
- any other material considered by the local authority.

Such documents should be sent in electronic form.

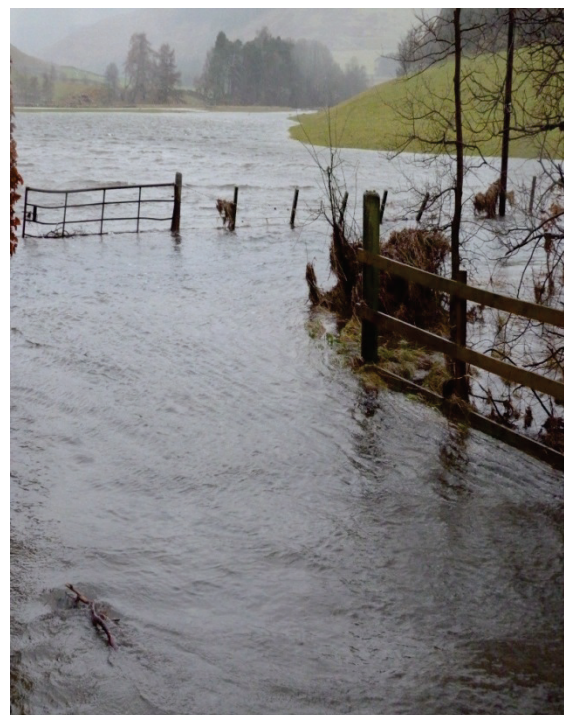
Regulation 10 of the 2010 Regulations describes how decisions in relation to flood protection schemes with

environmental statements are to be made.

The local authority (or Scottish Ministers as appropriate) must take into account the environmental information, see below, and state in its decision that they have done so.

Environmental information is:
(a) any environmental statement or revised or updated environmental statement prepared in connection with the scheme;
(b) any representation made by any of the persons referred to in paragraph 1(1)(f) of schedule 2 to the Act;
(c) any representation made by any of the consultative bodies; and
(d) any valid objection to the scheme (unless withdrawn).

This applies to the confirmation of the scheme and the granting of deemed planning permission powers under the Act.



Flooding in the Borders January 2014

2.20 Ministerial call-in

Where the Scottish Ministers receive notification of a proposed scheme under paragraph 5(5) of schedule 2, paragraph 6(1) requires them to 'call in' the proposed scheme where any relevant objector is a local authority or National Park Authority. If the objection is submitted by any other relevant objector, the Scottish Ministers can choose whether or not to call the scheme in.

In these circumstances, the Scottish Ministers must within 28 days of receipt of a notice advise the local authority whether they will:

- consider the proposed scheme; or
- not consider the proposed scheme.

In reaching this decision on whether to call in, the Scottish Ministers must have regard to the factors listed in paragraph 6(3):

- the extent of the proposed operations;
- the likely reduction in flood risk that will result from the completion of those operations;
- the nature of the objections made;
- the likely effect on the objectors of the scheme being confirmed; and
- the extent to which the objections appear to raise issues of disputed fact.

Sub-paragraphs (4) and (5) allow the Scottish Ministers to extend the time in which they must decide whether or not to call in a scheme by up to 28 days, but they must make any decision to extend within the original 28 day period and must notify the local

authority of the extension as soon as practicable.

2.21 Ministerial consideration of proposed Scheme

Paragraph 7 of schedule 2 to the Act applies where the proposed scheme has been called in by the Scottish Ministers and requires them to hold a public local inquiry, unless all objections made by relevant objectors are withdrawn.

Paragraph 7(3) of schedule to the Act applies the provisions of the Local Government (Scotland) Act 1973 concerning local inquiries to be held under paragraph 7(2). The Scottish Ministers must consider the material received by them under paragraph 5(5) as well as the report of the person who held the public local inquiry, if one is held, before either confirming the proposed scheme either with or without modifications, or rejecting the scheme.

The Scottish Ministers may not confirm a scheme with modifications unless they have notified relevant objectors and anyone else they consider to be affected of the proposed modifications at least 28 days before confirming the scheme, giving them an opportunity to make objections about the proposed modifications, and considered any objections made as a result. Paragraph 7(6) of schedule 2 requires the Scottish Ministers must notify the local authority of their decision as soon as reasonably possible.

2.22 Public local inquiry

Where a proposed scheme has been notified to the Scottish Ministers under paragraph 5(5) of schedule 2 to the Act and the scheme is to be considered by the Scottish Ministers, a public local inquiry must be held

unless all relevant objections are withdrawn.

The Directorate for Planning & Environmental Appeals (DPEA) will arrange for the appointment of a suitable Reporter and liaise with the local authority and relevant objectors about arrangements for the holding of the inquiry, usually within 24 weeks of the relevant date (refer to *DPEA guidance*).

The Scottish Ministers must consider the Report of any inquiry and the material provided by the local authority with the notification under paragraph 5(5) of schedule 2 before making a final decision under paragraph 7(4) to confirm the scheme with or without modification or to reject the scheme.

Where any modifications are to be considered, they must, at least 28 days before coming to a decision, give notice of the proposed modifications to the relevant objectors and anyone else they consider affected by them, unless such notice has already been given by the local authority under regulation 8, giving them an opportunity to object to the proposed modifications and consider any such objections received. The Scottish Ministers would normally release the Report of an inquiry at this stage.

Once the Scottish Ministers have made their final decision they shall notify the local authority of the decision as soon as reasonably practicable after making it. They will also send copies of their reasons for doing so to the relevant objectors. Having notified their decision and published their reasons for doing so, the Scottish Ministers will have fulfilled their functions under the Act.

2.23 Local authority hearing to consider proposed scheme

Paragraph 8 of schedule 2 to the Act applies where the local authority has made a preliminary decision in relation to a proposed scheme under paragraph 5 and the proposed scheme has not been called in by the Scottish Ministers (either because it did not have to be notified to them under paragraph 5(5) or because they decided not to call it in following such notification). A flow chart of the statutory process where a local authority makes the final decision on a scheme is shown in Appendix A – Flow chart of legal process of Flood Protection Scheme.

In accordance with paragraph 8, the local authority must hold a hearing to consider the proposed scheme if it has notified the Scottish Ministers under paragraph 5(5) but they have decided not to consider the scheme, or may hold a hearing in any other case before making a final decision (see also notes on paragraph 9). Sub-paragraph (3) requires the local authority to invite each objector to the hearing who has made a valid objection (unless withdrawn) or a late objection which the authority intends to consider. Any invitation under sub-paragraph 3 must be given not less than 28 days before the proposed hearing. Notice of the hearing must be published in a local newspaper within the relevant local authority area(s) at least 21 days before the proposed hearing.

It is for the local authority to make the arrangements for the hearing and determine who is to conduct the hearing. Objectors having an interest in land on which scheme operations are to be carried out, or whose interest in other land may be affected by the

operations or alteration in the flow of water caused by the operations, have rights to be given a fair and independent hearing. See Appendix E - 'Interest in Land' and 'Land affected'. Given that the local authority will have already made two decisions: (1) to promote the scheme and (2) a preliminary decision to confirm it with or without modification under paragraph 5, the local authority should consider whether to appoint a person independent of the local authority to hold the hearing and Report to them although this is not a requirement of the Act. The Directorate of Planning & Environmental Appeals (DPEA) can provide the services of a Reporter on request. However, the cost of the Reporter, his expenses and any administrative support for making arrangements for the hearing, would be a matter for the local authority.

Appendix G contains the Code of Practice for Hearings used by DPEA. This code contains the procedure which the objectors, the local authority and, if relevant, other parties should follow where a hearing is to take place whether or not the local authority has appointed a DPEA Reporter. The code is intended to save the parties time and money and to allow the Reporter to lead a structured discussion about the matters at issue. The aim is to give everybody, including interested third parties, a fair hearing and to provide the Reporter with all the information necessary for his Report, but in a more flexible and less formal atmosphere than at a local inquiry. Although the code does not have statutory force, all parties to a hearing are expected to comply with it.

Before coming to a final decision to confirm the scheme with or without modifications or to reject the scheme the local authority must consider:

- the representations made at the hearing and all valid objections;
- the environmental information specified in regulation 10(3) of the 2010 Regulations where this applies, and must state in their decision that they have done so; and
- where any modifications are under consideration, any objections to the proposed modifications.

Where any modifications are to be considered which have not been notified at an earlier stage they should be notified to the relevant objectors and anyone else they consider affected by them not less than 28 days before a final decision is made in accordance with regulation 8 of the 2010 Regulations (where this applies) and paragraph 9(3) of schedule 2 to the Act, giving them an opportunity to object to the proposed modifications and consider any such objections received.

It would be desirable therefore for the local authority to allow at least 28 days between the hearing and the consideration for the final decision.

Once the local authority has made its final decision, it shall give notice of the decision to every person given notice in relation to the proposed scheme under paragraph 1(1)(d) to (f) of schedule 2 to the Act; to any relevant objector; to anyone else who was notified under paragraph 7(5)(a) or 9(3)(a) of that schedule; and where the decision is to confirm the proposed scheme (with or without modifications) in the newspapers as detailed in paragraph 1(1)(a) to (c). See paragraph 2.26 below.

2.24 Final decision following preliminary decision

Paragraph 9 of schedule 2 to the Act requires the local authority to make a final decision in relation to the proposed scheme by either confirming it, with or without modifications, or rejecting it, unless the scheme has been called in by the Scottish Ministers.

Sub-paragraph (2) lists matters which the local authority is to take into account. Sub-paragraph (3) prohibits a local authority from confirming a scheme with modifications unless it has notified the relevant objectors and anyone else considered to be affected by the proposed modifications. This should be done at least 28 days before confirming the scheme, giving the relevant objectors an opportunity to make objections to the proposed modifications. The local authority must have considered any such objections before confirming a scheme.

2.25 Notice of final decision

Paragraph 10 requires that, where a final decision of a local authority or the Scottish Ministers is made on a proposed scheme, the local authority must give notice of the decision to every person given direct notification of the scheme at the outset, every relevant objector (see paragraph 5(3) and 5(4) of schedule 2 to the Act) and anyone else who received notification of a proposed modification to the scheme. Should it be decided to confirm the proposed scheme (with or without modifications) then notice must be given in local newspapers in the relevant local authority areas, and in the Edinburgh Gazette.

2.26 Post-confirmation.

Whether a scheme has been confirmed by the local authority or the Scottish Ministers after a public local inquiry, notice of confirmation of the Scheme must be published by the local authority in the newspapers in which notices were first published by virtue of paragraph 1 of schedule 2 to the Act and, no later than the first date of publication in a newspaper, notice must be given to all parties served notice under paragraph 1(1)(d) to (f) of schedule 2.

A copy of the Report of any hearing or public local inquiry should be provided to all parties who participated and a copy of the reasoned decision provided to all objectors if not already issued. Where the Scottish Ministers have made the decision they will usually release the Report of the public local inquiry and publish their reasons when notifying their decision to the local authority.

The notice must include a statement that any person affected by the confirmed scheme may appeal the decision made by the local authority on the grounds specified in paragraph 12(5) of schedule 2 to the Act by summary application to an appropriate sheriff before the expiry of the period of 6 weeks beginning with the day this notice is published in a newspaper circulating in the local authority's area.

The confirmed scheme becomes operative 6 weeks after the notice of confirmation however, if an appeal is made, the sheriff may suspend the operation of the scheme or of any part of it either generally or insofar as it affects the interest of the appellant, pending determination of the appeal.

On confirmation of the proposed scheme by a local authority, if the

proposed scheme constitutes development under planning legislation, the local authority must request the Scottish Ministers to direct that deemed planning consent to any development described in the scheme is granted by writing to the Planning Decisions Manager, National and Territorial Planning, Planning and Architecture Division of the Scottish Government. The request must be accompanied by the information required by Regulation 14 of the 2010 Regulations preferably in electronic form.

The Scottish Ministers may attach suitable conditions to the planning consent and any draft conditions recommended by the relevant Planning Authority should be included for their consideration. The local authority should seek advice from the relevant Planning Authorities, including National Parks Authorities, in recommending draft conditions.

Where the final decision to confirm a scheme has been taken by the Scottish Ministers, the direction of deemed planning consent, with any conditions attached, will normally be issued by the Scottish Ministers concurrently with the notification to the local authority of that decision.

If the Scottish Ministers have imposed a condition requiring the local authority to submit further details of the scheme for approval by the Planning Authority or by the Scottish Ministers and an environmental statement is prepared in respect of these further details the local authority must follow the procedures set out in regulation 9 of the 2010 Regulations, which provides for a period of 28 days for objections to the further details to be made.

On commencement of a confirmed scheme varying or revoking an

improvement order made under the Land Drainage (Scotland) Act 1958, the local authority must send a notice of the variation or revocation to the Registers of Scotland for it to be registered in the relevant Register.

A copy of the confirmed scheme and plans, together with associated technical reports, should also be sent to SEPA for retention on the Scottish Flood Defence Asset Database.

2.27 Commencement of Scheme

Paragraph 11 of schedule 2 sets out that a scheme becomes operative 6 weeks after notice of its confirmation is published under paragraph 10(2)(d).



Progress being made on the River Ness Tidal Section

2.28 Appeals

Any person affected by a final decision of the local authority or a decision of the Scottish Ministers to confirm a scheme may appeal that decision.

Paragraph 12 of schedule 2 states that an appeal must be made within 6 weeks of the notice of confirmation of the scheme being published in a newspaper circulating in the area of the local authority taking forward the scheme.

An appeal under this paragraph is to be made by summary application to the sheriff of a sheriffdom in which all or some of the proposed operations are to be carried out. Sub-paragraph (5) provides that the grounds on which a decision can be appealed are, that the local authority or the Scottish Ministers: failed to comply with the requirements relating to improvement orders under the Land Drainage (Scotland) Act 1958 (see also section 61(3) and (4) of the Flood Risk Management (Scotland) Act 2009); erred in law; or failed to follow a procedural requirement.

Sub-paragraph (6) enables the sheriff to suspend the operation of the scheme in whole or in part pending consideration of the appeal. Sub-paragraph (7) enables the sheriff to uphold the appeal only where the interests of the appellant have been substantially prejudiced and to quash the scheme in whole or in part.

2.29 Managing changes

There may be circumstances where the local authority may need to make changes to a scheme for a variety of reasons following notification, after a preliminary decision or a final decision when a scheme has been confirmed. The timing, scale and type of change

may require different actions to be taken and different processes to be followed.

A change may be required as a result of:

- issues arising during notification, which, for whatever reason, were not resolved prior to publication.
- an objection to a notified scheme;
- other issues arising following period of notification; or
- new information after the preliminary decision or a final decision (e.g. more detailed study results, or archaeology discovered during construction).

Minor changes may not require a formal modification, if they do not materially affect the scheme. Local authorities should consider and seek legal advice on whether a small amendment, such as changing the material of a wall, would be considered a material change and therefore a modification under the Act.

For further consideration of the issues see [Appendix H – Modifications and Managing Change – Post Scheme Approval](#).

CASE STUDY

Managing Modifications and Changes

The Highland Council promoted the River Ness Flood Alleviation Scheme under the 1961 Act, and the Order was made in 2009. Notices were served on affected landowners to enable the works to commence in 2013. Between the making of the order and the intention to start construction, a landowner had submitted a planning application to change the area affected from a commercial operation to a housing development. The housing development was refused as the development was to be on the 'wet' side of the flood alleviation scheme. The affected landowner requested that the scheme be amended to accord with his developed proposals. This gave rise to two issues:-

a) The variation was significant and could not be constructed under the made order. Consent to the revised flood alleviation measures were subsequently obtained under the 2009 Act.

b) Grant monies to construct the scheme was linked to the Order promoted under the 1961 Act. Scottish Ministers confirmed that if the Highland Council obtained the necessary consents and the proposal was cost neutral, then Scottish Government would grant aid the variation. A 'minute of agreement' was entered into such that the landowner would fund any increase in costs that arose as a result of the alternative line. It is of note that this was conducted at a time before tenders had been issued and two tenders were invited, the conforming Order and the alternative line, thus establishment of the tendered cost of the alternative line

could be easily established and formed a part of the costs associated with the implementation of the variation, which included matters such as design costs and design adoption, additional site investigations, removal of manmade obstructions and also the compensation applicable to the conforming and alternative line.

This case study demonstrates good practice in the management of modifications and making changes to a Scheme.

3. Case studies



Selkirk FPS – Construction works

3.1 Scottish Borders Council – Selkirk Scheme

Extensive consultation was undertaken throughout the Option Assessment Process (Project Stage No. 3) with: two stakeholder workshops, a public exhibition and over 60 separate discussions with key landowners and stakeholders. This process of extensive consultation continued throughout the Outline Design Process (Project Stage No. 4) with the following meetings being held to date: two stakeholder workshops, a public exhibition and approx. 90 separate discussions with key landowners and stakeholders to ensure that all those affected by the Scheme had the opportunity to comment. The Project Team also established two Working Groups to advance the design of the St. Mary's Loch (SMALL) Flood Storage Option and the Natural Flood Management (NFM) Option with representation from the Tweed Forum.



Brechin FPS – Construction works

3.2 Angus Council – The Brechin Flood Prevention Scheme

The Brechin Flood Prevention Scheme has been progressed under the '61 Act at a time where the 2009 Act would be applied to any new schemes. The process applied to the Brechin FPS has therefore been in accordance with the '61 Act, but with the spirit of the 2009 Act being applied for consistency. In terms of compensation and acquisition of land, both Acts are relatively consistent and are open to current practice in terms of valuations.

The approach adopted for the promotion of the Brechin FPS has been to actively seek compensation claims from the affected parties and those with interest in land. Land acquisition by agreement has been used rather than compulsory purchase due to the specific future access requirements of the Scheme. These have been conscious efforts to limit reputational risk to the council in being seen as using powers under the Act without regard for the impact of using these powers on the affected parties.

A series of activities including issuing of letters, email, telephone conversations, face to face meetings, drop in sessions and more formal public meetings have been held to engage with the affected parties. The local community council and Angus Council ward members have been particularly useful in sharing and agreeing to the approach being taken. Professional advice has been on hand to encourage the affected parties to engage their own professional advisors where appropriate. This has been to seek more informed discussions and easier resolution to heads of compensation or land acquisition that could be agreed. Early resolution, where appropriate, of

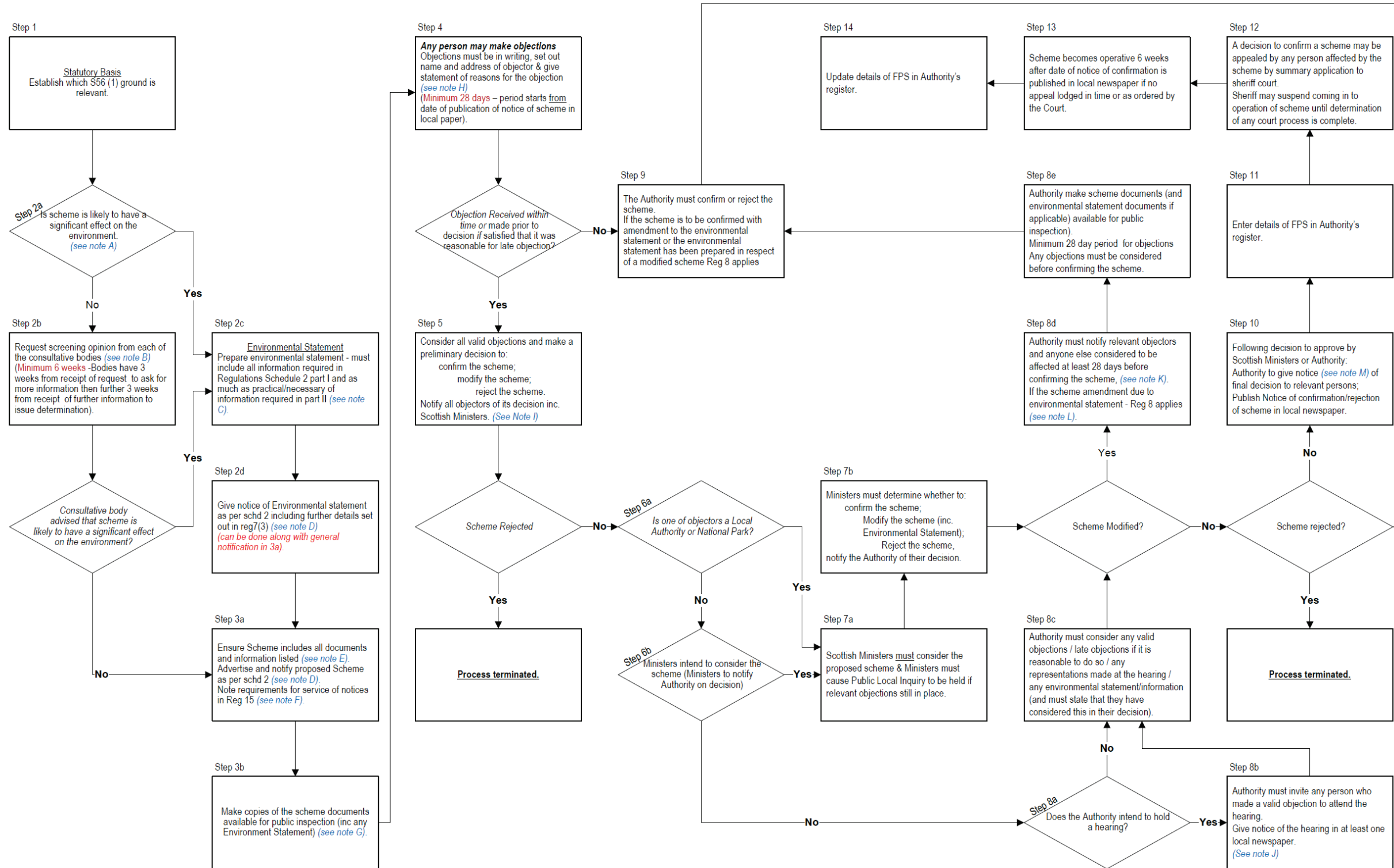
compensation claims has been sought to limit the risk of future compensation claims.

The main lesson learned in this case study has been to invest resources, most notably in terms of professional advice from flood risk, to legal to land evaluations, and develop lasting relationships with each of the affected parties. To this end, every effort to coordinate and seek a single point of contact with the council within the flood risk team has been applied, recognising that at times letters do need to be issued by other services such as legal notices. These relationships are not always easy but the benefits of pursuing these and maintaining them cannot be underestimated in managing the risks associated with compensation, land acquisition, land access, objections, reputation loss, and ultimately the delivery of flood protection schemes.

4. Appendices

Legal Process

It has been assumed that technical appraisals, design, costing and initial informal public consultation has all been done



Note A – factors which must be considered in determining whether a scheme is likely to have a significant effect on the environment.

1. **Characteristics of scheme**

The characteristics of the scheme must be considered, having regard, in particular, to—

- (a) the size of the scheme;
- (b) the cumulation with other schemes;
- (c) the use of natural resources;
- (d) the production of waste;
- (e) pollution and nuisances; and
- (f) the risk of accidents, having regard in particular to substances or technologies used.

2. **Location of scheme**

The environmental sensitivity of geographical areas likely to be affected by the scheme must be considered, having regard, in particular, to—

- (a) the existing land use;
- (b) the relative abundance, quality and regenerative capacity of natural resources in the area; and
- (c) the absorption capacity of the natural environment, paying particular attention to the following areas—
 - (i) wetlands;
 - (ii) coastal zones;
 - (iii) mountain and forest areas;
 - (iv) nature reserves and parks;
 - (v) areas classified or protected under legislation;
 - (vi) special protection areas designated pursuant to Council Directive 2009/147/EC on the conservation of wild birds and Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora;
 - (vii) areas in which the environmental quality standards laid down in [EU] ¹ legislation have already been exceeded;
 - (viii) densely populated areas; and
 - (ix) landscapes of historical, cultural and archaeological significance.

3. **Characteristics of the potential impact**

The potential significant effects of development must be considered in relation to criteria set out under paragraphs 1 and 2 above, and having regard, in particular, to—

- (a) the extent of the impact (geographical area and size of the affected population);
- (b) the transfrontier nature of the impact;
- (c) the magnitude and complexity of the impact;
- (d) the probability of the impact; and
- (e) the duration, frequency and reversibility of the impact.

Note B –list of consultative bodies

- (a) SEPA;
- (b) Scottish Natural Heritage;
- (c) Scottish Water;
- (d) any planning authority whose district is likely to be affected by the proposed flood protection scheme (other than the Authority proposing the scheme); and
- (e) any other body designated by statutory provision as having specific environmental responsibilities which, in the opinion of the Authority proposing the flood protection scheme, has an interest in relation to the environmental effects of that scheme;

Note C – contents of the environmental statement

Regulation 6 requires the Authority to prepare an Environmental Statement assessing the scheme's environmental effects.

Schedule 2 Part I lists the required content of an Environmental Statement prepared by a Authority under Regulation 6:

1. An environmental statement must identify, describe and assess the direct and indirect effects of the proposed scheme on the following factors—
 - (a) human beings, flora and fauna;
 - (b) soil, water, air, climate and the landscape;
 - (c) material assets, including architectural and archaeological heritage; and
 - (d) the interaction between the factors mentioned in sub-paragraphs (a) to (c).
2. An environmental statement must include—
 - (a) A description of the scheme comprising information on the site, design and size of the scheme.
 - (b) A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects.
 - (c) The data required to identify and assess the main effects which the scheme is likely to have on the environment.
 - (d) The main alternatives studied by the Authority and the main reasons for its choice, taking into account the environmental effects.
 - (e) A non-technical summary of the information provided under a to d above.
3. And such of the information below as is reasonably required to assess the environmental effects of the proposed scheme and which, having regard in particular to current knowledge and methods of assessment, the Authority can reasonably be required to compile.
 - (a) A description of the scheme, including in particular—
 - (i) a description of the physical characteristics of the whole scheme and the land-use requirements during the construction and operational phases;
 - (ii) a description of the main characteristics of the production processes, for instance, the nature and quality of the materials used;
 - (iii) an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, etc.) resulting from the operation of the proposed scheme.
 - (b) A description of the aspects of the environment likely to be significantly affected by the scheme, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors.
 - (c) A description of the likely significant effects of the scheme on the environment, which should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the scheme, resulting from—
 - (i) the existence of the scheme;
 - (ii) the use of natural resources;
 - (iii) the emission of pollutants, the creation of nuisances and the elimination of waste, and the description by the Authority of the forecasting methods used to assess the effects on the environment.
 - (d) A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.
 - (e) A non-technical summary of the information provided above
 - (f) An indication of any difficulties (such as technical deficiencies or lack of know-how) encountered by the Authority in compiling the required information.

Note D – Schd 2 notification requirements

1. The Authority must give notice of a proposed flood protection scheme:
 - (a) in at least one newspaper circulating in the Authority's area (which must, if practicable, be a local newspaper),
 - (b) where any of the proposed operations are to take place in another local authority's area, in at least one newspaper circulating in that area (which must, if practicable, be a local newspaper),
 - (c) in the Edinburgh Gazette,
 - (d) to every person known to the Authority—
 - a. to have an interest in any land on which the proposed operations are to be carried out, or
 - b. whose interest in any other land may be affected by any of the proposed operations or by any alteration in the flow of water caused by any of the proposed operations,
 - (e) where any of the proposed operations are to be carried out on land affected by an improvement order, to each of the authorised persons,
 - (f) to the following persons—
 - (i) SEPA,
 - (ii) Scottish Natural Heritage,
 - (iii) any local authority in whose area any of the proposed operations are to be carried out,
 - (iv) where any of the proposed operations are to be carried out in a National Park, the National Park authority for that National Park,
 - (v) any responsible authority whose flood risk related functions may be affected by any of the operations or by any alteration in the flow of water caused by any of the operations (insofar as the authority has not been notified under another provision of this sub-paragraph),
 - (vi) any statutory undertaker whose statutory undertaking may be affected by any of the operations or by any alteration in the flow of water caused by any of the operations,
 - (vii) any other person specified by order by the Scottish Ministers, and
 - (g) in such other manner as the authority considers appropriate.

2. The Authority must also display a notice of the proposed flood protection scheme in a prominent position in the locality in which the operations are to be carried out.

Requirements of the Notice

3. A notice must—
 - (a) contain a general description of the effect of the proposed scheme including—
 - (i) a summary of the operations to be carried out, and
 - (ii) a summary of the benefits which the Authority considers are likely to be derived from carrying out the operations,
 - (b) state where and at what times the scheme documents can be inspected in pursuance of paragraph 2, and
 - (c) state that objections can be made about the proposed scheme to the Authority before the expiry of the period of 28 days beginning with the date notice is first published under sub-paragraph (1)(a).

4. Notices must be given or, as the case may be, displayed no later than the date that notice is first published in the local newspaper.

Plus - for 2d only:

- Notices must, in addition to the information above, include a statement—
- (a) that the scheme is likely to have a significant effect on the environment;
 - (b) that the scheme documents are accompanied by an environmental statement which is available for public inspection;
 - (c) describing the circumstances under the Act in which the Scottish Ministers may cause a public inquiry into the application; and
 - (d) setting out the nature of possible decisions that may be taken in relation to the scheme.

Note E – contents of scheme documents

1. A proposed flood protection scheme must include a description, by reference to maps, plans and specifications, of—
 - (a) the extent and scale of the scheme operations;
 - (b) the land which the Authority considers may be affected by those operations; and
 - (c) any land on which the Authority would require to enter (whether temporarily or otherwise) for the purposes of carrying out the operations.
2. The maps and plans referred to in paragraph (1) must be at an appropriate scale to enable interested persons to identify whether their land will be affected by the scheme operations.
3. A proposed flood protection scheme must include an estimate of the cost of the scheme operations proposed to be carried out.

Note F – requirements for service of Notices

Regulation 15 makes provision about methods of service of notices or other documents.

- Any notice or other document to be sent, served or given under these Regulations or under schedule 2 to the Act may be sent, served or given either—
 - by delivering it to the person on whom it is to be served or to whom it is to be given;
 - by leaving it at the usual or last known place of abode of that person, or, in a case where an address for service has been given by that person, at that address;
 - by sending it in a prepaid registered letter, or by the recorded delivery service, addressed to that person at their usual or last known place of abode, or, in a case where an address for service has been given by that person, at that address;
 - in the case of an incorporated company or body, by delivering it to the secretary or clerk of the company or body at its registered or principal office, or by sending it in a prepaid registered letter, or by the recorded delivery service, addressed to the secretary or clerk of the company or body at that office; or
 - in a case where an address for service using electronic communications has been given by that person, by sending it using electronic communications, in accordance with the condition set out in paragraph (2), to that person at that address.
- The condition mentioned in paragraph (1)(e) is that the notice or other document must be—
 - capable of being accessed by the person mentioned in that provision;
 - legible in all material respects; and
 - in a form sufficiently permanent to be used for subsequent reference, and for this purpose "legible in all material respects" means that the information contained in the notice or document is available to that person to no lesser extent than it would be if served or given by means of a notice or document in printed form.

Note G – making documents available for public inspection

Paragraph 2 of the Act makes provision about the availability for public inspections of documents relating to the proposed scheme in both the area of the Authority taking forward the scheme and that of any other local authority where work would be carried out.

- The Authority must make a copy of the scheme documents available for public inspection in a place in the authority's area **AND**
- Where the proposed operations are to be carried out in another local authority's area, the authority must also make the scheme documents available for public inspection in a place in the other authority's area **AND**
- The scheme documents must be available for inspection at all reasonable times during the period from the date notice is given in at least one newspaper circulating in the Authority's area which must, if practicable, be a local newspaper, until the date a decision is made

Note H – objection period

- Any valid objection to a proposed flood protection scheme must be accompanied by a statement of the reasons for the objection.
- Where an objector, where the objection is valid, has an interest in any land on which the proposed operations are to be carried out or which may be affected by any of the proposed operations, or by any alteration in the flow of water caused by any of the operations, that person's objection must include—
 - details of the land in which the objector has an interest;
 - disclosure of the nature of the objector's interest in the land; and
 - details of which aspects of the proposed operations affect the objector.

Note I – listed persons

- A person who made an objection is referred to as a "relevant objector".
- Where any relevant objector is a person,
 - having any interest in any land on which the proposed operations are to be carried **OR**
 - whose interest in any other land may be affected by any of the operations or by any alteration in the flow of water caused by any of the operations **OR**
 - where any of the proposed operations are to be carried out on land affected by an improvement order, to each of the authorised persons **OR**
 - the following persons—
 - SEPA,
 - Scottish Natural Heritage,
 - any local authority in whose area any of the proposed operations are to be carried out,
 - where any of the proposed operations are to be carried out in a National Park, the National Park authority for that National Park,
 - any responsible authority whose flood risk related functions may be affected by any of the operations or by any alteration in the flow of water caused by any of the operations (insofar as the authority has not been notified under another provision of this sub-paragraph),
 - any statutory undertaker whose statutory undertaking may be affected by any of the operations or by any alteration in the flow of water caused by any of the operations,
 - any other person specified by order by the Scottish Ministers.
 - then the Authority must also give to the Scottish Ministers notice of its decision together with—
 - the scheme documents,
 - a summary of the objections received by the Authority,
 - copies of those objections, and
 - copies of any other material considered by the local authority.

Note J – Authority Hearing

The Authority must—

- invite to the hearing each objector who has made a valid objection (unless withdrawn) or a late objection which the authority intends to consider, and
- give notice of the hearing in the manner –
 - in at least one newspaper circulating in the Authority's area (which must, if practicable, be a local newspaper) **AND**
 - where any of the proposed operations are to take place in another Authority's area, in at least one newspaper circulating in that area (which must, if practicable, be a local newspaper),
- An invitation must be given not less than 28 days before the proposed hearing.
- Notices must be published at least 21 days before the proposed hearing.

Note K – Notice of modification

- The Authority must give notice:
 - in at least one newspaper circulating in the Authority's area (which must, if practicable, be a local newspaper),
 - where any of the proposed operations are to take place in another local authority's area, in at least one newspaper circulating in that area (which must, if practicable, be a local newspaper),
 - in the Edinburgh Gazette,
 - to every person known to the Authority –
 - to have an interest in any land on which the proposed operations are to be carried out, or
 - whose interest in any other land may be affected by any of the proposed operations or by any alteration in the flow of water caused by any of the proposed operations,
 - where any of the proposed operations are to be carried out on land affected by an improvement order, to each of the authorised persons,
 - to the following persons –
 - SEPA,
 - Scottish Natural Heritage,
 - any local authority in whose area any of the proposed operations are to be carried out,
 - where any of the proposed operations are to be carried out in a National Park, the National Park authority for that National Park,
 - any responsible authority whose flood risk related functions may be affected by any of the operations or by any alteration in the flow of water caused by any of the operations (insofar as the authority has not been notified under another provision of this sub-paragraph),
 - any statutory undertaker whose statutory undertaking may be affected by any of the operations or by any alteration in the flow of water caused by any of the operations,
 - any other person specified by order by the Scottish Ministers, and
 - in such other manner as the authority considers appropriate.
- The Authority must also display a notice of the proposed flood protection scheme in a prominent position in the locality in which the operations are to be carried out.
- Notices must be given or, as the case may be, displayed no later than the date that notice is first published in the local newspaper.

Requirements of the Notice

- A notice must—
 - contain a general description of the effect of the proposed scheme including—
 - a summary of the operations to be carried out, and
 - a summary of the benefits which the Authority considers are likely to be derived from carrying out the operations,
 - state where and at what times the scheme documents can be inspected in pursuance of paragraph 2, and
 - state that objections can be made about the proposed scheme to the Authority before the expiry of the period of 28 days beginning with the date notice is first published under sub-paragraph (1)(a).

Note L – Notice of modification – additional requirements where the environmental statement has been updated/amended/modified

As per Note K plus further requirements in Reg8(3)

- Requirements of the Notice will also:
 - Contain a statement
 - That the proposed scheme has been modified
 - Describing the modifications
 - Explaining the reasons for the modifications
 - That the modified scheme is likely to have a significant impact on the environment
 - That the scheme documents are accompanied by an environmental statement which is available for public inspection
 - Describing the circumstances under the Act in which the Scottish Minister may casue a public inquiry into the application
 - Setting out the nature fo the possible decisions that may be taken in relation to the modified scheme

Note M – Notice of Final Decision

- Notice must be given—
 - to every person given notice in relation to the proposed scheme (to every person known to the Authority
 - to have an interest in any land on which the proposed operations are to be carried out,
 - whose interest in any other land may be affected by any of the proposed operations or by any alteration in the flow of water caused by any of the proposed operations **OR** anyone mentioned in Note G above)
 - to every objector
 - to anyone else who was notified by a) Scottish Ministers given notice of the proposed modification to the relevant objectors and anyone else the Scottish Ministers consider is affected by them at least 28 days before confirming the scheme, **OR**
 - a Local Authority given notice of the proposed modifications to the relevant objectors and anyone else who the Authority considers is affected by them at least 28 days before confirming the scheme and where the decision is to confirm the proposed scheme (with or without modifications),
 - in at least one newspaper circulating in the Authority's area (which must, if practicable, be a local newspaper),
 - where any of the proposed operations are to take place in another local authority's area, in at least one newspaper circulating in that area (which must, if practicable, be a local newspaper) **AND**
 - in the Edinburgh Gazette,

4.2 Appendix B - Model outline Scheme

FLOOD RISK MANAGEMENT (SCOTLAND) ACT 2009

() COUNCIL

() FLOOD PROTECTION SCHEME 20**

1. General

In exercise of the powers conferred upon them by the Flood Risk Management (Scotland) Act 2009 the (*insert name of local authority*) Council (hereinafter referred to as “the Council”) have prepared the following flood protection scheme (hereinafter referred to as “the scheme”) the purpose of which is to manage the risk of flooding in (*specify area to be protected*) from flooding by (*specify the source of flooding*).

The Council considers that (State how the scheme will contribute to the implementation of current measures described in any relevant local flood risk management plan OR state the reasons why the Council considers carrying out the scheme will not affect such implementation.)

2. Terms of the Scheme

The terms of the scheme are as detailed in paragraph 3 to (end) hereunder.

3. Land

The operations are to be carried out on land situated at (*describe locality*). The land which the Council considers may be affected by the operations and the land on which the Council would require to enter (whether temporarily or otherwise) for the purposes of carrying out the operations are shown on the plans marked () attached and executed as relative hereto¹.

4. Description of the operations

The operations to be carried out in terms of the scheme are as follows :-

(*Detailed description of operations, etc., referring to the relative said marked plans (including sections)*)

5. Variation or Revocation of an Improvement Order (*if applicable*)

The (*insert name*) Improvement Order 19** made under the Land Drainage (Scotland) Act 1958 shall be varied or revoked (*as the case may be*) as follows (*Describe proposed variations/ revocation*)

¹ The first reference in the scheme to particular plans should incorporate the phrase “attached and executed as relative hereto”. Thereafter it is sufficient to refer to “the said plans marked ()”

6. Cost

The estimated cost of the scheme operations is (in words).

Made by the Council on (date)

SCOTTISH BORDERS COUNCIL

FLOOD RISK MANAGEMENT (SCOTLAND) ACT 2009

AND

**THE FLOOD RISK MANAGEMENT (FLOOD PROTECTION SCHEMES,
POTENTIALLY VULNERABLE AREAS AND LOCAL PLAN DISTRICTS)
(SCOTLAND) REGULATIONS 2010**

SELKIRK FLOOD PROTECTION SCHEME 2012

In accordance with Section 60 and Schedule 2 of the above Act and Parts II, III & IV of the Regulations, the Council proposes the above flood protection scheme. This constitutes a notice under Paragraph 1 of Schedule 2 of the Act and under Paragraph 7 of the Regulations.

The effects of the proposed operations will be:

- To generally reduce the risk of flooding to residential, agricultural, community and business properties along the Yarrow Water from the outlet of St Mary's Loch to the confluence with the Ettrick Water, through the adaptation of the existing infrastructure and level control of St Mary's Loch on the Yarrow Water, for flood storage purposes.
- To generally reduce the risk of flooding to residential, agricultural, community and business properties along the Ettrick Water from its confluence with the Yarrow Water to its confluence with the River Tweed, through the adaptation of the existing infrastructure and level control of St Mary's Loch on the Yarrow Water, for flood storage purposes.
- To mitigate the effects of flooding to residential, community and business properties in the Philiphaugh, Bannerfield and Riverside areas of Selkirk from the Ettrick Water through the provision of flood defence walls and embankments.
- To mitigate the effects of flooding to residential, agricultural, community and business properties in the Bannerfield and Philiphaugh areas of Selkirk from the Long Philip Burn through the provision of river restoration, flood defence walls and embankments and improved channel conveyance (including the replacement of the A707 road bridge by Philiphaugh Farm Cottages and removal of the A708 road bridge by Leslie Cottage).
- To mitigate the effects of flooding to residential and business properties in the Riverside area of Selkirk from the Shaw Burn through the provision of a new storm bypass culvert, improved channel conveyance and flood defence walls and embankments.

The scheme is likely to have a significant effect on the environment and consequently an environmental impact assessment has been undertaken. The results of the environmental impact assessment have been incorporated into an environmental statement which is included with the other scheme documents. These

documents can be inspected from 22/02/12 to 21/03/12 inclusive at:

- Scottish Borders Council, Council Headquarters, Newtown St Boswells, Melrose, TD6 0SA, between 8.45am and 5.00pm, Mon to Thurs and between 8.45am and 3.45pm on Fri.
- Scottish Borders Council Contact Centre, High Street, Selkirk, TD7 4JX, between 9.00am and 5.00pm on Mon, Tues and Thurs; between 9.30am and 5.00pm on Wed and 9.00am and 3.45pm on Fri. Note this location is closed for lunch between 12.30pm and 1.30pm.

Objections in writing can be made about the scheme during the period from 22/02/12 to 21/03/12 inclusive to: Head of Legal and Democratic Services, Council Headquarters, Newtown St Boswells, Melrose TD6 0SA. Any objection to the proposed scheme must be accompanied by a statement of reasons for the objection. Where an objector has an interest in any land on which the proposed operations are to be carried out or which may be affected by any of the proposed operations or by any alteration in the flow of water caused by any of the operations that person's objection must include details of the land in which the objector has an interest, disclosure of the nature of the objector's interest in the land, and details of which aspects of the proposed operations affect the objector. If no valid objections are made to the scheme, then the Council must make the final decision to confirm or reject the proposed scheme. If, however there are objections which are not valid objections under Paragraph (3) (2) of Schedule 2 of the Act, the Council may make a preliminary decision and hold a hearing to consider the proposed scheme, before confirming or rejecting the scheme. Where valid objections are made to the scheme, the Council will consider the objections and make a preliminary decision to either (a) confirm the proposed scheme without modification, or (b) confirm the proposed scheme with modifications, or (c) reject the proposed scheme. Where an objection is received from a relevant objector, who is a person to whom paragraph 5(6) of Schedule 2 of the Act applies, the Council must notify Scottish Ministers of the preliminary decision. The Scottish Ministers must then decide whether to consider the scheme or not. If the Scottish Ministers decide to consider the scheme and valid objections remain, then the Scottish Ministers must cause a Public Local Inquiry to be held. After considering the outcome of the Public Local Inquiry, the Scottish Ministers must make the final decision to: (a) confirm the proposed scheme without modification, or (b) confirm the proposed scheme with modifications, or (c) reject the proposed scheme. Where the Scottish Ministers decide not to consider the scheme; the Council must hold a hearing to consider the proposed scheme. Following the outcome of the hearing, the Council must make the final decision to (a) confirm the proposed scheme without modification, or (b) confirm the proposed scheme with modifications, or (c) reject the proposed scheme. Notification of the final decision, whether made by the Council or the Scottish Ministers will be given.

SCOTTISH BORDERS COUNCIL

FLOOD RISK MANAGEMENT (SCOTLAND) ACT 2009

AND

**THE FLOOD RISK MANAGEMENT (FLOOD PROTECTION SCHEMES,
POTENTIALLY VULNERABLE AREAS AND LOCAL PLAN DISTRICTS)
(SCOTLAND) REGULATIONS 2010**

SELKIRK FLOOD PROTECTION SCHEME 2012

Notice is hereby given that on 21 June 2012 in terms of paragraph 10, and paragraph 1, of schedule 2 of the above Act the Scottish Borders Council confirmed the proposed Selkirk Flood Protection Scheme 2012 with a modification. The final decision was made in accordance with section 60 and paragraph 9 of schedule 2 of the above Act and Parts II, III & IV of the above Regulations.

In accordance with paragraph 11 of schedule 2 of the above Act the Selkirk Flood Protection Scheme 2012 will become operative six weeks after notice of its confirmation is first published in a locally circulating newspaper, as is required under paragraph 10 (2) (d) of schedule 2 of the above Act, unless an appeal in accordance with paragraph 12 of schedule 2 of the above Act is made against the Scheme i.e. between the period 18 July to 29 August 2012 inclusive.

An appeal is to be made by way of summary application to the Sheriff of the Sheriffdom of Lothian and Borders at: Sheriff Clerk's Office, Sheriff Court House, Ettrick Terrace, Selkirk, TD7 4LE; however, it may be made through any other Sheriff Court in the Sheriffdom of Lothian and Borders. The grounds on which a decision can be appealed are: (a) that the confirmed scheme breaches the restriction in section 61 (3) or does not comply with the requirement in section 61 (4) of the above Act; (b) that, in reaching the decision, the local authority erred in law; or (c) that there was a failure to comply with a procedural requirement contained in schedule 2 of the above Act or the above Regulations. The Sheriff may, on the application of the appellant, suspend the operation of the scheme, or any part of it, either generally or insofar as it affects any interest in land which the appellant has, pending determination of the appeal. If the Sheriff is satisfied that the interests of the applicant have been substantially prejudiced, as detailed in paragraph 12 (7) of schedule 2 of the above Act, then the Sheriff may uphold the appeal and quash the scheme, or any part of it either generally or insofar as it affects the interest in land which the appellant has.

Ian Wilkie, Head of Legal and Democratic Services, Newtown St. Boswells

4.4 Appendix D – Land Drainage Orders

Section 61 makes provision for flood protection schemes to vary improvement orders made under the Land Drainage (Scotland) Act 1958. The powers do not extend to flood protection works. The 1958 Act allowed owners of agricultural land to apply jointly to the Scottish Ministers for improvement orders authorising drainage works in order to improve drainage or prevent or mitigate flooding or erosion of their agricultural holdings. Under the terms of the Orders the authorised persons were responsible for the maintenance of the authorised works in perpetuity and the cost of such maintenance was recorded as a burden on the land in the titles of the agricultural land concerned. As the general power for local authorities to manage flood risk under section 49 now covers 'all land', Paragraph 1 of schedule 3 amends the 1958 Act so that new improvement orders cannot be made for the purposes of preventing or mitigating flooding. However, that amendment does not prevent new orders being made under the 1958 Act for the purposes of improving drainage or preventing or mitigating erosion. Records of such orders are not held centrally but it is understood that there have been no improvement orders granted since the early 1980's. Existing improvement orders under the 1958 Act and earlier Acts will remain in place but this section allows them to be varied where they affect any land on which operations are proposed to be carried out under a flood protection scheme.

Subsection (2) sets out the changes which can be made to improvement orders. Flood protection schemes can revoke improvement orders completely, they can reduce the size of improvement areas or they can remove all or any part of the drainage or protective works covered by an improvement order. Schemes can also amend, reapportion or remove the obligations on authorised persons to maintain drainage or protective works covered by the improvement order. This should be read with subsections (3) and (4) which restrict the changes which can be made to maintenance obligations. "Authorised persons" are defined in section 2(2) of the 1958 Act as the owners of agricultural land situated in the improvement area covered by the improvement order.

Subsections (3) and (4) restrict the changes which can be made to maintenance obligations under improvement orders. Subsection (3) prevents flood protection schemes from altering maintenance obligations under improvement orders so as to oblige the authorised persons to maintain things done by local authorities under schemes. Where proposed scheme operations will alter drainage or protective works carried out under an improvement order, subsection (4) requires the scheme to remove the obligations on authorised persons to maintain the parts of the drainage or protective works which are altered.

The commencement of a flood protection scheme triggers the variation or revocation of the improvement order. Subsection (6) requires a notice of the variation or revocation of an improvement order to be registered in the Land Register of Scotland or the Register of Sasines, whichever is appropriate. The form and content of such notices may be specified by order under section 61(7) of the Act.

Contact details for Registers of Scotland are below:

Registers of Scotland, Meadowbank House, 153 London Rd, Edinburgh, Midlothian EH8 7AU. Phone: 0131 659 6111

4.5 Appendix E - 'Interest in Land' and 'Land affected'

Preamble

The following are considered to represent persons with an interest in land:

- Land owners
- Occupiers
- Those with leases
- Those with servitudes
- Those with securities

Persons affected by the operations may be much wider than those with an interest in land.

In applying fair and reasonable endeavours to identify these persons so that they can be considered for the serving of notices, payment of compensation or identified as possible relevant objectors, the local authority should have a clear record of the considerations given and parameters applied to land affected and persons affected by scheme operations.

Introduction

There are a number of references within the Act to persons with an 'interest in land' and where land is 'affected'. This appendix to the Part 4 guidance should be considered in conjunction with the body of the guidance.

Paragraphs 1(1)(d) to (f) of schedule 2 to the Act require a local authority to send direct notification of a proposed scheme to those with an interest in land affected or any other land affected, e.g. by alteration in the flow of water, which could be upstream or downstream.

The relevant objectors falling within paragraph 5(6) of that schedule include those with an interest in land affected.

The Act gives some indication on what is meant by 'interest in land' or 'interest in land affected' but these are not defined. There is also the broader Scots Law context as described below.

Scots Law

Scots Law can be considered to be fairly clear on who has an "interest in land" or "real right". These are: (i) ownership and (ii) subordinate real rights, including servitude and lease. The latter are treated as real rights burdening the land directly. Real burdens are conditions upon lands which are effective due to their registration in one of the Register of Sasines or the Land Register of Scotland.

It is considered that each local authority should establish that it is content with the methods applied to determine those with a real right to land under Scots Law and also in terms of the interpretation to be applied to 'interest in land' as used in the Act

and regulations. A record of this consideration should be made with clear reference to the parameters applied.

Human rights

People depend on the environment around them for their physical and mental health, and general wellbeing. When that environment is threatened, certain human rights may be undermined. In particular, the progression of flood protection works or a scheme may have implications for property owners and for occupiers where these interfere with the right to respect for private and family life (Article 8) of the European Convention on Human Rights and peaceful enjoyment of their possessions (Article 1 of the First Protocol to that Convention). However, it is generally considered that any actual or apprehended infringement of such Convention Rights is justified in the public interest and in accordance with the council's duty to carry out works to reduce the likelihood of flooding of land. However, the local authority should take legal advice to ensure that any such scheme or works is compatible with Convention Rights, including those Rights as read with Article 14 (prohibition of discrimination) of the Convention. In progressing a flood protection scheme or works, care should be taken to ensure that the poorest and most vulnerable people are not discriminated against, e.g. low value property is sacrificed at the expense of higher value land.

Information about ownership etc. of land

In order to enable it to exercise any of its functions under Part 4 of the Act, a local authority may require land owners or occupiers to state their interest in that land in writing (section 68). Land owners or occupiers may also be required to provide contact details for any other person known to have an interest in that land. Any person failing to comply with the requirements of a local authority under this section, or knowingly or recklessly providing false or misleading information, is guilty of an offence.

Given land owners have an 'interest in land' and occupiers have an 'interest in land' it may reasonably be interpreted that the provision of 'contact details for any other person known to have an interest in that land' could be limited to those who also own (e.g. shared ownership) or occupy the land (e.g. shared, sub-letting). This is relatively clear as to who definitely has an 'interest in land' under this section of the Act. However, other parts of the Act and broader legal interpretation (e.g. those with a servitude) may indicate that there are other persons who have an 'interest in land'.

Common examples of servitudes include: right of access to property; right of drainage and/or sewage, and right to draw water from a private water supply.

Other burdens on land that the local authority should consider establishing are those relating to securities on land. These might be standard securities or heritable securities. Examples are those secured creditors over land where a debt is tied to the land with deeds, which may be registered securities over land. For example, banks and building societies may be 'heritable creditors' (equivalent to a mortgagee). Local authorities should consider the risks to the delivery of flood protection schemes resulting from those with securities on land, either standard or heritable, from their legal and estates services.

Therefore, in order for a local authority to be able to provide land owners or occupiers who have been required to state their interest and provide contact details for other persons known to have an interest in land, the local authority should have established the parameters of those with an interest as described earlier. This will allow the local authority to provide clear direction in seeking Information about ownership etc. of land.

Land affected

A local authority or, as the case may be, the Scottish Ministers must consider the objections made from 'relevant objectors' (see below) who are 'affected' by a modification (see paragraphs 7(5)(a) and 9(3)(a) of schedule 2 to the Act) and any person may appeal if affected by the confirmation of a scheme. A fair and reasonable assessment of how operations may affect land and those with an interest in land should be straightforward. However, such an assessment should be recorded and the parameters applied should be clearly stated. This is particularly important in considering the compensation that must be paid (see below) and also in identifying those who should be served notices under the Act, or later be considered as a 'relevant objector'.

'Any of the operations or by any alteration in the flow of water caused by any of the operations' should be considered. Scheme effects on land affected or persons with an interest in land can be indirect or remote from the scheme. For example, a scheme to reduce river flooding may also have an impact on water abstraction within the catchment, which should be readily available information, but may also impact on land drainage to agricultural land in the catchment. The increase or decrease in downstream flood levels is another example of where an interest in land remote to the scheme is relevant.

Another example, which might not be obvious, is a concrete batching plant established to provide supplies to construct a scheme would be considered to have an effect even if this was miles away from the 'site' of construction. Consideration should therefore be given to the upward supply chain for the scheme operations.

'Remote' effects can therefore have a particular relevance in considering environmental impacts. The local authority should have a clear record of the considerations given and parameters applied to land affected by such operations.

Compensation

Compensation must be paid to any person who has sustained damage as a consequence of exercising certain powers under the Act (see section 82). Section 83(1) defines damage as the depreciation of the value of a person's interest in land or the disturbance of a person's enjoyment of land. 'Enjoyment of land' therefore needs to be considered. As with 'interest in land' or 'interest in land affected', there is no definition within the Act of 'enjoyment of land'.

The 'legal' rights to enjoyment (of land) might cover the right to light, to clean air, to clean water, to lack of loud noise and so on. These might cover the right to rainwater from a neighbour's land, the right of passage to access landlocked land over that of

a neighbour, or the right to pasture your animals on another's land. It might also extend to the right to enjoy the use and benefit of another's property by a beneficiary, i.e. life rent or fiar.

Land owners and occupiers should be aware of servitudes affecting their interests, and that this would provide insight for the local authority in considering the interest in land, which would apply to compensation, and other considerations under the Act, e.g. issuing of notices.

There is wider consideration of the interest in land of, for example, anglers or a 'dog walker', or those using an affected right of way such as footpath or bridleway, and their enjoyment in the land that may be affected by scheme operations or other powers exercised. The broad publication of notices, on site notices and in newspapers, and the broader consultation required to develop a flood protection scheme should be sufficient to allow for fair and reasonable notification of these wider interests. It would then be for the local authority or Scottish Ministers to consider an objection if made by such persons, who may then be classed as a relevant objector, or indeed in the eventuality of an appeal to the Lands Tribunal for Scotland.

Advice on the amount of compensation in all these cases needs to be taken by the local authority, e.g. District Valuer Scotland and chartered surveyors.

Description of the operations

The description of the operations should contain sufficient information to allow a person to understand the scale and nature of the proposed works and determine the impacts the operation would have on his interests. Such a description should consider the wider aspects of those affected and the local authority should record this consideration.

In addition, maps and plans should be at an appropriate scale to enable interested persons to readily identify their own land and identify whether their land will be affected by the operations. Again in developing and publishing such maps and plans the local authority should consider the wider aspects of those affected and record this consideration.

Objections

Under regulation 12 of the 2010 Regulations, any objection must be accompanied by a statement of reasons for the objection and, where the objector has an interest in land on which the proposed operations are to be carried out or which may be affected by any of the proposed operations or by any alteration in the flow of water caused by any of the operations, that objection must include:

- details of the land in which the objector has an interest;
- disclosure of the nature of the objector's interest in the land; and
- details of which aspects of the proposed operations affect the objector.

The local authority may seek legal advice on questions of validity of any objection and how it should be treated if any of the prescribed information has not been

provided timeously. It should also be satisfied that it has sufficient information to determine which objectors are persons to whom paragraph 5(6) of schedule 2 to the Act applies.

In particular, a person determined at this stage to have a valid interest in land should be considered by a local authority to be a “relevant objector” for the purposes of paragraph 5(5) of schedule 2 to the Act.

The local authority should consider how, who and where objections are to be received and assessed. On the basis of the objection being valid, the local authority shall assess the objections with due consideration of need for independence of the assessment based on the nature of the objection. The local authority may wish to consider using the experience of their planning authority or others in assessing and determining objections to operations that the local authority are themselves the promoter of. The local authority should make it clear to the relevant objectors how objections are to be assessed and determined, and such assessments should be recorded.

Local authority hearing

Objectors having an interest in land on which scheme operations are to be carried out or whose interest in other land may be affected by the operations or alteration in the flow of water caused by the operations should be presumed as having a right to be given a fair and independent hearing. The aim is to give everybody, including interested third parties, a fair hearing. This will provide the Reporter (or any other person leading the hearing) with all the information necessary for their Report, but in a more flexible and less formal atmosphere than at a local inquiry.

Given the introduction of ‘interested third parties’ at this late stage of the process, the local authority should make clear in their earlier wider considerations of those with an interest in land how third parties have been defined and considered, and therefore how they might be determined to be ‘relevant objectors’. Such clarity will assist the Reporter at the Hearing stage and reduce the risk presented by an unforeseen objector.

Post confirmation.

The confirmed scheme becomes operative 6 weeks after publication of the notice of confirmation. However, if an appeal is made, the Sheriff may suspend the operation of the scheme or of any part of it either generally or insofar as it affects the interest of the appellant, pending determination of the appeal. This would offer a final backstop for a person with ‘interest in land’, who has not been notified to be heard or who had not submitted an objection. It is considered that at this stage, given the Sheriff’s consideration should be limited to the correct application of the procedure and that a local authority should have applied fair and reasonable endeavours to establishing a list of those who have an interest in land, that this represents a risk to the suspension of a notice of confirmation.

4.6 Appendix F – Example of VOA correspondence compensation

VALUATION OFFICE AGENCY

DVS INVERNESS OFFICE

INFORMATION NOTE

[Insert name of FPS]

The Valuation Office agency has been instructed by The [LA] to provide independent advice and information on compensation matters and negotiate and settle claims for compensation with persons/businesses affected by the [insert FPS].

The purpose of this information note is to explain the work carried out by the Valuation Office Agency and to give an indication of the rights to compensation you may have if your property is affected by construction works arising out of this FPS. The note also provides contact details within the Agency and sets out the standards we seek to achieve.

This note can give only general guidelines to the rights you may have. The notes are not intended to be exhaustive, and should be read with the appropriate legislation. Your property, circumstances and the nature of the construction works carried out on your land will vary greatly and claims for compensation will be treated on an individual basis.

If you are in any doubt, or want further information you should get help from the local authority; a qualified Solicitor or Chartered Surveyor. Before doing so you should contact the local authority or District Valuer who will advise if you may be able to claim for obtaining such professional advice.

WHO ARE WE?

The Valuation Office Agency is an Executive Agency of Central Government. You may also hear us referred to as the District Valuer. We are the largest provider of valuation and surveying services to the public sector including the Scottish Government, other Government Departments, NHS Health Boards, Housing Associations and HMRC. We have 5 Offices in Scotland located in Edinburgh, Glasgow, Aberdeen, Inverness and Dundee.

We are an entirely independent organisation from The [LA].

COMPENSATION

Claims for compensation will be dealt with in terms of the Flood Risk Management (Scotland) Act 2009.

The FPS will describe by maps, plans and specifications the construction work or other operations which are to be carried out and will specify also the land which [LA]

and its appointed contractor/representatives require to enter to enable them to carry out this work.

The Act confers on The [LA] powers to do the necessary work – Part 4, Section 66 of the Act gives power to The [LA] to acquire property for the Scheme, if need be, although it is not anticipated that your property will be acquired unless by prior agreement. Generally, works will be undertaken to your property in terms of Part 6, Sections 79 – 81 of the Act, which gives The [LA] powers of entry to your property.

Compensation would normally be paid in terms of Part 6, Sections 82 & 83 of the Act. The Scheme may provide for reinstatement of land and/or property damaged by the works. It is possible however that protective works might not in all cases prevent damage or disturbance and that in some cases reinstatement of land might not be physically possible. The Act allows for compensation to be paid in such circumstances if you can show that the value of your interest has been depreciated, or that you have suffered damage by being disturbed in the enjoyment of your property as a consequence of the carrying out of the Scheme (provided that a person shall not be entitled to compensation under this section unless the act or omission causing the depreciation or disturbance would have been actionable at his instance if it had been done or omitted otherwise than in the exercise of statutory powers).

A claim must be made in writing to The [LA] either within two years of the damage becoming apparent, or within ten years of the completion of the Scheme, whichever is earlier.

Upon receiving your claim the LA will instruct the District Valuer to provisionally agree the compensation amount. The District Valuer will then negotiate directly with you or your representative before submitting a report to The [LA].

Negotiation expenses, where appropriate, will be paid in accordance with the RICS Guidance Note - The calculation of surveyors' fees relating to the exercise of statutory powers in connection with land and property, 1st edition.

Prior to appointing advisors you should contact the local authority or District Valuer who will advise if you may be able to claim for obtaining such professional advice and agree the level of fee at the outset.

If your business/home is affected by streetscape works this is a separate matter upon which you should take further advice.

DO I HAVE A RIGHT OF APPEAL IF I DISAGREE WITH THE COMPENSATION?

Under the Act, any dispute on compensation will be settled by the Lands Tribunal for Scotland.

Please bear in mind however that the District Valuer is impartial and independent of The [LA].

OUR COMMITMENT TO YOU

We will provide the best possible service; provide helpful and impartial advice; help you to understand your rights and obligations; treat everyone fairly by valuing all properties impartially; keep information about your property confidential.

WHEN WE VISIT YOUR PROPERTY

We will: contact you to arrange a good time to inspect your property; be punctual in keeping the appointment (you can help us by letting us know in advance if you are unable to keep the appointment); carry identity cards.

IF YOU HAVE SPECIAL NEEDS

We are committed to helping all our customers. If you have a disability which we should take account of in order to help you fully, please tell us. We will respect your confidence at all time.

CONTACTING US

Compensation matters and any other issues arising from the Scheme will generally be handled by DVS, Inverness Office whose contact details are listed below.

District Valuer

Inverness Valuation Office

River House

Young Street

INVERNESS IV1 1QL

Tel: 03000 506298

Please quote case reference XXXXXXXX in any correspondence.

WHAT IF THINGS GO WRONG?

If you have a complaint about the service we have provided you should write to DVS at the office concerned who will look into the matter. We will do our best to put things right if we have made a mistake. We will acknowledge and try to deal with your complaints within 5 days. If we need to carry out further research we will let you know and try to have completed this within 20 working days.

4.7 Appendix G – Code of practice for hearings

This code contains the procedure which the objectors, the local authority and, if relevant, other parties should follow where a hearing is to take place. The code is intended to save the parties time and money and to allow the Reporter to lead a structured discussion about the matters at issue. The aim is to give everybody, including interested third parties, a fair hearing and to provide the Reporter with all the information necessary for his Report, but in a more flexible and less formal atmosphere than at a local inquiry. Although the code does not have statutory force, all parties to a hearing are expected to comply with it. Paragraph 14(1) of Schedule to the Act does though allow Scottish Ministers to make provision for the procedure to be followed at a hearing held under paragraph 8, which may be considered should this code need to have statutory force.

The Reporter may be appointed by the Directorate of Planning & Environmental Appeals (DPEA) or the role of 'Reporter' may be undertaken by the local authority or commissioned separately. However, given that the local authority will have already made two decisions, to promote the scheme and a preliminary decision to confirm it with or without modification under paragraph 5 of Schedule 2 to the Act, the local authority should consider whether to appoint a person independent of the local authority to hold the hearing and Report to them although this is not a requirement of the Act.

Agreement on procedure

The Reporter will give the objectors and the local authority an opportunity to comment on the proposal to use the code. Each party should within 7 working days inform the Reporter of their views on whether or not the code is appropriate. If it is suitable the aim will be for the hearing to take place within 12 weeks of the date (the "relevant date") on which it is known that the objections are to be heard at a hearing.

Written Statements

An important element of this procedure is that the Reporter must be fully aware of the issues involved and the arguments likely to be put forward at the hearing so that he can properly lead the discussion. It is therefore essential that, within 4 weeks of the relevant date, the objectors and the local authority provide a written statement containing full particulars of the case they wish to make at the hearing, and a list of any documents to which they intend to refer. At the same time, the objectors and the local authority should send copies to each other.

Where he considers it appropriate, the Reporter may request one or more third parties to submit statements and documents to the Reporter, the objectors and the local authority. In such circumstances, the objectors and the local authority will be asked to send additional copies of their statements and documents to those third parties.

If any party wishes to respond in writing to any aspect of another party's statement, this should be done within 2 weeks of the receipt of that statement. Copies of the

response should be submitted to the objectors and the local authority, as appropriate, and to the Reporter.

Copies of documents to which parties intend to refer to should be submitted to the Reporter and to the other party or parties at least 4 weeks before the hearing is due to start.

Failure to adhere to the timetable may be fatal to the procedure. If the Reporter cannot be provided with the necessary information in sufficient time before the hearing, it may be necessary to delay or defer it. A party may become liable for expenses if another party is put to unnecessary expense through the late submission of statements or through other unreasonable behaviour.

Arranging the hearing

The local authority must invite to the hearing each objector whose objection is to be considered and give notice of the hearing in the manner set out in paragraphs 1(1)(a) and (b) of Schedule 2 to the Act. Invitations must be given not less than 28 days before the hearing and notices must be published at least 21 days before the hearing.

The local authority will also send to each objector a copy of this procedure and a note of the topics that the Reporter has decided should be considered at the hearing.

The arrangements for the hearing and the conduct of it should be designed to create the right atmosphere for discussion and to eliminate or reduce the formality sometimes encountered at a public local inquiry. To this end, the accommodation provided for the hearing should be informal, and the Reporter and the parties should wherever possible sit round a table. Small committee rooms are usually satisfactory, whereas council chambers, which often have a more formal atmosphere, should generally be avoided.

Procedure at the hearing

The Reporter will conduct the hearing. After resolving any doubts about the scheme or plans, he will explain that the hearing will take the form of a discussion which he will lead. The Reporter will then summarise his understanding of the relevant issues from reading the papers and any pre-hearing site visit, and will indicate those matters where further explanation or clarification is required. This will not preclude the parties from referring to other aspects which they consider relevant, provided that adequate prior notice and particulars have been given.

Written material should have been circulated and exchanged beforehand, and so it will not normally need to be read out at the hearing. Parties should avoid introducing new material or documents not previously referred to, as this may necessitate adjournment of the hearing to a later date and frustrate the objectives of the hearing procedure. It may also result in a claim for an award of expenses.

Objectors may present their case through an agent or advisor, but such representation is not essential. Legal representation should not normally be

necessary. The local authority will usually be asked to start the discussion. Those participating in the hearing will have the opportunity to comment on the submissions made by other parties, and they will be able to ask questions informally (through the chair) throughout the proceedings, subject only to the questions being relevant and the discussion being conducted in an orderly manner. The Reporter will indicate when he considers that sufficient clarification of a topic has been achieved and will then move on to the next issue. He will also discourage repetitive or irrelevant evidence and questioning. The objectors will be allowed to make any final comments before the discussion is closed (although formal closing submissions are not appropriate).

Before the end of the hearing, the Reporter will consider whether there should be a further, accompanied, visit to the site, and will advise parties of the arrangements. If appropriate, the Reporter may decide to allow further limited discussion of relevant matters on site before formally closing the hearing.

The Reporter will prepare a report and recommendation for the local authority. The local authority will consider the Report of the hearing and will make a final decision, which will subsequently be notified to all those who took part in the hearing.

Expenses

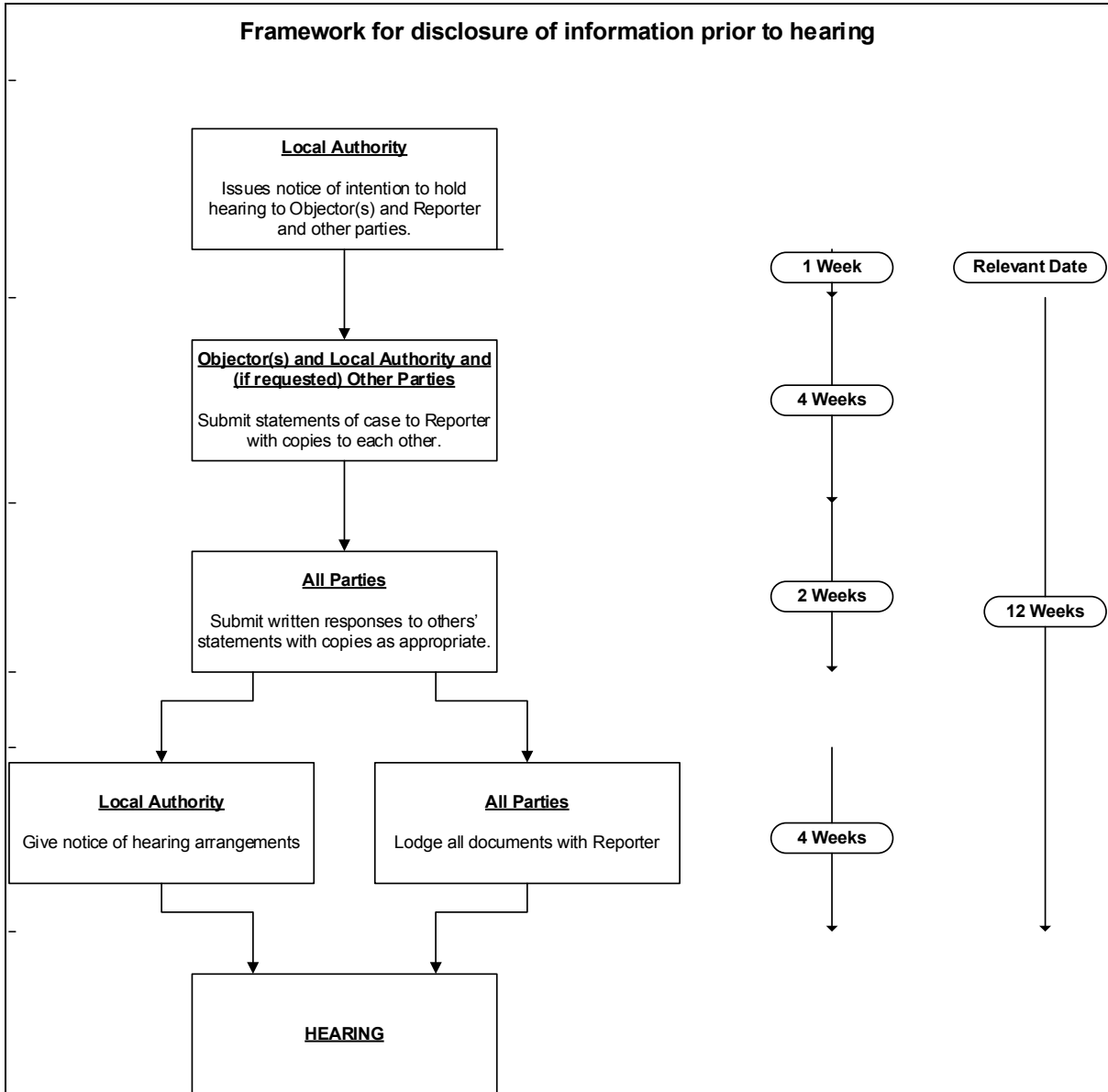
It is not uncommon for parties to seek expenses when attending a hearing. However, parties are normally expected to meet their own expenses when presenting a case, in person or through an agent or advisor, at an inquiry hearing.

The normal practice is, where an objector is successful in his/her objection, is an award of reasonable expenses including professional fees. A partial success will similarly get a partial award. Statutory objectors who are unsuccessful are expected to bear their own expenses.

Whilst the 2009 Act is not specifically provided for under Circular 6/1990 "Award of Expenses in Appeals and Other Planning Proceedings and in Compulsory Purchase Order Inquiries", it would not be unreasonable to adopt the provisions of the Circular for the purposes of this guidance.

The circular indicates that an award of expenses is only made in certain circumstances – there are three tests which require to be met. Consideration therefore should be given to making contingency budgetary arrangements on a 'case by base' basis.

Framework for disclosure of information prior to hearing



4.8 Appendix H – Modifications and Managing Change – Post Scheme Approval

Flood Protection Schemes – Modifications

Section 60 (1) of the 2009 Act makes provision for a local authority to promote a flood protection scheme.

Section 60 (2) introduces Schedule 2 which makes further provision about the making of flood protection schemes.

Schedule 2 Section 5 (1) sets out a process for resolving objections to a scheme. This requires that when a local authority receives a valid objection (as defined in Section 3 (2) of Schedule 2), it must make a preliminary decision to:

- (a) confirm the proposed scheme without modification;
- (b) confirm the proposed scheme with modification; or
- (c) reject the proposed scheme.

This process provides a mechanism for resolving objections (as defined in Section 5 (2), (3) and (4) of Schedule 2) without any necessary recourse to either a local authority hearing (as per Section 8 (2) of Schedule 2) or a public local inquiry (as per Section 7 (2) of Schedule 2).

This provides an opportunity, which was not available under the 1961 Act, to consult further with relevant objectors to determine whether or not it is possible to modify the proposed scheme to satisfy the objector without compromising the scheme objectives.

If such a modification is possible and the local authority is prepared to implement the proposed scheme with modification it should ask the objector if they will remove the objection if the modification is incorporated as part of the scheme.

When the preliminary decision to confirm the proposed scheme with modification has been taken, the local authority must then give notice of its decision to every person who made a relevant objection.

There is then a reasonable expectation that the relevant objector who instigated the modification will confirm in writing that he has removed his objection to the scheme with modification.

Provided there are no other remaining relevant objections this will allow the final decision to be made by the local authority (as per Section 9 (1) of Schedule 2) or Scottish Ministers (as per Section 7 (4) of Schedule 2).

If Scottish Ministers decide to call-in and consider the proposed scheme (as per Section 6 of Schedule 2) there is a corresponding opportunity to resolve relevant objections through the incorporation of modifications.

It is noted, that neither local authorities nor Scottish Ministers may confirm a scheme with modification unless it has:

- (a) given notice of the proposed modifications to the relevant objectors and anyone else who it considers is affected by them at least 28 days before confirming the scheme;
- (b) given those persons an opportunity to make objections about the proposed scheme; and
- (c) considered any objections so made.

It is therefore advisable that any person, in addition to the relevant objector, whose interest in any land may be affected by the modification, or who may be affected by an alteration in the flow of water caused by the modification, or any statutory authorities (as per Section 1 (1) (f) of Schedule 2) who may have an interest in the modification, are consulted and their agreement to the proposed modification obtained in advance of the preliminary decision.

A scheme can only be modified during the making of a scheme. Modifications cannot be made after a final decision to confirm the scheme, with or without modification, has been made either by a local authority or by Scottish Ministers.

Any proposed alteration to a scheme after the final confirmation is not a modification, but is a change and must be managed by an acceptable change procedure.

It is arguable that design changes during the making of a scheme can be incorporated as a modification. This will only be acceptable if the changes are not major in scope, are in accordance with the objectives of the scheme and all persons that are affected by the changes and interested statutory authorities are consulted and agree that the changes can be incorporated into the scheme as a modification.

Change within a FPS pre-approval:

- Where a change is required before the publication of the Scheme one simply changes the design.
- Where a change is required following publication but prior to confirmation this is a modification and it is dealt with through the processes defined in the guidance.

Managing Changes to a scheme post-approval (Managing Change):

There is no provision in the Flood Risk Management (Scotland) Act 2009 or its 2010 Regulations that deals with changes to a scheme post-approval. Furthermore, there is currently no precedent from an existing flood protection scheme.

With a major flood protection scheme in an urban environment, given the level of complexity of such a scheme and the interaction with existing public utilities, the built environment and many stakeholders, it is almost certain that a change will be required.

How changes are to be managed needs to be considered, identified and documented by the local authority. The following provides guidance on how post-approval changes could be managed.

Nature of Change

How has the change arisen? Is it “unforeseen” or a “change of choice”? And ultimately, what are the impacts / consequences of the change?

If there are effectively no impacts then presumably there is no issue in making the change. In coming to this decision one should consider the change; the land owners and other stakeholders; the deviation from the approved scheme operations and thereby the “material change” criteria that would apply to a scheme modification / normal planning consideration.

On the basis that a local authority can advance any flood protection works by agreement. Advancing a change by agreement within a FPS is therefore a logical advancement of this ability. Where a change affects multiple parties then the level of consultation with other potentially affected parties and reaching agreement becomes more complex.

Other significant effects may result through dealing with ‘unforeseen conditions’ during construction. These may result in effects on the environment with or without changes to the permanent works. It would appear unrealistic that these latter changes would be changes that require a modification, but they should be recorded on as-built drawings and scheme operation management plans.

Where agreement is not reached on a proposed change post-approval and certainly during construction, it is considered unreasonable that a local authority cannot proceed with that change if it has followed a reasonable approach to consulting with affected parties and mitigating any adverse effects on them or the environment.

Change management post-approval and certainly during construction needs to plan and record the approach taken and decisions made. This would be standard practice for construction contracts, however, consideration of the nature and impact on the change to the scheme on non-contractual parties should be recorded.

Case Study: The Selkirk FPS used the Change by Agreement route at Ravensheugh, Selkirk in 2013. They wished to include this location in the scheme but pre-approval the stakeholder did not wish for them to do so. They did not need to fight the matter as it did not affect the scheme hydraulics: it was essentially an added bonus and completed the restoration of the lower reach to the upper catchment. The stakeholder then requested that they increase the length of the Long Philip Burn River Restoration by approx. 140m immediately upstream of the scheme end-point and through their property post-approval. This is entirely within private property and a CAR Licence will be obtained before works commence. In essence it added to the scheme, by agreement, without being in (or funded by) the scheme. It did not therefore complicate the scheme: it is however not funded by the scheme!

4.9 Appendix I – List of Key Stages

This is an abstract from the Selkirk FPS - Invitation to Tender giving the key stage requirements as an example to assist others.

The list of the stages is given below:

- Stage 1 Appoint Consultant
- Stage 2 Review Studies
- Stage 3 Option Assessment + Public Consultation 1
- Stage 4 Outline Design of Preferred Scheme + Public Consultation 2
- Stage 5 FPS Order Process
- Stage 6 Detailed Design
- Stage 7 Procure Contractor
- Stage 8 Construction and Maintenance

N.B. – The numbering and references to appendices in the text below do not relate to the numbering in the rest of this Guidance.

2.1. STAGE REQUIREMENTS

2.1.1 Stage 1 – Procure Consultant

This stage is for the procurement of a Consultant to take forward preparation and implementation of the Scheme. The stage ends when the Consultant is appointed.

2.1.2 Stage 2 – Review Existing Studies to Determine All Further Work Required for Full Option Assessment and Detailed Design

2.1.2.1 The Selkirk Flood Study Cost Benefit Analysis report dated May 2006 gives the results of a reduced scope cost benefit analysis for flood defence options for Selkirk. This takes the form of two independent investigations, one based on flooding from the Ettrick Water, which is caused by less intense but prolonged rainfall in the catchment, and the other on flooding from the Long Philip Burn, which is caused by intense localised storms in the upper catchment. The recommendations of this report are:

- the most cost-effective solution for defending Selkirk against flooding for the 200 year event, from the Ettrick Water, is direct defences and
- the most technically feasible solution for defending Selkirk against flooding for the 200 year event, from the Long Philip Burn, is upstream attenuation with limited direct defences in the lower catchment.

This study was however limited in that it did not include any environmental or social appraisal of options. The study is therefore not sufficiently robust to take forward the recommended options and it will be necessary for the Consultant to undertake a full option assessment to determine the preferred option to take forward for implementation.

- 2.1.2.2 The Consultant will review the Selkirk Flood Study and Cost Benefit Analysis reports and the other previous reports detailed in section 2.3 above along with associated existing historical and modelling information (all provided on an “information only basis”). The Consultant will then determine what further investigation work will be required to undertake a full option assessment as detailed in section 2.8.3 below. The Consultant will be responsible for scoping, procuring, managing and interpreting this further investigation work.
- 2.1.2.3 The Consultant will be required to take full responsibility for the design of the Scheme.
- 2.1.2.4 The Consultant will be required to hold a risk workshop with the Project Board on completion of his review of the previous flood studies. He will be required to produce a risk log (or register), product breakdown structure, product descriptions of each product, product flow chart and an updated time plan for project management purposes.
- 2.1.2.5 A hydrodynamic model of the Etrick Water, Yarrow Water and Long Philip Burn, in an ISIS format, is available to the Employer. This was used in the preparation of the Selkirk Flood Study and Cost Benefit Analysis reports. A copy of the model is given in **Appendix 8**, in CD format. This forms part of the tender documentation but the information provided is confidential, must not be copied and is to be returned with the Tender. Tenderers must determine whether or not the model can be developed for use in option assessment.
- A two-dimensional model of Selkirk Riverside is also available to the Employer. This was used in the preparation of the Selkirk Riverside Development Assessment and Master Planning and is available on the same basis as above.
- 2.1.2.6 A LIDAR survey of the river corridors of the Etrick Water, Yarrow Water and Long Philip Burn and possible attenuation sites has been carried out. A plan showing the extent of the survey is given in **Appendix 8**. The data in CD format will be made available to Tenderers if requested. A copy of the model will be provided to the Consultant who is appointed to take forward the Scheme.
- 2.1.2.7 The Consultant will provide updated project management information, as per Section 2.6, at the end of this stage.

Section 2.8.2 of the Employer's Requirements will be paid for as a lump sum.

2.1.3 Stage 3 – Option Assessment plus Public Consultation 1 and Landowner Consultation 1

- 2.1.3.1 The Consultant will develop options and undertake a technical, environmental, social, economic and risk assessment of all the viable options that would fulfil the strategy and objectives of the Scheme. In addition the Consultant will undertake an assessment of the “do nothing” option even though it is not considered a viable option, as this will provide a baseline against which the other options will be compared.
- 2.1.3.2 The option assessment will take account of any possible secondary flooding behind flood defences arising from the drainage network or groundwater.
- 2.1.3.3 The option assessment will be undertaken in accordance with the Flood and Coastal Defence Project Appraisal Guidance (FCDPAG) appraisal framework, latest guidance including supplementary guidance notes, produced by the Department of Environment, Food and Rural Affairs (Defra). Details of this guidance can be found on the Defra website at:- https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69419/pb13278-erosion-manage-090619.pdf. This series of documents was produced for England and Wales and it is important that it is read in a Scottish context. In addition the Flood and Coastal Defence Project Appraisal Guidance, Economic Appraisal (FCDPAG3) and Approaches to Risk (FCDPAG3) have been replaced in Scotland by the Flood Prevention Schemes: Guidance for Local Authorities, Economic Appraisal (Chapter 5) and Approaches to Risk (Chapter 6) respectively, produced by the Scottish Executive, now the Scottish Government. Chapters 5 and 6 will therefore be used in place of FCDPAG3 and FCDPAG4.
- 2.1.3.4 The Consultant will undertake an Environmental Scoping Study.
- 2.1.3.5 The Consultant will undertake a Geotechnical Desk Study.
- 2.1.3.6 This assessment will require survey work to be undertaken as detailed in section 2.10 below.
- 2.1.3.7 The Consultant will, as part of this option assessment process, undertake extensive consultation with most, if not all, of the parties and bodies listed in **Appendix 8**. This list is, however, not exhaustive and there may be other parties and bodies which require to be consulted. This consultation will allow the Consultant to arrive at the drivers which will influence the preferred option.

- 2.1.3.8 The Consultant will, as part of this option assessment process, consult with landowners who may be affected by the options.
- 2.1.3.9 The Consultant will also, as part of this option assessment process, hold a public exhibition in Selkirk and review the public's response to the options.
- 2.1.3.10 The Consultant will then compare options, taking account of the consultation process and recommend the option considered to be the preferred option to be taken forward to the Outline Design stage.
- 2.1.3.11 All of this assessment and comparison work will be reported in an Option Assessment Report which will be in the form given in the Flood and Coastal Defence Project Appraisal Guidance, Overview (FCDPAG1) – Annex A: Suggested contents of an Appraisal Report.
- 2.1.3.12 The Consultant will provide updated project management information, as per Section 2.6, at the end of this stage.

Section 2.8.3 of the Employer's Requirements will be paid as a lump sum except for topographical survey, ground investigation environmental survey and inspection and assessment of structures and consultations.

Topographical survey, ground investigation, Phase 1 Habitat survey and inspection and assessment of structures work will be paid on a percentage fee basis with adjustment for the actual total cost of the contract being above or below the estimated cost. Consultations will be paid for separately under other items in the Tender. The Consultant will also be paid separately for the printing of contract documents and drawings.

2.1.4 Stage 4 – Outline Design of Preferred Scheme plus Public Consultation 2 and Landowner Consultation 2

- 2.1.4.1 The Consultant will undertake sufficient detailed design work to allow the preferred scheme to be taken forward to Flood Protection Scheme (FPS) Order stage with confidence.
- 2.1.4.2 The Consultant will undertake a technical, environmental, economic and risk assessment of the preferred scheme in accordance the Flood and Coastal Defence Project Appraisal Guidance (FCDPAG) framework and Flood Prevention Schemes: Guidance for Local Authorities as per section 2.8.3.3 above.
- 2.1.4.3 This assessment will require survey work to be undertaken as detailed in section 2.10 below.
- 2.1.4.4 The Consultant will, as part of this preferred scheme assessment process, undertake further consultation with the parties and bodies listed in **Appendix 8** as per section 2.8.3.4 above.

- 2.1.4.5 The Consultant will, as part of this option assessment process, consult with landowners who will be affected by the preferred scheme.
- 2.1.4.6 The Consultant will also, as part of this option assessment process, hold a second public exhibition in Selkirk and review the public's response to the preferred scheme.
- 2.1.4.7 This assessment will be reported in a Preferred Scheme Assessment Report. This report will include an Environmental Assessment Report and an Environmental Statement. These reports and statement along with the Option Assessment Report will support the FPS Order process.
- 2.1.4.8 The Consultant will provide updated project management information, as per Section 2.6, at the end of this stage.

Section 2.8.4 of the Employer's Requirements will be paid as a lump sum except for topographical survey, ground investigation, inspection and assessment of structures and ecological survey contracts. Topographical survey, ground investigation, inspection and assessment of structures and ecological survey contracts will be paid on a percentage fee basis with adjustment for the actual total cost of the contract being above or below the estimated cost. Consultations will be paid for separately under other items in the Tender. The Consultant will also be paid separately for the printing of contract documents and drawings.

2.1.5 Stage 5 – FPS Order Process complete with Deemed Planning Consent plus CAR Licence Process

- 2.1.5.1 Following approval by the Employer, the Consultant will develop the Preferred Scheme outline design into a Flood Protection Scheme meeting the requirements of the proposed Flood Risk Management (Scotland) Act 2009 including the preparation of all documentation, drawings and notices.
- 2.1.5.2 The Consultant will provide all the documentation, drawings and notices required to enable the Employer to publicise the Scheme and submit it to the Scottish Government including serving and displaying relevant documents, drawings and notices as required by the proposed Flood Risk Management (Scotland) Act 2009.
- 2.1.5.3 Thereafter, the Consultant will assist the Employer in attempting to resolve any objections to the Scheme. The Consultant may be required to provide information and drawings for negotiations with the objector(s) and may be asked to become involved in the negotiations.
- 2.1.5.4 In the event that a Public Inquiry is held to consider any objections which are not withdrawn, the Consultant will assist the Employer to prepare for the Public Inquiry by providing information, documents and drawings. The Consultant may also be required to attend meetings

- with the Employer's legal representative and to appear as a witness for the Employer at the Public Inquiry.
- 2.1.5.5 The Consultant will prepare and submit an application to Scottish Environment Protection Agency for a licence for the Scheme under the Controlled Activities Regulations (CAR) and will provide any additional information required or undertake any further consultation necessary in order to obtain the licence.
- 2.1.5.6 The Consultant will provide updated project management information, as per Section 2.6, at the end of this stage.

Section 2.8.5 of the Employer's Requirements will be paid in two parts:

- (a) The fulfilment of the Employer's Requirements up to and including submission of the Scheme to the Scottish Executive will be paid as a lump sum. The Consultant will be reimbursed separately for printing the documents, notices and drawings required in terms of the proposed Flood Risk Management (Scotland) Act 2009.*
- (b) Payment for assisting the Employer in attempting to resolve objections to the Scheme will be on an hourly rate basis. The Consultant will be reimbursed separately for printing drawings, etc. requested by the Employer for use in consultations with objectors. If a Public Inquiry is required the Consultant will be paid on an hourly rate basis for assisting the Employer and appearing at the Inquiry.*
- (c) Payment for submitting an application for a CAR licence plus any further consultation will be on an hourly rate basis.*

2.1.6 Stage 6 – Detailed Design and Tender Documentation plus Land Acquisition

- 2.1.6.1 The Consultant will review the Scheme proposals as confirmed by the Scottish Government along with other relevant documentation such as those required under the Reservoirs Act. The Consultant will undertake final detailed design work and prepare tender documents and drawings for procurement of the works contract under the NEC3 Conditions of Contract.
- 2.1.6.2 This will include any advance contract such as further topographical survey and ground investigation work.
- 2.1.6.3 The Consultant will consult with Employer, Scottish Government, Appropriate Bodies, Landowners and Public.
- 2.1.6.4 The Consultant will produce all necessary land plans and accommodation works drawings and schedules to assist the Employer in obtaining entry to land to allow construction of the Scheme. All estate management and legal work will be arranged by the Employer.
- 2.1.6.5 The Consultant will provide updated project management information, as per Section 2.6, at the end of this stage.

Sections 2.8.6.1 and 2.8.6.2 of the Employer's Requirements will be paid on a percentage fee basis with adjustment for the actual cost of the Works Contract being above or below the estimated cost. The Consultant will be reimbursed separately for printing the necessary contract documents and drawings

Sections 2.8.6.3 and 2.8.6.4 of the Employer's Requirements will be for on an hourly rate basis. The Consultant will be reimbursed separately for printing the necessary drawings and schedules.

Sections 2.8.6.5 of the Employer's Requirements will be paid as a lump sum.

2.1.7 Stage 7 – Procure Contractor

2.1.7.1 The Consultant will produce a prospectus and pre-qualification questionnaire for the works contract which will be available to send out to prospective Tenderers after publication of the Contract Notice in the Official Journal of the European Union.

2.1.7.2 The Consultant will assist the Employer in preparing the relevant Contract Notice for inserting in the Official Journal of the European Union and the selection of suitable Tenderers which will involve the assessment of pre-qualification submissions.

2.1.7.3 The tender documents will be issued by the Employer but the Consultant will assist by dealing with relevant enquiries during the tender period. The Consultant will assist in the tender evaluation process and will submit a report on tenders to the Employer. The Employer will be responsible for awarding the contract.

2.1.7.4 The Consultant will provide updated project management information, as per Section 2.6, at the end of this stage.

Section 2.8.7 of the Employer's Requirements will be paid for on an hourly rate basis.

2.1.8 Stage 8 – Construction and Maintenance

2.1.8.1 Following award of the works contract the Consultant will issue contract documents and construction drawing and supervise the construction of the Scheme. The Consultant, acting as the Engineer's Representative, will establish a temporary site office and provide sufficient suitably qualified and experienced full time staff to carry out all relevant duties as follows:

- Supervising and inspecting the construction of the works
- Examining the Contractor's programme and method statements
- Informing the Employer of the progress and cost of the works and updating time and cost plans

- Arranging and chairing regular site progress meetings and producing the minutes of such meetings
- Undertaking monthly and final measurements and submitting such measurements to the Employer so that timely payments can be made to the Contractor.
- Assessing, evaluating and advising the Employer on any variations to the works contract.
- Assessing, evaluating and advising the Employer on the justification of and action to be taken on compensation events submitted by the Contractor including the consequences on contract cost and programme.
- Providing the Employer with record drawings and documents on completion of the works.
- Carrying out post-construction monitoring of the works during the maintenance period.

2.1.8.2 The Consultant will consult with Employer, Scottish Government, Appropriate Bodies, Landowners and Public.

2.1.8.3 The Consultant will provide updated project management information, as per Section 2.6, at the end of this stage.

Section 2.8.8 of the Brief will be paid on a percentage fee basis with adjustment for the actual cost of the Works Contract being above or below the estimated cost

2.1.9 All Stages – Designer Duties and Responsibilities under Construction (Design and Management) Regulations

2.1.9.1 The Consultant will be the Designer for the Scheme under the Construction (Design and Management) Regulations 2007 and will undertake the duties and responsibilities of that role at all stages of the Scheme. This will include identification of health and safety hazards and risks. The Consultant should preferably eliminate these risks through design but if this is not possible he should suggest means of mitigating the risks.

2.1.9.2 The “CDM Coordinator” for the Scheme under the Construction (Design and Management) Regulations 2007 will be appointed by Scottish Borders Council.

[NOTE: superseded by CDM2015]

Section 2.8.9 of the Employer’s Requirements will be paid as a lump sum for each stage of the project.

2.2. PROGRAMME

2.2.1 The Consultant, in complying with the terms these Employer’s Requirements, will allow for the following outline programme:

Stage 1	Appoint Consultant	Aug 2009
Stage 2	Review Studies	Aug 2009 - Sep 2009 (2 months)
Stage 3	Option Assessment + Public Consultation 1	Sep 2009 – Apr 2010 (7)
Stage 4	Outline Design of Preferred Scheme + Public Consultation 2	Apr 2010 – Sep 2010 (5)
Stage 5	FPS Order Process	Sep 2010 – Jul 2011 (10)
Stage 6	Detailed Design	Sep 2010 – Jul 2011 (10)
Stage 7	Procure Contractor	Jul 2011 – Dec 2011 (5)
Stage 8	Construction and Maintenance	Dec 2011 – Nov 2013 (23)

Note: The above outline programme assumes that it will not be necessary to hold a Public Inquiry to consider objections to the Scheme.

4.10 Appendix J – Links to legislation

The Flood Risk Management (Scotland) Act 2009

<http://www.legislation.gov.uk/asp/2009/6/contents>

The Flood Risk Management (Scotland) Act 2009 (Commencement No. 1 and Transitional and Savings Provisions) Order 2009.

<http://www.legislation.gov.uk/ssi/2009/393/contents/made>

The Flood Risk Management (Flood Protection Schemes, Potentially Vulnerable Areas and Local Plan Districts) (Scotland) Regulations 2010

<http://www.legislation.gov.uk/ssi/2010/426/regulation/1/made>

The Flood Risk Management (Scotland) Act 2009 (Commencement No. 2 and Savings Provisions) Order 2010

<http://www.legislation.gov.uk/ssi/2010/401/article/1/made>

The Flood Prevention (Scotland) Act 1961.

<http://www.legislation.gov.uk/ukpga/Eliz2/9-10/41/section/16>

4.11 Appendix K – Glossary

Catchment or Catchment Area

The specific land area that drains into a watercourse.

Coastal Flooding

Flooding that results from a combination of high tides and stormy conditions.

Compulsory Purchase Order (CPO)

A CPO can allow certain organisations to buy property without the owner's permission, if there is a strong enough case for this in the public interest.

Controlled Activities Regulations (CAR)

A reference to The Water Environment (Controlled Activities) (Scotland) Regulations 2005. All engineering works in or in the vicinity of rivers, lochs and wetlands now require authorisation under the CAR Regulations.

Cost Benefit Analysis

Comparison of present value scheme benefits and costs as part of an economic appraisal. The benefit-cost ratio is the total present value costs.

Culvert

A closed conduit used for the conveyance of surface drainage water under a roadway, railroad, canal, or other impediment.

Current Measures

The measures summarised in the current Flood Risk Management Plan which are identified as to be implemented before the plan is to be reviewed under Section 33 of the Act.

DEFRA

DEFRA (Department for Environment, Food and Rural Affairs) is a UK Government Department.

Embankment

Artificial raising of the natural bank height of a waterway.

Environment

Where environmental issues are referred to in this document, this term is used to encompass landscape and visual, flora, fauna, geological or geomorphological

features and buildings, air, water, sites and objects of archaeological, architectural or historical interest. (It is recognised that in other contexts the environment has much wider implications).

Environmental Impact Assessment (EIA)

Environmental Impact Assessment (EIA) is a process which identifies the potential environmental effects (both negative and positive) of a proposal.

Flood Risk Management Plans (FRMP)

High-level plans prepared by SEPA that set out the strategic direction of flood management, through to specific projects or schemes.

Floodplains

Floodplains are land areas adjacent to rivers and streams that are subject to recurring inundation.

Groundwater Flooding

Flooding that occurs when water levels in the ground rise above surface levels. It is most likely to occur in areas underlain by permeable rocks, called aquifers.

Hazard

A situation with the potential to result in harm. A hazard does not necessarily lead to harm.

Impermeable Surface

A surface that does not permit the infiltration of water and, therefore, generates surface water runoff during periods of rainfall.

Local Flood Risk Management Plans (LFRMP)

Plan prepared by local authorities that provide a local expression of the strategic plans prepared by SEPA. Include a summary of how actions will be implemented in each local plan area.

Pluvial flooding

Flooding that results from overland flow which has been generated by rainfall before the runoff enters any watercourse or sewer. This is also referred to as surface water flooding.

Probability

The probability of an outcome is the relative proportion or frequency of events leading to that outcome, out of all possible events.

Resilience

Resilience is a measure of the ability of something to recover from a flood.

Risk

A combination of the likelihood and consequences of an event.

Scottish Advisory and Implementation Forum for Flooding (SAIFF)

SAIFF is a partnership between the Scottish Government, Scottish public bodies and stakeholders that aims to support the implementation of the Flood Risk Management Act 2009

Scottish Natural Heritage (SNH)

SNH is the organisation responsible for promoting the care and improvement of Scotland's natural heritage

Scottish Water

Scottish Water is a publicly owned business, answerable to the Scottish Parliament and the people of Scotland. Its key duties are providing clean, safe drinking water and disposing of waste water from homes and businesses across Scotland.

SEPA

Scottish Environment Protection Agency. SEPA is the public body responsible for environmental protection in Scotland.

Temporary Works (TW)

In terms of the construction of a scheme or flood protection works, temporary works (TW) are the parts of a construction project that are needed to enable the permanent works to be built. Usually the TW are removed after use, e.g. access scaffolds, props, shoring, etc. Sometimes the TW is incorporated into the permanent works, e.g. haul road foundations and crane or piling platforms may be used for hardstanding or road foundations

4.12 Appendix L - Acknowledgements

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