Report to Perth and Kinross Council

FLOOD RISK MANAGEMENT (SCOTLAND) ACT 2009

Report by Paul Cackette, a reporter appointed by Perth and Kinross Council

- Case reference: FPS-340-2
- Name of Scheme: South Kinross Flood Protection Scheme 2024
- Promoting authority: Perth and Kinross Council
- Objectors: (a) Wilson Group (Scotland) Limited; and (b) John Russell
- Date of preliminary decision to confirm the Scheme : 4 December 2024
- Dates of hearing sessions: 28 and 29 October 2025 and 3 February 2026
- Date of site visit : 30 June 2025

Date of this report: 12 March 2026
Recommendation: To confirm without modification

Perth & Kinross Council
2 High Street
Perth
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DPEA case reference: FPS-340-2

Perth & Kinross Council
Perth

In accordance with my minute of appointment dated 25 February 2025, I conducted a hearing in connection with two objections into the Council's Flood Protection Scheme at South Kinross in relation to the justification for the Scheme and those two objections on 28 and 29 October 2025 and 3 February 2026.

The Scheme proceeds under the Flood Risk Management (Scotland) Act 2009. After promoting the South Kinross Flood Protection Scheme 2024 and receiving two objections to it, the Council considered the objections under paragraph 5(2) of Schedule 2 to that Act and on 4 December 2024 resolved, as a preliminary decision, under paragraph 5(1)(a) of Schedule 2 to that Act to confirm the Scheme without modification.

In terms of paragraph 5(5) of Schedule 2 to that Act, the Council gave notice to Scottish Ministers who decided on 30 January 2025 not to require an inquiry into the objections, by way of call-in under paragraph 6(2) of Schedule 2 to that Act. As provided for at paragraph 8 of Schedule 2 to that Act, the Council were in consequence required to hold a hearing into the objections before making a final resolution as to whether to adopt the Scheme. I was appointed as the independent reporter to hold that hearing and report.

My report into the policy justifications and outstanding objections is attached, along with a Report Summary. I held a Hearing on 28 and 29 October 2025 and 3 February 2026. I took into account the documents lodged by the Council and from the objectors (including the initial objections lodged within the statutory time period). Subject to a range of interim matters of a procedural nature, I took into account subsequent communications with agents for the objectors, the Council's Statement of Case and Scheme Justification, the Objector's Statements of Case, matters arising during the hearing, my impressions from my site visit on 30 June 2025 and respective Closing Submissions. I had regard to the Environmental Impact Assessment prepared in relation to the Scheme (to the extent narrated in my Report) and the relevant Flood Risk Management Plans.

In my view, the South Kinross Flood Protection Scheme is a legitimate, proper, reasonable and proportionate exercise of the powers of the Council under the Flood Risk Management (Scotland) Act 2009. It appears to me that there is a clear and rational connection between the legitimate aim of minimising the risk of future flooding in the area and the need for the Scheme as promoted as the means of securing that necessary aim in relation to the town of Kinross. That conclusion is supported by those Flood Risk Management Plans in identifying that need and that aim. I reached that view notwithstanding that each objector considered, to a greater or less extent, that the link between the flood risk in the area and the scheme was not adequately made and, in one case, that the impacts on the land affected outweighed the

benefit from proposed work on his land. For the reasons set out in the Report, in terms of Scheme justification as a matter of policy, I had regard to the Upstream Works separately.

Notwithstanding that general conclusion, I closely examined the extent to which the intrusion into private property rights (protected under Article 1, Protocol 1 of ECHR) were adequately balanced in order that the Scheme involved the least intrusive impacts on such rights and considered whether any feasible alternatives (both to a scheme in itself and to the scheme as proposed) had been adequately considered.

Subject to a range of specific concerns and issues addressed by me, I am generally satisfied that all the required procedures and processes under the 2009 Act and the Flood Risk Management (Flood Protection Schemes, Potentially Vulnerable Areas and Local Plan Districts) (Scotland) Regulations 2010 have been met. Subject to those concerns, I felt able to conduct this examination with sufficient information before me. I am satisfied that the holding of a Hearing (rather than a full public local inquiry) provided a sufficiently rigorous form of examination.

Notwithstanding all of that, I raise in my Report certain concerns as to how certain substantive rights of the objectors (and others not engaged in the current process) can be satisfied in relation to the detailed design of the Scheme, in circumstances where such detail is not as yet developed (and therefore can neither be examined by me nor easily challenged by objectors) and where, through a separate process not under the 2009 Act, planning permission for such detail may potentially be granted, by way of a deemed planning permission.

I have considered the various grounds set out in the outstanding objections. I have considered the impact of the proposal on the private ownership rights and the amenity of the property of the objectors. As required under the 2009 Act, I held a hearing into the justification for and objections to the Scheme.

None of the grounds of objection (from either objector) in my view support the making of modifications of the Scheme, in consequence of my examination of the Scheme before me.

I recommend that the South Kinross Flood Protection Scheme 2024 be confirmed without modification.

SOUTH KINROSS FLOOD PROTECTION SCHEME 2024 : SUMMARY REPORT

This Report is set out in four Chapters and recommends confirmation of the South Kinross Flood Protection Scheme 2024 without modification. It proceeds under the Flood Risk Management (Scotland) Act 2009 ("the 2009 Act") and the Flood Risk Management (Flood Protection Schemes, Potentially Vulnerable Areas and Local Plan Districts) (Scotland) Regulations 2010 ("the 2010 Regulations").

The Report is set out as follows.

In Chapter 1, I address and describe-

- Powers of the Council and steps taken in development of the Scheme (paragraphs 1.1 to 1.6);
- Funding (paragraph 1.7);
- Development planning under the Town and Country Planning (Scotland) Act 1997 (paragraphs 1.8 and 1.9);
- A description of the Scheme (paragraphs 1.10 to 1.15);
- Steps in relation to the Scheme as were required to be taken by the Council in terms of the 2009 Act and the 2010 Regulations (paragraphs 1.16 to 1.23, 1.25 to 1.27 and 1.29 to 1.32);
- A description of the Environmental Impact Assessment (paragraph 1.24);
- A note of the anticipated financial benefits of the Scheme (paragraph 1.28);
- A narration of objections and post-objection procedures (paragraphs 1.33 to 1.37);
- A description of the Scheme as adopted and matters consequential (paragraphs 1.38 to 1.40);
- Procedures in relation to the hearing of objections (paragraphs 1.41 to 1.48, 1.57 and 1.58);
- A description of my site visit (paragraph 1.49); and
- A description of the Hearing held by me on 28 and 29 October 2025 and 3 February 2026 and Hearing procedures (paragraphs 1.50 to 1.56).

In Chapter 2, I address and describe-

- The approach of the Council to the examination (paragraphs 2.1 to 2.3), setting out that I have considered, so far as reasonable, compliance with the procedural requirements (including intimation to persons potentially affected), the policy justification for the Scheme and the two individual objections;
- My assessment of the meeting of procedural requirements by the Council (paragraphs 2.4 to 2.16);
- An assessment of Scheme necessity and scheme justification (paragraphs 2.17 to 2.28);
- An assessment of the inclusion of the Upstream Works and of the options appraisal carried out by the Council (paragraphs 2.29 to 2.45);
- My consideration of alternatives in principle suggested for examination by objector John Russell (JR) (paragraphs 2.46 to 2.48);

- My consideration of the justification and alternatives in principle in relation to objector the Wilson Group (Scotland) Limited (WG), including natural flood management (paragraphs 2.49 to 2.57); and
- My assessment as to the lawfulness of the Scheme, in relation to consultation (paragraphs 2.58 to 2.76 in relation to JR and paragraphs 2.77 to 2.81 in relation to WG).

In Chapter 3, I address and describe-

- Consideration of the design detail of the Scheme in relation to the inter-action with deemed planning permission (paragraphs 3.2 to 3.10);
- Consideration of site specific objections by JR on the rigour of the methodologies used (paragraphs 3.11 to 3.36), impacts on drainage systems (paragraphs 3.37 to 3.38), land take and sterilisation (paragraphs 3.39 to 3.48), the accuracy of the cost benefit analysis (CBA) calculation (paragraphs 3.49 to 3.51) and the absence of direct benefit to either objector (paragraph 3.52);
- Consideration of site specific objections by WG including alternative options (paragraphs 3.53 to 3.64);
- Matters affecting the interests of Transport Scotland and Scottish Water (paragraphs 3.65 to 3.67);
- Detail design at the WG land (paragraphs 3.68 to 3.76) and at the JR land (paragraphs 3.77 to 3.81); and
- Modifications (paragraphs 3.82 to 3.91).

Chapter 4 draws these matters together in conclusions and my recommendation.

CHAPTER 1 : BACKGROUND

Powers of the Council and steps taken in development of the Scheme

1.1 The Flood Risk Management (Scotland) Act 2009 ("the 2009 Act") rationalised and updated flood risk related functions of public bodies in Scotland. This required them to take necessary steps to reduce overall flood risk. Public bodies were given functions under the 2009 Act to that end. The Scottish Environment Protection Agency (SEPA) and local authorities must act with a view to achieving the objectives in their Flood Risk Management Plan for the district. They must act co-operatively with a view to managing flood risk in a sustainable way, promoting sustainable flood risk and contributing to sustainable development and raising public awareness. Regard is to be had to the social, environmental and economic impacts of such steps. Duties are imposed on local authorities to establish a framework for assessing and mapping flood risks (Part 3 of the 2009 Act) and to take necessary steps to reduce the risk of flooding in their area, as may occur imminently and have serious adverse consequences for human health, the environment, cultural heritage or economic activity (Part 4 of the 2009 Act). The power for a local authority to manage flood risk is at section 56, within Part 4.

1.2 To those ends, planning to prevent or minimise those risks was undertaken by a range of local authorities (led by Falkirk Council, but including Perth and Kinross Council) along with SEPA through the adoption of a Local Flood Risk Management Plan (2016-2022) as the Forth Valley Estuary Plan District (Final Report). In that Report, a potentially vulnerable area (10/04) was identified at Kinross, Milnathort, Glenrothes and Kinglassie. A range of steps are identified in relation to that area at pages 59 to 68 of that Report. One of the measures (numbered 100110006, with an Amber status) is as follows-

> "A flood protection scheme has been proposed for South Kinross to address flooding from the South Queich, Gelly Burn and Clash Burn. The scheme would consist of flood defence walls and provide a 1 in 200 year (plus climate change) standard of protection".

1.3 The Local Flood Risk Management Plan Cycle 2 (2022-2028) and described as the Forth Valley Estuary Plan District is similarly developed, taking matters into what is described as Cycle 2. In that document the area of Kinross, Milnathort and Glenrothes is identified at page 45 and "designated as a potentially vulnerable area due to flood risk", now described as 02/10/03. Kinross is target area 239. The meaning of this is described at page 50. In summary "The main sources of flooding in Kinross are surface water and river flooding from the South Queich, Gelly Burn and Clash Burn. The local authority has carried out a flood study in this area in support of the proposed flood scheme. The study indicates that 129 homes and 55 businesses are currently at risk of flooding from the South Queich, the Gelly Burn and the Clash Burn". The Plan at page 50 shows an area including the full proposed area of the Scheme, including at the MOTO services at Kinross.

1.4 The then current understanding of flood risk states, in helping to "develop an understanding of flood risk in the area", that-

> "Since 2011 SEPA has developed and updated national assessments of flooding from rivers, surface water and coastal sources. The national assessment for river flooding was improved by flood study work supporting the on-going development of proposals for the South Kinross Flood Protection Scheme. The understanding of surface water flooding was also improved by Scottish Water's sewer flood risk assessment. There is a long record of flooding in this target area. Flooding occurred in January 1993, January 1999, December 2006, January and August 2008 and November 2009. In February 2020 a number of homes and roads suffered river flooding. Most recently, flooding was recorded on 12 August 2020 when homes flooded as a result of unprecedented rainfall in the area".

1.5 A range of steps are identified in relation to that area and one of the measures is the development of the current South Kinross Flood Protection Scheme, which is the subject of this Report. Section 3 of the Management Plan Cycle 2 sets out duties for next steps and the monitoring of progress.

1.6 Consistent with the foregoing, the Perth and Kinross Council Report of 4 December 2024 (see below) stated at paragraph 4.6 that "One of the key actions included within the Forth Estuary Local FRM [Flood Risk Management] Plan is to implement a flood protection scheme in South Kinross. The flood scheme was included as the 28th highest scheme on the national priority list". As well as those Plans (Production PKC 1.3.1), there is produced to me (Production WG3) a Strategic Flood Risk Assessment dated February 2025 (SFRA). That SFRA references the Scheme and the background to it at paragraphs 3.33, 3.34 and 6.253 to 6.255 (including Figure 134). That SFRA recognises that the Scheme remains subject to community consultation, statutory consents and the availability of sufficient funding.

1.7 In the analogy with compulsory purchase, I examined and sought assurances that funding allocations (as committed with as much certainty as was at this stage possible) had been set aside, or earmarked, to implement the Scheme if approved. This does not require undue precision at this stage on the sums involved (not least because of a range of future uncertainties of detail in implementation and having regard to inflation), but relates to assurances as to the reasonable future time scales. This is important so that persons affected are not left for unreasonable lengths of time with uncertainty as to the impacts on them. Financial information is included in the Committee Report of 27 November 2023 (further referenced below and with cost estimates uplifted in February 2024), in the Council Statement of Case where the anticipated benefits of the Scheme are stated and costed (see paragraph 1.28 below) and as was further provided at the Hearing session on 3 February 2026. Costs are identified in the risks section of the report of 7 November 2023. The Council capital funding commitment is 20% of the Scheme costs, with the balance to be met by the Scottish Government. This information is all drawn together at section 16 of the Council Closing Submissions. On the basis of the overall evidence presented, I was satisfied in these regards and report accordingly.

1.8 In the context of development planning under the Town and Country Planning (Scotland) Act 1997, I have considered the terms of the Perth and Kinross Local Development Plan 2019 (LDP2). This makes no direct reference to the Scheme (in contrast to a similar scheme at Perth), though in the location specific settlement statement sections of the Plan relating to Kinross and Milnathort, the Plan makes a number of references to flood risk and

the need for flood assessments at certain sites, including at the motorway service area. That Plan pre-dates National Planning Framework 4 (NPF4) adopted in February 2023, in which Policy 22 in its statement of policy intent indicates an intention "To strengthen resilience to flood risk by promoting avoidance as a first principle and reducing the vulnerability of existing and future development to flooding" so as to create places that are resilient to current and future flood risk. NPF4 states in Annex F that "For planning purposes, at risk of flooding or in a flood risk area means land or built form with an annual probability of being flooded of greater than 0.5% which must include an appropriate allowance for future climate change". The inter-action of the Scheme to the Local Development Plan (ie the other way round) is described at section 6.1 of the report of 7 November 2023.

1.9 One objector (Wilson Group) flagged up the ongoing steps working towards a new local development plan as has in recent times been under gatecheck consideration by Reporters appointed by the Scottish Government but is now back with the Council for consideration in consequence of that process (see paragraphs 10 to 13 of their Closing Submission). At the date of this Report, it has not been adopted. At the Hearing on 28 October, the planning witness for the Council indicated in very broad terms that the likely earliest date for adoption of a new Plan would be around January 2027. However, even as a broad indication of a direction of travel, the emerging plan was not produced to me (nor were relevant extracts) and accordingly I place little weight on what may (or may not) emerge in due course from that. NPF4 remains the more recent policy expression of the development plan. I nevertheless return to matters relating to development control under the Town and Country Planning (Scotland) Act 1997 below.

The Scheme

1.10 In the context of all of the foregoing (so far as in existence at the time), the Council developed a Scheme under section 60 of the 2009 Act as is under examination in this process. The Scheme, set out at the Scheme Description Report document (produced as part of PKC 1.4.2), is named the South Kinross Flood Protection Scheme 2024. The Scheme, as described in the statutory notices referenced below-

> "comprises a combination of flood defence walls, embankments, culverts and individual property works. The flood walls and embankments will incorporate appropriate seepage cut-off, back of wall drainage, road works, accommodation works, and erosion protection measures where required. The culvert works will involve upsizing and rerouting existing culverts which will include replacement of inlet and outlet headwalls. An upstream storage area is also proposed which will include an embankment and culvert.
>
> The defences are located on the right bank of the Gelly Burn and along both banks of the South Queich in the south of Kinross. The total extent of the proposed defences is approximately 1.4km.
>
> The culvert upgrades will be carried out on the Clash Burn. Works are in either roadways or greenspace such as Hopefield Place, The Myre, Smith Street, Sandport and Nan Walker Wynd. The total extent of the proposed culvert laying is approximately 0.7km.

The proposed upstream storage area will manage flows from the South Queich and is located in farmland west of Kinross Services. The total extent of the proposed defence is approximately 0.6km.

Four properties along the frontage of Loch Leven have been identified for installation of property level resilience measures.

The scheme involves the following operations:

• Flood defence walls

• Flood defence embankments

• Upstream Flood Storage Area

• Culvert Upsizing

• Utility and service diversions

• Hard and soft landscaping features

• Property Level Flood Resilience to 4 properties

Summary of the benefits which the Council considers are likely to be delivered from carrying out the scheme:

The scheme will reduce the risk of flooding to 177 properties across Kinross up to the predicted 1 in 200 year flood on the above noted bodies of water".

1.11 The Scheme is subject to examination in the context of an Environmental Impact Assessment (EIA), as further described in paragraph 1.24 below.

1.12 The primary purpose of the Scheme is to reduce that combined flood risk from the water courses described in the Scheme. It would be designed to benefit residential and other properties (including the Kinross services) in the event of a 1 in 200 year flood, as described above. The Scheme is designed to secure and deliver the environmental and other advantages in the area, as described in the Scheme. One aspect of such claimed environmental advantages relates to the potential for wildflower meadow planting (see below). Another wider advantage relates to the matter of public access to footpaths, of especial importance to one objector (also addressed below). These are permissible outcomes in my view (though that objector questioned this) but clearly are in principle secondary to the primary purpose of the Scheme. That primary purpose is not to be lost sight of.

1.13 On 23 January 2019, the Council's then Environment, Enterprise and Infrastructure Committee was updated on progress on implementation of the Scheme consistent with the 2016-2022 FRM Plan and agreed a recommendation to progress the Scheme, including to publication. On 19 December 2022, the updated Cycle 2 Forth Estuary Local FRM Plan was approved by the Council's Climate Change and Sustainability Committee and it approved a

report on an update to the Scheme. In pursuance of that consideration, the Council resolved to proceed with a flood protection scheme for the town of Kinross.

1.14 In accordance with that decision, the South Kinross Flood Protection Scheme was developed under those powers in section 60 of the 2009 Act. Promotion of such a Scheme under the 2009 Act requires to comply with the provisions of the Flood Risk Management (Flood Protection Schemes, Potentially Vulnerable Areas and Local Plan Districts) (Scotland) Regulations 2010 ("the 2010 Regulations"). Those Regulations were amended in 2017 to reflect the implementation of the Directive 2014/52 on the assessment of the effects of certain public and private projects on the environment (as then applicable). No provision amending those Regulations in consequence of the UK leaving the EU (and so disapplying or modifying those requirements set out in that Directive) have been made or advised to me. The current Scheme post-dates that implementation and so the 2010 Regulations as amended apply to it[1].

1.15 The powers under the 2009 Act are to be read with guidance issued by the Scottish Government entitled The Flood Risk Management (Scotland) Act 2009, Local Authority Functions under Part 4 Guidance ("the Guidance"). The clear position of the Council is of full regard and compliance with the Guidance. In the course of my examination, I have been referred in addition to the Scottish Government Circular 6/2011 (Compulsory Purchase), so far as relevant ("the Circular"). I treat those references to the Circular as being useful by analogy to the examination before me, insofar as the Scheme impacts on private ownership rights affected in the public interest, as protected by Article 1, Protocol 1 of ECHR (even where falling short of compulsory purchase in itself). Representations in relation to ECHR are addressed at paragraphs 1.45, 2.22 and 2.26 below.

1.16 A number of steps in relation to the Scheme were required to be taken by the Council in terms of the 2009 Act and the 2010 Regulations, as amended.

1.17 These included the preparation of an environmental impact assessment (the Council having determined that the Scheme would have a significant environmental impact), giving notice of the Scheme in terms of regulation 7(1) of the 2010 Regulations and the publicising, on a website used by it, of the proposed Scheme in terms of regulation 7(2) of the 2010 Regulations.

1.18 Under regulation 11, the Council were required to include a full description of the Scheme making clear the extent and scale of the operations thereunder, the land affected under them and land necessary to enter in order to implement the Scheme. The Scheme requires the Council to indicate an estimate of the cost of it. Regulation 12 makes provision for objections to the Scheme.

1.19 The Council undertook a series of steps by way of public consultation in relation to the Scheme, both on the preferred option and on alternatives (see Productions PKC 1.1.1, 1.1.2, 1.2.1 and 1.2.2). They went to public consultation over the period between 28 September 2023 and 5 October 2023. This comprised a public exhibition as was held in Kinross Parish Church at 10 Station Road, Kinross between those dates with the display boards (referred to

[1] See footnote 9 below in this regard.

in the consultation response at paragraph 2.3.3) available to view on the Council's Consultation Hub until 20 October 2023.

1.20 In terms of that public exhibition on the proposals, the local community was invited to view details of the flood scheme proposals and record their views. A total of 35 people attended the public exhibition and 12 comment forms or other responses were submitted. The response to the community public exhibition is recorded as generally positive with the majority of the community being supportive of the proposed outline design for the Scheme.

1.21 The Council have published a response in relation to that consultation, dated 29 January 2024 (also lodged as Production JR 17). The view of the Council was that "the response to the exhibition was generally positive with the majority of the community being supportive of the proposed outline design for the flood scheme. Some concerns were raised and these have been... addressed". I should record that, in terms of views of the public generally, I have only had regard to the information referred to at paragraphs 1.19 and 1.20 above and in that published response.

1.22 On 27 November 2023, the Council's Climate Change & Sustainability Committee was provided with an update on the progress of the Scheme (under reference to Report 23/332), produced as Production PKC 2.1.1. Amongst other matters, the Committee approved that: i) The recommended proposals were adopted as the Council's preferred flood scheme and ii) The recommended scheme be published under the 2009 Act and, subject to obtaining statutory approval and funding remaining in place, progress to detailed design and construction.

1.23 In the Report to that Committee, reference is made to the further modelling work which "confirmed the need to manage flooding on the Clash Burn and the risk to the M90 services at Turfhills from further upstream on the South Queich", consideration of alternative options (at Appendix A of the Report), cost benefit analysis and the public consultation exercise and consultation with key stakeholders. Matters of resource and funding are addressed in detail at section 2 of that Report. In general (as narrated at paragraph 1.7 above), the Scottish Government will meet 80% of the costs of the project (at the tender stage).

1.24 As was confirmed as necessary by the Council, an Environmental Impact Assessment (EIA) was required in relation to the Scheme. It was carried out by RPS (a firm of consulting engineers) commissioned on behalf of the Council to develop the design of the Scheme and undertake that EIA. Amongst other things, the EIA assessed the landscape and visual impact of the Scheme, the water environment and fluvial geomorphology, hydrogeology and contamination, ecology and nature conservation, cultural heritage and socio-economics, public access and amenity. As confirmed to me in the Hearing (and not disputed), the EIA should not be looked to in order to consider the adequacy of consultation with landowners (on which see below). The EIA serves different purposes. The Council have produced a Non-technical summary of the EIA, including lodging that with the EIA for the purposes of this examination (see production PKC 6). References in this Report to the EIA mean the Environmental Impact Assessment described in this paragraph.

1.25 Further to that decision made on 27 November 2023, notice was given to "landowners" in a generic letter dated 20 March 2024 (produced at me as PKC 4.1.1), comprising notice

under paragraph 1(1)(d) of Schedule 2 to the 2009 Act, as read with regulation 7 of the 2010 Regulations (in light of the need for the EIA). The effective date of that notice was 26 March 2024. The adequacy of such notice was challenged in this examination and those matters (and certain others relating to consultation) are addressed at paragraphs 1.31 and 2.4 to 2.16 below.

1.26 Beyond that local consultation in the town and the giving of notice to "landowners", other bodies consulted included SEPA, Kinross-shire Local Committee, Kinross Community Council, Kinross Flood Resilience Group, Loch Leven Fisheries, NatureScot, Transport Scotland, Historic Environment Scotland, the public utilities and "all other relevant organisations". Certain of those bodies are required persons on whom notice must be given under paragraph 1(1)(f) of Schedule 2 to the 2009 Act, as read with regulation 7 of the 2010 Regulations (again in light of the need for the EIA).

1.27 As noted above, by letter of 20 March 2024, the Council gave notice of the Scheme at Kinross as described above. The notice indicated an intention of the Scheme to reduce the risk of flooding to 177 properties, set out the intended operations and indicated that an EIA had been carried out. The combined number of business and residential properties was indicated in the Council Statement of Case as 194.

1.28 The anticipated financial benefits of the Scheme are stated in the Council Statement of Case, at the time of submission, as £15,950,261, based on 2023 prices and in line with the RPI for inflation (updated from the figure given to Committee on 27 November 2023 and broadly consistent with section 16 of the report dated 7 November 2023). Though the cost benefit analysis for the Upstream Works (as those works are also described in the Options Appraisal documentation as Flood Cell 3) was challenged (see below), the estimated cost/benefit ratio overall is 1.1. This is stated in the Council Statement of Case and was confirmed in discussion at the Hearing. That ratio means that the economic benefit accrued over time through the avoidance of flood damage is 1.1 times the estimated cost of the proposed Scheme.

1.29 That Notice of 20 March 2024 set out the process to follow, including how objections could be made in respect of the Scheme or the associated environmental assessment. Notice included arrangements to view or inspect Scheme documents (including the EIA), both at the offices of the Council (in Perth and in Kinross) and on a website used by it. As confirmed to me at the Hearing, site notices at appropriate places affected were posted (as required by paragraph 1(2) of Schedule 2 to the 2009 Act).

1.30 In addition (and as required by paragraph 1(1)(a) and (c) of Schedule 2 to the 2009 Act), there is exhibited to me a newspaper notice of the Scheme in the Edinburgh Gazette dated 26 March 2024, containing the prescribed content. I am advised that similar notice was given in the Perth Courier. As indicated in documents produced (and as confirmed in relation to the Hearing), a copy of the scheme documents (and EIA) was available at the Council offices, as required by paragraph 2 of Schedule 2 to the 2009 Act.

1.31 Under paragraph 3 of Schedule 2 to the 2009 Act, objections may be made within 28 days of first publication. Publication means newspaper publication. A doubt was raised with me in correspondence (and again in the Hearing and in Closing Submissions) by one

objector, as to whether the time periods in those requirements (of 28 days' notice) had been met, in part in light of the timings over Easter. In respect of such newspaper notice (referred to in paragraph 1.30 above), the time allowed (26 March to 24 April) appears to me to be 29 days. He could refer me to no provisions in the 2009 Act as the meaning of time periods in support of this matter (and I could see none). In addition (having regard to the risk of prejudice to others referred to in paragraph 1(1)(d) to (f) in respect of the letters referred to in paragraphs 1.25 and 1.26 above), these in effect gave additional days of notice to such persons before the prescribed period began. In consequence, I saw no merit in these points. In any event, no request was made to me by any person to be admitted as a late objector, as Schedule 2 to the 2009 Act permits.

1.32 In summary, paragraph 1 of Schedule 2 to the 2009 Act sets out the various requirements relating to the giving of notice of the Scheme. These requirements comprise persons to whom notice must be given and newspaper notice. Paragraph 1(3) of Schedule 2 to the 2009 Act prescribes the content of such notice. Subject to matters raised in my assessment below, I am satisfied that these requirements have been met. The firm position of the Council throughout is that all of these requirements have been fully met. Specifically in relation to residents at Levendale (on a matter raised after the Hearing) I accept the assurances from the Council that full service and intimation of the Scheme included such residents.

Objections and post-objection procedures

1.33 In terms of the notices described above and the legislative framework, the date by which objections could be made was 24 April 2024. Within the required period for making objection, two objections were received along with three other representations/submissions. The view of the Council, reflected in the Report mentioned at paragraph 1.37 below, was that these three representations were from statutory consultees providing technical advice on the EIA and outlining any future environmental requirements or considerations. None of those representees participated in this examination nor sought the opportunity to. No indications have been given to me that such representations comprised formal objections; are relevant to the matters before me; nor were those consultees seeking the opportunity to participate. I accordingly make no recommendations in these regards concerning such representations/submissions. No other objections or objectors in response to those notices have been identified.

1.34 The formal and valid objections to the Scheme were made by Wilson Group (Scotland) Limited, having a place of business at Old Cleish Road Kinross KY13 8DG on land there extending to 2.37 hectares or thereby ("WG") and John Russell, residing at Mawhill Farm, Kinross, KY13 0NP and owner of affected farmland at Mawhill Farm and Turfhills Farm ("JR"). Each of the objections were made within the statutory period to object under paragraph 3(2)(c) of Schedule 2 to the 2009 Act (and met the other requirements of that sub-paragraph). Each of these objectors have an interest (described in more detail below) as landowners of land both "on which the proposed operations [under the Scheme] are to be carried out" and "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". WG have owned such land since 3 March 2023 (under a title deed produced to me, under Land Register title KNR2370 (Production WG1)). JR has owned Mawhill Farm (personally) since 1990 and

acquired Turfhills Farm (formerly leased to him) on 1 June 2005 under Land Register title KNR1926 (Production JR3). Both objectors are "relevant objectors" for the purposes of Schedule 2.

1.35 Once the position regarding potential modifications (see paragraphs 3.82 to 3.91 below) affecting other persons with interests in land was clarified, I confirmed on 9 July 2025 that the interested parties in this examination were finalised as the Council, WG and JR. This confirmation was procedurally important, for the reasons set out at paragraphs 3.84 and 3.85 below. Neither objector challenged or questioned that confirmation as to interested parties between the date of confirmation and any of the Hearing sessions.

1.36 The objectors remain dissatisfied with the responses by officials of the Council and consider that inadequate consultation as mandated in the Guidance (and recommended in the Circular) has occurred. The Council produced to me their responses to the objectors by way of a line of emails dated between 23 February 2023 and 3 December 2024 representing correspondence with them both, as included correspondence with WG after formal adoption as a preliminary decision (and notification), up to 19 February 2025 (Productions PKC 4.1.1 to 4.6.1). It was not ultimately disputed that respective objectors had seen these emails at the times of issue (even though some were sent to agents instructed by the respective objectors, rather than directly to objectors). Any failures by the objectors and their agents to properly or effectively communicate with one another cannot be blamed on the Council. It is not unreasonable for the Council to rely on that correspondence in this examination. I provided the opportunity after the first two days of the Hearing for objectors to raise issues based on reliance on these documents (see the JR Closing Submission at paragraph 17) but this was not taken up by the date due of 2 December 2025. I address the detail of the grounds of objection in those regards or arising therefrom (maintained by both objectors) below. Suffice to say at this stage that each of the objections received remain unwithdrawn as at the date of this Report.

1.37 The Council's Strategic Lead – Environment and Infrastructure then, on 4 December 2024, prepared a Report with an update on the Scheme for consideration by Council. It recommended approval as a preliminary decision while noting the two valid objections (and the representations referred to at paragraph 1.33 above) and the terms of the Environmental Impact Assessment. The objections, as summarised, and officials' responses are at Appendix B of that Report (thus complying with paragraph 5(2) of Schedule 2 to the 2009 Act). These are produced at Production PKC 2.2.1.

1.38 The proposed Scheme (as the adopted preferred scheme) and as described at paragraphs 4.4 and 4.5 of that Report-

> "involved the construction of flood walls and embankments along the South Queich, culvert improvements on the Clash Burn and a flood storage embankment adjacent to the M90 motorway services at Turfhills. Property flood resilience measures will be adopted for a small number of properties next to Loch Leven.
>
> The preferred scheme has been designed, as a minimum, to protect existing properties up to the predicted 1 in 200-year flood event (the flood that has a 0.5% chance of occurring in any one year)".

1.39 The preferred Scheme was approved by the Council (without modification) as a preliminary decision made on 4 December 2024, as so recommended. That decision is a preliminary decision under paragraph 5(1) of Schedule 2 to the 2009 Act. Notice of that preliminary decision was given to the objectors, as required by paragraph 5(3) of Schedule 2 to the 2009 Act, by email of 13 December 2024.

1.40 These matters are of importance not least because, by virtue of compliance with regulation 14 of the 2010 Regulations, the confirmation of the Scheme under paragraph 9(1) of Schedule 2 will result in a deemed planning permission for the development which the Scheme sets out, if so directed by the Scottish Ministers. That is provided for by section 57(2B) of the Town and Country Planning (Scotland) Act 1997. I address matters relating to planning in this regard at paragraphs 3.2 to 3.10 below.

Procedures in relation to the hearing of objections

1.41 In terms of the 2009 Act, where objections are maintained but a preliminary decision is made to confirm the Scheme, the matter is referred to Scottish Ministers to consider whether the nature and extent of outstanding objections requires the holding of a public inquiry. That would be by way of call-in of the Scheme under paragraph 6 and inquiry under paragraph 7 of Schedule 2 to the 2009 Act. Otherwise, the matter falls to be considered by a hearing. As above, a preliminary decision under paragraph 5(1) of Schedule 2 to the 2009 Act to confirm was made by the Council on 4 December 2024. On referral to them, Scottish Ministers decided on 30 January 2025 not to proceed by the holding of a public inquiry. The adoption of the Scheme by the Council (as permitted under paragraph 9(1) of Schedule 2 to the 2009 Act) requires, as a pre-condition, consideration of valid objections (and any matters raised at the hearing), by virtue of paragraph 9(2) of Schedule 2 to the 2009 Act. Consistent with the Guidance, the Council determined that this be held by an independent person. Accordingly, following my appointment on 25 February 2025 as such an independent person, I took a range of preliminary decisions and set out a range of procedural requirements, ahead of, and with a view to, holding a hearing under paragraph 8(2) of Schedule 2 to the 2009 Act. I did this mindful of Appendix G of the Guidance in setting the framework for a structured discussion to ensure a fair hearing and to provide me with all the information known to parties as is necessary for the purposes of my Report.

1.42 In accordance with the Guidance, it was suggested by me that consideration of outstanding and un-withdrawn objections is to be carried out under a Code of Conduct for Hearings set out at Appendix G, if agreed by parties. Appendix G sets an important framework for this examination and sets the tone for openness and transparency in the conduct of parties in the public interest. Parties are expected to comply with it. No objection to so proceeding was given by the Council. By letters of 16 April 2025 issued to parties, agreement to the use of that Code was sought (with a 14 day period to object). Neither party objected, with active agreement forthcoming from WG. Those letters suggested an initial indicative time line for the Hearing and included an indication of how relevant documents could be seen, seeking views on the preference of objectors as to the oral procedure, indicating my intentions regarding the provision of written statements of case and intimating the need to provide documents or lists of documents intended to be relied on.

1.43 It should be noted and recorded at this stage that, although it was clear and has been clear throughout that JR was legally represented by their solicitors in Kinross (and in due course by Counsel at the Hearing), the position of WG remained unclear, up until 16 June 2025. Their lawyer (normally instructed by them) was not instructed initially in order to represent WG for the purposes of the examination, but was receiving *ad hoc* instructions, as various procedural stages progressed (and, in relation to each of those stages, as they occurred). That position was not initially stated (nor was adequately clearly stated or discernible) in the initial email from those lawyers of 26 February 2025 but was their position until, on my request, the legal representation for WG was confirmed on 16 June 2025, for the purposes of the Hearing. I should record, for the avoidance of doubt, that no representations were made by WG's lawyers that any letter or email to them in this process was defective or inadequate for want of authority to receive it or act for WG. In addition, I treated them as instructed throughout at least for the purposes of GDPR.

1.44 It should be noted and recorded at this stage too that, despite the suggestion by WG in the email of 26 February that the same Reporter (namely me) be appointed both in this regard and in relation to a Discontinuance Order also promoted by the Council (under sections 71 and 72 of the Town and Country Planning (Scotland) Act 1997), WG through their lawyer raised potential, though non-specific, questions as to the appropriateness of my appointment in respect of the Scheme and flagged up a previous professional relationship between that lawyer and myself, dating from 1999. The Council confirmed that they were content to proceed with my appointment (as I also was). I could see no reason for my appointment in both roles being inappropriate (in part as I was reporting to different bodies). Although both affected land in Kinross owned by WG, it was separately confirmed to me by the Council that nothing in the Discontinuance Order process was dependant on the Scheme. In any event, had it been, I would have been required to deal with that issue when examining the Order (not the other way round). No suggestion was made by WG that anything in the Scheme was dependant on the Discontinuance Order. My Report in relation to the Discontinuance Order was submitted to Scottish Ministers on 18 September 2025. Refusal to confirm the Order was determined by Scottish Ministers on 23 December 2025 (see Production WG 13).

1.45 I gave consideration to the fact that I was reporting in relation to the Scheme to the Council where they were also a party to the Hearing (in case that was the underlying concern of WG, based on natural justice). I did so, even though that proposition was not in fact put to me. However, the procedure whereby the Council hold a Hearing (where not called in by Ministers) in relation to their own Scheme is expressly provided for in primary legislation at paragraph 8 of Schedule 2 to the 2009 Act (read with appeal rights to an article 6 (ECHR) compliant court at paragraph 12). My role, consistent with Appendix G of the Guidance (the use of which was not objected to by any party in these terms), is as a person appointed to report to them thereunder. I make no recommendations arising from these matters as raised in this paragraph.

1.46 On 16 April 2025, I sought a Statement of Case from the Council (received on 8 May) and gave each objector the opportunity to lodge their Statements, supplementing the objections received previously within the statutory time period. These were received on 10 and 11 June 2025, but each gave rise to uncertainties and ambiguities, as led me to write to parties on 20 June seeking clarification of a number of issues, concerning both procedural

and substantive matters. These issues included lack of clarity as to the inter-relationship between these Statements and the original objections and lack of clarity on whether the objections were to the Scheme as a whole or only to parts (as might engage the power to recommend modifications). Clarity was needed, so as to assist the effective holding of a Hearing in due course.

1.47 As above and based on the questions asked by me in those letters and on the responses from WG and JR, I was in a position to determine that the list of persons interested for the purpose of my examination was finalised as the Council, WG and JR, as indicated to that effect to parties on 9 July 2025. There were no late objectors nor others identified with a potential interest deriving from the representations of the Council or the proposals of either objector. The latter has relevance in relation to the power to modify (on which see paragraphs 3.82 to 3.91 below). Although WG have questioned the compliance with specific notification requirements, no other objections or objectors in response to notifications of the Scheme have been identified to allow me to take a different view. WG did not respond in this regard to my indication on 9 July, in the period before the Hearing.

1.48 In consequence of responses to my letter of 20 June I was in addition able to be satisfied that the substantive content of each original letter of objection was fully covered and encompassed in the objectors' Statements. Mindful that the Statements of Case of the Council and the objectors had developed from the original letters of objection, I considered whether any outstanding other issues separately remained from the original letters of objection. The objectors both confirmed that position at the hearing. At the Hearing I gave the opportunity (at the end of respective objector sessions) to raise any matters as contained in the original letters of objection but not covered in the Statements or at the Hearing itself. None were raised.

1.49 In order to better familiarise myself with the area, the Scheme and the issues in the objections, I made an accompanied site visit, by foot and by car, to certain parts of Kinross affected by the Scheme proposals and the areas around where the objectors operate their businesses on 30 June 2025. I did so in three stages – an unaccompanied observation by me and visit to the town and parts where works are proposed (flood cell 1); the area of land comprising the business premises of WG and surrounding accesses and streets (by foot, with two representatives of WG, two Council officials and JR and his lawyer) (flood cell 1); and land owned by JR, along with areas in which the South Queich and Ury burns flow (in particular the Back Park (Field 5), Kippet Knowe (Field 7) and an area in the town of Kinross where the Ury Burn re-surfaces after passing under the M90), close or adjacent to the MOTO services (by car and foot, with two Council officials and JR and his lawyer) (flood cell 3). I spent 2 hours and 30 minutes on site in total at that site visit.

Hearing on 28 and 29 October 2025 and 3 February 2026

1.50 A hearing date was fixed for 28 and 29 October 2025 and subsequently on 3 February 2026, proceeding as a virtual hearing, as determined by me on 30 July 2025. I declined to hold the Hearing In Person, despite a request from WG (and separately from JR) to do so. By email to the objector's legal agents of 17 September 2025, notice of the Hearing date was given and comprised the notice is as required by, and in terms of, paragraph 8(3)(a) and (4) of Schedule 2 to the 2009 Act. Public notice of that hearing was given by newspaper

advertisement to allow members of the public to call in to attend as observers. This notice is as required by, and in terms of, paragraph 8(3)(b) and (5) of Schedule 2 to the 2009 Act. Notice was given in the Perth edition of the Dundee Courier and Advertiser on 25 September 2025. Further or additional notice was not, in my view, required in relation to the continued Hearing on 3 February 2026. Closing submissions were to be lodged by 24 February 2026.

1.51 In relation to the Hearing held on 28 and 29 October 2025 and 3 February 2026, this progressed in accordance with an Agenda, circulated by me in advance and initially in draft, subject to comments, suggestions or additions by parties (and in each case adjusted on the day). The Hearing was held in accordance with the Guidance.

1.52 The Council witnesses, in terms of their witness list submitted on 3 July, were Dr Rick Haynes, Russell Stewart, Rory Stuart, David Stephens, Katie Briggs, Andrew Jackson, Stephen Patterson and Aisling McGilloway, along with their In House lawyer (Bernard McFarlane). With my agreement, Georgia Webster attended on 3 February 2026 only. Attending for the Wilson Group was Mark Wilson and their agent Mr Watchman (on all three days). Mr Wilson made a personal statement on 3 February (later lodged as Production WG 17). Attending for John Russell on 28 and 29 October 2025 were Mr Russell himself, with witnesses Hugh Ironside and Dr Michael Stewart and their agent (Ms Miller) and Counsel (David Thomson KC). On 3 February 2026, only Ms Miller was involved (as observer without joining the call, rather than participant). Notes of the qualifications and roles of witnesses (other than the two objectors personally) were provided to me.

1.53 The Hearing proceeded on the basis of discussion of the issues led by me, in relation to those Agenda items and primarily based on the Statements of Case of the Council and the respective objectors, informed by documents lodged and admitted and from my site visit. The Hearing proceeded in light of various procedural indications and rulings made by me in correspondence with parties.

1.54 As at paragraph 1.48 above, I gave the opportunity at the Hearing to each objector to address me on any issues that arose in their original letters of objection that were not covered in Statements or otherwise in the Hearing. That opportunity (given at the end of respective objector sessions) applied equally to any other matters relevant to me in the examination (not otherwise raised, discussed or examined) and no such matters arose or were raised by objectors at the relevant point while evidence sessions remained open.

1.55 Despite the concerns referenced above, I felt able to conduct this examination with sufficient information before me. I am satisfied that the holding of a Hearing (rather than a full public local inquiry) provided a sufficiently rigorous form of examination. Consideration was given by me to this matter as Counsel for JR suggested or implied (without any kind of specific ground stated) that the Hearing process was inadequate as a form of examination. I did not agree with him in that regard.

1.56 After the Hearing, a period of 21 days was allowed for submission of Closing Submissions. Each party provided Closing Submissions. In the case of WG, there was in addition post-Hearing correspondence in respect of matters arising on 3 February. In addition to that, I was concerned that certain matters raised in Closing Submissions (though not by JR) comprised new material (including new case law) not properly aired with opportunities to

comment by parties affected. This led to a short period of further exchanges to provide such opportunities, with a view to ensuring procedural fairness and so that I could understand such issues and the views of parties on these matters. Where I remained in any doubt about such matters or reject evidence introduced by in the Closing Submissions, I disregarded such new material and in this Report narrate where that is done.

1.57 For the purposes of this examination, the Appendix to this Report sets out the documents from the parties interested (as determined in terms of my procedural rulings) and relied upon by them in my examination. Inventories of documents intended to be relied on at the Hearing were provided, as requested by me and as reflected in that Appendix. Although there was a procedural change after the first two days of the Hearing (to house documents locally on the Council website), these documents were initially uploaded onto the DPEA website, for the purposes of transparency and, as indicated to parties, I asked that documents should not be submitted by web link (since versions might change over time), but as pdf documents or extracts of relevant parts. Unless submitted to me (as directed by me), I did not have regard to documents accessible from other sources (such as the Council planning portal). As part of my examination and in order to assist the holding of the Hearing, I sought an indication from objectors of which parts of the EIA were intended to be relied upon. The responses to that request are as set out at Productions WG9 and JR32.

1.58 In relation to the documents before me, seven documents were produced after the start of the Hearing on 28 October. Four additional documents were on behalf of WG (Productions WG 11, 11A, 12 and 13) and three additional documents were on behalf of PKC (Productions PKC 7, 8 and 9). Although the three PKC documents were only produced on the Hearing date of 3 February itself, WG did not object (though reserved their position due to the lateness). I allowed all seven documents to be admitted into the examination. Other documents were produced with or after the deadline for Closing Submissions, admitted into the examination in light of the steps taken at paragraph 1.56 above. These are numbered Productions WG 14 to 19).

CHAPTER TWO : JUSTIFICATION FOR THE SCHEME AND CASE FOR THE PARTIES ON JUSTIFICATION AND LAWFULNESS

Approach to the examination

2.1 In order to be comprehensive in this examination and to be of assistance in considering this Report and because **the nature of my examination role** was the subject of representations before me, I should set out my approach in this role. This includes in particular why I have examined the Scheme beyond the subject matter of the two objections and the interests of the two objectors.

2.2 In addition to those matters, I have looked further, and so far as is reasonable and practicable, in relation to the fulfilment by the Council of the **notice and other procedural requirements** applicable to the Scheme. The reason for me doing so is that, in order to report fully (as recognised at page 64 of the Guidance), I consider it valuable to reasonably satisfy myself that – beyond the two objectors who engaged in this process as objectors – there are no other potentially affected land owners (or others with an interest) who might have engaged in this process but did not do so in consequence of any failure in the procedural requirements of due notice. And accordingly this can allow me to consider whether I can reasonably safely complete this examination and report, based on the representations of the identified parties before me.

2.3 I have looked too at matters of the **necessity for, justification for and lawfulness of the Scheme** (to use the formulation of JR). This includes looking to be satisfied that the policy decision to adopt the Scheme is within the range of options reasonably open to the Council; that the powers under the 2009 Act are properly open to them as exercised; that doing so is a proportionate response to the policy aim; that there is a causal link between the outcome desired and the Scheme as the adopted means to secure that outcome; and that, at a general level, this Scheme is the least intrusive alternative reasonably open in relation to the impact on private property rights (in the public interest). All of these, and in particular minimising intrusion on the peaceful possession of the objector's interests, read across to the detailed assessment (below) of the property rights of the objectors.

Meeting of procedural requirements by the Council

2.4 I address these matters generally at paragraphs 1.25 to 1.32 above, including a particular issue on the newspaper notice (at paragraph 1.31 above). The position of the Council is that all these requirements have fully been met, in all regards. In respect of the matters addressed in those paragraphs, I agree. The Council add that broader discussions and active engagement with persons affected by the Scheme (including residents at Levendale, which I take to be those residents of properties adjacent to the WG land) have been ongoing throughout.

2.5 WG though make two points to me in relation to others with a land interest. They also question, at paragraph 16 (second sentence) of their Statement of Case and paragraph 118 of their Closing Submission, the adequacy of notice to statutory undertakers potentially affected on his land but where there is produced to me a standard letter issued to such undertakers (Production PKC 1.4.1) and where I am assured by the Council that all such

persons have been engaged with as required under the 2009 Act at paragraph 1(1)(f)(vi) of Schedule 2. Reference is made in that regard to paragraph 1.33 above. I note too the terms of section 6.9 of the RPS Technical Report dated 7 November 2023 (public utilities diversions) which narrates impacts on utilities and the extent of engagement with them. I could see nothing supporting the suggestion at paragraph 118 of the WG Closing Submission that the Council had failed in engagement with the successors to the North of Scotland Hydro-Electric Board.

2.6 In considering these matters, lawyers for WG confirmed that they do not act for any statutory undertakers in this process. They gave no indication that they acted for any tenants of WG nor any other potentially affected persons. Of relevance to paragraphs 3.58 to 3.64 below, they do not act for Mr Lee. No such points under this heading are made by JR.

2.7 The first point made relates to the giving of notice to any person with an interest in land under paragraph 1(1)(d)(i) of Schedule 2 to the 2009 Act as it might apply to tenants of land owned by WG. I was aware, through my examination of the Discontinuance Order, that WG lets out parts of his land. In the course of *that* examination, a note of the names of the tenants was given to me. However, an equivalent note is not provided to me (or to the Council) in this examination. No copies of the leases (showing their extent or area) are provided nor were provided in that examination. This leaves me unable to assess or ascertain whether any such tenants are caught by that provision. I note that the proposed works on the WG land comprises embankments at the perimeter but there is nothing produced to the effect that any lease is (in part) over the affected land (in the words of that provision "land on which the proposed operations are to be carried out")[2]. The test in this provision relates to persons with an interest in land "known" to the Council.

2.8 Even disregarding that evidence as to the areas let are not available (as at the date of this Report), awareness of the existence of tenants is essentially only shown as arising (in a different process to different officials) around one year after notice of the Scheme was given (as narrated above). WG did not respond on these matters to my indication of the finalisation of the list of parties to this examination issued by my letter of 9 July (as to the potential to involve them if considered that the notice provision applied to them, in the period before the Hearing). As well as these factual differences from the examination by me of the Discontinuance Order, the context of that examination was in a planning matter where the required notice was analogous to a neighbour notification as a specific requirement under planning law.

2.9 Paragraph 1(1)(d)(ii) of Schedule 2 to the 2009 Act applies in respect of "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". It is possible, in contrast to paragraph 1(1)(d)(i), that these leases may be affected under that heading (see page 62 of the Guidance), though that is not shown (under reference to any materials before me). It might be inferred that this is the case, since intimation was given to WG (and since WG are landlords of lands leased). While no doubt WG were under no obligation to alert the Council, the position is that they did not. The problem though for this point, as made and relied on by

[2] The WG Closing Submission at paragraph 120 purports to introduce evidence in this regard. I have disregarded that evidence as incomplete and not brought into the examination at a point at which it could be tested.

WG, remains the issue of knowledge on the part of the Council, then and now (or at least at the date of this Report) of persons with an interest, to the requisite level of detail. WG knew the detail of the leases but chose not to bring that detail to me nor to the Council in the course of the examination. For the reasons below, the position is not retrieved by virtue of paragraph 119 of the WG Closing Submission. In such circumstances, it appears to me to be not unreasonable for the Council to rely on public notice (as the 2009 Act otherwise requires and was complied with) and to proceed on the basis of responses and engagement as described in paragraph 1.33 above. In this regard (and elsewhere in respect of this section of my Report), I am reminded of the terms of Appendix G of the Guidance, when considering the steps of WG before me, in Appendix G saying "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" (my emphasis).

2.10 In their Closing Submission, WG introduce three new points. Doing so is to be considered in light of what I write at paragraph 1.54 above. The first and second such points are addressed at paragraphs 2.11 and 2.12 below and the third at paragraph 2.15 below.

2.11 The first (paragraph 119) is that knowledge of the leases (though again presumably not the precise areas or location of land let) could – they suggest - be gleaned from the Valuation Roll. This is new because the Valuation Roll material was not produced to me in this examination and was not sought to be introduced in that Closing Submission. The correctness or otherwise of that proposition could not be tested by me. An opaque reference to WG's land being included in the Valuation Roll is made (at paragraph 2 of their Statement of Case), but with no reference to tenants. The context of that paragraph is the title history of WG. Insofar as a reference to tenants can be implied, the same difficulty narrated above (area and location of leases) applies as the position is not clear. I cannot accept that the existence of tenants can be treated as "known" to the Council as a matter of fact by virtue of that reference, in the absence of any further relevant detail. Paragraph 2 of their Statement of Case is not intimation of the existence of WG tenants. Neither is the WG note of 1 May 2025 (addressed to me), though at least that does generically mention tenants.

2.12 The second is the introduction of the Pridmore case (R (oao Pridmore) v Salisbury District Council [2004] EWHC 2511 (Admin), at Production WG18), footnoted at paragraph 110 of the WG Closing Submission. That case exists whether admitted to this process or not and the Council will require to consider its relevance on receipt of this Report. My comments on it are therefore limited. As I do above (regarding the Discontinuance Order), I note that Pridmore is a planning case, proceeding in a different statutory context. WG in a number of places draw analogies to planning but where I consider that such analogies may not be safe. My primary observation is that Pridmore may not be as helpful to WG as they think. The main point appears to be that service for one purpose cannot be treated as service for other purposes. The flip side of that reasoning is that awareness by the Council for one purpose (whether it be the Discontinuance Order or the content of the Valuation Roll) cannot be unthinkingly applied to be awareness for the purpose of notice in a different context, in this case under the 2009 Act.

2.13 Moving on from tenants, WG note in their Statement of Case at paragraph 16 that there is a security over WG's land (as disclosed in the title sheet produced by them as

Production WG1, registered on 6 March 2023). They point out that Appendix E of the Guidance includes security holders as part of the list of persons considered as having an interest in land. That term is relevant to paragraph 1(1)(d) of Schedule 2 to the 2009 Act. WG argue that this interest is covered. Even if not capable of being known (in the way that tenancies are not, as described above), WG argue that a diligent check of the title position would have disclosed that interest. They suggest that the inclusion in Appendix E of security holders in that list should have alerted the Council to the need to check the title position. Production WG1 was lodged on 10 June 2025 (again some time after the giving of wider notice), but the security is shown as being registered on 6 March 2023. No indication of giving notice to the security holder is produced to me by the Council. On the other hand, without seeking to suggest that the notification responsibility lay with WG, they too give no indication that they gave notice to, or alerted, the holder of the security over the affected land as could have permitted them to participate in this examination.

2.14 Accordingly, my examination proceeds (or appears to proceed) without the security holder being able – if so advised – to participate. I was content to do so. No steps were taken, so far as I am aware, to provide late notification to them. It cannot be said with certainty whether the security holder would have participated, if they had been notified. The Council are advised to seek legal advice in this regard, including as to whether the obligation is of the nature of a mandatory or directory nature and as to the consequences of the circumstances as described to me and as set out above.

2.15 The third matter introduced in the WG Closing Submission is the position regarding land next to WG's, described as the former railway land. See paragraphs 44, 122, 123 and the second sentence of paragraph 124 of their submission. I treat this matter separately because – in contrast with WG's tenants and the standard security holder - this relates to land separate from land owned by WG. There are many areas of land affected by the Scheme relating to land separate from land owned by WG and they are not the guardians of those with interests in such land.

2.16 The late introduction of points regarding the former railway land after closing of the evidence sessions makes it impossible for me (short of re-opening) to make findings in this regard. Indeed, it is possible that WG answer their own question in paragraph 122 ie it may be that no notice was given because the owners could not be traced. In that case, the owners would not be "known" to the Council, to use the language of the 2009 Act. Without proper notice to them in this process, the Council were not given the chance to have "presented evidence about its land referencing and the use of that tool in this instance". I cannot answer such points, as introduced in this way. The Council, as above, rely in part on site notices and newspaper notice (as a typical tool, where and if land ownerships are not known to them). WG do not suggest that I re-open the examination in this regard and, based on this assessment, I see no cause to nor advantage in doing so.

Scheme necessity and scheme justification

2.17 In principle, the justification for the Scheme is set out in the flood risk management policy documents in their relevance to the catchment areas of the relevant rivers, all as set out at paragraphs 1.2 to 1.6 above. These flood management policy documents provide a

policy justification in principle for the Scheme at this location. The policy context of that is consistent with the 2009 Act.

2.18 I narrate above, the history of consideration by the Council of the Scheme and its development (including in light of objections) through committee reports. Paragraphs 1.19 to 1.21 above addresses public consultation.

2.19 Though only in part examined at the Hearing (and done only to the extent relevant to the matters before me), the EIA addressed matters described in more detail at paragraph 1.24 above. The non-technical summary of the EIA (Production JR16) described the planning context (albeit with an erroneous reference to TayPlan, described as an irrelevant consideration in the WG Closing Submission at paragraph 102); set out the seven elements of the Project, by way of Project Description; summarised the options review; and summarised various environmental impacts addressed in the EIA in more detail. The inclusion of the Upstream Works (Flood Cell 3) in the Scheme was recognised in this. Though the objectors focus on the EIA was limited, I am nevertheless satisfied that all requirements as regards EIA related considerations are met and that the EIA is complete and comprehensive. The reference in error to TayPlan is not material.

2.20 Though the implementation of the Scheme would necessitate taking mandatory access onto private land for construction work (estimated as being for a duration of 8 weeks for the objectors' land) and that works forming part of the Scheme (such as embankments, flood defences and environmental improvements) would impact on the full peaceful possession of land affected, it is a matter of significance that no compulsory acquisition of land (by means of a Compulsory Purchase Order (CPO)), in itself, is necessitated by virtue of the Scheme, at least as at the date of this Report. That includes, subject to the same provisos, any land of the objectors. That certainly was my interpretation of the Scheme documentation in my consideration of the matters before me, though it became apparent during the Hearing that neither objector had previously understood that to be the position (nor had understood it as clearly as I had). Compulsory Purchase powers are available, if needed, under the 2009 Act (section 66) and at the Hearing both objectors sought assurances in these regards. The Council were clear as to current intentions. In any event, I was satisfied in that regard for the purposes of this examination, not least because, if CPO powers were proposed in future to be exercised (and objections made), a separate hearing and confirmation process leading to a decision by Scottish Ministers would follow, at some future date. That is not the current position.

2.21 On that basis (though as an aside to that main point), it is clear to me that Circular 6/2011 can only have relevance to me by way of analogy to the bespoke flood risk scheme guidance issued by the Scottish Government. I found little to assist this examination in the documents produced in relation to a flood protection scheme (with a CPO) at Almondbank (Productions WG 11, 11A and 12).

2.22 As I note above, the reduced degree of impact on peaceful possession does not exclude the need to consider Article 1, Protocol 1 of ECHR in that regard. I was though addressed in submissions on matters relating to the rights to take entry onto land under section 79 of the 2009 Act. Moreover, even such reduced rights (including where resulting in sterilisation of land used for business purposes) could give rise to matters of compensation

as part of the assessment under Article 1, Protocol 1. Any matters of compensation for loss necessitated by virtue of the Scheme are however not matters for this examination. It was put to me for JR that costs of compensation played into the justification for the Scheme in light of the undisputed high quality of the farmland impacted upon (as set out in the evidence of Mr Ironside, as read with Productions JR6 and 7) and in the suggestion of an impact on the cost benefit analysis calculation, if understated (as JR thought it was). However, in my view neither point was material in impacting on the matter of the Scheme justification.

2.23 Although I take a different view in relation to procedures for more detailed flood defence works in the planning context (see below), I am satisfied that arrangements for taking mandatory access onto private land for construction work require to be come to (and determined) later in the project. They must be developed so as to minimise the level of intrusion on, or inconvenience to, persons affected. The fact that these will be developed later, with that understanding on minimising the level of intrusion or inconvenience, is not in itself a reason to recommend refusal to confirm. The period of time involved for construction is relatively minimal (8 weeks) and was not in itself challenged or questioned. These works and the exercise of powers of entry onto land under section 79 of the 2009 Act are to be effected and exercised cautiously and with that aim in mind. I reach this view, with the same caveats, more generally in relation to development of the detail of flood defence works in the context wider than planning and address that below, in light of matters raised in the Hearing.

2.24 In different ways, both objectors made detailed representations on the powers in relation to access at section 79 of the 2009 Act. As I note above, these matters are for application later, determined where necessary not by me but by the Sheriff under section 80. Indeed they only would arise where voluntary access cannot be agreed through discussion (as WG accept). Section 56(2)(d) of the 2009 Act provides a power to enter into agreements or arrangements with any person "(i) for the carrying out by that person or by the authority of any work which could be done by the authority under [Part 4 of the 2009 Act], 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". Both challenge the reliance by the Council on section 79(2)(e) in particular, under reference specially to section 82.

2.25 However, section 79(2)(e) of the 2009 Act mentions entry for the purposes of carrying out the scheme operations, which must be read as cross-referring to section 56(2)(a) where a Council "may in particular— (a) carry out any operations to which a flood protection scheme relates (see section 60)". As above, if that proves inadequate, CPO powers under section 66 remain, as clearly indicated by the Council.

2.26 For the record I should set out that no significant reference was made in the objections to protections under Article 8 of ECHR (right to respect for private and family life). There is no obvious inter-action with Article 8 in respect of either objector, since their land affected does not comprise or impact on residential property in their ownership.

2.27 Subject to paragraphs 2.29 to 2.57 below and a range of detailed matters, the broadly stated policy framework put by the Council was not in itself challenged by the objectors. JR, in particular, accepted the case for the Scheme in principle.

2.28 In relation to the justification of the scheme as a whole or in principle (or insofar as affecting land separate from the ownership of the objectors or insofar as appropriate to so separate these matters), there were two matters before me. On the facts before me (as differed significantly between both objectors), these were primarily raised by JR, but have relevance and applicability (in different ways) to WG.

Inclusion of Upstream Works and the options appraisal

2.29 At that level of challenging the justification in principle, JR questioned the inclusion of the Upstream Works in the Scheme, for two related reasons - in part in questioning inclusion of these works at a later stage of the scheme development than in respect of Flood Cells 1 and 2 and in part in the context of an absence of flooding history at his land. He separately questions a range of more specific issues relevant to those works (see below). His objection in this regard is set out at paragraphs 13 and 14 of his Statement and is supported by reference to Productions JR 12, 13, 14 and 16. It is developed in his Closing Submission.

2.30 Before addressing these in detail and considering the matters raised in those documents and at the Hearing, I should record the context of the documentation before me in relation to the outline design and options appraisal, as developed by the Council and those commissioned by them. Produced to me in one collective document (Production PKC 1.4.2), the relevant documents are (a) the South Kinross Flood Protection Scheme Technical Report dated 7 November 2023 (b) the Mouchel flood study report of September 2010 (c) the Options Review Report of 14 December 2022 and (d) the Standard of Protection Recommendations dated 9 September 2022. Clearly the Mouchel flood study report pre-dates the proposals for the Upstream Works. All of these documents have been carefully considered by me, both in respect of JR and WG.

2.31 The report of 7 November 2023 sets out hydrological and hydrology modelling (section 3), scheme development (section 4), the options appraisal (section 4.1), standards of protection (section 5), design principles (section 5.2) and, as relevant to JR, consideration of the upstream works (section 9). These lead to conclusions at section 16. The Options Review Report provides a review and update, including relating to the shortlisting of options affecting JR (section 3.3.3), an update to the position at the South Queich river, albeit with no changes affecting WG (section 5.2) and consideration of climate change matters (section 6). Twelve options were considered as “potential actions” as may be considered suitable.

2.32 On the first of those challenges, JR flagged up that, as originally envisaged, the Upstream Works were not planned to be included. These only became envisaged, in terms of the case put by JR in his Closing Submissions at paragraphs 18 and 19, between the hydraulic model identification in 2020 and inclusion in the optioneering report at November 2021[3]. Accordingly, his view is that any justification for inclusion of such works, designed to protect the MOTO services facilities at Kinross and serving the M90, must be treated as being flawed. The services have been in existence at that site for many years. His experience in farming that area of land for decades was that there is no localised history of flooding and he could see nothing in the justification put forward indicating that the risk regarding the MOTO services has increased over time. He saw no personal benefit to him from this part of the

[3] I had understood it was some time earlier but use that time frame (stated by JR) as the most favourable to his case.

Scheme. At the Hearing, the Council generally accepted that historical explanation and explained their position that, rather than the risk now being materially greater, the development of flood prevention policies in more recent years has become more precautionary or proactive, bringing into greater or more focussed consideration the degree of risk to the services. In the past, proposals were more likely to be derived or developed reactively to flood events (where this would not have come forward in light of the absence historically of flooding events) in the vicinity of the Upstream Works. That position or approach has changed. This is described at this location as being a "no regrets approach" at section 5.1.3 of the report of 7 November 2023. The Council make clear in this examination (not challenged by the JR witness Dr Stewart) that the land concerned forms part of the functional flood plain.

2.33 I accept that explanation and, in any event, I would reject the suggestion that the Upstream Works are an unjustified afterthought or are not adequately assessed under the Scheme materials. That conclusion is as evidenced by the public consultation; the report to Committee by the Head of Environmental and Consumer Services of 27 November 2023, in particular at paragraphs 4.11 and 4.14; and the earlier preliminary work for example in sections 5 (Scheme Summary, bullet 6 and figure 5-1) and 6.10.1 of the report dated 7 November 2023, building on the Options Review Report of 14 December 2022 and the Standard of Protection Recommendations. Moreover, although it was not made fully clear to me how detailed their consideration of it was, the engagement in and endorsement by SEPA of the February 2025 Strategic Flood Risk Assessment (SFRA) - which included the Upstream Works - supports the approach of the Council in including those works.

2.34 On the second of those challenges, even though agreeing in relation to flooding affecting the town of Kinross (as accepted by JR as being relevant for Flood Cells 1 and 2), JR flags up this had never occurred in consequence of flooding from land in his ownership. It is neither necessary nor proportionate in his view, for all these reasons, to proceed with the Upstream Works. Consistent with that point, the Scheme could simply be modified to exclude these works[4]. Moreover, the position of JR is that there was no especially important status of the MOTO services (highlighting that houses and hospitals were priority infrastructure rather than such services).

2.35 In examining these matters, I have, as above, considered the Option Review Report (part of Production PKC 2.4.1, as well as the extracts identified by JR in his productions), Appendix A of the report to Committee by the Head of Environmental and Consumer Services of 27 November 2023 (Summary of Potential Flood Scheme Options Considered) and the evidence at the Hearing. I have considered that the Scheme is recognised in the Flood Risk Management Plans as one of a range of identified options (not being mutually exclusive), though it appears to me that, in terms of an assessment of alternatives at a high level or strategic level, the specific impacts on JR as an exercise of reviewing alternatives by the Council were of a more limited nature.

2.36 From the evidence at the Hearing (which was wholly consistent with the documents at Production PKC 2.4.1), I took the Council witnesses as having concentrated at first on these high level matters and then latterly on the detailed impact on JR (assuming that the Scheme

[4] Which, as a modification, I would accept as feasible, under reference to paragraphs 2.45 and 3.34 of this Report.

will progress). Plan 5 sets out the detail of the measures at JR's land. That approach is criticised as creating a flawed consultation process (see below), but for the reasons set out in this Report I do not consider that to be a material gap in the process undertaken. As well as maintaining general consistency with the content of the report of 7 November 2023, this is because, if the need to protect the MOTO services is justified, this is better done broadly at the proposed location of the services themselves. High level alternatives were considered but there are in my view none that appear realistic (or sufficiently realistic as to require refusal of confirmation with a view to more detailed re-appraisal). In effect none in any kind of detail are put forward by JR. His focus is disputing that the need to protect the MOTO services is justified (which I would reject). I accept of course that it is not for him to design or re-design the Scheme and that justification in this regard is for the Council but I consider that they have done so. I address below the issue of any potential for localised modifications in the vicinity of the MOTO services.

2.37 In light of these points, the reasons for making proposals regarding the MOTO services were explored at the Hearing. While I agree that certain types of property may be treated as higher priority, these are not definitive matters and I have little hesitation in agreeing with the Council that the services in principle are important to protect, as an element of trunk road infrastructure. It appears to me that the protection of the services was central to the decision to include the Upstream Works (see for example in section 6.10.1 of the RPS Technical Report dated 7 November 2023, stating that "The proposed upstream storage area will capture an overland flow path from agricultural land blocking it from reaching the Kinross services"). I heard evidence on the potential consequences of a flooding event impacting on a filling station, with underground supplies of hydrocarbons, such as petrol and diesel, on which see paragraphs 2.43 and 2.44 below. There are suggestions too in the proposals that the impacts of a flood event might extend to the carriageway of the M90 itself. However these are recorded, in relative terms, as lower risk and, though considered by me at the Hearing, were not considered by the Council to be of primary significance.

2.38 Although I accept that the proposals regarding the services were not originally envisaged, they have been part of the formal Scheme for some time. I would hesitate to rule the Upstream Works out simply because they were not originally envisaged, if justified now. They cannot in my view be considered to be, or fairly to be described as, an unjustified afterthought.

2.39 I reach that view having given careful consideration to the fact that, as a separate point, the Upstream Works do not have a specific policy root in the Flood Risk Management Plans referred to in paragraphs 1.2 to 1.5 above. I did this because the history of the development of these proposals; because I could see no reference in those plans to the MOTO services; because they lie some distance from the town of Kinross; and because of the absence of a history of flooding, as described by JR.

2.40 I take the view though that such works have a clear and adequate causal connection with the Plans, for three reasons. Firstly, the Flood Risk Management Plans in general are non-specific as to the measures concerned and have little by way of specification of the meaning of, in this case, Kinross. Instead, the emphasis is on rivers and catchment areas and on "potentially vulnerable areas". The relevant location map on page 50 of the Cycle 2 FRM Plan includes the MOTO services. The relevant river identified as liable to lead to

flooding in this area is the South Queich Burn. It is the risk of overtopping of that river (at Burnbrae) which gives rise to the concerns in relation to the MOTO services. Those services lie between Burnbrae and the town of Kinross.

2.41 Secondly, although it might be thought that the M90 forms in practice a boundary of the edge of the town of Kinross, I do not consider it correct to treat the buildings to the west of the M90 comprising the MOTO services and the Garden Centre as not being part of Kinross. Such an approach is in my view unnecessarily narrow. To do so would be inconsistent with the location map found in the Cycle 2 Flood Risk Management Plan at page 50.

2.42 Thirdly, I accept the evidence from Council witnesses as to why the Upstream Works were not originally envisaged. Mindful of the absence of a history of flooding. I address the evidence from witnesses for JR below.

2.43 On a separate but related matter, I heard evidence at the Hearing on matters relating to the potential for pollution risks if the petrol filling station elements of the MOTO services were to flood (if the identified risk materialised). At the Hearing, there was discussion about the sealing of hydrocarbons (petrol and diesel fuels) on site. While Dr Stewart (witness for JR) expressed confidence that fuels ought to be adequately sealed to guard against such pollution risks (or more generally against leakage), witnesses for the Council were less sure that reliance on the adequacy of seals could justify exclusion of the Upstream Works from the Scheme.

2.44 As this seemed potentially important at the Hearing but as the evidence before me in this regard was limited in nature, I gave parties the opportunity in writing to make further representations on these points. I sought in addition to ascertain whether either Transport Scotland (as Trunk Road authority) or the owners of the MOTO services had requested (or have indicated support for) the measures comprising the Upstream Works and more generally what consultation with them had taken place (on such matters or otherwise). No further detailed information was forthcoming from the Council on the general issue of pollution risk and so I place little or no weight on such matters. In any event, since the Council confirmed that neither Transport Scotland (as Trunk Road authority) nor the owners of the MOTO services had themselves sought the Upstream Works, I do not consider the matter of pollution risk to be a relevant factor. I remain of the view though that the importance of protecting a significant part of the trunk road network against flood risk is material, even if not directly sought by them (provided that the risk to the MOTO services otherwise justifies the Upstream Works, as addressed below).

2.45 I should also record the view of the Council that the Upstream Works should be understood as also serving the town and not just the MOTO services. The Scheme, designed to proceed as a whole, was described in evidence as being “a holistic solution”. In general terms, I tend to agree with that view about treating the Scheme as a collective whole. Notwithstanding that, that does not mean that I conclude that these works are unable to be assessed separately (as done by me) nor severed from the Scheme as a whole if the view was ultimately reached (contrary to mine) either (a) that the Upstream Works are not justified or (b) that the Upstream Works should at this stage be excluded (or phased, as described at paragraph 3.34 below) pending further work on, or consideration of, the justification. Such

severing could mean in practical terms (on the ground and in contractually let operations under the Scheme) as well as in the legal drafting of a modification to exclude them.

Alternatives in principle (JR)

2.46 JR suggests that a better measure (if the Council wish to address flooding in the area around the services and his holdings) would be to take steps to address the flood risk at Burnbrae, which – on the Council modelling and as pointed out to me on site – is where the overbanking is most likely to occur. This could better protect his land and he identifies a number of houses to the east (between Burnbrae and the MOTO services) that gain no advantage from the Scheme as proposed. The hydraulic drawings (Productions JR27 and 28) are produced to support that. Since, as Dr Stewart points out, protection of residential property is a high (though not sole) priority in a flood protection scheme, this is in effect an opportunity missed. An assessment of alternative options to flood storage at the JR land is set out at section 3 of the Technical Memo of Dr Stewart dated 10 June 2025 (Production JR 22).

2.47 I would reject this suggestion primarily since I conclude and agree with the Council (as above) that a significant driver of the Upstream Works is protection of the MOTO services and that this is best done by installation of embankments in the immediate vicinity of the services (as proposed). Given that priority, it is not obvious to me (as a reverse of Dr Stewart's argument) that measures several kilometres to the west are the best way to secure that primary objective. The objectives identified by JR (including the potential to benefit his land) are of course important but are secondary to that primary objective.

2.48 JR touches on but does not develop in detail other general alternatives. Further of course to the Council response to the main suggestion made by him, there are a nearly infinite number of different variations for a scheme that could achieve different outcomes, with different consequences and risks. Even if entirely reasonable, the existence of such variations is not in itself a reason to recommend refusal of confirmation, in order to examine them. Ranges of options are recognised in the Forth Estuary Local Plan Cycles 1 & 2 (Flood Risk Management) Plans and in Appendix A to the Council Report of 27 November 2023 (Productions PKC 1.3.1 and 2.1.1). An options appraisal (as in the documents described in paragraph 2.21 above) was carried out.

Justification and alternatives in principle (WG)

2.49 That all applies equally to the objection to scheme justification in principle of WG (as a means of addressing flood risk in Kinross), as set out at paragraphs 26 to 41 of their Statement of Case and developed in Closing Submissions. They too sought to challenge the development of options and alternatives. This was responded to on 3 February by Council witness with a reprise of the options selection process, including setting out why potential alternative means of flood prevention were not preferred in the design and options appraisal in terms of the documents produced. That part of the WG Statement flags up the alternative approaches (to locations and types of measure) and complexity of design across a range of balancing considerations. This includes watercourse dredging (ruled out for the reasons set out in the answer to Question 5 in Production JR17). For completeness (in light of paragraphs 26 to 32 of the WG Closing Submission), I have considered the documents referenced at

paragraph 2.30 above in regard to the Do Nothing/Do Minimum options (as so described in those documents). I consider that these were part of the options appraisal processes and were duly considered and rejected. I could see no merit in any suggested options (if so suggested or intended in those paragraphs of the WG Closing Submission) of leaving the development of flood defences measures to individual land owners, acting individually or somehow collectively. No evidence produced in this examination supported the suggestion that flood defence measures done by owners since July 2020 should provide a reason not to proceed or not to confirm the Scheme[5].

2.50 At the Hearing, under reference to paragraph 6.255 of the SFRA (Production WG3), WG raised matters about the scope for better use of natural flood management (NFM) opportunities. This complements paragraph 39 of the WG Statement of Case. Other than doing so, none of these options, comments or, in effect, missed opportunities (in the opinion of WG) are substantiated or more fully explained by technical or expert evidence or witnesses on their behalf. It was accepted by Council witnesses that natural flood management has a role and can be effective, but in this context was considered less effective or less fully effective than the detailed design of the measures in the Scheme. More specifically, the evidence to me was that such measures are generally most effective at reducing the frequency and magnitude of smaller, more frequent flood events. They are considered to be unlikely to provide protection against the most extreme events on their own. Though not produced, I am referred to the existence of studies that indicate that natural flood management measures typically provide protection against 50% AEP and 10% AEP flood events. The use of NFM was asked about during consultation and I note the answer to Question 7 in Production JR17. At a general level and in the absence of contrary evidence, I accept those explanations and consider there is limited merit in the suggestions of unutilised scope for, or better use of, natural flood management to address the risks identified at Kinross.

2.51 I address below two more specific alternative options raised by WG. At this point I address (as a challenge to the justification as applies at the site owned by WG) one specific area highlighted by WG in their Statement and at the Hearing session on 3 February. This relates to the factual justification, insofar as relying on the consequences of the most recent flooding events at the area around Old Cleish Road in 2020. WG focussed on the event in February 2020, though later flooding at Queich Place and Todd and Duncan (to the east and where parties met to park for the site visit) occurred in August 2020. Details of these flood events are set out in the report of 7 November 2023 (paragraphs 2.2.4 and 2.2.5). It should not be overlooked that Queich Place was part of areas previously flooded in 2006 and 2008, as described at paragraph 3.62 of the Mouchel study in 2010. This is important because the specific flood defences impacting most severely on the WG land are designed to protect the group of - primarily - residential properties at Queich Place (along with businesses to the east of the B996) and all generally lying to the east of the WG land and to the south of the South Queich river before flowing into Loch Leven. The properties identified at risk in a 0.5% AEP event are shown on figure 3.2 of the Options Review Report of 14 December 2022. These properties and the WG land are part of flood cell 1.

[5] WG only acquired their land in March 2023.

2.52 WG argued either or both that (a) the evidence of flooding in that area deriving from that flood event in February 2020, as objectively ascertained, does not support the measures impacting on them or (b) the evidence of such flooding, as narrated by the Council in their supporting documents, does not support such measures. Although it might be thought more appropriate to consider the Scheme (or at least flood cells 1 and 2) as a whole (having regard to wider issues such as the WG land being identified as part of the functional flood plain[6]), I have considered the points made because of the direct link to that discrete and identifiable group of properties, both residential and business.

2.53 When put to them directly at the Hearing, WG accept that what happened in February 2020 was indeed a flood event. WG rely though on a range of matters in questioning the need at this location. These are certain photographs provided in Council exhibition documents, which show only pooling of water on WG land (rather than more significant flooding) and from which can be seen that land close to that group of properties remain dry (or at least not under water). They point out (as Mr Wilson did on the site visit) that these properties lie on higher ground than his site entrance. They narrate at paragraph 53 of their Statement a number of differences affecting different properties in that flood event in February 2020. For example flooding at the rear of number 14 Queich Place but not of number 16. They suggest that such flooding had causes other than flooding from the WG land. Any such flooding can be addressed by other means. The depths of flooding shown on figure 40 in the Mouchel Flood Study Report are pointed out, which indicates less depth of flooding risk at these residential properties.

2.54 The personal evidence of Mr Wilson here is of only limited value (having only bought his site three years later in 2023 where he accepts, under reference to the matters at paragraphs 2.77 and 2.78 below, that he was unaware before then of flooding matters in this part of the town). He denies the risk of overtopping of the Gelly Burn (in order to make his suggestion regarding the alternative of using Mr Lee's land), but I prefer the evidence of the Council, including the plan of water flows (Production PKC 9) that these are real and material risks, based on past events including, but not limited to, the February 2020 event. That risk is identified in the Plans referenced at paragraph 1.3 above. The Mouchel Report of September 2010 at section 4.2 identifies this risk and states that "The South Queich, Gelly Burn and Clash Burn are the main watercourses likely to affect South Kinross in terms of flooding". Differences in elevation do not appear to me to be material.

2.55 After the Hearing on 3 February, WG returns to the issue of the Gelly Burn and water flows, under reference to the document produced on 18 February on flow paths (Production WG 16). This however in my view contains a mis-reading of the Council position, implying that the purpose of the Scheme at this location is to stop the Gelly Burn overtopping. Instead, the purpose is to utilise the WG land for water storage in a flood event until it can naturally flow away. This was explained on 3 February by Council witnesses.

2.56 I would reject the unduly forensic approach set out at paragraph 53 of the WG Statement which seems to presume that a future flood event can only be predicted to have the same effects as the last one or that past flooding does not justify an approach protecting more of the properties at this location. The differences identified are, to say the least,

[6] Noting what WG say in their Closing Submission at paragraph 40, not appearing to dispute that.

marginal. Even if it could be said that the full justification does not extend to that whole area, the need and justification to the extent necessitating the proposed works on WG land are both clearly made in my view.

2.57 But there is a more important reason to reject the case put by WG and prefer the approach in the documents described at paragraph 2.30 above. In their Closing Submission (paragraphs 64 to 68), WG focus on the plans showing the extent of the 0.5% (Present Day) Fluvial AEP standard of protection. With only one exception, this section of the WG case appears to overlook both the power and the duty (under NPF4, set out at paragraph 1.8 above) to allow for an appropriate climate change adaptation, all described in section 5 (and shown on figure 5.1) in the report of 7 November 2023. This is precisely what the Scheme does at this location.

Lawfulness of the Scheme – consultation

2.58 Having so considered the general scheme justification in paragraphs 2.17 to 2.57 above, I now turn to the representations made to me – both by JR and WG – that the Scheme is not lawful, specifically in relation to the claimed failure of due proper and adequate consultation with these objectors. Though the focus in each case was different, both objectors consider that the inadequacies of consultation (applicable respectively to them, though more directly so put by JR), as a matter of law and fact, are such as makes the confirmation by the Council of the Scheme unlawful.

2.59 Starting first with JR, he draws together three themes – the encouragement of consultation in relevant guidance; the legal minimum requirements of a legally competent consultation; and the facts as applied to those themes.

2.60 The view of JR is that consultation in a meaningful way is a requirement forming a pre-requisite of the progressing of the Scheme. In doing so he relies on the strong encouragement of consultation in Circular 6/2011 (Compulsory Purchase Orders), although accepts that the application of the Circular is at best by analogy, having received confirmation during the Hearing that none of his land is planned to be acquired by CPO. In any event, that Circular does not in its terms mandate consultation, even though strongly encouraging it.

2.61 More pertinently the Guidance on flood protection schemes at page 12 mentions “close consultation” with affected landowners. Although it is not fully clear whether this is used simply a relative term (to place a higher duty than more generally applicable for a scheme) or is intended to stress the importance of consultation with affected landowners, the intention is clear. In any event, as JR points out under reference to the case of Cains Trustees (Jersey) Limited to Cains Judiciaries (Jersey) Limited as Trustees for the East Gate Unit Trust 2024 CSOH80 (Production JR 19 and referred to by me as “Cains”) that, even if voluntary, minimum standards apply to a lawful consultation.

2.62 In citing the case of Cains (and being clear, which I accept, that this case is simply representative of many other legal authorities making similar points), JR sets out a reliance on four principles described as the Sedley principles that consultation should take place when proposals are at a formative stage, that sufficient information and reasons should be provided to enable an intelligent consideration and response, that adequate time be afforded for such

a response, and that the results of the consultation should be conscientiously evaluated and considered, all generally under-pinned by the requirement of fairness. He refers me in particular to paragraphs [35] and [36] of Cains.

2.63 In the Hearing I suggested (and continue to consider) that in the context of the Scheme, the legislative framework and the interest of JR, the securing of a fair consultation in the round, in the application of the Sedley principles, could or should mean one or more of (a) consultation with JR on the principle of the Scheme (b) consultation with JR on the principle of the Scheme as it applies specifically to his interest in land (c) consultation on the detail of the impacts, if approved, on the land of JR and (d) engagement about alternatives as affect the land of JR, to explore these or explain why certain alternatives (whether suggested by JR or not) are ruled out. Stage (a) seems to me broadly to accord with stage 3 in the Guidance (page 77). Stages (b) and (c) accord with stage 4 in the Guidance (page 78).

2.64 In relation to heading (a), I recognise a distinction between general consultation and consultation with directly affected landowners (shown as adhered to here). It appears to me that there is a degree of contradiction between the lengthy history of the development of the Scheme and the relatively speedy transition from public consultation in September and October 2023 (see paragraph 1.19 above) through to the internal adoption of and advertising of the Scheme. JR was consulted in this respect at around September 2023. Hence the lateness of inclusion of the Upstream Works, not included at the outset but first envisaged in 2020, was not a factor prejudicing JR (at least in this regard)[7]. It has though been in contemplation for some time (and formed part of the Council's general scheme development in documents post dating inclusion as set out above). I accept, in general terms, that after a long gestation period, matters moved on from late 2023 relatively quickly. The Council indicate that JR did not engage with general consultation, as is his right. Stage 3 (per the Guidance) ran for a short period from then until February 2024. Expressed in these terms (and notwithstanding that speed of transition), so far as relating to timings, I do not consider that these factors point to, or establish, unfairness.

2.65 In relation to heading (c), though JR feels that a degree of pre-determination has occurred in the minds of officials, the information before me discloses extensive communications on the design detail (if the Scheme is approved) comprising some 45 pages of emails lodged with me covering the period from 23 February 2024. JR is entitled not to be content with these matters. He says, or implies, in his Closing Submission that these steps were not proactive enough. But it cannot be said that inadequate efforts have been made to engage, or offer to engage, on matters of detail. The fact that these started relatively late is no surprise, since the principle must come first and since the Council have been clear that development of the design in detail will follow from the desired approval of the Scheme in principle, as is still ongoing in this examination process. Stage 4 (per the Guidance) ran for a relatively short period from 23 February 2024 until 3 December 2024.

2.66 In relation to heading (d), JR argues that this is an essential component of a lawful consultation. However, I consider that whether this is the case is context specific and is dependent on the nature of alternatives. The local knowledge of JR (as a person who has

[7] Despite this, it is not wholly clear to me why consultation with WG's predecessor in title in 2019 (see paragraph 2.78 of this Report) was so much earlier.

farmed this land for decades) may be very useful to the Council[8] and might be necessary where detailed alternatives are finely balanced. But where here (as I find below) alternatives short of excluding these Upstream Works are not realistic or sensible, it appears to me that it would not be correct to treat heading (d) as an essential component of a lawful consultation in this context. I would consider it as respectful and courteous to JR (in this context) to explain what and why alternatives as affecting his land were looked at and why they were rejected, but not that the failure to do so creates a flawed consultation.

2.67 In reaching that view, I have had regard to the terms of paragraph [28] of the case of R (Moseley) v Haringey London Borough Council [2014] UKSC 56, [2014] 1 WLR 3947 (quoted at paragraph [9] of Cains). That states that "But, even when the subject of the requisite consultation is limited to the preferred option, fairness **may** nevertheless require passing reference to be made to **arguable yet discarded alternative** options" (my emphasis). The circumstances here (as described in the paragraph above) explain why "discarded" options need not be consulted on. They are not "arguable".

2.68 The ground where JR's case appears strongest should in my view be focussed on the basis of heading (b). His case on the facts is relatively straightforwardly stated. Consultation did not take place when proposals are at a formative stage, where communication commenced in September 2023 but the decision in principle to proceed with the Upstream Works (following the narrowing down of options in the optioneering phase from a "long list" of options in November 2021) was made in October 2022. The issue accordingly is the chronology.

2.69 JR also considers that insufficient information was made available to understand the proposals and the impact (as is still his position, as at the Hearing of his case on 29 October 2025). In his view, the engagement since February 2024 on detail was about other issues, pre-supposing confirmation; was not sufficient information; and the provision of adequate reasons to enable him to give intelligent consideration to the proposals and respond was not sufficient. It follows in his view that the results of the consultation cannot be said to have been conscientiously evaluated and considered.

2.70 In exploring these issues at the Hearing, points were made by the Council that efforts to communicate with JR were made and that – as he is entitled to – JR did not engage in the process of public consultation. He had made clear his complete opposition to the Upstream Works (as is his right).

2.71 In assessing this evidence, I am conscious of three related factors in considering the question of the adequacy of consultation. Firstly is that the nature of what can be regarded as adequate (and legally sound) consultation is highly context specific. The requirements (required to ensure fairness) are as varied as the purpose of consultations can be. Cains describes this as protean (paragraph [36]) and the extracts at paragraphs [23] and [24] of the case of R (Moseley) v Haringey London Borough Council (cited at paragraph [9] of Cains and using the same term) are helpful and instructive. The cases cited by the Council in their Closing Submissions (but not produced) fall into that same category. The case of Mull

[8] As well as aiding in the democratic process as recognised in Cains at paragraph [36] and in Moseley at paragraph [24].

Campus Working Group Limited, Petitioner [2026] CSOH 11 is later in time than Cains but, as described, is consistent with it.

2.72 Secondly, it appears to me to be important to recognise the challenge in developing consultation between putting forward a proposal that is sufficiently developed in order for it to be intelligently considered and responded to, while not being so developed as to appear as a *fait accompli*. This is difficult for officials involved in the project and is susceptible to being interpreted as a closed mind to alternatives. While I understand the argument about the closing of minds (in paragraphs 16 and 22 of the JR Closing Submission), I have seen no evidence (or no sufficient evidence) from or in relation to officials to that effect. I would align my conclusion in this regard with the approach as set out in paragraph [42] of Cains and reach the same view here.

2.73 Thirdly is the question of this examination by me as part of the statutory framework set out in the 2009 Act. JR argues that there is nothing that can now be done to retrieve the failures of timings narrated above. The dye is cast. I disagree. In part because of my active decision to consider the justification and necessity for the Scheme, I consider that this examination (if fully and adequately done in a substantively and procedurally fair way and with an open mind) can still satisfy the requirements of fairness, as applied in Cains and elsewhere through in particular the Sedley principles. I have endeavoured to do that to the best of my ability. If consultation (in its broadest sense) includes this examination, the failure of chronology (at paragraph 2.68 above) cannot be fatal. Seen in the legislative context (which unusually provides for this examination), the “formative stage” has not in fact necessarily passed.

2.74 In relation to the arguments of JR, I conclude that the consultation does not appear to me to be unlawful for the reasons above and as follows-
a) the matter of fairness remains an ongoing one, as examined by me in this Report, including on questions of justification in principle. The Council response to this examination is capable of addressing the fourth Sedley principle (that the results of the consultation should be conscientiously evaluated and considered);
b) if it is reasonable to conclude (as I do) that the only realistic way to protect the MOTO services are flood defences and, if it is reasonable to conclude (as I do), that providing protections immediately adjacent to the services is the only realistic option, that considerably narrows down alternative options at other locations. Given the source of potential flooding and given that the JR land is part of the functional flood plain, use of JR land appears inescapable. The only issue becomes the detail of minimisation of impact, mitigation and/or compensation;
c) in principle (and mindful of point (b)), it does not appear to me that the options eliminated as part of the optioneering process were sufficiently realistic as to necessitate discussion with JR, as a legal requirement or pre-requisite.

2.75 In reaching that view, I have treated these matters in the round (rather than mechanistically broken down into constituent parts, as the Council submission appears to suggest). Doing so adheres to the suggestion in Cains that fairness in the round is the test. Looking at this therefore in the round, I consider that the consultation has not been unfair.

2.76 Lastly on consultation (in respect of JR), I note that, in his closing submission (paragraph 14), JR introduces – for the first time, as far as I can see – a claim under and in respect of his legitimate expectation of fair consultation. The judgement in Cains makes no express reference in itself in the decision section to the doctrine of legitimate expectation (though the Moseley case (cited above) states that "the search for the demands of fairness … is often illumined by the doctrine of legitimate expectation"). I accept that the consultation requires to be fair, but am not addressed on the constituent parts of the doctrine of legitimate expectation as it applies to the detailed facts here. I am not clear whether this point on JR's expectation arises for them from the Scottish Government Guidance or from express undertakings by the Council (and, if the latter, which ones). I would presume it is the former (given the other content of paragraph 14 of the JR Closing Submission and in light of what I say at paragraph 2.61 above). My comments above on consultation accordingly associate the steps taken with the relevant parts of the Guidance.

2.77 Moving on from JR, WG did not adopt an objection based on lack of consultation in the same way and on the same basis, but made two complaints as part of their objection. The first, pursued primarily by Mr Wilson himself, was that he had not been adequately made aware on or before the purchase of the affected site in March 2023 that the Scheme was planned nor, after purchase, had the Council done enough to engage with him. Though not put the same way as JR, there are some common themes in these points with the approach under reference to Cains.

2.78 Although the Scheme itself was not formally progressed until after that date of his purchase (triggering notification requirements), the flood risk in this area was generally known about and had been for some time. It was confirmed in the Hearing session on 3 February that Council officials had engaged at the time with the previous landowners (from around 2019) in general discussion on matters of scheme development as affecting the land. I cannot make findings on best practice or on what could or should have been done by WG or the sellers to alert future purchasers to these matters of scheme development. However, responsibility for that was not the Councils. They could not be expected to consult with WG before he bought the land. Although Mr Wilson referred to a phone call with a planning official where the flood protection scheme was not mentioned to him, there is nothing to support any suggestion that he was misled by virtue of the actings of the Council or their officials. The earliest reasonable engagement point was at the point of WG's acquisition of the site. Though it is understandable that WG does not seek to rely on Cains, nothing in that case supports their criticisms in this regard giving rise to a conclusion that this has been an unfair consultation.

2.79 The record of communication since acquisition is produced to me (Production PKC 4.5.1) and discloses no obvious failure on the part of the Council. I was aware of ongoing discussions separate from the formal examination and, as below, was led through certain proposed changes in detail at his land during the Hearing session of 3 February. While I tend to agree with WG that more notice to him (and indeed me) would have been helpful, I do not accept that there was a failure of engagement with him, as part of the Scheme process.

2.80 The second, based on the WG Statement of Case at paragraphs 20 to 25, focussed at the Hearing on the lack of notice in relation to public access and to footpaths at his land. The Council drew my attention to consultation documents comprising Public Display Board

no. 12, as includes Figure 20 “Access during construction works (in town)” (prepared as part of Scheme consultation) which included plans showing at various locations references to “permanent” footpaths. WG noted that the particular plan shown to me appeared to be a figure relating to the construction phase (and was not designed to be a reach out to WG on the matter of access paths in future). Though potentially misleading to that former extent, these documents seem to indicate an awareness of pre-existing public paths in the area of WG’s land, as a factor under consideration by the Council. Knowledge of paths (and disputes in that regard between WG and the Council) were a feature of the examination by me that led to the decision by Scottish Ministers on the Discontinuance Order (see Productions WG 4 and 13). Production WG 4 in particular confirms WG’s knowledge of these matters.

2.81 In any event, as noted at paragraph 1.12 above, matters concerning footpaths and public access over paths are secondary to the main purpose of the Scheme and any failure in this regard (even if shown) does not undermine the Scheme or its primary purpose, for want of notice or under this head of consultation. Furthermore, I address (see paragraph 3.64 below) a specific matter relating to public footpath options as alternatives.

CHAPTER THREE : OBJECTIONS IN DETAIL AND MODIFICATIONS

3.1 In this Chapter, I set out a range of matters which, though reading across to the matters of a more overarching nature addressed in Chapter Two, are more specific to the local circumstances pertaining to the affected land of each objector (or, in some respects, also beyond).

Design detail of the Scheme and inter-action with deemed planning permission

3.2 In this examination (and indirectly first raised by WG) is a question relating to the provisions of regulation 14 of the 2010 Regulations, through which the agreement of the Scheme in this process is transmitted to the Scottish Ministers with a view to issue by them of a deemed planning permission under section 57(2B) of the Town and Country Planning (Scotland) Act 1997 (inserted by section 65 of the 2009 Act). That deemed planning permission under that Act must be directed though may be granted subject to conditions. There is nothing in the terms of those provisions or in the representations made to me on behalf of the Council that suggests that the deemed permission is of the nature of a planning permission in principle, required to be followed by a second and detailed permission. Nothing in these provisions indicate who any such detailed application is to be made to or determined by[9].

3.3 As I am appointed to report to the Council in respect of the Scheme; as the functions of the Scottish Ministers relating to flooding were exercised (to a conclusion) in leaving the examination to the Council in their determination of 30 January 2025; and as no planning functions of Scottish Ministers are yet engaged, I have no remit to examine or make findings on those planning functions under section 57(2B) of the Town and Country Planning (Scotland) Act 1997. Further provision in relation to a deemed permission is made at regulation 14 of the 2010 Regulations. Hence I disagree with paragraphs 25 and 31b of the JR Closing Submission.

3.4 The relevance of this to the objectors (and potentially other persons who had not objected but might be affected) is that, in each case, the terms of the Scheme (as described to me in the examination) will necessitate the construction of ramps at the respective objectors properties to enable access over embankments forming in the view of the Council essential components of the Scheme.

3.5 The impacts are different for each objector. For WG, the height of the embankment necessitating ramps is 1.4 metres with only one side directly affecting land of WG. The other

[9] Unless a condition is imposed where a further matter gives rise to the need for a new or modified EIA, in which case regulation 9(3) of the 2010 Regulations apply, as read with page 44 of the Guidance. In the Hearing sessions, no evidence to that effect was led but WG in their Closing Submissions (paragraph 136) suggest that the Council modifications of plans affecting their land may have that effect. If it transpires that WG are right, this – for them – is a complete answer to my concerns expressed in paragraphs 3.2 to 3.9 of this Report. They have a remedy through regulation 9(3). In respect of JR, the same applies where a further matter gives rise to the need for a new or modified EIA. Where such a matter does not, I would not treat that as a modification contrary to law (as asserted in the JR Closing Submissions at paragraphs 31 and 32). Instead the relevant concerns should in my view be treated in the manner expressed in paragraphs 3.2 to 3.9 of this Report, with the appropriate response being as stated at paragraph 3.10 of this Report. See also paragraphs 3.90 and 3.91 of this Report on post-examination modification.

ramp (over an existing public road) is not on his land but might potentially affect residents around Old Cleish Road who use the public road for access to their properties. Tenants of WG need access for HGV vehicles as part of their businesses and business needs. The position of JR is different because he owns the land on both sides of the proposed embankment. He needs access for farm vehicles such as tractors and combine harvesters, though the height of the embankment to be crossed is lower at 1.1 metres.

3.6 The Council stress that, if the Scheme is approved in principle, discussions will be undertaken with the affected landowners in these regards. Clearly one factor in that is the need to minimise intrusion and assessing the ability of landowners to enjoy the use of those parts of land that will, in future and on this basis, form ramps (as so described). The Council indicated confidence that agreement and accommodation is capable of being reached and that this is an important focus for them. These matters may ultimately become questions of compensation (not within my remit, but with well established systems to address matters in dispute). The short answer (and indeed only answer beyond a reference to compensation as a solution) to questions about progress in this regard so far was that these are matters of detailed design, while the current issues relate to whether the Scheme should be approved in principle. The proposal to have ramps at both sites, in principle, are or will require to be part of the outline design.

3.7 My concern raised at the Hearing was that, notwithstanding best endeavours, what the rights and remedies would be for affected landowners if agreement could not be reached. Short of default to judicial review, I sought to explore how these avenues in the eventuality (a) that the Scheme were approved in the absence of a detailed design, examined by me and (b) that, in consequence, deemed planning permission followed (as it appears it must, for the reasons above), before a detailed design solution were developed. In timings terms, that risk appears real to me. As I indicate above (and as was confirmed by attendees at the Hearing), the option of treating these matters as planning permission in principle and then in detail is not the solution. In any event, detailed permission would be sought by the Council itself, with no appeal rights following a grant of permission arising for either objector (leaving again only the remedy of judicial review).

3.8 It may be considered that the detailed works (such as building ramps) are not part of the Scheme and, on that reasoning, are not of the nature of development authorised by the Scheme (if approved). As a generality, that might be a reasonable interpretation as to how the inter-action between the Scheme and deemed planning permission is to be treated. However, on the facts before me here, the risk is that the embankments at both locations and the ramps proposed over them are so closely inter-connected that this type of compartmentalisation is unrealistic in practice. I doubt that this issue can be addressed by imposing conditions in the deemed permission. Further detail in relation to WG's land was produced on 3 February (addressed below in a non-planning context). But no equivalent for JR was before me at the opening two days of the Hearing. There is accordingly insufficient detail (in my view) of what might be ultimately planned, in order to frame conditions so as to adequately protect the objectors (though ultimately that is a matter for the Council in the terms on which they seek the deemed permission from Scottish Ministers). I accordingly agree with JR that, as of now, there is probably insufficient detail to frame potential conditions.

3.9 Since I recognise the distinction made by the Council between approval in principle and development of the detail of implementation measures, I do not suggest that the confirmation should necessarily be refused. But, if confirmed, it appears to me for the reasons above that (a) the development of the detail by the Council (in particular of the ramps at both locations) needs to be open-minded and to include genuine options or design alternatives of ramps as the preferred means of accessing land that would otherwise become inaccessible because of the planned embankments and (b) the Council cannot and should not rely on the (by then) approval in principle of the Scheme as a reason, basis or ground to disregard or over-rule legitimate and reasonable representations by the objectors (and any others) to the proposals in detail. This includes the operational farming needs of JR and the WG suggestion at the Hearing on 3 February that a wall rather than an embankment might be better, so as to reduce the impact on his land[10].

3.10 I recommend that, if confirmed, the transmission by the Council of the request for deemed planning permission under regulation 14 of the 2010 Regulations should be accompanied by a Report setting out my findings and comments at paragraphs 3.2 to 3.9 above as being relevant material in terms of regulation 14(3) of the 2010 Regulations. Doing so would be consistent with the Council Closing Submissions.

Site specific objections by JR

3.11 Though closely reading across to the matters as set out in Chapter 2 of this Report, I turn to address a number of more detail points made by JR in the course of this examination.

3.12 The first of these relates to the evidence of Dr Stewart on his behalf, challenging the **rigour of the methodologies** used so as to conclude that the risks to the MOTO services are sufficiently great as to justify the Upstream Works and the consequences on the land owned by JR.

3.13 It is important before assessing this evidence to stress what the position of JR is and what it isn't. He is clear (and rightly clear) that the responsibility for coming forward with the Scheme is the Council's alone. His position is that confirmation should be refused if the justification of the Council is not made out. JR has no responsibility to develop the Scheme or offer workable alternatives. His Counsel made that explicitly clear at the Hearing. I agree. That said, his initial letter of objection at least in part implied that – for example due to the high quality and value of his land – modifications ought to be considered that had implications on his neighbours rather than him. For that reason, I sought assurances in this regard in the period ahead of the Hearing and in particular my letter of 20 June 2025 (while recognising in correspondence the point made by his Counsel) and required JR, as a procedural step, to identify such alternatives (if promoting them). This was vital to do, in order to fully consider the content of any such alternatives and give notice to any such neighbour so identified and offer them the opportunity to make representations before me. JR was clear in response that this was not in his mind and I was grateful for that. It would have been a significantly more challenging examination if he had so intended not least because of the hydrological unpredictability of any likely alternative in working out precisely who such affected neighbours

[10] I did not regard the suggestion in paragraph 76 (bullet 6) in the WG Closing Submission about underground storage tanks to be a likely solution based on the limited information given to me.

might be and what any impact might be. I touch on this more in the section below on modifications.

3.14 For the record, I should indicate that I took no issue with the evidence indicating the high quality of his land (in Productions JR5, 6 and 7). It became clear that JR was not suggesting that alternatives impacting on neighbours should be identified, examined and, as appropriate, taken forward (perhaps after declining to confirm in principle) because their land was not of the same high quality as his. Where farmland is taken for a Scheme such as this, I accept that it is a disadvantage to take higher quality land. The higher quality the land, the greater that disadvantage. More specifically, loss of high quality land was not in itself developed before me as a reason to reach a different view on the loss of land and the potential provision of a wildflower meadow in Field 5 (Back Park) as part of flood storage measures, discussed in more detail at paragraphs 3.44 and 3.47 below. I remain mindful that land values in themselves are principally matters of compensation, not before me.

3.15 Furthermore, for the purpose both of assisting my examination and in light of the way in which Counsel for JR expresses the position (for example at the last paragraph of paragraph 13 of the JR Statement of Case), I sought the views of engineers for the Council and Dr Stewart on what is meant by a 1 in 200 year flood event (0.5% AEP) + Climate Change. This was agenda item 1.10 of the Hearing (so inserted at the start of the Hearing). The Council Public Exhibition Slide 3 Flood Risk (Production JR23) is of assistance on this matter.

3.16 All the attendees with knowledge of flooding and hydrology (including Dr Stewart) in fact were broadly agreed on this matter, at a general level. It is not that a flood will occur only once every 200 years. It is an indication of the risk and magnitude of a flooding event, influenced by the amount of water and matters such as flow volume and depth. A 1 in 10 event is a larger event than 1 in 20. 1 in 200 year + Climate Change is a planning reference which is what schemes are designed to mitigate against (but not in every instance). It is the annual exceedance probability that, in any one year, it may happen 0.5% of the time or that "the flood that has a 0.5% chance of occurring in any year" (see Production JR23). The modelling is based on the likelihood of event occurring in the next 200 years but it does not mean that it will only occur once in that period (or risks being mis-interpreted if so regarded). In my view an example of that risk is the description of Dr Stewart's view in the JR Closing Submission (paragraph 36)[11]. I prefer the explanation given to me by him at the Hearing. That description in turn undermines the last sentence of paragraph 38 of the JR Closing Submission on probability of a flood event happening.

3.17 It should be noted that the Council in their Closing Submissions include further representations on these matters (at paragraphs 6.40 to 6.49). This is unhelpful in that these were accordingly not able to be commented on by Dr Stewart, as would have been helpful at the Hearing (and would have been fairer to him at the point of discussion of such matters). I accordingly have paid no regard to those paragraphs.

[11] Like JR I did though at first note some references to a 1 in 100 year event, but took the Council evidence as confirming that the standard of protection was against a 1 in 200 year event.

3.18 The term is an expression of the likelihood of an event occurring. 1 in 200 is better thought of as an event occurring once in a human lifetime. An uplift in risk assessment is needed due to Climate Change uncertainties (described in Production JR23 as “freeboard”) because floods are likely to occur more often in the future and be more severe. The planning justification for this approach, in including an appropriate allowance for future climate change, is supported in NPF4 (described at paragraph 1.8 above) The Council are planning for risks in the future rather than risks now. In that respect, the value of the JR evidence as to the lack of a flooding history has to be qualified, to a degree, not least where his land is part of the functional flood plain.

3.19 Mindful of that context, I turn to the evidence of Dr Stewart in support of the position of JR. As above, Dr Stewart takes no particular issue with the meaning of a 1 in 200 year flooding event (or the flow calculations or return periods), but challenges the application of that reasoning to the circumstances at this location. He considers that, in scientific and analytical terms, the modelling or causal link between a flooding event at Burnbrae (if it occurred) and the consequence necessitating the measures at the MOTO services is not adequately established, based on how often the flood waters would be likely to reach the services (ie the degree of risk) and frequency, depth and volume of flows (ie the consequences if they do).

3.20 Dr Stewart, entirely reasonably, points out that the likely source of a flood event is a considerable distance to the west of the services. He describes a flow pattern over unpredictable countryside with a number of factors potentially diverting the flood water flow in uncertain directions. It requires a particular (and by no means guaranteed) set of flows and circumstances to reach, and so to cause the flood event at, the MOTO services that the Upstream Works are designed to protect against. He considers that the visually compelling indications of the likely water flows produced and seen on plan 5 in the Council document headed “PKC Public Exhibition Slide 3: Flood Risk” (Production JR 23) to be deceptively straightforward in its presentation. The reality in his view is much less likely or predictable. He makes the same point under reference to Council Figure 4-6 attached to his Technical Memo.

3.21 Within that framework, he develops at section 1 of that Memo a range of criticisms based on the uncertainties of modelling and the accuracy of topographical information in respect of the controls of overtopping of the “level of the water from the river valley to the chicken farm” and the flow pathway from the chicken farm to JR’s holding at Turfhills Farm and the MOTO services. He considers that the pathway is “complicated or contorted”.

3.22 Dr Stewart criticises the sole reliance on modelling data (called Phase 1 LIDAR) and the fact that is not currently up to date. It was sufficiently outdated to require in his view additional verification and checking before being able – with confidence – to be relied on. More accuracy than this reliance can provide is, in his view, essential. If there are errors in LIDAR (for a range of possible reasons), “then this could significantly impact on the resultant predictions of flood risk” at these locations. While recognising that calibration has occurred in consequence of a flooding event in February 2020, Dr Stewart reflects (in a way consistent with the evidence of JR himself) that the history of flooding in this area does not provide the necessary corroborative evidence that he considers advisable. The flooding event at February 2020 (and another in August 2020) occurred in the town of Kinross rather than at

Turfhills (as confirmed by the Technical Report Chapter 2 - Flooding Issues, Production JR26).

3.23 The Council response to this evidence was threefold. They indicated that the risk of relying on the age of the LIDAR information was lower here as, in contrast to certain more urban areas, the topography of the area has not significantly changed. They stated that certain further calibration had in fact occurred (by way of topographic surveys in 2022 and water course surveys in 2020) and that additional cross-checking with the LIDAR beyond that was not considered to be necessary. They indicated that reliance on LIDAR and the approach here (on methods and outputs) is supported by SEPA as representing best practice and the information available gave confidence in the LIDAR. That support from SEPA is narrated in Council Public Exhibition Slide 3 Flood Risk (Production JR23). Beyond that, no direct evidence in support of their position was provided at the Hearing nor did the Council bring a SEPA witness to the Hearing in support of this aspect. As noted above, the Technical Note was produced by JR well ahead of the Hearing.

3.24 I note, in relation to the options considered specifically in respect of the Upstream Works (Flood Cell 3) to address Climate Change uncertainties (or "freeboard"), that it is stated in the Council Public Exhibition Slide 3 Flood Risk (Production JR23) that "Recent SEPA guidance suggests increasing the peak design river flows by 39% to allow for future climate change. This has been fully considered as part of the investigations noted above. For the proposed flood scheme, it was not feasible to incorporate this for flood cells 1 (South Queich) and 3 (Kinross Services), in addition to the 1 in 200 year level of protection, due to the excessive heights of the proposed defences that would be required and the associated visual impact and 'buildability' issues. However, the foundation designs for the flood defences in these flood cells will allow for the flood defences to be raised in future to adapt to climate change if required". This is clearly indicative of consideration by the Council of local circumstances impacting on the interests of JR and the need to minimise these (as of now), consistent with paragraph 3,23 above.

3.25 It is informative on this matter to consider the SFRA (Production WG3). That document is dated February 2025. As confirmed at the Hearing on 3 February 2026, SEPA were consulted on the terms of the SFRA and it can be said that SEPA have endorsed it (at least at the level of generality).

3.26 In relation to the current Scheme, that document states, as at 2021 outputs-

- The consultants have now finalised the outline design for the flood scheme. This has been informed by ground investigations as well as environmental and topographic surveys. The consultants have undertaken detailed modelling to understand the risk of flooding in South Kinross from the South Queich, the Gelly Burn and the Clash Burn. To increase confidence in the model, photographs, levels and information from the February 2020 and August 2020 flood events have been used. The proposed scheme is intended to protect properties up to the 1 in 200-year flood event but remains subject to community consultation, statutory consents and the availability of sufficient funding"; and
- "Not included at this stage as no GIS data outputs provided yet. However, this will be available prior to Call for Sites and Ideas April 2025, and the SFRA will be amended

and published again, and hopefully online mapping will be available" (under the heading "How flood study data is used within this SFRA").

3.27 Noting that the flooding events at February and August 2020 occurred in the town of Kinross rather than at Turfhills, this indication tends to support the evidence of Dr Stewart. It acknowledges expressly that SEPA endorsed online mapping was not available in February 2025 (and so was not used) and acknowledges implicitly that having such mapping would assist or aid accuracy.

3.28 That said, in discussion at the Hearing, Dr Stewart accepted that while LIDAR evidence was "older" it was in fact still be best evidence available of that nature. The inference that might be drawn from his Note from the reference to evidence being older (ie that there was unused later and therefore better evidence) was not correct. The above SFRA extracts underscore that such inference would not be correct to draw.

3.29 More importantly, in my careful consideration of his note, it appears to me that he was not going so far as to say that the Council evidence and modelling was wrong. He does not say that flooding of the services will not occur. He simply was highlighting that more confidence would be able to be drawn had it been cross-checked and verified more thoroughly (and would have better informed the cost benefit analysis). The available information in his view (as expressed in his Note) is not clear. Dr Stewart does not flag up errors in the LIDAR. Rather he says that "**If** there are errors… then this **could** significantly impact on the resultant predictions" (my emphasis). He does not say that the flood pathway is not real. Rather he says that "**If** this flood pathway is not real in terms of the route and flood volume, then constructing flood storage at the farm **may** be unnecessary or in the wrong location" (my emphasis).

3.30 Dr Stewart suggests that it is (a) not shown that there is a clear need for the works; (b) not shown that there are clear benefits to the MOTO services; and (c) shown that there are better alternatives. This approach is to be considered in light of the available evidence. As can be seen in this Report, based on the evidence before me, I would reject all three of these propositions.

3.31 Notwithstanding all of that, I do agree with him that predicting uncertain futures in the context of flood events is highly challenging. The consequences of flood events can be devastating. If he is right that building in the wrong place is a real risk (though that is not established on the basis of his evidence), the Scheme may fail in one important objective. For that reason, I have considered the matters before me from two sets of different, but related, perspectives. The first is this. If Dr Stewart is right for the reasons proffered that JR's land is adversely affected to no benefit (and the MOTO services never flood), how should we balance that adverse effect with a decision to proceed with protective works against the possibilities in the Council case potentially not arising? JR will certainly be compensated for the sacrifice of full use of his land and the interference with peaceful possession of his land, but this is only part of the answer.

3.32 The second (and related matter or perspective) relates to the SFRA statement that, at some future point, "hopefully online mapping will be available". The somewhat loose language used in the SFRA, on the face of it, lends support to the concerns of Dr Stewart.

With the outputs of better future mapping only able to be known in due course and in an undefined timescale, that might imply flaws or gaps in the data available to the Council. I was not wholly reassured on 3 February 2026 by indications that better mapping relates to high level (ie SEPA prepared and endorsed mapping) rather than more local mapping. However, it was confirmed that the Council understanding is that, in the year since issue, better mapping is not yet available and appears not to be imminent.

3.33 In light of all of this (and despite these concerns), I am satisfied that the information at present available is sufficient to justify the proposed Scheme. In itself, on balance (in addressing the question at paragraph 3.32 above), the currently available data establishes that justification. There is nothing materially significant before me suggesting that awaiting better future mapping is a precaution necessary, realistic or advisable to be taken.

3.34 Consistent with paragraph 2.45 above, I would though encourage the Council to review the justification if better mapping data becomes available before committing to the Upstream Works. Equally, where possible or feasible, phasing of the implementation in respect of flood cell 3 may be worth considering if that may provide scope to have regard to better mapping data before fully committing.

3.35 Notwithstanding that potential scope to allow for improved (though not essential) data gathering over the period immediately ahead, in my view the public benefit (even accepting that the flood event may not materialise and that better data is always preferable) outweighs these various factors creating degrees of uncertainty, in separately assessing the justification for the Upstream Works comprising flood cell 3.

3.36 I noted that the Council in their Closing Submissions include at paragraph 6.7 an update on LIDAR and its meaning. This is unhelpful in that the update was accordingly not able to be commented on by Dr Stewart, as would have been helpful at the Hearing (and would have been fairer to him). I regarded Dr Stewart as a reliable and helpful witness, experienced in his areas of specialism and having many years' experience, as described at paragraph 3a of the JR Closing Submission. I accordingly have paid no regard to that Council update. I do not consider that to be unreasonable in light of my encouragement to the Council to review the justification in regard to these specific matters, as set out at paragraph 3.34 above.

3.37 To a degree related to these points was a concerned raised by Mr Ironside that disturbance of or to long established **drainage systems** might be regarded as undesirable or give rise to unacceptable risks on land owned and farmed by JR. These issues may be linked to the point made by JR himself (on site and at the Hearing) that his land is highly porous and naturally (or with the assistance of good drainage systems) could be left to address any potential problem without the Upstream Works and consequential impacts on him. In that wider context of the porous nature of the land, while I accept that a clay dam (or dam constructed with other impermeable materials) will benefit flood defences, I could not see how the potential adverse impacts of that matter (of use of a clay dam) on wider drainage systems are likely to be insurmountable (as is suggested at paragraph 39 of the JR Closing Submission).

3.38 These concerns were not evidenced by detailed data or documents produced in this examination, though parts of the Agricultural Impacts Assessment (Production JR5) point in favour of the evidence of Mr Ironside. Overall, I do not in principle doubt the points made both by JR and his witness Mr Ironside. Equally though, there is not placed before me any evidence to the effect that new or renewed effective drainage systems (so far as needed in implementation or in consequence of the embankment or other works) are incapable of being constructed or designed. I see no basis to consider that the risks described to me are such as to lead to a recommendation to exclude the Upstream Works from the Scheme. These concerns are though clearly genuinely held and it is important that they are fully and seriously addressed in the development in detail of the Scheme in due course, if confirmed.

3.39 In relation to **land take** from JR, insofar as this matter goes beyond compensation (as is not before me), this matter relates to the obligation on the Council to take land or sterilise land to the minimum level of intrusion on his rights as is reasonable and practicable in the implementation of the Scheme.

3.40 As clarified at the Hearing, these issues relate to **potential sterilisation of land** rather than land take (whether voluntary or by compulsory purchase). With the confirmation at paragraph 2.20 above that there is no compulsory purchase of land arising in relation to the Scheme as before me, it appears that issues in these regards could relate to the proposed wildflower meadow planting area (as opposed to flood storage areas as will not necessarily arise, at least at this stage, in the absence of a flood event) and land sterilisation so far as needed for embankments and for ramps over embankments; and, failing the building of the latter, land sterilised in consequence of the Scheme if confirmed.

3.41 The proposals in relation to the wildflower meadow planting area are set out in section 9.1.2 of the technical report (Production JR14). This includes a plan at figure 9-1, although the area concerned appears smaller on the plan at Production JR9. The Council indicate that “the area is currently used for crops which would no longer be feasible with the cycle of flooding and drying. Depending on landowner discussions and budgets PKC may purchase the land or agree a suitable compensation in perpetuity. The space would no longer be suitable for arable agricultural therefore it could be repurposed as a wildflower meadow to provide environmental benefits to the scheme”. The benefits of this suggestion are set out in that part of the Report at section 9.1.2 and are consistent with what is permissible under the Scheme as described at paragraph 1.12 above. This remains though (as indicated to me by Council witnesses) a potential rather than certain option (with implications in consequence on matters of compensation). I was left unclear how to entirely reconcile that part of this technical report with the indication given to me at the Hearing. I proceed in reliance on the former (or, in other words, that the area will not be usable for crops even though the alternatives are as yet unagreed).

3.42 At the Hearing, under reference to Figure 3.7 of the Options Review Report (and the narrative relating to that figure on page 32), alternative locations for flood storage land (described as an action type) were set out. The Council flag up the reasons for ruling these out.

3.43 That Review at page 32 states-

> "The viability of this action type was assessed to be limited, as it would require large volumes to be excavated with multiple large embankments across multiple storage features to achieve the storage volumes required to significantly reduce flood risk downstream. These storage features would be situated on areas of high-grade agricultural land, which may be considered too valuable to flood. Furthermore, two of the storage areas to the south in Figure 3.7 are disconnected and set a distance away from the main South Queich watercourse. This would require works to construct a new diversion feature to direct water to this area during flood events, and in addition construct a new flow route for stored water to be diverted back into the South Queich at a suitable location downstream. This action was ruled out as being technically unfeasible."

3.44 The proposed area is part, though not necessarily the whole, of Field 5 (Back Park) which JR points out, consistent with that technical report, would potentially be sterilised. Although relevant to an understanding of the overall impact on land owned by JR, the primary consequences of this relate to matters of compensation, as is clear from how matters are put in Production JR5 in terms of reduced or adversely affected productivity. For the purposes of this examination, the benefits of inclusion (as described in paragraphs 1.12 and 3.41 above) are not challenged in detail or in substance and appear to me to be justified in particular in consequence of the need for flood storage measures in the form of the proposed embankment (at the proposed location) as part of the Upstream Works.

3.45 Moving on to the proposals to create embankments separating the fields, it appears to me (a) that there is no significant scope (nor any suggested to me at this location) to reduce the impacts of the building of the embankments themselves, if accepted in principle as needed and (b) that the impacts of the ramps, though I was advised have been under separate discussion in recent weeks, are to be developed in detail later, in such discussion between the Council and JR. I agree with JR that – if but only if ramps capable of being used by tractors and combine harvesters are not part of the Scheme or not otherwise provided – a risk arises of Field 7 (Kippet Knowe) becoming sterilised. This could arise not because it might flood but because it might become unable to be used or served by such equipment. Parties should use all best endeavours to minimise that risk. All the indications from the Council (re-iterated in their Closing Submission at paragraphs 6.16 to 6.19 in their willingness to continue discussions on these matters) are that doing so is the intention. Mindful of that, such risk is not though in itself a reason in principle to recommend refusal of Scheme confirmation as including or affecting the Upstream Works.

3.46 Some concerns were raised on the extent of disruption arising from the construction period itself, but the period of anticipated disruption is limited and is estimated at around 8 weeks. These matters are for discussion of the detail in due course rather than impacting on the matters of principle before me.

3.47 I have considered the extent or risk of land potentially being sterilised in consequence of a flooding event, both in respect of Field 5 (Back Park) and Field 7 (Kippet Knowe), if the Scheme proceeds. In respect of Field 5, the Scheme design envisages the potential for that field flooding on a protective basis, by way of flood storage, in consequence of a flooding event. However, I recognise that (a) the Scheme plans involve a sluice into the Ury Burn to alleviate flooding quickly (b) JR regards the land as porous enough anyway and (c) JR

considers, based on farm history (see paragraph 11 of his Statement), that such a flooding event is virtually unprecedented and so highly unlikely. In respect of Field 7, the embankments (if effective) will avoid, or are to be designed to avoid, that eventuality. Points (b) and (c) in any event apply equally.

3.48 In conclusion on land take and intrusion on land owned by JR, I would conclude that the Council proposals in the Scheme are reasonable and proportionate and involve the minimising of such impacts in pursuance of the appropriate objectives of the Scheme.

3.49 Dr Stewart in his evidence at the Hearing and at section 2 of his Technical Memo (Production JR 22) challenged the **accuracy of the cost benefit analysis** (CBA) calculation. That had concluded a CBA of 1.1. Any figure in excess of 1 can in short be treated as justified. He cast doubt on the figures in so far as underestimating the, as yet, undetermined compensation sums due to JR, as would reduce the CBA figure. Drawing on Production JR30, he sought also to break down the CBA figures for each of the three constituent parts of the scheme. He highlighted from section 3.3 of that production that the CBA of the Upstream Works (if taken alone) was 0.76. On that basis, it was not worth doing. The Council refute that claim. Their approach to the CBA takes a wider view in having regard to benefits to the national economy. They cite other schemes (such as Grangemouth and at Montrose, at the GSK site) where that has been done under reference to the importance to national infrastructure, such as of the nature of the MOTO services.

3.50 It struck me as unlikely that the feeding in of the compensation due to JR (once done) would have the consequence claimed, However, compensation matters are not for me nor are figures yet ascertainable (as the detailed implications on his land are not assessed as yet).

3.51 Consistent with my general view (though read with paragraphs 2.45 and 3.34 above, as potentially applicable to the Upstream works), I would though reject the CBA breakdown into the three elements of the Scheme. The Scheme (certainly in terms of the CBA) requires to be treated in my view as a whole and in the round. In that regard I note and agree with the Options Review Report of 14 December 2022, which at section 3.4, says –

> "A cost benefit cannot be attributed to any of the individual options as there is interaction between all three Flood Cells, as detailed in Sections 2.1 to 2.3 [of that Report]. To compare these individually would either double count some properties or not include others when totalling the costs and benefits associated with each option".

3.52 Lastly – and associated with the clear evidence of JR as to the lack of a flooding history – I require to address the suggestion that the Scheme be refused in light of the **absence of direct benefit** to JR. This, issue of direct benefit, to a degree, ties in with his suggestions as to alternatives. However, I would reject in principle that proposition of necessary direct benefit. The Scheme is promoted in the wider public interest rather than that of any one person, even if affected adversely. I accept – as Council witnesses did too at the Hearing – that impacts on individual property rights should be minimised and that this should be factored into option appraisals. I accept too that, everything else being equal, if there were a choice between impacts on Council, or publicly owned, land or impacts on private land, the former should be preferred. As set out in this Report, I have seen no evidence of failings in these

regards. Matters of direct benefit in relation to JR are addressed in paragraphs 6.20 to 6.30 of the Council Closing Submission.

Site specific objections by WG

Alternative options

3.53 Though generally referencing alternatives (and noting a general concern about the absence of a direct personal benefit to their land), WG put forward and developed in some detail two particular alternative suggestions of steps as could be taken or considered as would reduce or eliminate the impact on their land (and hence reduce the degree of intrusion on their private property rights and permit greater enjoyment of peaceful possession of their land). As with JR, I accept that these are legitimate matters simply to question in terms of scheme justification as an affected landowner. It is not for WG to design or justify the Scheme, which can only proceed based on the Council's objective justification.

3.54 Their first was to suggest that full consideration ought to be given (or ought to have been given) to measures utilising the embankments of the M90 to the west of their land to create flood storage on farmland on the other side of the motorway from WG. This would have provided the additional benefit of protecting their land rather than using it to create flood storage. See paragraph 50 of the WG Statement of Case. My comments in relation to direct benefit to JR (set out above) are applicable equally to WG.

3.55 As noted above, there are many alternatives or variations open on any potential scheme, but I am satisfied that the Council appropriately considered this alternative and I accept the explanations given at the Hearing on 3 February for having ruled it out. In the Mouchel flood study of September 2010 at paragraph 4.7.1 an assessment of factors relevant to that area is set out. The WG proposal is described in that Report as "flow controls" (section 5.3). The Mouchel Flood Study Report states at paragraphs 5.3.1 and 5.3.2, under reference to figure 41-

> "*Hydraulic / Technical Feasibility*
> Restricting the capacity of the existing culverts under the M90 motorway and utilising the M90 motorway embankment was considered as a possible way of alleviating flooding to South Kinross. The flow throttles would result in increased flooding to upstream farmland (which could be potentially managed) and would be impounded by the height of the existing M90 embankment. The general option schematic is shown in Figure 41…. A number of modelling scenarios including various aperture sizes were tested. No options were able to remove flooding downstream. It was possible to restrict flows to the required level (around 15 m3/s) but flood levels built up behind the M90 motorway embankment to such an extent that that they then overtopped the motorway and resulted in extensive flooding as per the existing situation.
> …
> *Option Status*
> In theory it is possible to restrict flows but there would need to be a substantial flood embankment constructed along the westerly edge of the M90 motorway to impound all flood waters. Such a structure would require design and regulation under the Reservoirs Act 1975. There could be potentially issues with reduced productivity of upstream farmland due to increased frequency of flooding. Existing culverts through

the M90 would need to operate under surcharge conditions which could present safety issues during times of flood. Downstream velocities where flows emerge from the M90 culverts would be greater and the consequences of culvert blockage could be significant. Access and maintenance would be difficult during times of flood if culverts are surcharged.
Due to large doubts over the feasibility and cost of this option it has been discarded from further assessment on its own. However, there is potential for some level of flow control to be used when combined with other options such as flow diversion as explored later".

3.56 At the Hearing it was stressed that this suggestion would involve different impacts elsewhere, with the use of new and existing culverts under the M90. The reasons given for ruling this out are consistent with the Mouchel Flood Study Report, including in light of the impacts on the M90 embankments. Although (in the context of JR's land) I find at paragraph 2.37 above that the risk of flooding onto the surface of the M90 carriageway is a second order matter, that is not to say that the risk of that occurring should be encouraged. It seems to me that the WG suggestion, utilising M90 embankments, would import precisely that risk into the Scheme. That would be undesirable. Given that past sources of flooding include from the Gelly Burn (running across WG land), it was not clear to me, from the limited development of the idea of this alternative, that it could create an acceptable alternative or one that justified requiring the Council not to proceed with the Scheme and re-consider this as an option, before proceeding further. Use of the M90 as a barrier to hold back flood water was ruled out for the reasons set out in the answer to Question 6 in Production JR17.

3.57 Moreover, in an echo of my conclusion on the best location of flood defences at the MOTO services (paragraphs 2.36 and 2.47 above) ie closest to the assets to be protected, it appears to me that flood prevention measures immediately next to the group of houses and businesses in the area described at paragraph 2.51 above are more desirable. The position might be different if there were houses or analogous buildings on the WG land but there are not. Without pre-empting a planning application to build houses there, it seems unlikely that permission to build on that part of the functional flood plain would in future be granted.

3.58 The second alternative suggestions related to consideration of land next to that of WG in the ownership of Thomas Lee (seen on a plan on the last page on Production WG5, described by me as "the Lee land"). As noted, Mr Lee is not an objector nor was he intimated by WG that his land was intended to be scrutinised in this examination. He was not called as a witness on behalf of WG nor attendee.

3.59 The suggestion is that the Lee land might now be available as an alternative flood storage area. The Lee land is closer to and adjacent to the South Quaich river (lying south of it) and, only in the course of this examination, has it become clear that residential property previously on the Lee land will in future no longer be there. This is in consequence of the abandonment of a challenge to the Court of Session in relation to enforcement action by the Council under planning legislation (as advised to me by WG and confirmed in Closing Submissions). Accordingly the availability of non-residential land as part of flood scheme planning was not known to the Council at the relevant time of scheme development.

3.60 While I accept what WG say (to that extent), it remains the case that this Scheme is taken forward as a flood related matter rather than a planning matter. Any scheme cannot be required to be reviewed or modified every time a change in the planning status of a constituent part arises (unless shown to be fundamental). In a town such as Kinross, the planning status of areas of land may change regularly and at any time. That conclusion is the appropriate answer too in my view to the points made in the WG Closing Submissions (paragraphs 47 and 48) on the changing planning history of the WG land itself. The changes over time are not fundamental. If on the other hand the change had, in the meantime, *permitted* residential dwelling houses on the WG land (a significant reversal of the factual position at the Lee land), that of course would be different.

3.61 Considering this in more detail, I sought views from WG as to whether they are suggesting that the Lee land be used for flood storage instead of their land or that both are used. Consistent with the Scheme being for the Council (not WG) to justify, the view of WG was that either or both should be considered.

3.62 From an analysis of the evidence before me, it appears implausible that use of the Lee land to the exclusion of the WG is likely to protect the residences and businesses described at paragraph 2.51 above. That might be possible if the risks come only from the river to the north of the Lee land. But from the information before me, including based on risks from the Gelly Burn, the risks appear to me to be wider and I find to that effect. The water flow plan (Production PKC 9) and figure 3-5 in the report of 7 November 2023 (overview of flood cells), read with the details of the land inter-relationships at Production WG2 and the indications of river reach on a 2% AEP flood event shown on the plan at Production JR28 (Hydraulics Report 2 September 2024 Appendix K Drawing IBE1585_DepthF01) firmly suggests to me that use of the Lee land *instead* is unlikely to secure the desired protection. Geography and likely water flows do not support WG's view. Despite WG persisting in that view in Closing Submissions, I prefer the evidence from Council witnesses in this regard.

3.63 On consideration of the merits of taking *both* areas to use as flood storage (or adding in the former railway land, as that idea is expanded on in the WG Closing Submission) might have the effect of reducing the impacts on the WG land, by creating a larger flood storage area. But the evidence of Council witnesses at the Hearing is that any reduction of impact in respect of WG's land is likely to be marginal. It might lead to quicker flowing away from the flood storage areas into the nearby rivers, after a flood event. But it would still require installation of essentially (or indeed exactly) the same flood defences at least as far as affecting WG as at present proposed. I see little or no merit in the suggestion, as described in this way.

3.64 On the topic of the Lee land, WG suggested that, with that land now potentially freed up from residential properties, it would be a preferable route for the public footpath in dispute as it runs across WG land at present. The Council are engaging in that matter because of the implications on the proposed flood defences at the WG land. However, I do not consider these matters are materially relevant to this examination. This is partly because provision of public access over footpaths is secondary to the main purpose of the Scheme (see paragraph 1.12 above) and partly because access matters engage other functions of the Council (such as the potential use of powers under the Land Reform (Scotland) Act 2003) not under examination by me. While relevant to WG land (and considered at section 11.1 (Community

greenspace) in the report of 7 November 2023), it is beyond my remit to examine whether access rights for different purposes could be better provided over this area of alternative land, not least with Mr Lee not present or engaged.

Transport Scotland and Scottish Water

3.65 WG at the Hearing on 3 February sought assurances as to the extent to which Transport Scotland as trunk road authority (for the M90) and Scottish Water have been involved in and were intimated in connection with the Scheme. The fulfilment of notice requirements regarding these bodies and bodies like them is addressed in Chapter 1 of this Report. At this part of the Hearing, the Council stressed that all due and required intimation had been given to these bodies, neither of which had objected. I note the terms of section 11.4 of the report dated 7 November 2023 regarding Transport Scotland and of section 3.9 of the Mouchel flood study of September 2010, replicated as part of the report of 7 November 2023 regarding Scottish Water (along with other references to them in these reports). Continued engagement with Transport Scotland is indicated on outline design proosals.

3.66 I sought assurances and information regarding Transport Scotland where considered appropriate by me, such as at the MOTO services (JR objection) in light of certain indications of a risk (albeit regarded as relatively small) of flood water running in the carriageway of the M90 in that vicinity. Had the M90 and its embankments been intended to be used more proactively as a significant part of flood protection measures (for example as WG suggests, but not limited to that suggestion), that would need to have been put to them, but I do not recommend consideration of that.

3.67 I did not find the references to sections 28 and 30 to 32 of the Roads (Scotland) Act 1984 (first raised in the WG Closing Submissions) of assistance in looking at potential functions of Transport Scotland in this context. I had by then already reached the view (and advised parties to that effect on 12 November 2025) that I was not intending to consider flooding to the M90 carriageway as a primary factor in this examination. I remain of that view. Had Transport Scotland any concerns about flooding of the carriageway, they could take steps such as under section 30 of that Act or have taken steps in proactive engagement in the Scheme. I am advised of no such concerns. They would certainly need to be consulted if consideration of the WG suggestion (paragraph 3.54 above) were pursued by the Council, in light of the context as narrated by me at paragraph 3.56 above. As above, I do not recommend that.

Detail design at WG land

3.68 At the Hearing on 3 February, some time was used in considering the detailed design implications at the WG site. This was useful in giving WG an indication of current thinking as to the design phase as would follow if the Scheme is confirmed. It was reasonable and appropriate as part of Council engagement to have done so and I encourage that. This was useful for me too, though seeing plans (Productions PKC 7 and 8) only on the Hearing date was less useful and I note that the same approach was not taken in relation to JR (at least on matters before me). I accept too that these plans follow from a desktop assessment by Council officials.

3.69 I address above the implications of the principle and design distinction in the context of planning permission. On the approach to design detail in itself, the Council indicate to me on 6 February 2026-

> "Following the Part 4 Guidance for Local Authorities, and at the point of undertaking the Local Authority Hearing, the Council have completed Section 2.12 (Publishing the Scheme), considered Objections (Section 2.13) and Section 2.15 (Schemes attracting objections). This latter Section (and also Section 2.16) notes a 'Preliminary decision...'. The Council issued the preliminary decision to Scottish Ministers (Section 2.17) and we are currently undertaking the Local Authority Hearing (Section 2.23). On that basis, the South Kinross Flood Protection Scheme is not considered formally 'confirmed' until the conclusion of the Hearing and a 'Final decision' is made (Section 2.24). Therefore, the incorporation of the access ramp(s) would form part of the Outline Design and be further refined within the Detailed Design process. It is not unusual for drawings to be adjusted between the initial publishing of the Flood Order and the conclusion of construction with As-Built drawings being produced".

3.70 In the limited time he had, Mr Wilson flagged up a number of concerns with the plans produced. These related to the practicality of the operation of the proposed one-way system round his site and the feasibility of HGV's being able to complete a sharp right turn on entry to his land due to the likely camber of the access ramp.

3.71 It was useful for me to see these plans as, from the site visit, I had not found it easy to visualise how the ramps could achieve the required access aims, in particular in light of the potential for impacts on neighbouring residents who may be unaware of the detailed proposals and had not objected in principle. The Council assured me that such neighbours had been and are being consulted.

3.72 After the Hearing, Mr Wilson submitted written comments (Production WG14), very much consistent with what he said at the Hearing, having had time to consider these matters in more detail. The points in that note are described as serious concerns, relating to safety, feasibility and practicality. The photos in that document were helpful to see.

3.73 The detailed design task in relation to the ramp over the embankment continues to appear challenging to me, even from the explanation offered by the Council. The Council did though confirm that all standards for road build under the Design Manual for Roads and Bridges would be met. I took this to mean with HGV's in particular in mind (a) on gradient of the ramps (b) the clearance height on the ramps to avoid vehicle grounding and (c) the width of the access to the WG land.

3.74 Discussions will no doubt continue and my concern relates not to what the best solution is to detail design matters (which is not for me to resolve, for the reasons set out in the Guidance referenced above) but what would happen if resolution were not possible. As with planning matters, the view of the Council is that these would be matters of compensation. That could occur for example if the right turn concerning WG resulted in a ramp re-design with greater impact on the area of WG land affected. I do not consider that a ramp is not the answer (as Mr Wilson claims) but that a differently designed ramp might be.

3.75 The points of relevance, at this juncture and in this respect, are-

1) That the Council, when asked at the Hearing, fully explained the need for the access path arrangements running towards the M90 embankment (not being part of proposals for public footpaths), despite the assertion to the contrary in paragraph 76 (bullet 7) in the WG Closing Submissions;
2) That the reasons for there needing to be an embankment rather than a wall are explained in the Report of 7 November 2023 and options appraisal (despite the assertion to the contrary in paragraphs 76 (bullet 6) and 100 in the WG Closing Submissions);
3) That it appears to me to be no alternative to there being a ramp (in principle and as part of the outline design), if the flood prevention works under the Scheme are to be effective; and
4) That, as above, these design matters will potentially sound primarily in matters of compensation.

3.76 Expanding on point (3) above, WG (at paragraphs 57 to 60 of their Statement of Case and paragraph 97 of their Closing Submission) question the justification for business disruption and the weighting of such matters in the decision making process. A degree of such disruption appears to me to be inescapable – based on point (3) – if the Scheme is otherwise justified. Minimising that disruption will be part of the foregoing detailed discissions. The position on business disruption would be different if no ramp is suggested as part of the outline design (but it is).

Detail design at JR land

3.77 In contrast with WG, the Council did not place before me at the appropriate Hearing session relating to the JR objection any suggestion as to what detailed design solution might be suitable at land owned by JR. I am advised that a drawing was shared with him on 20 February 2026 by the Council. It was attached (I presume simply for completeness and to show consistency with WG) as Appendix A to the Council Closing Submissions. JR takes issue with an examination of that plan being undertaken in this process as a matter of design detail and I do not do so. As with WG, I address above the implications of the principle and design distinction in the context of planning permission.

3.78 As with WG, the incorporation of the access ramp will nevertheless require to be part of the Outline Design. Also as with WG, I encourage engagement with JR on design details on impacts such as these, in the period ahead, if the Scheme is confirmed, building on the correspondence between 23 February and 3 December 2024. At this point I would simply draw out and stress two of the various differences between the detail design of embankments at the land of WG and of JR – (a) that JR owns the land on both sides of the proposed embankment and (b) that there are fewer obvious wider impacts on public roads or access to such roads for neighbours at the Turfhills site.

3.79 It was anticipated ahead of the Hearing that JR would wish to develop a further matter of the design detail relating to localised different options in exploring whether a better alternative could involve using the allotments adjacent to the MOTO services as well as or instead of his land. This was rooted in the not unreasonable suggestion that Council (or otherwise publicly owned) land should be used in preference to private land such as that of

JR. JR questions whether council owned land comprising allotments adjacent to his land, where capable of securing the same or a similar result, could be brought into the area where flooding would be permitted (and controlled) while protecting the services. The inter-relationship between the embankment (as then envisaged) and the allotments can be seen in the options appraisal report of December 2022 on page 49 at figure 5.3. At the Hearing JR indicated that this would be developed in Closing Submissions. This was not done, possibly because of the indication at the Hearing that the allotment land in his mind was not Council owned, but is owned and used privately. The Council confirm this in their Closing Submission.

3.80 In any event, it would seem clear that such utilisation would be in addition rather than instead of use of JR land and from consideration of the impact on the lines of proposed embankments would gain JR little beyond creating a loss of land in a flood event to a third party. On alternatives at or affecting his land, the need not to impede the potential overland flow routes was stressed to JR by email of 17 July 2024. In procedural terms, no notice had been given to such third parties. I had given the opportunity to raise such matters (if parties were so minded), in order to consider intimation to them of potential impacts. That was ruled out in my letter to objectors of 9 July 2025, in the absence of any such suggestion. This is a specific example of the point made at paragraph 3.84 below.

3.81 I would reject this because (a) as indicated at the Hearing, the allotment land is not in fact owned by the Council but is privately owned (b) this would still require the building of an embankment on JR's land with similar impacts on his holding and (c) while it would very marginally increase the area flooded (in a flooding event), the reduced impact on JR seems to me to be relatively insignificant. In other words, his idea would create new adverse impacts on others (likely to be significant for allotment owners if a flooding event occurs) with marginal benefit to him.

Modifications

3.82 Paragraph 5(1)(b) of Schedule 2 to the 2009 Act permits the Council to confirm the Scheme with modifications. Section H of the Guidance covers advice on modification, both before and after confirmation. Accordingly in this examination, consideration has been given by me to whether to recommend confirmation of the Scheme with such modifications as considered appropriate, based on the evidence and representations before me. It became clear in my examination that the objection of JR was in effect limited to the Upstream Works, rather than the Scheme as a whole (though he raised a range of general questions too). The position of WG was unclear to me at first (as their Statement might have been read to suggest that, by virtue of a modification that protected their land, they might withdraw their objection), but in response to my letter of 20 June, it was confirmed (a) that this was not the case and (b) that the objection remained. Their legal closing submission does not suggest modification, though the statement from Mr Wilson (Production WG17), in conclusion, does.

3.83 In addressing matters relevant to potential modification, I make two sets of general points of relevance to my examination, one of substance and one of procedure (and procedural fairness to all persons affected or potentially affected).

3.84 The procedural point is that, in terms of the initial JR letter of objection, it might be implied that one part of the objection suggested that, rather than carry out Upstream Works

on his land, alternatives were open involving the same outcomes being achievable by using other persons' land. As it transpired, from my site visit it was clear to me that this was not a feasible or realistic possibility. JR ultimately did not suggest such alternatives. However, prior to the site visit, I considered this as a possibility. I was concerned that, if identified landowners might be impacted by modifications previously unknown to them, notice should be given that these might be examined and potentially recommended. Accordingly, their land and interests required to be identified and notice given to them. I sought clarification or confirmation from JR in that regard in my letter of 20 June 2025 (giving an extended period to take steps to investigate the title position of such persons), However, on 4 July 2025, JR confirmed that the only modification forming part of their objection was that of the exclusion of the Upstream Works. See also my letter in consequence of 9 July 2025.

3.85 The position on that same point (in respect of affected third parties) of WG was superficially more straightforward. They were reluctant to rule out modifications (depending on the development of the evidence) and made reference in their Statement of Case to two possible alternatives. However, WG did not identify in advance such alternatives in a way giving rise to the possible need to identify landowners as might be impacted by modifications previously unknown to them, to permit participation in the examination. Objections by WG relating to the effects or impacts on immediate neighbours did not appear to me to give rise to that direct suggestion. That direct suggestion was not part of their case, as I understood it. I confirmed that understanding with WG by letter of 9 July 2025 (limiting the parties interested to the Council, WG and JR). While for one neighbour (Mr Lee) a change of circumstance arose in the course of the examination (as was advised to me by WG, under reference to Production WG5), no steps were taken by WG between 9 July 2025 and 3 February 2026 to trigger intimation of this possibility affecting Mr Lee nor was he present at the examination hearings, at the instigation of WG. No steps were taken or intimated to the effect that I should review my ruling of 9 July 2025.

3.86 My ruling of 9 July 2025 not only allowed me to confirm the parties to the examination as being limited to the Council, WG and JR, but this allowed me to conclude that a separate Hearing session to consider potential modifications (in terms of my letter to parties of 20 June 2025, responses of 4 July and my letter of 9 July) was not needed.

3.87 The first part of the point of substance, acknowledged by WG, is that exceptional care is needed in considering and making recommendations of modification to have regard to potential consequences (both foreseen and unforeseen, direct and indirect) of changes to the Scheme presented to me for examination. I was satisfied that the Upstream Works were – in principle - capable of being severed from the Scheme as a whole (on which see paragraph 3.34 above). If the Council reach a different view from that expressed by me on the scope for securing better mapping data and the implications on the justification for the Upstream Works (see paragraph 2.45 above), severing those works would be advisable (at least until that data has been obtained and assessed). In that case, it appears to me to be relatively straightforward in drafting terms to make a modification to exclude the Upstream Works from the (otherwise) confirmed Scheme if the Council are so minded to otherwise confirm. In that eventuality, the desirability of first obtaining better data would outweigh, in my view, the "holistic" advantages of treating the Scheme as an indivisible whole.

3.88 However I have grave doubts as to how other modifications can be contemplated through in effect a partial reconfiguration of the developed Scheme placed before me. For those reasons, my starting point (other than in respect of the Upstream Works) is that, where the Scheme cannot be recommended as a whole, it should be refused as a whole (to allow proper consideration and re-consideration of the Scheme and the basis on which it cannot be recommended as a whole and so as the permit appropriate, fully assessed alternatives, to be developed).

3.89 Lastly on the matter of modifications (and on a second point of a substantive nature), I address a matter arising on 3 February (as affects WG), in consequence of the tabling and lodging of Productions PKC 7 and 8. These are plans produced to set out the further thinking as to the detail of impacts on WG. They show variations of impacts both on their land and beyond. I consider these matters above. Although being changes (in detail), the Council do not put these to me as necessitating formal modifications to the Scheme. Their position remains that, even if taken forward, the Scheme before me for examination should, in this respect, be confirmed without modification. This is clear from their Closing Submission at paragraph 20.2.

3.90 I should record though that, as significant parts of the changes shown on those plans relate to and impact on land owned by persons other than WG, I do not consider that I could, in any event, make recommendations for modification since no intimation of these has been given to affected landowners under reference to my examination (nor, to my knowledge, under paragraph 9(3) of Schedule 2 to the 2009 Act). Such changes are at or near the Gelly Bridge. No such persons have had the chance to participate in this examination. No request was made to adjourn my examination without reporting so as to facilitate this, under that sub-paragraph. If modification is needed, either a new and/or modified Scheme is needed or the Council (if so advised) might proceed in treating these as minor modifications affecting such other persons under Part 4 of the Guidance, as quoted at paragraph 3.69 above (rather than using modification powers under the Scheme as before me). That was the import of the note from WG of 26 February 2026 (Production WG19) in connection with what they describe in that Note as the 2026 drawings. I stress this point because paragraph 20.2 of the Council Closing Submission only sits under the heading “Mr Wilson”.

3.91 A similar point arises (but in a different way) regarding the drawing, not provided to me in a way as was capable of examination by me as affecting the detailed impact on JR (as he rightly notes). The Council accept that the ramp is not yet shown in the Order at JR’s land. Equally though no modification of the Scheme (in that regard) is sought **in this examination**. Nor I think could it be (for the reasons stated in the JR Closing Submission that it was not provided or presented to me at the appropriate time for examination). Again, no request was made to adjourn my examination without reporting so as to facilitate such an examination. The Council position is stated at paragraphs 20.2 and 20.4 of their Closing Submission, read with paragraph 20.5. I need comment no further on this matter (for the reasons stated there), save to recognise and stress the difference between modification of the Scheme as before me and a later modification by the Council post-examination, by definition not before me. The power to do the latter is recognised at paragraph 9(3) of Schedule 2 to the 2009 Act.

CHAPTER FOUR : CONCLUSIONS AND RECOMMENDATION

Justification of the Scheme in principle

4.1 For the reasons set out in this Report, I consider that the policy, legal and factual context under-pinning and justifying the promotion and adoption of the Scheme is established. That policy background is seen in the Forth Estuary Local Flood Risk Management Plans described in paragraphs 1.1 to 1.6 above. The Scheme is described in paragraphs 1.10 to 1.15 above and the justification addressed at paragraphs 2.17 to 2.28 above. The powers of the Council under the 2009 Act to promote and adopt the Scheme are clear and are clearly applicable to the needs of the town of Kinross. These powers are properly open to them as exercised. The steps taken by the Council in the promotion of the Scheme and leading to this examination appear to me to be within the powers under that Act.

4.2 Subject to my comments at paragraphs 4.12 and 4.13 below, the requirements of the 2009 Act in terms of procedures and processes are satisfied. The same applies to the 2010 Regulations. The Guidance concerned as issued by the Scottish Government has been applied and broadly followed.

4.3 As the policy decision to adopt the Scheme is in my view within the range of options reasonably open to the Council; that doing so is a proportionate response to the policy aim; that there is a causal link between the outcome desired and the Scheme (as the adopted means to secure that outcome); and that, at a general level, the Scheme is the least intrusive alternative reasonably open in relation to the impact on private property rights (in the public interest), the promotion and adoption of it is justified. On that last point, I have considered matters in light of ECHR, principally Article 1, Protocol 1. The Scheme is a legitimate, reasonable, proper, justified and proportionate exercise of the powers of the Council. It appears to me that there is a clear and rational connection between the legitimate aim of minimising the risk of future flooding in the area and the need for the Scheme as promoted as the means of securing that aim in relation to the town of Kinross. The Scheme is shown as being needed. As at paragraph 2.41 above, I consider that the town of Kinross includes the areas covered by the Upstream Works.

Development of options and options appraisal

4.4 On consideration of the documents described at paragraph 2.30 above and on consideration of the process of development of the Scheme since inception (tested in this examination), I am satisfied that a rigorous process of option appraisal has been undertaken. Options as to different responses to the risks (or types of response) have been considered. Alternatives to the form, shape and extent of the Scheme (mindful of impacts) have been considered. Environmental impacts have been considered and assessed. Public engagement has been undertaken and I would reject the suggestion that the consultation process has been unfair and unlawful (as set out at paragraphs 2.58 to 2.81 above).

4.5 In the development of options by the Council, I am conscious that the range of options and decisions for them are wide and often involve choices and decisions of a discretionary nature. The responsibility for these – and to justify decisions – lies with the Council alone. Nevertheless, I am satisfied that the key decisions in these regards have not been shown to

be flawed or containing (or omitting) alternatives outwith the reasonable range of options open to a properly informed Council. There was nothing emerging in this examination that suggested that elements of the Scheme required to be refused so as to be returned to the Council to re-consider.

4.6 More specifically, I would summarise my conclusions on options appraisal and options (or alternatives) considered as being that a thorough and rigorous options appraisal was carried out. There were options as to the range of different types of flood prevention and alleviation measures (as can be seen under the Local Flood Risk Management Plans). In relation to the Scheme, options were developed in regard to all three flood cells. These went through an optioneering process described in the Options Review Report of 14 December 2022, set out as part of Production PKC 1.4.2. Twelve options were considered as "potential actions" as may be considered suitable. These are as summarised in Appendix A of the report to Committee by the Head of Environmental and Consumer Services of 27 November 2023 and considered on that date by elected members on that Committee. As narrated there, they were assessed on technical, environmental, social and economic grounds.

4.7 In the objections, both objectors flagged up that certain other options at a general level could have been more thoroughly considered (such as better watercourse dredging). Some, more local, suggestions were made but – in each respect – were found wanting or already having been considered and rejected with good reason. These matters are addressed at paragraphs 2.46 to 2.57, 3.53 to 3.64 and 3.68 to 3.81 above. Chapters 2 and 3 are to be read together.

4.8 The option of excluding the Upstream Works is one that I would recommend is rejected, for the reasons set out at paragraphs 2.29 to 2.45 above, looking at that separately. See in particular paragraph 2.45 above. I reach that view having given careful consideration of site specific objections by JR on the rigour of the methodologies used (at paragraphs 3.11 to 3.36 above). Although the Council in their representations are clear that the Scheme is an overall collective package (and that the Upstream Works serve more than protection of the MOTO services), consideration should in my view nevertheless be given to further data gathering and phasing as described at paragraph 3.34 above. As set out in this Report, the justification in my view is clearly made in respect of flood cells 1 and 2. It is also made out in my view – albeit with those qualifications - in respect of flood cell 3.

4.9 I have given careful consideration to whether refinements or alternatives might give rise to different outcomes for objectors, with reduced impacts. This ties in with the need to minimise intrusion onto private land interests. This applies to both objectors, but was explored mainly in relation to WG. For example, see paragraphs 2.51 to 2.54, 3.58 to 3.63 and 3.79 to 3.81 above on whether the proposals are overly cautious or excessive in relation to the properties described at paragraph 2.51 above, use of the Lee land and use of allotments (respectively). Even if I had agreed, it was not obvious to me that significant differences would arise on the nature and extent of the flood prevention measures proposed at the sites concerned.

Other objections or points raised

4.10 Consideration has been given by me to impacts on the drainage systems at JR's land (paragraphs 3.37 to 3.38 above), land take and sterilisation (paragraphs 3.39 to 3.48 above), the accuracy of the cost benefit analysis (CBA) calculation (paragraphs 3.49 to 3.51 above), the absence of direct benefit to either objector (paragraph 3.52 above). Matters affecting the interests of Transport Scotland and Scottish Water are considered (paragraphs 3.65 to 3.67 above).

4.11 I draw specific attention to how the design detail of the Scheme would inter-act with deemed planning permission (paragraphs 3.2 to 3.10 above) and my recommendation at paragraph 3.10 above.

Notification and other procedural requirements

4.12 In relation to the reasons for examining compliance with legislative requirements of notification (at paragraphs 1.55 and 2.2 above), I should record that I remain satisfied that I can and could reasonably carry out and complete this examination, notwithstanding the points made by WG and what I say below. In particular, I have no reason to consider that I have not been sufficiently fully appraised of the key and pertinent issues relevant to the matters before me.

4.13 The consequences arising from the points made by WG on notice require full legal consideration by the Council, in light in particular of what it can be concluded was "known" by them regarding land interests at the relevant points in time. In this examination (before, at and after the Hearing sessions), the smoke and mirrors approach of WG to the placing of information before me (which they are of course perfectly entitled to adopt) has nevertheless impeded my examination and the ability of the Council to exercise their judgement on what was in fact known; in light of what was known to them; and what can be said or presumed to be known to them (where known all along to WG). Though entitled to, that approach has not conformed to the encouragement of openness in providing all the information necessary to inform my Report in an informal environment (as set out in Appendix G of the Guidance, as quoted at paragraph 2.9 above) in the wider public interest of facilitating a full and rigorous examination. That encouragement is addressed to all, not just the Council.

Recommendation

4.14 I recommend that the South Kinross Flood Protection Scheme 2024 be confirmed without modification.

Modifications

4.15 For the reasons in this Report and as set out at paragraphs 3.82 to 3.91 above, I recommend that (where the Council determine to confirm the Scheme, insofar as was subject to examination by me) they do so without modification. The indications in respect of later post-examination modification (as considered by the Council in terms of section 20 of the Council Closing Submission, in particular at paragraph 20.5) are for them and for a later process.

Expenses

4.16 As set out at page 70 of the Guidance, the terms of Planning Circular 6/1990: awards and expenses will apply, as if the examination were an inquiry in terms of that Circular. Decisions on expenses (where sought) would not arise in processes and procedures under the 2009 Act, but as an administrative decision by the Council under that Circular. I make no further reference therefore to expenses in this Report.

Right of appeal

4.17 The decision reached by the Council in consequence of the consideration of this Report (if to confirm) is subject to a right to appeal to the Sheriff by way of Summary Application under and in terms of paragraph 12 of Schedule 2 to the 2009 Act, on grounds set out in paragraph 12(5).

Reporter
12 March 2026

APPENDIX – DOCUMENTS LODGED AND RELIED ON BY PARTIES

PERTH AND KINROSS COUNCIL

PKC 1.1.1. South Kinross - Flooding Newsletter No.1 - 10 June 2021

PKC 1.1.2. South Kinross - Flooding Newsletter No.2 - 15 September 2023

PKC 1.2.1 Public Exhibition Display Boards, Presentation and Comment Form

PKC 1.2.2 Public Exhibition Report

PKC 1.3.1. The Flood Risk Management (Scotland) 2009 Guidance and Forth Estuary Local Plan Cycles 1 & 2

PKC 1.4.1. Notices - Edinburgh Gazette, Courier, Landowners and Statutory Consultees

PKC 1.4.2. Scheme Documents - Flood Order Drawings, EIA Report, Outline Design Report, Public Consultation Report, Scheme Description Report and Flood Order Notice

PKC 2.1.1. Council Committee Report, Summary of Potential Flood Scheme Options Considered, Plan of Recommended Flood Scheme dated 27 November 2023

PKC 2.2.1. Council Committee Report, Plan of Recommended Flood Scheme, Objection Summary dated 4 December 2024

PKC 3 Notification to Scottish Government and Scottish Government Acknowledgement and Confirmation of Decision to PKC

PKC 4.1.1. Mark Wilson and John Russell Objection Documents

PKC 4.2.1. Correspondence Documents from Mr Wilson to PKC

PKC 4.3.1. Documents provided by PKC in response to that received within 4.2.1

PKC 4.4.1. Minutes from site meeting between PKC and Mr Wilson on 22 May 2024

PKC 4.5.1. Correspondence between PKC and both Objectors

PKC 4.6.1. Summary document detailing correspondence between both Objectors and PKC

PKC 5.1 Witness Profiles for PKC and RPS

PKC 5.2. Supporting Statement from PKC Planning Department

PKC 5.3 Statement of Case

PKC 6 EIA Volume I (Non-technical summary), Volume II (EIR) and Volume III (technical appendices)

PKC 7 Updated plan #1 on WG land dated 27 January 2026 (produced on 3 February 2026)

PKC 8 Updated plan #2 on WG land dated 27 January 2026 (produced on 3 February 2026)

PKC 9 Water flows from 2020 flood events (produced on 3 February 2026 and lodged on 5 February 2026)

OBJECTOR – WILSON GROUP (SCOTLAND) LIMITED

WG1. Title Number KNR 2370

WG2. Cameron Laird Architects Ltd drawing (reference 23014 (2-) 003)

WG3. February 2025 PKC Strategic Flood Risk Assessment

WG4. Undated (May 2025) PKC Report on Handling for the January 2025 (s 71) Discontinuance Order

WG5. 30 April 2024 PKC Planning Enforcement Notice about development of land which was the subject of an appeal (DPEA reference ENA-340-2062) by Mr Thomas Lee, The Yard, Queich Place, Kinross

WG6. August 2025 PKC Planning Enforcement Report in relation to WG5 above

WG7. WG Statement of Case dated 10 June 2025

WG8. WG Note dated 4 July 2025

WG8A. Appendix to above note

WG9. WG Note dated 18 July 2025 about 2024 Environmental Impact Assessment

WG9A. Appendix to above note

WG10. VP02 Old Cliesh (sic) Road Proposed View (extracted from Appendix J - Landscape & Visual Photomontages Environmental Impact Assessment Report Volume III – Technical Appendices)

WG11. Perth and Kinross Council (Huntingtowerfield, Farm, Almondbank) CPO 2017

WG11A. Map relating to WG11

WG12. Perth and Kinross Council (Huntingtowerfield, Farm, Almondbank) CPO 2017 Statement of Reasons

WG13. Decision of Scottish Ministers on Discontinuance Order dated 23 December 2025, further to WG4

WG14. Proposed ramps on Old Cleish Road – comments by Mr Wilson

WG15. Comments on 2026 drawings (Mr Watchman)

WG16. Comments on Queich Place flow path (Mr Watchman)

WG17. Text of Mr Wilson's Statement presented on 3 February 2026

WG18. R (oao Pridmore) v Salisbury District Council [2004] EWHC 2511 (Admin)

WG19. Note regarding intimation to residents at Levendale of the Scheme and drawings affecting WG dated 26 February 2026

OBJECTOR - JOHN RUSSELL

JR1. Statement of Case

JR2. Field Plan

JR3. Title Sheet and Plans for Turfhills Farm, KNR1926

JR4. CV Hugh Ironside, SAC

JR5. Agricultural Impact Assessment by SAC Consulting dated 2 June 2025

JR6. MacAulay Soil Survey Map of Scotland 1974

JR7. MacAulay LCA Map1986

JR8. Scheme Description Report dated 12 March 2024

JR9. Flood Drawings No 5 – IBE1585_FO_2005

JR10. Flood Drawings No 9 – IBE1585_FO_2009

JR11. Outline Design Report dated 7 November 2023 – Section 4 Scheme Development

JR12. Outline Design Report dated 7 November 2023 – Section 5 Scheme Summary

JR13. Outline Design Report dated 7 November 2023 – Section 6 Design Considerations

JR14. Outline Design Report dated 7 November 2023– Section 9 M90 upstream storage area

JR15. Outline Design Report dated 7 November 2023 - Section 14 Scheme Economics

JR16. EIA Non-Technical Summary

JR17. Public Consultation Community Report dated 29 January 2024

JR18. Scottish Government Planning Circular 6/2011

JR19. Cains Trustees (Jersey) Limited to Cains Judiciaries (Jersey) Limited as Trustees for the East Gate Unit Trust 2024 CSOH80

JR20. Letter of Objection on behalf of John Russell dated 19 April 2024

JR21. CV Dr Michael Stewart, Kaya Consulting Limited

JR22. Technical Memo by Kaya Consulting Limited dated 10 June 2025

JR23. PKC Public Exhibition Slide 3: Flood Risk

JR24. Technical Report 2023 Chapter 3.3 Flood Impacts (pages 15-19)

JR25. PKC Statement of Case Appendix A 24 April 2025

JR26. Technical Report 2023 Chapter 2 – Flooding Issues

JR27. Hydraulics Report 2 September 2024 Fig 4.7

JR28. Hydraulics Report 2 September 2024 Appendix K Drawing IBE1585_Depth_F01

JR29. Technical Report 2023 Options Appraisal 4.1 (pages 19-20)

JR30. Technical Report 2022 Appendix G Standard of Protection Recommendation (pages 7-9)

JR31. Compulsory Purchase in Scotland – Scottish Government Guidance April 2018

JR32. EIA Passages relied upon – 18.07.25