



Flood and Water Management Bill

Bill 9 of 2009-10

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There has been growing pressure to introduce legislation to address the threat of flooding and water scarcity—both are predicted to increase with climate change.

The Government published a draft *Flood and Water Management Bill* in April 2009, and the Environment, Food and Rural Affairs Select Committee undertook pre-legislative scrutiny of the document. The Committee welcomed a number of the proposals, but it was concerned that a lack of parliamentary time would undermine the introduction of a comprehensive Bill. The Government introduced a slimmed-down version of the Bill on 19 November 2009.

Key features include measures to: require the Environment Agency to create a National Flood and Coastal Erosion Risk Management Strategy, which a number of organisations will have to follow; require lead local flood authorities to create Local Flood Risk Management Strategies; enable the Environment Agency and local authorities more easily to carry out flood risk management works; introduce a more risk-based approach to reservoir management; change the arrangements that would apply should a water company go into administration; enable water companies more easily to control non-essential uses of water, such as the use of hosepipes; enable water companies to offer concessions to community groups for surface water drainage charges; require the use of sustainable drainage systems in certain new developments; and, introduce a mandatory build standard for sewers.

Second Reading of the Bill in the House of Commons is on 15 December 2009.

Oliver Bennett

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Summary

This Research Paper outlines the *Flood and Water Management Bill* of the 2009-10 session. The Environment, Food and Rural Affairs Select Committee's pre-legislative report on the draft Bill, and the Government's response, should be consulted for detailed background information.

There has been growing pressure to introduce legislation to address the threat of flooding and water scarcity following the drought of 2004 and the floods of 2007. Both threats are predicted to increase with climate change. The Bill may reduce the impact of floods such as those seen in Cumbria in November 2009.

The Government published a draft *Flood and Water Management Bill* in April 2009, and the Environment, Food and Rural Affairs Select Committee undertook pre-legislative scrutiny of the document. The Committee welcomed a number of the proposals, but it was concerned that a lack of parliamentary time would undermine the introduction of a comprehensive Bill. It recommended that the Government delay the Bill so that important legislation would not have to be left out.

However, the Government introduced a slimmed-down version of the Bill on 19 November 2009. Key features include measures to:

- require the Environment Agency to create a National Flood and Coastal Erosion Risk Management Strategy, which a number of organisations will have to follow;
- require lead local flood authorities to create Local Flood Risk Management Strategies;
- enable the Environment Agency and local authorities more easily to carry out flood risk management works;
- introduce a more risk-based approach to reservoir management;
- enable water companies more easily to control non-essential uses of water, such as the use of hosepipes;
- enable water companies to offer concessions to community groups for surface water drainage charges; and,
- require the use of sustainable drainage systems in certain new developments;

The Government said of the Bill:

Communities, homes and businesses will be better protected from the risk of flooding and water shortages in future under plans published in the Flood and Water Management Bill [.]

The Bill addresses many of the recommendations from Sir Michael Pitt's review of the summer 2007 floods. It will give the authorities that manage flood risk better powers to do so, putting local authorities in charge of dealing with local flood risk and the Environment Agency in charge of overseeing flooding and coastal erosion nationally.¹

Second Reading of the Bill in the House of Commons is on 15 December 2009.

¹ Department for Environment, Food and Rural Affairs Press Release, [Better protection for homes and communities from flooding and drought](#), 19 November 2009

1 Background

The draft *Flood and Water Management Bill*, published April 2009, was divided into 'flood' and 'water' sections.

1.1 Flood

The flooding of 2007 created impetus for new legislation:²

Between May and July 2007, two periods of extreme rainfall resulted in widespread flooding in parts of England and Wales. Approximately 49,000 households and nearly 7,000 businesses were flooded. Major infrastructure such as transport links, schools, power and water supplies were disrupted.³

In August 2007 the Government asked Sir Michael Pitt to conduct an independent review of the flooding. Sir Michael's final report was published in June 2008. All 92 recommendations were accepted by the Government. He said:

The floods of last year caused the country's largest peacetime emergency since World War II. The impact of climate change means that the probability of events on a similar scale happening in future is increasing. So the Review calls for urgent and fundamental changes in the way the country is adapting to the likelihood of more frequent and intense periods of heavy rainfall. We have searched for practical solutions to highly complex problems and thought carefully about the public interest. Our recommendations are challenging and strong national leadership will be needed to make them a reality.

- We believe that there must be a step change in the quality of flood warnings. This can be achieved through closer cooperation between the Environment Agency and Met Office and improved modelling of all forms of flooding. The public and emergency responders must be able to rely on this information with greater certainty than last year.
- We recommend a wider brief for the Environment Agency and ask councils to strengthen their technical capability in order to take the lead on local flood risk management. More can be done to protect communities through robust building and planning controls.
- During the emergency itself, there were excellent examples of emergency services and other organisations working well together, saving lives and protecting property. However, this was not always the case; some decision making was hampered by insufficient preparation and a lack of information. Better planning and higher levels of protection for critical infrastructure are needed to avoid the loss of essential services such as water and power. There must be greater involvement of private sector companies in planning to keep people safe in the event of a dam or reservoir failure. Generally, we must be more open about risk.
- We can learn from good experience abroad. People would benefit from better advice on how to protect their families and homes. We believe that levels of awareness should be raised through education and publicity programmes. We make recommendations on how people can stay healthy and on speeding up the

² Environment, Food and Rural Affairs Committee, [The Draft Flood and Water Management Bill](#), 16 September 2009, HC 555-I 2008-09

³ Environment, Food and Rural Affairs Committee, [The Draft Flood and Water Management Bill](#), 16 September 2009, HC 555-I 2008-09

whole process of recovery, giving people the earliest possible chance to get their lives back to normal.⁴

Some of Sir Michael's recommendations would require legislation to implement, such as the update and streamlining of flooding legislation "under a single unifying Act of Parliament".⁵ The draft Bill proposed to take forward some of these recommendations.

1.2 Water

In February 2008 the Government published its strategy, *Future Water*, for water management and the water sector to 2030. That document stressed the need to plan for future water scarcity:

The drought of 2004-06 was only managed through controls on what we could use water for. This was not a one-off; indeed droughts are likely to be more common. By 2080, some long term climate projections forecast half as much rainfall in summer (nothing like fully offset by 30% more rainfall in winter) in the South East. We need to plan ahead and each of us needs to play our part.⁶

The strategy had the following aims:

- sustainable delivery of secure water supplies;
- an improved and protected water environment;
- fair, affordable and cost-reflective water charges;
- reduced water sector greenhouse gas emissions; and
- more sustainable and effective management of surface water.⁷

The draft Bill proposed to take forward certain policy measures identified in *Future Water* such as ending the ability automatically to connect surface water drains and sewers to the public sewerage system and encouraging the uptake of sustainable urban drainage systems (SUDS).⁸

2 Pre-legislative scrutiny

In April 2009 the Department for Environment, Food and Rural Affairs (Defra) published a consultation document containing a draft *Flood and Water Management Bill*. The Environment, Food and Rural Affairs Select Committee (EFRA) conducted pre-legislative scrutiny of the draft Bill, and published its report on 29 September 2009.

Relevant conclusions and recommendations made by EFRA are referred to throughout this paper. EFRA was concerned that there would not be enough parliamentary time to develop a comprehensive Bill:

DEFRA still has a long way to go if it is to introduce into Parliament a comprehensive Flood and Water Management Bill of which it can be proud. The current draft is a

⁴ Sir Michael Pitt, [Learning lessons from the 2007 floods](#), December 2007

⁵ Environment, Food and Rural Affairs Committee, *The Draft Flood and Water Management Bill*, 16 September 2009, HC 555-I 2008-09

⁶ Environment, Food and Rural Affairs Committee, *The Draft Flood and Water Management Bill*, 16 September 2009, HC 555-I 2008-09

⁷ *Future Water: The Government's Water Strategy for England*, CM 7319, February 2008

⁸ [Taking forward the draft Flood and Water Management Bill: The Government response to pre-legislative scrutiny and public consultation](#), CM 7741, November 2009

confusing mix of measures, many of them poorly drafted; a patchwork that seeks to address individual identified problems, rather than deriving from a coherent and comprehensive strategy to implement the vision set out in *Future Water*. That lack of a comprehensive approach makes scrutiny more difficult. That difficulty is compounded by omission of the secondary legislation required to implement the full provisions of the Bill. It is also not helped by the fact that many policies are still under development, which could lead to significant additions or alterations to the Bill

[...]

Flood risk management is ultimately about spatial planning and management; it is land form and land use that determines the proportion of precipitation that becomes runoff, with the potential to result in flooding. The draft Bill adopts piecemeal measures; sustainable drainage systems (SUDS) for new urban development are to be promoted and Defra is consulting upon whether new statutory nuisances should be created or local authorities be given the power to designate Run-Off Reduction Zones. We would like to see a clear definition of rights and responsibilities for land owners and others with regard to land drainage and the maintenance of watercourses. Furthermore, the provisions on SUDS leave questions unanswered. It is desirable that the different varieties of spatial plans required under this Bill be integrated with the existing spatial planning process established under planning legislation.

One purpose of the Bill is [to] transpose the EU Floods Directive into domestic legislation; we recommend that Defra make it clear to the European Commission the benefits of including the provisions of the Directive in comprehensive legislation whilst indicating that the process is not an exercise in procrastination.

The draft Bill proposes several new powers, particularly for the Environment Agency. Where a body has been given powers, we consider it essential that counterbalancing safeguards should be included, such as provisions providing for appropriate appeals procedures.

We consider the reservoir safety provisions have the potential to add an unnecessary administrative burden on owners of small reservoirs. We recommend Defra reduce the burdens associated with small reservoirs and consider applying existing structures to achieve the same ends.

We conclude that the Impact Assessments underpinning the changes in responsibilities, particularly for local authorities, are not robust.

In our report on Ofwat's 2009 price review, we concluded that the regulatory mechanism provided insufficient incentives to achieve the relatively modest targets for water efficiency set out in *Future Water*; the Bill offers an opportunity to introduce such incentives.⁹

Given the limited amount of parliamentary time available, EFRA recommended that the Government delay the Bill until the next Parliament. It outlined the risks associated with introducing a 'slimmed-down' version of the draft Bill:

The Department's pick and mix approach over what ultimately might be in the Bill means that the process of pre-legislative scrutiny is inevitably undermined. We recommend that if the Government proceed to develop a truly comprehensive piece of

⁹ Environment, Food and Rural Affairs Committee, *The Draft Flood and Water Management Bill*, 16 September 2009, HC 555-I 2008-09

water legislation that the Committee be given a further opportunity to scrutinise those parts of the Bill which are still very much work in progress.

With the Queen's speech now scheduled for 18 November, a comprehensive flood and water management Bill is unlikely to be enacted before the next general election, due to the lack of Parliamentary time. Despite many flood and water issues being inter-related and requiring coordinated action, Defra may have no alternative but to consider introducing a slimmed-down bill that covers only the most important issues. If Defra pursues a slimmed-down bill it will lose this once in a Parliament opportunity to comprehensively and thoroughly address current water and flooding issues. We recommend the Government adhere to Sir Michael Pitt's recommendation for a proper consolidating Bill.¹⁰

EFRA said that if "Defra finds it has no alternative but to introduce a slimmed-down bill" that it should consult stakeholders as soon as possible. However, it stressed its view:

...that such an approach inevitably means that the 'left out' sections may have to wait years for a further legislative opportunity to the detriment of properly addressing Sir Michael Pitt's recommendations [on flooding].¹¹

3 Government response to EFRA Report and consultation

The Government responded to the EFRA report and public consultation on 19 November 2009. Responses to specific conclusions and recommendations made by EFRA are referred to throughout this document in the discussion on the clauses of the Bill.

In summary the Government recognised the benefits of consolidating legislation on flood and water management, but it said that this would not be possible in the Bill because:

- policy is not finalised in several areas of the consultation paper (for example, the review led by Anna Walker of charging for household water and sewerage services has not yet reported); and
- this Session of Parliament is necessarily short, so there is unlikely to be sufficient Parliamentary time for a very large Bill to be passed.¹²

The Government argued that rather than waiting to introduce a single Bill:

...it is clear that [the Government] should legislate for the new clear roles and powers necessary to protect people from the risk of floods as soon as possible.

Furthermore, the EU Floods Directive¹³ is due to be transposed this month. Even if the UK Government agreed with the EFRA Committee's desire for delay, it could not wait for a further 12-18 months before bringing the Directive into law in England and Wales.

Therefore, the Government said that the Bill would:

¹⁰ Environment, Food and Rural Affairs Committee, *The Draft Flood and Water Management Bill*, 16 September 2009, HC 555-I 2008-09

¹¹ Environment, Food and Rural Affairs Committee, *The Draft Flood and Water Management Bill*, 16 September 2009, HC 555-I 2008-09

¹² Environment, Food and Rural Affairs Committee, *The Draft Flood and Water Management Bill*, 16 September 2009, HC 555-I 2008-09

¹³ The EU Floods Directive requires Member States to assess if all water courses and coast lines are at risk from flooding, to map the flood extent and assets and humans at risk in these areas and to take adequate and co-ordinated measures to reduce this flood risk

- implement “the most urgent elements of [its] programme”, such as enabling water and sewerage companies to operate surface water drainage charge concessionary schemes for community premises;
- clarify “roles and responsibilities for flood and coastal erosion risk management” and define responsibilities related to surface water and groundwater flooding;
- enable the adoption of a more risk-based approach to the management of reservoirs;
- require the use of sustainable urban drainage (SUDS) in new developments, with certain exemptions, to help reduce flood risk;
- introduce measures to prevent the removal, alteration or damage to assets owned by third parties that currently help to reduce the risk of flooding;
- change the arrangements that would apply should a water company go into administration;
- introduce a framework to help the delivery of large and unusual water infrastructure projects;
- enable water companies to more easily control non-essential uses of water, such as the use of hosepipes; and
- abolish the Fisheries Committee in Scotland.¹⁴

4 Parts of the draft Bill not taken forward

The Government explained in its response to the EFRA report that the Bill would not take forward a number of elements referred to in the draft Bill and consultation document:

- implementation of the Water Framework Directive [which will now be taken forward in regulations];
- the Cave Review of competition in the water industry and the Walker Review of charging for household water and sewerage services;
- introduction of a new provision for the most appropriate body to handle complaints against water and sewerage companies;
- enhancement of Ofwat’s enforcement powers so that it is better able to protect consumers’ interests;
- extension of the Environment Agency’s powers of entry, to allow it to install monitoring equipment where this is necessary to the Agency’s functions;
- a power to enable the Drinking Water Inspectorate to impose a charging scheme which will recover the cost of its regulatory functions from water companies;

¹⁴ *Taking forward the draft Flood and Water Management Bill: The Government response to pre-legislative scrutiny and public consultation*, CM 7741, November 2009

- a power to enable the Secretary of State and Welsh Ministers to make regulations for the abstraction and impoundment of water to be licensed as part of a single environmental permitting regime;
- powers for sewerage companies to rectify misconnected sewers, thereby reducing pollution;
- reduction of property owners' and occupiers' impact upon local flood risk;
- redefinition of the responsibilities, governance and funding arrangements for internal drainage boards; and
- a duty on the Environment Agency to maintain the main river map which defines which rivers are the responsibility of the Agency in terms of flood risk management.¹⁵

5 The Bill

The Bill¹⁶ was published on 19 November 2009 as Bill 9 of Session 2009-10; it is divided into three parts.

Part 1—Flood and Coastal Erosion Risk Management

Clauses 1 to 6 of the Bill set out key definitions, including 'flood' and 'risk management'.

5.1 National Flood and Coastal Erosion Risk Management Strategy

Clause 7 provides for the creation of a National Flood and Coastal Erosion Risk Management Strategy in England. This requires the Environment Agency to develop a national strategy for flood and coastal erosion risk management in England "to maintain it (which includes reviewing and updating it), and monitor its application".¹⁷

EFRA recommended that more information about the Strategy should be included on the face of the Bill—the Government accepted this by inserting **subsection (2)** that requires the Strategy to set out:

- a) the risk management authorities in England,
- b) the flood and coastal erosion risk management functions that may be exercised by those authorities in relation to England,
- c) the objectives for managing flood and coastal erosion risk,
- d) the measures proposed to achieve those objectives,
- e) how and when the measures are to be implemented,
- f) the costs and benefits of those measures, and how they are to be paid for,
- g) the assessment of flood and coastal erosion risk for the purpose of the strategy,
- h) how and when the strategy is to be reviewed,

¹⁵ *Taking forward the draft Flood and Water Management Bill: The Government response to pre-legislative scrutiny and public consultation*, CM 7741, November 2009

¹⁶ The Bill and Explanatory Notes are available at UK Parliament website, Bills before Parliament 2009-10, [Flood and Water Management Bill](#)

¹⁷ *Flood and Water Management Bill*, Explanatory Notes, Bill 9 [EN] 2009-10

- i) the current and predicted impact of climate change on flood and coastal erosion risk management, and how the strategy contributes towards the achievement of wider environmental objectives.¹⁸

Clause 8 provides for the creation of a National Flood and Coastal Erosion Risk Management Strategy in Wales.

5.2 Local flood risk management strategy

Clause 9 provides for the creation of local flood risk management strategies in England. This clause requires “all lead local flood authorities in England to develop, maintain (which includes updating and reviewing), apply, and monitor the application of, a strategy for local flood risk in their area”.¹⁹ **Clause 9 (2)** states that local flood risk means flood risk from runoff, groundwater, and ordinary watercourses (including lakes and ponds).

EFRA recognised that local strategies will “be subject to [local] democratic accountability”. However it thought that the relationship between the national and local plans would have to be made clearer:

Defra must explain how the national plan will relate to local spatial planning. Local authorities are already responsible for the spatial planning process, and this Bill also gives them a remit for flood and coastal erosion risk management planning. Authorities will have to fit the two together and synchronise the cycles for revising and updating their plans.²⁰

5.3 An over-centralisation of power?

EFRA was concerned about the democratic implications of the new arrangements:

The approach taken in the draft Bill with regard to flood and coastal risk management is over-centralising: all power and monies will be concentrated in the Environment Agency with the roles of existing Regional Flood Defence Committees and Internal Drainage Boards being downgraded. Power will be taken from democratically accountable bodies and shifted to the Environment Agency, with local decision making over priorities substantially reduced. Local flood risk management strategies are required to be consistent with the national strategy prepared by the Agency but there is a void in the draft provisions with regard to both the content of that strategy and the extent of stakeholder engagement in its development. This overly centralising approach creates the real danger that local communities will see the only scope for involvement in the decisions as being through court action and that they will regard the Agency as an adversary. Instead, we consider that the local authority proposal for catchment flood management boards has much to recommend it. In addition, we consider it vital that the Internal Drainage Boards’ experience and expertise in preserving high quality agriculture land be maintained.²¹

In order to improve accountability, EFRA recommended that the strategy be reported to Parliament and that the Government set out how the National Flood and Coastal Erosion Strategy “will be prepared, scrutinised and how, and over what cycle, it will be reviewed”. The

¹⁸ *Flood and Water Management Bill*, Bill 9 2009-10

¹⁹ *Flood and Water Management Bill*, Explanatory Notes, Bill 9 [EN] 2009-10

²⁰ Environment, Food and Rural Affairs Committee, *The Draft Flood and Water Management Bill*, 16 September 2009, HC 555-I 2008-09

²¹ Environment, Food and Rural Affairs Committee, *The Draft Flood and Water Management Bill*, 16 September 2009, HC 555-I 2008-09

Government said that it would set out its proposals for the preparation, scrutiny and review of the strategy in a factsheet to be published in time for the Committee Stage of the Bill.²²

The Government rejected EFRA's charge that the approach taken in the draft Bill was over-centralising, although it recognised that there may be a tension between local and wider objectives:

The Bill will put local authorities, the representatives of their local communities, squarely at the heart of local flood risk management. The Bill therefore strengthens the direct democratic accountability for local flood risk management and puts the responsibility in the hands of bodies used to bringing together a wide range of partners, through local area agreements for example there is inevitably scope for tension between this role for local authorities and the need for a large scale (e.g. catchment) perspective on flood and coastal erosion risk. Furthermore, circumstances will be very different across the country. Government therefore want to avoid a prescriptive and bureaucratic approach.

Government has considered carefully suggestions that statutory local flood risk management boards or groups should be established. The legislation we are bringing forward would certainly allow such models, but we do not wish to prescribe them to the exclusion of others. Others suggested that we should not define which authority should have the responsibility of ensuring that a strategy was put in place and leave that to local discretion. Again, many models are possible – including a district council with particular capabilities doing much of the work for the local strategy, for example. However, Sir Michael Pitt's report was very clear about the benefits of clear local responsibilities residing in one place and we agree.

We believe that the Bill provides a pragmatic and highly flexible approach by clearly making county and unitary authorities responsible for leadership on local flood risk in their area, but enabling them and other risk management authorities to enter into arrangements for nearly all aspects of flood and coastal erosion risk management for which they are collectively responsible.

This is supported by the requirements for delivery authorities to co-operate and act consistently with local and national strategies and guidance and for others to provide information and have regard to the strategies.

The guidance accompanying the national strategies will focus particularly on the local partnerships and should help ensure that best use is made of the knowledge and expertise from all local partners (particularly those with practical experience in the area, such as district councils and internal drainage boards where they exist). It might also set out possible models and arrangements for local partnerships based on the experiences of those authorities that have already established groups for similar purposes such as coastal groups.

However, it will be for the authorities in the local area to agree the best arrangements for them, taking account of their existing roles and capacities. Cross-boundary, catchment or sub-catchment groups will certainly not be precluded by the Bill.

The local strategy will provide a vehicle for formalising these arrangements, for setting out how risks will be managed within the area and for identifying how this will be co-ordinated with wider activities. Both the national and local strategies will evolve over time, and will be informed by a range of plans (such as shoreline management plans, catchment management plans and surface water management plans) and

²² Department for Environment, Food and Rural Affairs, *Bill Team—personal communication*, 9 December 2009

assessments (such as strategic flood risk assessments) which will have been consulted on individually within the relevant areas. These will provide communities with an opportunity to influence all significant decisions.

The Environment Agency will largely be responsible for determining the management of flooding from main rivers and the sea, as they are now, to ensure that wider considerations across administrative boundaries are reflected. Similarly, regional flood and coastal committees and local authorities will continue to be able to raise funding locally to take forward projects that are identified as viable but are not sufficiently high priority to be funded from national budgets.

The Bill will ensure that public consultations are held for both the local and national strategies. This, together with the enhanced scrutiny arrangements for local authorities to explore management of all sources of flood risk within the area should also help ensure that communities are able to influence flood risk management in their locality.²³

5.4 Impact on water bills

The draft Bill required water companies, and other risk management authorities, to act in a manner consistent with both national and local strategies. EFRA said this might have an impact on water bills:

We acknowledge the concerns raised by Ofwat and accept that there could be an impact on customers' bills. A balance must be struck between providing those with responsibility for flood and coastal erosion risk management with the necessary tools to do that job and ensuring that those bodies do not place undue obligations on the water companies or others. We recommend that Defra clarifies how this power is expected to be exercised and in what circumstances it would not be applied.²⁴

The Government responded:

[T]he Department has concluded that [water companies] should be subject to a duty to act consistently with the national strategy and, in view of Ofwat's and the Committee's comments, to have regard to the local strategies.

The Bill will also require organisations to co-operate and provide pertinent information. Guidance on how different partners should work together to develop and deliver the local flood risk management strategies will be provided by the Environment Agency in England and the Welsh Ministers in Wales alongside the national strategies.

The Department will continue to work with Ofwat to ensure water companies contribute to local strategies and the delivery of objectives, and that the national strategy and duty to co-operate are considered as part of the periodic review of price limits.

At the local level, the ability of local authority scrutiny committees to hold water companies and others to account should also help to ensure all partners contribute to effective flood risk management.²⁵

The Government included **clause 11 (3)** in the Bill that requires water companies to:

(a) act in a manner which is consistent with the national strategy and guidance, and

²³ *Taking forward the draft Flood and Water Management Bill: The Government response to pre-legislative scrutiny and public consultation*, CM 7741, November 2009

²⁴ Environment, Food and Rural Affairs Committee, *The Draft Flood and Water Management Bill*, 16 September 2009, HC 555-I 2008-09

²⁵ *Taking forward the draft Flood and Water Management Bill: The Government response to pre-legislative scrutiny and public consultation*, CM 7741, November 2009

(b) have regard to the local strategies and guidance.

5.5 New powers for the Environment Agency and local authorities

Pre-legislative scrutiny of the draft Bill highlighted concerns about the strong powers that would be granted to the Environment Agency and local authorities to carry out work:

The draft Bill provides the Agency and local authorities with powers to carry out work, or direct others to carry out works in accordance with the national or local flood and coastal erosion risk management strategies or for the benefit of the natural environment. The National Farmers' Union (NFU) expressed concern about the Agency's use of general powers, describing the Bill as being "power heavy and duty light". For example, Clause 41 [now clause 38] confers a power on the Environment Agency to carry out work that may cause flooding or coastal erosion, subject to certain conditions (including those listed in Clause 6(3)), if it considers such works would benefit the natural environment. The NFU questioned the appropriateness of Clause 41, noting that while the Clause required the Agency to 'have regard to' its own national strategy, "there is no requirement that the work be for the purpose of flood or coastal erosion risk management or any related purpose (e.g. compliance with the EU Water Framework or Floods Directives). Given that, this standalone power should not feature in this Bill and should be removed". Lord Smith described the potential conflict in the draft Bill as reflecting "a potentially conflicting case of objectives on the ground". Lord Smith said that he was determined that there should be discussion with communities to reach an agreed conclusion rather than imposing a solution.²⁶

EFRA recommended that:

...Defra include provisions that establish appeal mechanisms against the powers of the Environment Agency and local authorities... Such mechanisms must provide for an independent court or tribunal to decide appeals.²⁷

The Government responded:

The Department accepts this recommendation and is providing for appeals for relevant parts of the Bill. Where the Bill proposes modifications to existing powers there will already be appeal mechanisms in place and the Bill includes provision for these to be consolidated and made more consistent.

Provisions to establish appeal mechanisms will be included for those parts of the Bill that provide new powers to the Environment Agency and local authorities. In nearly all cases the details will be defined through secondary legislation and Government are considering the role that independent courts or tribunals should play, but in some cases it is likely that other mechanisms (such as determination by the Secretary of State or Welsh Ministers) will provide a more proportionate and effective approach.²⁸

Clause 38 is an example of the power that will be granted to the Environment Agency. It would allow the Agency to carry out a wide range of work that may cause flooding and coastal erosion if the following conditions are satisfied:

(2) Condition 1 is that the Agency considers the work in the interests of—

²⁶ Environment, Food and Rural Affairs Committee, *The Draft Flood and Water Management Bill*, 16 September 2009, HC 555-I 2008-09

²⁷ Environment, Food and Rural Affairs Committee, *The Draft Flood and Water Management Bill*, 16 September 2009, HC 555-I 2008-09

²⁸ *Taking forward the draft Flood and Water Management Bill: The Government response to pre-legislative scrutiny and public consultation*, CM 7741, November 2009

- (a) nature conservation (including conservation of the landscape),
 - (b) preservation of cultural heritage, or
 - (c) people's enjoyment of the environment or of cultural heritage.
- (3) Condition 2 is that the Agency considers the benefits of the work will outweigh the harmful consequences for matters listed in section 2(4)(a) to (d) [such as human health and the social and economic welfare of individuals and communities].
- (4) Condition 3 is that the Agency has consulted—
- (a) the lead local flood authority for the area in which the work is to be carried out,
 - (b) the district council (if any) for that area, and
 - (c) the internal drainage board (if any) for that area.

In exercising these powers the Agency “must have regard to” the national and local flood and coastal erosion risk management strategies and any guidance on these. A similar power is granted to local authorities or internal drainage boards under **Clause 39**.

Appeals process for clause 38 and 39

Defra said that the appeals process for **Clause 38** and **39** is covered by **38 (8)**, which would apply aspects of the *Water Resources Act 1991*:

The Minister will make an order which provides for the compulsory purchase, powers of entry and compensation provisions of the Water Resources Act 1991 to apply in respect of the works power granted by clauses 38 and 39. These provisions in that Act have appeal provisions built into them.²⁹

No specific appeals process is envisaged for the clauses:

We have not proposed any appeals for the works powers in subsection (1) in each of clauses 38 and 39 (and there are none for the other works powers), but would expect the Environment Agency to follow established procedure in consulting on work that they intend to undertake. If the works resulted in damage to any person (perhaps through flooding of their land) then the statutory compensation provisions (as discussed above) will apply. There are notice requirements before a works power may be used (these are linked to the requirement to use a power of entry), and if a person thought that the power was going to be used unreasonably or outside of scope then they could bring judicial review proceedings.³⁰

5.6 Reporting on flood and coastal erosion risk management

Clause 18 requires the Environment Agency to report to the Minister (or Welsh Ministers in Wales) about flood and coastal erosion risk management, and how the national strategies are being applied across England and Wales. The timing and content of the report would be determined later.

Clause 19 requires local authorities to investigate flooding incidents in their area.

²⁹ Department for Environment, Food and Rural Affairs, *Bill Team—personal communication*, 9 December 2009

³⁰ Department for Environment, Food and Rural Affairs, *Bill Team—personal communication*, 9 December 2009

Clause 20 enables the Minister to direct a risk management authority (as defined by **Clause 6 (13)**) to undertake works where that authority has failed to exercise its flood risk management function, or where it has failed to act in accordance with the national or local strategies.

5.7 Regional Flood and Coastal Committees

Clause 22 would establish Regional Flood and Coastal Committees. These would replace the existing Regional Flood Defence Committees through which the Environment Agency is currently required to arrange its flood risk activities. **Clause 23** provides for the Environment Agency to consult with and gain the consent of the committees. **Clause 24** enables the Minister to make regulations about the composition of the committees.

These proposals would, in effect, turn the committees into advisory rather than executive bodies. The Government said that these changes were needed due to the new role and responsibilities of the Environment Agency.³¹ Some witnesses to the EFRA inquiry were concerned about the proposals:

53. Several witnesses considered that the Bill's provisions diminished the role of RFDCs. The Regional Flood Defence Committees argued that their role should be strengthened under the Bill, and considered that the current Clauses "would in practice diminish their influence in the future and might have the effect of deterring senior Councillors and others from becoming members". The Association of Drainage Authorities echoed those views and "strongly disagrees" with altering the status of the committees, which it argued would diminish local democratic input into the decision making process.

54. Local authorities, including Gloucestershire County Council, however, questioned the value that existing RDFCs brought and noted that their public accountability could be improved. Our witnesses from local authorities favoured catchment area flooding boards. The Regional Flood Defence Committees emphasised that the majority of their membership was elected local authority members which therefore ensured "local democratic input into the decision making process". Lord Smith endorsed the work done by RFDCs but took the view that in practice the draft Bill's provisions would not alter the role of RFDCs. He noted that the committees would retain their executive role in relation to local levy expenditure.

Respondents to the public consultation were also concerned about the changes:

The majority of respondents stated that they would prefer the regional flood defence committee to remain executive instead of becoming an advisory body. The primary concerns were that a change in role would result in the reduction of powers, regional flood defence committees would not be able to have as much of a say as they do at present and potentially their views may not be taken into account by the Environment Agency.³²

The Government pressed ahead with its proposal:

Governments view is that the role of [a] regional flood defence committee has already changed due to revisions made in 2004 largely replacing levies with funding from the Department and allocation of that funding in accordance with national priorities and

³¹ *Taking forward the draft Flood and Water Management Bill: The Government response to pre-legislative scrutiny and public consultation*, CM 7741, November 2009

³² *Taking forward the draft Flood and Water Management Bill: The Government response to pre-legislative scrutiny and public consultation*, CM 7741, November 2009

targets. Though final decisions on the Department-funded work are formally taken by the regional flood defence committee, in practice this role is akin to an advisory role.

The present arrangement, which formally requires the Environment Agency to exercise its flood defence functions through the regional flood defence committee, creates legal ambiguity. The Environment Agency Board receives flood defence grant in aid and is accountable to Ministers for its expenditure, yet the actual legal powers rest with the regional flood defence committee. The proposals in the draft Bill give the Environment Agency these decision making powers and create clear lines of accountability in line with the Pitt Review.

3.8.5 The new proposed national strategy will help determine priorities on the basis of objective criteria and reflect the detailed work fed through from a local level under the Floods Directive. In light of this, the Department has considered further the role that regional flood defence committees can play. Our conclusion is that the most appropriate role is a predominantly advisory role that uses members' local knowledge (including those that are appointed by local authorities) to help prioritise and advise on schemes.

3.8.6 Regional flood defence committees can inform the risk assessment process (which will determine priorities), risk maps, and management plans, under the Floods Directive. They can also advise the Environment Agency in its quality assurance and co-ordination role relating to input from local authorities and the Agency's regional offices. The Environment Agency will need to have regard to this advice and will (in accordance with principles of administrative law) be able to justify decisions which go against this advice

3.8.7 The current funding system gives regional flood defence committees the power to raise levies on local authorities for additional local projects. These must be agreed by the majority of local authority members of the relevant regional flood defence committees and are in addition to those schemes funded out of Flood Defence Grant in Aid from the Department to the Environment Agency. We propose to leave this power with the regional flood defence committees. The Department also proposes to leave the regional flood defence committees with executive powers over those other sources of funding which are under the Environment Agency's control, i.e. the General and Special Drainage Charges and the internal Drainage Boards precept. As a result, the regional committees will continue to play a key role through this combination of executive powers in relation to local funding, and the ability to make representations which the Environment Agency Board would have to take into account regarding any flood or coastal erosion risk matter.

3.8.8 Indeed, the Department wishes to strengthen these committees by ensuring their members are of the right calibre and standing and able to provide effective local input. The Bill therefore now gives Ministers the power to decide the number of members on a committee and how they should be selected and appointed. This will enable these arrangements to reflect changing needs in representation on these committees. This is necessary because there are already powers to change boundaries and thereby alter the size of area covered by regional flood defence committees.

3.8.9 The Department recognises the importance of giving regional flood and defence committees a clear mission and sense of purpose, and ensuring that they are sufficiently independent to be able to play the role of an independent advisory body. The Department will continue discussions with regional flood defence committee Chairs and keep the role of their committees under review. Further changes to

arrangements and the associated legislation may be brought forward as a result in future.³³

5.8 Sustainable development duty

The Government said that in the public consultation “there were... strong calls for the greater integration of flood and erosion risk management with other social, economic and environmental objectives”:

A significant body of opinion (especially amongst environmental groups) considered the definition of risk management limited insofar as it would restrict authorities to assessing and managing only the harmful consequence of flood and erosion. Instead these respondents felt that the potentially beneficial effects in some cases of flooding for biodiversity, archaeology or recreation for example should also be assessed.

3.2.5 In general, environmental groups, their supporters and some authorities preferred what they described as a more integrated approach whereby authorities would be charged with managing flooding and erosion to both reduce risks to people and property and further sustainable development. They considered that this would lead to greater benefit than the definition in the draft Bill. Consultation responses also called for stronger links with the town and country planning systems, water quality management under the requirements of the Water Framework Directive and environmental objectives...

Government's main objective is to reduce the adverse impacts of flooding and erosion. However, we aim to do so in ways which also “deliver the greatest environmental, social and economic benefit, consistent with the Government's sustainable development principles”.

To promote this approach the Government included **Clause 27**, which introduces a sustainable development duty:

This clause gives lead local flood authorities, district councils, internal drainage boards and highway authorities a duty to aim to make a contribution towards the achievement of sustainable development when discharging their flood or coastal erosion risk management functions (subsection (1)). The duty does not include the Environment Agency which already has such a duty under section 4 of the Environment Act 1995. Nor does it relate to water companies as the water industry regulator, Ofwat, has such a duty which applies to its regulation of the industry.

88. This clause also requires the Minister to issue guidance on how the specified authorities should contribute to the achievement of sustainable development through their flood or erosion risk management functions (see subsection (2)). It requires the specified authorities to have regard to the Minister's guidance. The Minister already has a duty, under section 4 of the Environment Act 1995, to provide guidance to the Environment Agency on how it should exercise its functions so as to contribute to sustainable development.

89. Subsection (4) lists the flood risk management functions to which the duty in subsection (1) relates and subsection (5) does the same in respect to coastal erosion risk management functions.³⁴

³³ *Taking forward the draft Flood and Water Management Bill: The Government response to pre-legislative scrutiny and public consultation*, CM 7741, November 2009

³⁴ *Flood and Water Management Bill*, Explanatory Notes, Bill 9 [EN] 2009-10

5.9 Designation of third party assets or features

Clause 30 introduces Schedule 1 (risk management: designation of features). This would provide:

...additional legal powers for certain authorities in England and Wales to formally designate assets or features which affect flood or coastal erosion risk. It increases regulatory control of the significant number of assets or features which form flood and coastal erosion risk management systems, but which are not maintained or operated by those formally responsible for managing the risk.³⁵

The owner “may not alter, remove or replace a designated structure or feature without consent of the responsible authority”, which includes the Environment Agency and lead local authority.

A large number of assets or features owned by third parties affect flood risk. EFRA said:

For example, of the approximately 11,000 flood risk assets in the Thames region, the Environment Agency own around 10–15%. Such assets might include, for example, purpose-built flood defences constructed by developers to protect particular buildings and existing structures such as factory walls which form part of a continuous linear defence. The NAO found that the proportion of third party assets in good or very good condition was lower than for Environment Agency-maintained assets. It also found that the Agency had very limited powers to force other bodies to improve the condition of their assets.³⁶

Several witnesses to EFRA’s inquiry were concerned that the clause was vague:

...the draft Bill... includes powers for the designation of “things” (a structure or natural or man-made feature of the environment) that are owned, maintained or operated by third parties, if they are considered to affect flood or coastal erosion risk. The Bill confers these powers on the Environment Agency, local authorities and Internal Drainage Boards. We asked our witnesses from local authorities and the Environment Agency about these powers. None seemed sure what a “thing” was[.] Dr Leinster from the Environment Agency explained how the process might be applied:

If you take, as an example, Leeds and you take the river running through Leeds, then the flood defences will be provided by walls to car parks, the backs of factories, some purpose-designed defences and, as you say, some culverts. The purpose of this is to understand, and then what we need to look at is whether you can place a requirement on someone to maintain—if that is an asset which is there providing flood defence, whether or not there can then be a requirement placed upon them to maintain that in a way which maintains the flood defence properties.

58. Ofwat was concerned that the provisions might lead to increased costs for the water industry and therefore for water consumers. Ms Finn, chief executive of Ofwat, explained that the current drafting could enable the Environment Agency to designate an entire sewerage system. Mr Runcie, from the Environment Agency, explained that

³⁵ *Flood and Water Management Bill*, Explanatory Notes, Bill 9 [EN] 2009-10

³⁶ Environment, Food and Rural Affairs Committee, *The Draft Flood and Water Management Bill*, 16 September 2009, HC 555-I 2008-09

the Agency already recorded these assets and that the purpose of the provisions was to enable them to collect information on the ownership of those assets.³⁷

EFRA supported the purpose of the clause, but said that:

We are concerned that bodies that would be able to designate “things” appear unsure about their scope or scale. The purpose of the provisions is not in question but there needs to be greater clarity about what could be designated, how the designating authorities would coordinate with one another and how differences of opinion between designating authorities would be resolved.³⁸

It also called for an appeals process:

Provisions providing safeguards and appeals should be included in the Bill. The lack of such provisions in the draft Bill is a serious deficiency. The legislation would confer substantial powers on designating authorities and the checks and balances should have been available for this Committee to scrutinise and for stakeholders to comment upon. We recommend that Clause 95 be amended to exclude the Minister from the list of bodies that could consider appeals in relation to Part 2.³⁹

The Government responded:

On work powers, safeguards are provided in the existing legislation and will apply to the revised and additional provisions in the Bill. The only exception to this would be an urgent need for an authority to take remedial action on a designated feature. This would be when there is an immediate risk which would mean it is unsafe to serve a period of notice. Both owners of features and persons subject to enforcement proceedings (if different) will be given notice and the opportunity to make representations ahead of further action being taken by the responsible authority. For example, the owner of a feature may make representations in respect of a ‘provisional designation notice’ and may appeal a subsequent ‘designation notice’.

Appeals are also provided for where an owner is refused consent to alter, remove or replace a feature, refused a request to cancel a designation, or is in receipt of an enforcement notice. The Department accepts the importance of safeguards and is proposing that authorities must give notice of the intention to enter land, make it clear why access is necessary and to include similar provisions to those already enshrined in the Water Resources Act 1991 in the event of damage being caused to an individual’s property.

The Bill provides for the appeals mechanism to be defined in secondary legislation because the arrangements for the appeals process are essentially administrative and process-oriented and as such are unlikely to be controversial. The Department does not want to prescribe such procedural detail on the face of the Bill itself it considers the appeals mechanism to be an integral part of the decision making process, particulars of which may also be prescribed by secondary legislation. By making use of regulations, we will have the opportunity to reflect changing circumstances, especially if any particulars of the notices were to be changed, with a minimum of bureaucracy and without recourse to primary legislation.

³⁷ Environment, Food and Rural Affairs Committee, *The Draft Flood and Water Management Bill*, 16 September 2009, HC 555-I 2008-09

³⁸ Environment, Food and Rural Affairs Committee, *The Draft Flood and Water Management Bill*, 16 September 2009, HC 555-I 2008-09

³⁹ Environment, Food and Rural Affairs Committee, *The Draft Flood and Water Management Bill*, 16 September 2009, HC 555-I 2008-09

We do, however, intend for the secondary legislation to be made under the affirmative resolution procedure. Above all, we are committed to giving individuals every opportunity to make representations and raise an appeal at all stages of designation.

The regulations must give the power to consider the appeal to a court or tribunal, or to the Secretary of State or Welsh Ministers as appropriate. They must also set out how the person might appeal and the procedure for doing so. However, in some circumstances, there may be more appropriate ways of achieving this than through a court or tribunal. The reference to the Minister is therefore necessary to enable him to delegate this function to some other independent body or person, acting as a court or tribunal.⁴⁰

6 Part 2—Miscellaneous

6.1 Sustainable drainage

Surface water is rainwater that falls on properties. This water has to be channelled and drained away, particularly from hard surfaces such as roofs and car parks. In many cases water is drained into public drainage systems that are managed and maintained by water and sewerage companies. There are significant costs associated with such maintenance—approximately £600 million per year.⁴¹ Water companies can charge customers for this service.

Two-thirds of the 57,000 homes affected by the 2007 floods were flooded due to surface water run-off overloading drainage systems. Some 80,000 properties are currently at very high risk of surface water flooding. Such events are predicted to increase with climate change.

The *Pitt Review* recommended that the “automatic right to connect surface water drainage of new developments to the sewerage system should be removed”, to encourage the adoption of sustainable drainage systems, or SUDs.⁴² SUDs reduce the volume of water entering the drainage system during heavy rain and can therefore reduce flood risk. They include measures such as permeable surfaces on car parks, soakaways and green roofs.

Clause 32 would give effect to **Schedule 3** (sustainable drainage). Under the Bill, the Minister would be required to publish national standards for the construction, design, maintenance and operation of SUDs. The unitary authority or county council will be designated the ‘approving body’ for its area, and permission would have to be sought from it before construction work with drainage implications can commence. Permission would therefore have to be sought for the laying of a patio or similar works. Applications may be made individually to the approving body, or as part of an application for planning permission. A charge would be made for an application. SUDs are adopted by the approving body once they are constructed, except for those that service single properties or roads.

EFRA welcomed the SUDs provisions of the draft Bill as “a critical part of future water management”.⁴³ However, it said “the... provisions leave several questions unanswered [including the] funding arrangements for the adoption and maintenance of SUDS”.⁴⁴

⁴⁰ *Taking forward the draft Flood and Water Management Bill: The Government response to pre-legislative scrutiny and public consultation*, CM 7741, November 2009

⁴¹ [Why do I have to pay for surface water drainage?](#), Ofwat, on 8 December 2009

⁴² Sir Michael Pitt, *Learning lessons from the 2007 floods*, December 2007

⁴³ Environment, Food and Rural Affairs Committee, *The Draft Flood and Water Management Bill*, 16 September 2009, HC 555-I 2008-09

⁴⁴ Environment, Food and Rural Affairs Committee, *The Draft Flood and Water Management Bill*, 16 September 2009, HC 555-I 2008-09

6.2 Adoption of SUDs

A number of witnesses to EFRA's inquiry raised concerns about the approving body's duty to adopt and maintain SUDs:

The Clauses provide for local authorities acting as the approving body and in most cases adopting SUDs. The Campaign for Rural England argue that the draft Bill's proposals would cause fragmentation and confusion within two-tier areas because the county councils would approve a drainage system while the body implementing it will be the district council planning authority. It suggested that the district council would be the most appropriate body to approve a sustainable drainage system as part of a planning permission, as well as to implement it.

76. Mr Runcie from the Environment Agency said that "if we bring together sustainable urban drainage systems within the current surface water environment, that is a much more confused picture and it does need local ownership and the proposition is that that local ownership should be vested with local authorities". However, Mr Jonathan Hodgkin, from Yorkshire Water, suggested an alternative to local authorities adopting SUDs. He suggested that "water companies themselves should have a greater role in terms of providing, operating and maintaining SUDs to ensure that these things actually deliver the promise". Ms Finn supported that approach to some extent, saying that Ofwat's approach was to "choose the best deal, do the right thing in the long term" and that in relation to SUDs that may mean water companies build or adopt SUDs. She said that the question was whether the draft Bill's provisions "are exactly right or pinned down yet" and that Ofwat would want to ensure that "what is put in place is workable".⁴⁵

The Government responded:

The SUDs Approving Body must adopt the SUDs assets that serve more than one property. This means the SUDs approving body will be responsible for the ongoing maintenance of SUDs in public spaces, and SUDs on private property – where those SUDs provide drainage for more than one property [...]

No formal delegation functions were set out in the original Bill, and we do not feel that legislation is required to enable the SUDs Approving Body to delegate to organisations which may be better-placed to deliver on SUDs. However, the SUDs Approving Body will retain overall responsibility and liability for decisions on what drainage proposals are approved. [...]

EFRA was also concerned about the cost implications for local authorities of the adoption of SUDs:

131. [DEFRA] expects the savings from private sewers adoption and better local flood risk management to fully offset the costs of new local authority activity through to around 2020. At which time, the Department told us, the increasing costs of maintaining SUDs might exceed the savings and existing expenditure because of the number of new properties being constructed with SUDs. However, because homes benefiting from SUDs will be able to opt out of water company surface water charges, Defra told us it was considering options to fund the maintenance of SUDs by raising an equivalent charge on those householders benefiting.

EFRA concluded:

⁴⁵ Environment, Food and Rural Affairs Committee, *The Draft Flood and Water Management Bill*, 16 September 2009, HC 555-I 2008-09

There remains some uncertainty about the costs of adopting and maintaining SUDS—until these questions are answered doubts remain about the impact assessments' robustness.

The Government responded:

SUDS maintenance is a long term issue. SUDS are expected to have lifetimes lasting decades. We have assumed they will last 30-50 years and the number of SUDS to be maintained will rise gradually as new developments using SUDS are built. In the medium term, the expected savings of over £50 million from the transfer of private sewers to water companies, together with savings from better local flood risk management, are expected to more than cover the rising costs of maintaining adopted SUDS.

We recognise that longer term funding must be in place from around 2018, and are considering a number of options to address the funding of SUDS maintenance in the long term...

Government has strengthened the analysis for the calculation of new burdens for local authorities, which demonstrates that it is extremely unlikely that additional local authority expenditure will exceed the savings identified. We are confident that the assessment represents the best available evidence; it uses the upper end of the range of cost estimates and the conservative end of the range of potential benefit. The Department will monitor the situation as implementation proceeds, including local authority take-up of new powers and functions. The Department will ensure that any increased costs to local authorities are fully funded to avoid upward pressure on council tax.

To provide greater certainty and transparency, funding for the new lead local flood authority role and SUDS maintenance will be provided to local authorities as un-ringfenced area-based grants, so that local authorities will see how much is being provided to fund the additional roles.⁴⁶

6.3 Reduced drainage charges for customers

In its inquiry into the *Ofwat Price Review 2009*, EFRA also recommended that:

...customers who install [SUDs] should share the benefits, through lower tariffs, of reduced costs from lower volumes of surface water run-off generated. We recommend that Defra explores how individual households can be informed about sustainable drainage systems and encouraged to install them. The costs for highway drainage, that water customers currently bear, should be shared with local taxpayers who benefit from the service.⁴⁷

The Government responded:

There is already an incentive to household customers to make arrangements so that no surface water from their property drains to the sewerage system: each sewerage company offers a rebate of surface water drainage charges to any customers who can show their house is not connected to a public sewer.

Further incentives to household customers to reduce rainwater run-off (so that only part of the property drains to the sewer) may be problematic. Four companies have

⁴⁶ *Taking forward the draft Flood and Water Management Bill: The Government response to pre-legislative scrutiny and public consultation*, CM 7741, November 2009

⁴⁷ Environment, Food and Rural Affairs Committee, *Ofwat Price Review 2009*, 15 July 2009, HC554-I 2008-09

introduced charges for surface water drainage for non-household customers based on site area. Under this system customers are incentivised to reduce the area of their property that drains to the sewerage system as the charge they pay is calculated based on the size of that area. This encourages the use of permeable surfaces and technologies such as sustainable urban drainage systems or soakaways. This type of system would be more difficult to implement for households, as the size of household premises does not vary widely and it would be difficult to show how the costs vary for individual households which partially drain to the sewer.

Annual highway drainage charges total around £700 million and currently account for about £25 of each household bill in England and Wales. We recognise that there is currently no incentive for highway authorities to install sustainable drainage systems because the cost of highway drainage is met by water customers. The Walker Review is considering whether it would be more in line with the “polluter pays” principle if highway drainage charges were paid by highway authorities. However, the cost of highway drainage would still have to be met and any transfer of highway drainage charges to highway authorities would place a cost on local authorities. The Government will consider this further in light of Anna Walker’s final recommendation on this issue.⁴⁸

No provisions are included in the Bill.

6.4 Reservoirs

Clause 33 would give effect to **Schedule 4** (reservoirs). It makes various amendments to the *Reservoirs Act 1975* with the aim of introducing a risk-based approach to reservoir safety, and gives the Environment Agency related enforcement powers. The provisions would allow the Environment Agency to designate ‘high-risk’ reservoirs that may endanger human life if they were to fail, and to put into place an inspection regime for such reservoirs. It would also require the preparation of flood plans to direct action in case of dam failure. The changes have been proposed on the advice of the *Pitt Review* following the near failure of the Ulley reservoir in 2007.⁴⁹

EFRA was concerned that the draft Bill proposals might add an “unnecessary administrative burden on owners of small reservoirs”. It went on:

Defra should examine including a provision to establish a low-cost initial assessment of smaller reservoirs. Reservoirs adjudged to be low risk under such a system could be exempted from the panoply of inspections and procedures currently set out in Part 3 of the draft Bill...

Defra should examine with the insurance industry the scope for synergies between the needs of insurance companies and the risk management aims of the draft Bill, to minimise any additional cost for reservoir owners.

Offences that are set out on the face of the Bill should be as clear as possible. We recommend that Defra review the offences under Part 3 within a year of the Bill being enacted to ensure that they are appropriate, enforceable and if necessary amended in the light of experience.⁵⁰

⁴⁸ Environment, Food and Rural Affairs Committee, *Ofwat Price Review 2009: Government Response to the Committee’s Fifth Report of Session 2008–09*, 14 October 2009, HC 1023 2008-09

⁴⁹ Environment, Food and Rural Affairs Committee, *The Draft Flood and Water Management Bill*, 16 September 2009, HC 555-I 2008-09

⁵⁰ Environment, Food and Rural Affairs Committee, *The Draft Flood and Water Management Bill*, 16 September 2009, HC 555-I 2008-09

The Government accepted a number of recommendations made by EFRA including that there be a low cost initial assessment of smaller reservoirs. The Government set out how it would address EFRA's concerns about insurance, sanctions and flood plans:

Insurance

3.13.24 The EFRA Committee also recommended the Department should examine with the insurance industry the scope for synergies between the needs of insurance companies and the risk management aims of the draft Bill, to minimise any additional cost for reservoir owners.

3.13.25 Some responses to the consultation on the draft Bill did not consider insurance to be an alternative to statutory regulation, some that owners should be required to have third party insurance (without any further comment on benefits or costs). Some felt that the role of insurance was worth exploring further or that insurance could reflect risk, through pricing premiums according to safety measures undertaken by owners but subject to conditions, explicitly stating or implying some form of agreement with Government as to what conditions should apply.

3.13.26 However, there are several complications that make a role for insurance in reservoir safety less attractive than it may at first appear. The main problem is that the market for insurance cover is likely to be very thin. Reservoir failures are extremely rare events and very difficult to predict. As such there is unlikely to ever be the type of historical risk/outcome information that would be needed for a competitive market to develop. Whilst public liability cover is widely taken up by businesses it often includes a large range of risks and the incentive to manage a particular risk may not be readily apparent.

3.13.27 Conversely if a specific product was developed for reservoir liability, the market would be relatively small and the profile of losses extremely uncertain (since very few reservoirs would be expected to fail, but the costs of such a failure could be very large). As well as resulting in a less competitive market, this is likely to mean that insurers rely on reinsurance which could be subject to rapid variations in cost or availability, thus making the operation of reservoirs sensitive to wider events (such as increases in the cost of capital).

3.13.28 Similarly, if the cover were provided through an annual contract (as is currently the norm for commercial insurance) the transaction costs associated with inspections and assessments could be very high in relation to the risks posed by some reservoirs. Insurance policies seldom cover the full range of impacts – they typically include tangible property damage and injury to people (including loss of life), but some risks (such as incident response cost and some consequential losses) may be excluded. In some cases, the total impacts significantly exceed the cover and thus the appropriate level of safety may not be achieved.

3.13.29 Based on these considerations and consultation with insurers to date, Government has concluded that an insurance based approach would not provide an adequate substitute for the primary legislation and without effective regulation the availability of insurance is likely to be severely constrained. The new legislation will facilitate a continuing role for insurance in enabling organisations to manage their potential liabilities. Further discussions with the insurance industry, focused on ensuring that there is an appropriate market to maintain widespread availability of cover, will continue as policy develops in detail, and information from inundation mapping and registration becomes available [...]

Sanctions

3.13.32 The EFRA Committee also recommended that offences set out on the face of the Bill should be as clear as possible; and that the Department review the offences under Part 3 within a year of the Bill being enacted to ensure that they are appropriate, enforceable and if necessary amended in the light of experience.

3.13.33 Government has concluded that these issues must be addressed not only in the light of consultation responses but also any proposals that are brought forward to introduce a system of civil sanctions, as provided for in the Regulatory Enforcement and Sanctions Act 2008. These will provide for a set of measures that might apply before prosecution is considered such as fixed and variable monetary penalties and enforcement undertakings. Proposals will be brought forward at the appropriate time once the Bill has been enacted.

Flood plans direction

3.13.34 The EFRA Committee recommended that the Department should consider whether the existing Control of Major Accident Hazards regulations might be extended to include reservoirs. Some respondents were in favour of proceeding ahead of the Bill's enactment, some in favour of waiting for the Bill to be enacted.

3.13.35 The main point made by most was that owners should not be required to pay for off-site planning as the costs are likely to be burdensome and out of the control of the owner. On the other hand local authorities were concerned that the costs of off-site planning should be fully funded, either by the owner or Government.

3.13.36 In relation to the costs of off-site planning, the Department considers that the Select Committee's recommendation can best be met by providing for regulations to be made allowing Ministers to require the costs of off-site planning to be met by reservoir owners. We do not, however, consider that we should at this stage require such costs to be met by reservoir owners.

3.13.37 Part of the consideration of this issue is how far the requirement will substantially be met by the off-site planning being carried out this year and next under the £1.25 million UK Government has made available to support the production of such plans as part of its response to Sir Michael Pitt's recommendations. In the meantime, we are consulting separately on a Direction under the Water Act 2003.⁵¹

Following publication of the Bill, the National Farmers' Union raised concern about the impact of the provisions on the farming sector:

It is... vital to ensure that new clauses on reservoir safety are not used in the future to enable unnecessary additional costs and bureaucracy to be placed on the farming sector. That could have a direct impact on small on-farm reservoirs which are an important tool for helping farmers and growers to use water more efficiently.⁵²

6.5 Hosepipe bans

The draft Bill proposed to replace and strengthen the provisions in the *Water Industry Act 1991* "to enable water companies temporarily to prohibit or restrict specified uses of water", such as the use of hosepipes. Currently, companies can only ban or restrict the use of

⁵¹ *Taking forward the draft Flood and Water Management Bill: The Government response to pre-legislative scrutiny and public consultation*, CM 7741, November 2009

⁵² [NFU raises concerns over flood and water management Bill](#), NFUOnline, 25 November 2009

hosepipes when they are used to water private gardens or clean private vehicles—but not when they are used for other purposes such as for filling swimming pools or to clean patios.

In EFRA's pre-legislative scrutiny of the draft Bill many witnesses were supportive of the plans—although the NFU argued that “there should be an express duty for water companies to produce a Code of Practice and have regard to it when using their powers to restrict discretionary uses of water”.⁵³ EFRA concluded:

We welcome the provisions... Much of south and east England suffer water scarcity, which is set to become more frequent and widespread. We note the concerns raised by the National Farmers' Union and recommend that, when using the powers... Ministers and water companies consider measures to mitigate the impact on agriculture.⁵⁴

The Government said:

Government welcomes the support for proposals to widen the scope of the hosepipe ban powers and has taken forward the clause proposed in the draft Bill into the Bill currently before Parliament.

3.14.5 New non-essential uses will only be added to the hosepipe ban powers through an Order once further work has been undertaken to establish the costs and benefits both to water companies and also to their customers of adding those non-essential uses. Water companies will have the flexibility to limit the effect of a hosepipe ban by restricting its application in terms of timing, area, customers, practices and apparatus. The Water Industry Code of Practice sets out the principles by which water companies will operate to ensure that practices are consistent, transparent and proportionate.⁵⁵

The provisions were taken forward in **Clause 36**.

6.6 Agreements on new drainage systems—mandatory build standard for sewers

On 15 December 2008 the Government announced its intention to transfer all existing privately-owned sewers and lateral drains in England into the ownership of water and sewerage companies. A similar decision was taken in Wales. This decision was taken partly because private sewers can be poorly maintained and may contribute to flooding.⁵⁶

To ensure that no new privately owned sewers are built, the Government proposed to introduce a minimum design and construction standard for new sewers and lateral drains and to make their adoption by water and sewerage companies automatic. The Government summarised its proposals and outlined the responses that it had received during the public consultation:

We consulted on introducing a requirement to build new sewers and lateral drains to an approved mandatory standard, if intended to connect to the existing public system. We proposed amending section 106 of the Water Industry Act 1991, making the right to communicate with the public sewerage network dependant on meeting the new sewer standards.

⁵³ Environment, Food and Rural Affairs Committee, *The Draft Flood and Water Management Bill*, 16 September 2009, HC 555-I 2008-09

⁵⁴ Environment, Food and Rural Affairs Committee, *The Draft Flood and Water Management Bill*, 16 September 2009, HC 555-I 2008-09

⁵⁵ *Taking forward the draft Flood and Water Management Bill: The Government response to pre-legislative scrutiny and public consultation*, CM 7741, November 2009

⁵⁶ Sir Michael Pitt, *Learning lessons from the 2007 floods*, December 2007

3.20.2 A key theme from the consultation responses was concern that this amendment in isolation would not deliver the required outcome practicably. Key stakeholders such as Water UK and housing developers stated that the proposed changes to Section 106 should be supported by further amendments e.g. to Section 104 of the Water Industry Act 1991. Water UK considered that bonds should be required to ensure compliance with standards, but housing developers expressed concern that the use here of 100 per cent bonds, as set out in SUDS proposals, would place overly onerous financial burdens on them. Developers also called for an appeals mechanism, to enable the settlement of disputes over the water companies' application of the new sewer standards.

3.20.3 In light of the consultation responses and following discussions with key stakeholders, Government proposes that the right to communicate with the public sewerage network under section 106 of the Water industry Act 1991 should be made dependent on entering into a section 104 'adoption' agreement bound by two parameters – that the sewer or lateral drain a) be built to mandatory standards either published by Ministers or agreed by the parties to the agreement and b) ultimately vests in the relevant water company as a public sewer.

3.20.4 This approach acknowledges the views of key stakeholders that section 104 agreements would be a practical way of overseeing the construction stage to deliver the new sewer standards better when they are introduced. It is a procedure housing developers and water companies are used to. The details of the agreement, e.g. bonds, can be site specific and risk based, if that is preferred to a general model agreement, and developers can appeal to Ofwat under section 105 of the Water Industry Act in the event of a dispute over the terms of the agreement.

3.20.5 The amendments will be introduced in the current Bill and will extend to s105 of the Water Industry Act 1991, to ensure that disputes over the standard an asset has been built to are also covered. These will be provisions for the Secretary of State and Welsh Ministers to make regulations in respect of the requirements for s104 agreements and to issue more general guidance if necessary.

3.20.6 The amendments will also have the effect of introducing mandatory adoption by water companies. On 15 December 2008, the UK Government announced that it would take steps to prevent the proliferation of new private sewers connecting to the public system, as part of its transfer of such existing assets to water companies. On 31 March 2009, the Welsh Assembly Government launched the Strategic Policy position Statement on Water, which included a commitment to take steps to prevent the further proliferation of private sewers that are not of an adoptable standard.⁵⁷

The Government acknowledged that a number of witnesses wanted further clarification about the mandatory build standard that would apply, and said that it “will continue to work closely with stakeholders on the content of a standard”.⁵⁸

The provisions are taken forward by **Clause 41**, which amends the *Water Industry Act 1991*.

6.7 Concessionary drainage charges—response to the ‘rain tax’ campaign

In the past, charges for the provision of surface water drainage services were based on the rateable value of the property. The rateable value represents the rental income that may be achieved by a property. However, rental income is not a good indication of how much surface

⁵⁷ *Taking forward the draft Flood and Water Management Bill: The Government response to pre-legislative scrutiny and public consultation*, CM 7741, November 2009

⁵⁸ *Taking forward the draft Flood and Water Management Bill: The Government response to pre-legislative scrutiny and public consultation*, CM 7741, November 2009

water may drain from a property. A large property with a low rental income might not pay its fair share for the maintenance of drains. The system discourages effective management of surface water:

...charges for surface water drainage, highway drainage and foul sewage are often encompassed into the general charge for sewerage. Charges for sewerage services make up more than half of the average bill that householders pay to water companies. The lack of transparency of the proportions of each of the three elements of the sewerage charge means there is no incentive for householders, businesses and highway authorities to minimise their runoff.⁵⁹

To encourage more sustainable and 'fair' drainage charges Ofwat recommended that charges should be made on the area of the property that drains into public sewers. This should encourage the installation of sustainable drainage systems (SUDs), the benefits of which are discussed in section 6.1 of this paper. The *Pitt Review* was also supportive of this as a measure to reduce flood risk.

There has been controversy surrounding this change as it may lead to bill increases for some not-for-profit and charitable organisations if they use large properties and do not reduce their use of the drainage system. The Scout Association claimed that some of its groups "have reported an increase in water costs of between £60 and £600 a year" representing "between 1% and 25% of their overall budgets".⁶⁰ However, some not-for-profit organisations may actually see a reduction in charges:

It is also important to recognise that many organisations have seen their [drainage] charges fall as a result of this change... For example, in the area served by United Utilities, more than 300 charity shops have seen their [drainage] charges reduced as a result of these changes.⁶¹

Clause 42 would allow undertakers to charge concessionary charges to community groups. The Government said:

The Department agrees with Ofwat that all customers connected to the surface water sewer should make a contribution towards the cost of removing and treating surface water where they use public sewers. This provides a financial incentive to reduce surface water runoff which can reduce the risk of surface water flooding, which is likely to increase in the future because of climate change. For this reason, where a charging scheme is based on surface area, we do not propose that any organisation should be wholly exempted from surface water drainage charges.

However, increases in bills of many thousands of pounds, for example, are clearly unaffordable for community and voluntary groups, who risk having to close or cut back significantly on the valuable services that they provide to society. That would be in nobody's interest. The Secretary of State therefore announced on 28 September that Government will legislate to enable water companies in England and Wales to operate concessionary schemes for community premises for the purpose of surface water

⁵⁹ *Taking forward the draft Flood and Water Management Bill: The Government response to pre-legislative scrutiny and public consultation*, CM 7741, November 2009

⁶⁰ [Stop the rain tax campaign](#), The Scout Association website [on 10 December 2009]

⁶¹ [How does charging for surface water drainage by site area affect community organisations?](#), Ofwat website [on 10 December 2009]

drainage charges, and require Ofwat to allow companies to exercise their discretion in the design and operation of schemes.⁶²

7 Part 3—General

Clauses 44 to 46 are general provisions. **Clause 44** provides for one of the Pitt Review's key recommendations, to consolidate the legislation applying to flood and water management.⁶³

8 Liberal Democrat and Conservative Party views on the Bill

Members debated the Bill during the debate on the Queen's Speech on 24 November 2009.

Tim Farron MP, for the Liberal Democrats, said:

The Flood and Water Management Bill is late. We could have had it a year or two ago, but it will be welcomed throughout my constituency. [...]

[I] agree that there is a lot wrong with the Bill. It is inadequate in many respects, but it is on the table and it is significantly better than nothing. We will scrutinise it throughout its progress through this House, but we believe that it will be better for my constituents, for his and for the whole country if we end this Parliament with a Flood and Water Management Bill on the statute book. I hope that it will be better than the one in front of us at the moment.

I shall give some reasons why the Bill would be a positive step. The presence of a single co-ordinating body across the country—it makes sense for that to be the Environment Agency—will be a huge improvement. There is far too much confusion and buck passing, and not enough backside kicking, when it comes to preventing flooding from happening and dealing with it when it happens. One area of my constituency that thankfully did not flood this time round is Grange-over-Sands, although it often does flood in the Windermere road area. Fixing that problem is a nightmare, when the Environment Agency, local authorities, United Utilities, Network Rail and others all pass the buck to each other, no doubt because solving it would cost money. I want to see a single entity that has the power, the authority and the resources to knock heads together and ensure that we solve such problems. That single co-ordinating body should have the muscle and the inclination to tackle such problems. I observed this morning that Severn Trent Water was celebrating—or perhaps apologising for—record profits. I think of the record profits that United Utilities and other water companies have been, shall we say, fortunate to amass, thanks to an infrastructure paid for by the taxpayer—an infrastructure that is also elderly, but which they have been far too complacent about.

[...]

I also welcome the elevated role of local authorities, as a potential consequence of the Flood and Water Management Bill. It is right that they should have single responsibility for the local flood risk strategy, but they must also have the resources to do that job. One of the other success stories, as it were, in our area that we would like to talk about is that in Kendal, even with a deluge, say, a quarter of the size of the one that we have experienced in the past few days, the Sedbergh road area would have been flooded and about 250 homes would have been under water. Indeed, with that particular

⁶² *Taking forward the draft Flood and Water Management Bill: The Government response to pre-legislative scrutiny and public consultation*, CM 7741, November 2009

⁶³ *Flood and Water Management Bill*, Explanatory Notes, Bill 9 [EN] 2009-10

deluge, I suspect that we would have had 500 to 700 properties under water. However, that area of Kendal did not flood because two years ago the local district council built the Stock beck flood relief system, which has worked, even in this most dramatic of situations. That came about after I chaired a meeting of about 11 different agencies, sitting them round a table at the Castle Park primary school. It is wonderful what getting people sitting round a primary school table on those low chairs with their knees underneath their chins can do to, let us say, interfere with their dignity and ensure that they address the issues. We banged heads together and ensured that a successful flood relief scheme was built.

[...]

Also, although the generalised flood warnings put out by the Environment Agency were excellent, timely and accurate, we now have the know-how, particularly in the national flood forecast centre, to give specific targeted warnings to homes and businesses well in advance to allow them to take the necessary precautions, move furniture upstairs, evacuate if need be or sandbag themselves in to ensure that they do not get flooded at all.

I am also concerned that the warnings are given only when homes or businesses are at risk of flooding because of rivers bursting their banks, because the majority of the homes flooded in my constituency were flooded because of surface water and ground water. All those things are just as predictable-or potentially predictable, using different models-but at the moment they are not in the Environment Agency's remit. That is wrong. I want to ensure that the Bill makes provision to put that in law, although they are things that can also be fixed without legislation. I would like the Secretary of State to take steps towards addressing that right away, because we have the know-how to sort it out.

As other right hon. and hon. Members have mentioned this evening, we also need to be able to strengthen the hand of local authorities to say no to development on flood plains and in other flood-risk areas. I am absolutely committed to developing new, affordable homes for local families, particularly in my area. It is a tragedy that we have a waiting list of 5,000 people for council homes in social rented properties, but only 4,000 social rented homes available. I will not go into why that might be, but we all know the reasons why-the failed policies of the past, shall we say? That is a tragedy, so I want more social rented and other affordable homes built as an urgent priority. However, I do not want the families who get those homes to be subject to almost instant misery because the houses have been built in areas where we will be dealing with flood risk year after year. We surely have the capacity to deal with that in this day and age.⁶⁴

Nick Herbert MP, for the Conservatives, said:

Effective measures also mean passing the right legislation so that the law is clear and responsibilities for flood defence are properly demarcated. We therefore welcome the Flood and Water Management Bill, announced in the Gracious Speech. As I made clear yesterday, my party will back the necessary measures to implement the Pitt Review recommendations for flood prevention so that they become law at the earliest opportunity. I join with those hon. Members who have called for a Second Reading for that Bill as soon as possible. We would welcome that.

The legislation must end the institutional confusion over responsibility for flood risk management and the Environment Agency needs strategic overview of all types of

⁶⁴ HC Deb 24 November 2009 c473

flooding. We are keen to ensure that this does not mean that power is taken away from local communities, or that key decisions over coastal protection are taken away from Ministers accountable to Parliament. We must ensure that the current Bill truly reflects the importance of local decision-making to effective flood prevention. We must also make sure that local communities have a strong voice in decisions over priorities for flood risk management and avoid top-down imposition.

However, it is also vital that we address water management issues as well as flooding, because in the decades ahead, resource efficiency, and in particular, the supply and availability of water will be a key concern. By 2050, climate change could reduce the amount of water available by 10 to 15 per cent., when 20 million more people could be living in England alone. Average summer river flows could be reduced by 50 to 80 per cent. by that time. With climate change having a significant impact on supply, we will need to prepare for long dry periods, such as those in the summers of 2005 and 2006, and for potential problems with abstraction as rising temperatures reduce river flows, possibly by as much as 80 per cent. in the summer. The World Wildlife Fund has warned of the impact that this will have, for example, on our chalk streams such as the River Itchen in Hampshire, which I visited recently and which is one of WWF's "rivers on the edge"-those that are already under serious threat from over-abstraction.

On those significant questions, the Bill is notable as much for what is not in it as for what is. The title, "Flood and Water Management" implies a greater focus on the water industry than we have in the final Bill. Later this week, Ofwat will announce the final price limits for the next five years, and we will be presented with an opportunity-a break in the regulatory cycle -to tackle some of the challenges that the industry is facing.

Climate change and population growth will put pressure on our water supplies and will increase concerns about affordability and environmental protection. The industry must do more to conserve water itself and help incentivise water efficiency. Changes need to be made now in order to ensure a strong industry and a sustainable supply of water in the future.

Only seven months ago, Ministers committed to bringing forward legislation to implement key measures from the Cave review of innovation in the water industry and we were also promised legislation to implement measures from the Walker review of charging and metering. The final report by the Walker review has not yet arrived, and those measures will not now happen.

Instead of tinkering around the edges, we need innovative reform in the water industry and water policy. Such reforms do not form part of this Bill, so it will fall to the next Government to draw together all the work that has been done on industry and regulatory change to promote the conservation of water and set out real proposals for change.⁶⁵

⁶⁵ HC Deb 24 November 2009 c495