UKELA WATER WORKING GROUP

DRAFT FLOOD AND WATER MANAGEMENT BILL

DRAFT RESPONSE TO CONSULTATION PAPER AND DRAFT BILL

INTRODUCTION

1 The UK Environmental Law Association ("UKELA) aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

2 UKELA prepares its responses to consultations with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared with the help of the Water Working Party.

3 UKELA's current priorities include:

- Informing and actively influencing the broad law and policy debate on climate change including the measures to reduce greenhouse gas emissions and manage their impacts at the international, EU and domestic level;
- Helping deliver more effective and efficient environmental regulation including enforcement at the EU and UK level, not lower standards nor less regulation unless the same or better outcomes will be achieved.

4 UKELA works on a UK basis and seeks to ensure that best legislation and practice are achieved across the devolved jurisdictions.

5 UKELA makes the following comments on the Draft Flood and Water Management Bill and accompanying consultation paper, issued in April 2009.

6 Our response is divided into two parts:

(a) Introductory comments on the principles underlying the flood provisions of the Bill, in particular:

- Division of responsibility between the Environment Agency ("EA") and lead local flood authorities;
- The Role of IDBs

- Implementation of the Floods Directive
- Emergency Powers

(b) Responses to specific consultation questions[1].

PART 1: INTRODUCTORY COMMENTS ON THE PRINCIPLES UNDERLYING THE FLOOD PROVISIONS OF THE BILL (FLOODS PROVISIONS)

a) Division of flood risk management responsibilities between Environment Agency and lead local flood authorities

1 Whilst we recognise that the government has stated its commitment to implementing the Pitt review recommendations, we consider that the division of flood risk management responsibilities between Environment Agency and local authorities set out in the draft Bill will give rise to a number of problems. We consider that a better solution would be for the Environment Agency to have a greater role, possibly as the sole flood authority in England and Wales (although the valuable role currently played by IDBs is recognised). We base this view on the following points.

2 Alternatively, a system which encouraged greater integration would also be beneficial, for example with the EA as the automatic lead authority in default. Although we note that clause 35 does provide a power of direction on the Secretary of State, we suggest that the need for directions from the Secretary of State will only slow and tie up the system and the EA should be able to act in default in a greater number of circumstances. Appropriate safeguards for lead local authorities could be provided by other means, such as an appeal or approval mechanism

(i) Confusion/conflict as to which drainage authority is responsible for a particular length of watercourse

3 One problem under the current regime is that there can be confusion/conflict as to which drainage authority is actually responsible for a particular length of watercourse, what flood defence works are required, and which drainage authority will pay. Related to this, is a lack of transparency as to who is responsible so far as the general public is concerned.

4 By way of example, based on a real case situation (which we believe will be a common situation within the country), watercourse A (defined as an "ordinary watercourse") flows for a distance of some 12 miles before it joins a larger watercourse B (defined as a "main river"). For its first couple of miles the drainage authority for the ordinary watercourse is one District Council and for the next 5 miles the drainage authority is a different District Council and for

[1] We have not responded to each and every question.

the remainder of its length before meeting the main river the authority is the IDB; from its confluence the drainage authority is the Environment Agency. In respect of such an ordinary watercourse, the two local authorities and the IDB operate under Section 14 Land Drainage Act 1991 but this is subject to:

(a) the default powers of the County Council under s.16 Land Drainage Act 1991;

(b) the requirement for consent for any works from the EA under s.17 Land Drainage Act 1991; and

(c) the fact that the Environment Agency exercises a "general supervision" over all water courses under s.6(4) of the Environment Act 1995.

5 In this example, confusion/conflict as to who is responsible for what has meant it has been extremely difficult to make any progress with agreeing as to what studies are required following the June 07 floods.

6 We understand that part of the purpose of the present draft Bill is to address these types of problems. However, we are doubtful that the draft Bill will adequately address these kinds of issues. It has been suggested to us that local strategies might represent a solution by setting out an agreement as to who is responsible for what. For this to work, the strategies would need to be very detailed indeed. We also query whether it will be possible to agree all these matters in the strategies.

7 Making the Environment Agency the sole responsible authority in England and Wales for FCERM functions (or at least responsible for watercourses in addition to main rivers thereby removing the split between rivers and ordinary watercourses[2]) would avoid these kinds of problems. Any perceived deficit in democratic accountability could be resolved by changes to the Environment Agency, for example by expanding the role of Regional Flood Defence Committees of the Environment Agency.

(ii) Fragmentation of approach to managing flood risks

8 The draft Bill proposals involve an approach which does not align responsibility with natural catchment areas. Rather, flood risk management responsibilities will be split between a number of authorities in any given catchment each trying to cover parts of that catchment. This will make it difficult to achieve coherent management of catchment areas, or of other flood risk areas that straddle political boundaries of local authorities. In order to work, the system would rely heavily on effective coordination and information sharing that may be difficult to achieve in practice.

[2] We note that no mention is made in the Bill of "critical ordinary watercourses" which are under the EA's control.

9 This is a particular issue in relation to the implementation of the Floods Directive which requires flood risk management plans etc for river basin districts (although, for certain cases, different units of management are permitted). For local authority prepared plans, strategies and assessments covering smaller areas to dovetail with catchment /river basin district level plans, it will be essential that the same methodology is adopted as set out in the Floods Directive.

10 The potential problems associated with piecing together local level plans, strategies and assessments would be avoided if the EA were given a greater role (e.g. as the sole authority). This would also allow better consideration of the relationship between risks from ordinary watercourses, surface runoff and groundwater and risks from the sea, main rivers and reservoirs – both in terms of the risks of different types of flooding occurring, areas affected, and measures taken to address different types of flooding risk (a particular issue in relation to the Floods Directive).

(iii) Complexity of arrangements

11 The division of responsibilities under the draft Bill seems complex, with much of the detailed provisions seemingly designed to set out how all the relationships should work – for example, provisions for default and concurrent powers, and guidance and directions. In flood situations, urgent action is required which require immediate and clear understanding of responsibility and obligations; a complex regime may have the effect of preventing such action being taken with speed and urgency. Giving the Environment Agency overall responsibility would give rise to a far simpler regime and obviate the need for such detailed provisions.

(iv) Resourcing

12 However responsibilities are split, it is crucial that authorities are adequately resourced to discharge their functions.

13 We are concerned that local and unitary authorities are inadequately resourced (both technically and financially) to fulfill the expanded range of functions proposed under the Bill. Building the necessary FCERM capability within local/unitary authorities that currently frequently rely on external consultants will be a substantial challenge, and will require substantial financial, technical and human resources.

14 In our view, the EA is potentially much better placed to discharge expanded FCERM functions, as it already has considerable FCERM capability. However, we consider it crucial that any expansion in the roles of any of the FCERM authorities should be properly resourced.

(*v) Accountability issues*

15 We acknowledge that granting the (unelected) EA a greater role may raise democratic accountability issues. However, we believe that such issues can be addressed by other means,

for example by reinforcement of Regional Flood Defence Committees as suggested by the Agriculture Committee of the House of Commons; a role for stakeholder groups (as is the case under the Water Framework Directive); greater accountability to the Secretary of State and Welsh Assembly Government ("WAG") (see for example arrangements for implementing the Water Framework Directive); more provision for consultation (e.g. on the strategies to be formulated); more safeguards and appeals provisions (e.g. see our comments on clause 34).

(b) Role of Internal Drainage Boards ("IDBs")

16 It is acknowledged that IDBs have significant specific historical knowledge, and also take the burden off the EA who may neither have the financial nor technical resources to be able to govern every watercourse in England and Wales. Also of note are the many sub-agreements between industry and IDBs, the transferral of which would cause logistical and legal difficulties. Thus, overall, we believe IDB's should be retained at least at the present time although we believe the question of their management and democratic accountability should be fully considered as part of the current consultation.

17 To ensure consistency in democratic accountability across all FCERM authorities, we would recommend that careful consideration be given to the responses posed regarding the governance of IDBs to allow greater representation of local authorities. If possible, the result of the consultation on this important issue should be incorporated into the present Bill to be laid before Parliament.

c) Relationship between the national and local FCERM strategies and risk assessments, management plans etc under the Directive

18 The consultation document does not explain how implementation of the Floods Directive will mesh with the provisions for developing and implementing national and local FCERM strategies. We regard this as an important issue given the obvious overlap in subject matter and functions. There is a risk of parallel work streams (and wasted costs from duplication of effort) that fail to appreciate overlaps and interdependencies.

19 An example of potential duplication are maps which have been created under Strategic Flood Risk Assessments. These seem to fulfill similar purposes to Flood Hazard Maps (at clauses 57, 58 of the Bill). Where possible, the Bill should seek to avoid the need to duplicate work already carried out under other requirements, for example by ensuring that maps created under one requirement can be deemed to be maps created under a different legislative requirement, if they both fulfil the same purpose.

(d) Emergency Powers

20 We consider it crucial that emergency action is not delayed. If an authority is not taking appropriate action in a flood situation, then it seems logical that there should be provision to enable them to be compelled to do so, coupled with emergency powers for another authority to do the necessary works itself (subject to clarity as to what is an emergency and safeguards for third parties).

21 Links to emergency powers should be made clearer, and the circumstances in which such powers can be exercised, and by which bodies. Currently clause 34 and clause 42 do not distinguish between the circumstances in which works can be carried out in normal and emergency situations, and we are not aware that separate procedures are set out anywhere in the Bill.

22 A view has been expressed that IDBs, the most concentrated groups of which are in areas where the hydrological systems of streams and mechanisms of flooding are highly complex due to tidal locking, can act in the event of an emergency without requiring EA consent (which would seem to be required under the amendments proposed to the Land Drainage Act 1991 at clause 36, without separate provision for emergency procedures).

23 The consultation document makes no reference to the Civil Contingencies Act 2004. Accordingly, we are not clear whether the objectives of that Act and the UK Resilience movement in relation to flooding have been taken into account in providing a coherent and joined up system for emergency situations.

PART B: RESPONSES TO SPECIFIC QUESTIONS

Style and accessibility of the draft legislation (Consultation Paper para. 1.10)

1. How far, in general, would you say that the draft legislation is written in a reasonably clear style that is likely to be understood by readers?

1 We welcome the new style of drafting, with clauses broken down logically into short digestible sub-clauses which are expressed simply in modern English. We think this will greatly help the lay read in understanding the nature of the provisions, although we would caveat that this move toward simplicity should not be at the expense of legal clarity (see below at question 4). We would encourage this style of drafting in other legislation.

2. In general, do you think the individual clauses are too long, too short or about the right length? How far is their overall order in the draft legislation reasonably logical and easy to follow?

2 As above, we think that in general the individual clauses are about the right length, and set out in a logical manner that aids understanding.

3. In general, do you think the individual sentences in the draft are too long, too short or about the right length and is their structure too complex, too simple or about right?

3 We think the individual sentences are about the right length. The move away from provisos in each sentence and "sub-concepts" creates sentences and a structure which aids understanding. However, we have some concerns regarding cross referencing and the use of subordinate legislation, as below.

4. Please give examples of anything in the style of the draft legislation that you particularly liked or disliked. Please also give your reasons.

4 We welcome the proposal for a single unifying Act containing all the flood risk & coastal provisions. Consolidating the legislation in this way would make it more accessible and understandable and ought to provide for a more coherent legislative regime. We are not keen on the piecemeal approach seemingly being adopted under the draft Bill, with many of the core provisions and duties remaining in the Land Drainage Act 1991, the Water Resources Act 1991 and the Highways Act 1980, with the Bill containing cross-references and amending provisions of such other Acts. This makes it difficult to have a coherent picture of the law relating to flooding and coastal erosion.

Framework Legislation

5 The legislation is drafted in a similar style to the Planning Act 2008, so that the Act is merely a framework with much of the detail provided in subsequent statutory instruments. Whilst we recognise some benefit in having a framework Bill by aiding understanding and making it more digestible, such benefit we believe is outweighed by the disbenefits.

6 Whilst we recognise that some matters of detail may be appropriately settled by statutory instrument, statutory instruments are subject to relatively little parliamentary scrutiny in comparison to a Bill and any of the safeguards, restrictions and procedures applying to the Flood and Water Management Bill will be within these statutory instruments. The provisions of these statutory instruments will be crucial to ensure a fair and effective constitutional procedure and compliance with the UK's international obligations such as human rights and compliance with EU legislation. The framework manner of approaching legislation makes it difficult to comment on the legislation from a legal perspective and the comments offered by the UKELA Water Working Group are given in a context where much of the important detail of this legislation is effectively absent.

7 If Parliament is minded to approve such a framework structure, then a greater use of the affirmative resolution process for statutory instruments which relate to safeguards, restrictions and procedures under the Bill would ensure greater transparency and scrutiny by Parliament.

Use of the words "in particular"

8 The addition of the words "in particular" at sub clause 7(2) and other places implies that such things are higher in a hierarchy, whereas future changes in practice and understanding of risk management may mean this is not always the case. The clause would work just as well without the words "in particular" (this applies in other instances where the words are used).

Use of examples in substantive clauses (clause 7(3) and "risk management")

9 The use of examples can aid understanding and helps make clear the scope of "risk management" – it puts beyond doubt that the matters listed are covered. However, we would suggest that such examples could be included in a place which allows greater flexibility so that, if developments mean that flood or coastal erosion risk management ("FCERM") functions would need a wider interpretation, this can be done simply e.g. through statutory guidance.

10 Notwithstanding the legislation stipulates the matters listed at clause 7(3) are only examples of a non-exhaustive nature, the *ejusdem generis* rule of statutory interpretation could mean actions which in the future would be appropriate to be carried out as a FCERM function may not be found to be not lawful. More flexibility would be gained we suggest by providing examples in statutory guidance which could more easily be amended than statutory enactments.

5. Please give examples of provisions that you thought helpfully simple or well expressed or ones that could be made simpler or otherwise improved. Please also give your reasons.

11 Clause 35 is a good example of drafting without the use of provisos, other than as separate sub-clauses. However, we query the use of "but" at the beginning of a sentence.

6. Are there any drafting techniques (such as cross-references to other provisions of the draft legislation) that you would like to see used more or less?

12 Please see our answer to question 4 (comments on consolidation and framework legislation).

13 In terms of cross references to other provisions within the Bill, it may help understanding if the heading of the section which has been cross referenced was also included in brackets after the section number.

7. Please suggest any improvements to the way in which legislation is drafted that you think would make it easier to understand and apply.

14 Please see our answer to question 4. If amending provisions are to be retained in the Bill (rather than it involving a consolidation of relevant Acts into a single unifying Act), it would be helpful if, where practicable, amended provisions were set out in Schedules to the new legislation so that the complete effect of them can be seen as an entirety.

15 If the new style of legislation is to incorporate explanatory clauses such as clause 1, such explanatory clauses could include provisions to explain the purpose or provenance of the legislation. However, this is mentioned merely as a suggestion for further consideration and proper debate as there are diverse views on this issue within UKELA.

Sections 2 and 3: Flood and coastal erosion risk management

Condoc 2.1 New approaches to flood and coastal erosion risk management (clauses 2-14)

8. Are you content with the definitions of "risk" and "risk management" in the draft Bill?

16 The definition of "risk" is broadly acceptable and we understand is in line with accepted technical understanding. However, we note that the definitions used are different from that set out in the Floods Directive and query whether this is necessary. It has been suggested that the

proposals should start with the transposition of the Floods Directive. As commented above, it is not clear how the various strategies assessments and plans contained within clauses 2-49 are intended to relate to clauses 50-63 and the assessments contained therein.

17 We note that these concepts are broadly expressed and therefore enable flexibility of approach, which is a sensible approach. However a consequence of this is that FCERM functions are very broad in scope. There need to be effective mechanisms for ensuring the functions are exercised sensibly, fairly and accountably: see our comments below on consultation, clause 34 etc.

9. Are you content that the draft Bill should enable a wider range of approaches to managing flood and coastal erosion risk than is currently allowed under existing legislation, such as resilience, and that it should be sufficiently flexible to accommodate new approaches which may be developed in future?

18 See our comments to question 8 – it seems sensible to have flexible powers, but these should be accompanied by accountability mechanisms and procedural safeguards.

10. Does the approach in the draft Bill to flood and coastal erosion risk management adequately cover adaptation?

19 As the Consultation Document notes at paragraphs 70 – 73, the Bill does not make explicit provision for adaptation to climate change. Without knowing how the Secretary of State intends to use his powers under the Climate Change Act 2008, we cannot comment on the adequacy of such provisions. However, we would strongly suggest that the Bill should have specific provisions to deal with adaptation and the dynamic aspects of this risk, as it is intrinsically embedded within flood risk, flood risk management, resistance and resilience.

11. Does the proposed approach to flood and erosion risk management:
• facilitate and encourage authorities to make effective links between land management and flooding and erosion?
• enable and encourage authorities to play an appropriate role in the delivery of wider multiple objective projects through the use of their flood and erosion management functions, including projects that are specifically required to achieve environmental, cultural and social outcomes?

20 PPS 25 provides guidance between land use and flood risk. Any draft flood risk management strategy would need to be consistent with PPS 25 (see also our response to question 13). Indeed, the approach under a national Planning Policy Statement on development and flood risk would seem to us to be a key part of any national strategy to deal with flood and coastal erosion risk management (e.g. see clause 7(3)(a)). The draft Bill does not appear to address this relationship. We consider that clarity as to the roles and responsibilities and obligations relevant to the relationship between development and flood risk is important to ensure a workable approach.

21 DCLG has recently published its review of the effectiveness of PPS 25 (June 2009), which is positive in the main. However, we hope that Defra fully takes on board the recommendations in the review, in particular the areas highlighted as requiring further improvement. For example, the review notes that the majority of EA objections are due to the non inclusion, or inadequacy, of flood risk assessments (FRAs) with planning applications; and that LPAs are failing to notify the EA of decided applications, as PPS 25 recommends. Such issues could be addressed through provisions in the Bill directly.

22 We would also recommend that resources are provided to authorities to ensure that effective links are facilitated and encouraged with a view to increasing cohesion and encourage leadership, such as programmes of education and practical mechanisms to encourage leadership throughout the chain.

12. Are there any approaches to flood and coastal erosion risk management that should be adopted but which the draft Bill would not allow?

23 We believe that the EA should be given greater control, if not made the sole FCERM authority. See our introductory comments above at Part 1 above in relation to the exercise of default powers by the EA.

24 Whilst we understand that clause 41 relates to allowing flooding where there is benefit to the natural environment (rather than strictly to FCERM functions), clause 41(3)(b) may potentially create a larger barrier than intended in allowing flooding or coastal erosion for the benefit of the natural environment. Clause 6(3) as referred to in 41(3)(b) are the criteria for assessing risk, whereas in 41(3)(b) such criteria are set out as absolute parameters. In addition, allowing flooding/coastal erosion would be prohibited if there was an increase in "potential" harmful consequences of those listed in section 6(3). The use of the word "potential" would seemingly make it virtually impossible to ever use the power under clause 41, and we suggest that "significant harmful consequences" may be more appropriate or something along those lines.

25 Not only are links with climate change policy not fully integrated, but there seems to be a lack of consideration of the objectives of the UK Resilience movement as enacted through the Civil Contingencies legislation.

13. Should all operating authorities be required to contribute to sustainable development objectives when carrying out flood and coastal erosion risk management?

26 The requirement to contribute to sustainable development is a commonly applied responsibility of public authorities when exercising functions relating to development control. We believe that the concept is sufficiently understood to make it possible to apply it to other

authorities in appropriate contexts. However, it requires clarification in the context of control over flood defence.

27 It is not clear whether the requirement to contribute to sustainable development is intended to oblige authorities to exercise their FCERM functions in such a way that development that would not otherwise be possible could come forward as development proposals. If that is the case, this would be in conflict with the aspirations of PPS25.

28 For example, if an authority builds a flood defence and as a result reduces flood risk to areas down river from the flood defences, according to PPS25, that does not remove or reduce the flood risk status that applies to those areas. If they were within flood risk zone 3 before the defences were constructed, they remain in flood risk zone 3 after the defences are built. Any development proposals within those areas still need to go through the relevant sequential and exception tests in PPS25. The rationale for this is that the flood defences may be breached or overtopped so that the areas down river from the defences will still flood.

29 We recommend that clarification is provided so that PPS25 is not undermined by the application of a duty to contribute to sustainable development, so operating authorities do not mistakenly believe that they are under a duty to provide flood defences in such a way that development is facilitated in areas where there is a flood risk that makes that development inappropriate. (See also our response to question 11.)

30 It has been suggested that the duty could be better expressed as towards "sustainable flood risk management objectives", which would be clearer and more specific and link back to objectives under PPS 25.

31 Another aspect of sustainable development is the question of what it means in the context of managed retreat. One of our members has commented 'I've always construed sustainable development as that which does not restrict the options of future generations, and does not disable them from maintaining themselves and their way of life. Hence, in managed retreat, there would be an obligation to seek to pursue the relocation of a community intact, rather than destroy it without relocation.' Is this a fair assumption? This seems to us an important policy issue that is appropriate to clarify in order to in order to ensure the EA guidance and local authority exercise of FCERM functions reflect a coherent national vision.

32 No provisions are included in the Bill as to what types of compensation, financial or otherwise, those affected by managed retreat could expect to be given. This should be made clear and explicit.

2.2 Future roles and responsibilities (Clauses 15-49)

Note: Questions under these sections overlap with general issues for the introductory paragraph to sections 2 and 3 on FCERM.

EA strategic overview role

14. Are the component parts of the EA strategic overview clear and correct and do they achieve the objectives?

33 See our introductory comments above at Part 1 on the division of FCERM functions (problems with multiple authorities and advantages of giving the EA a bigger role), and on the relationship between the strategic overview role under clauses 15-49 and implementation of the Directive (potential parallel workstreams and duplication of effort).

16. Do you have any comments on the proposal that the EA issues a National Strategy for FCERM with which all operating authorities will be required to act consistently when delivering their FCERM functions?

34 See our introductory comments above at Part 1 about problems associated with multiple authorities exercising national and local functions.

35 Under the approach proposed in the draft Bill, a National Strategy would need to be sufficiently clear and understandable so that operating authorities (and the public to whom they are accountable) are clear in how they should act to be consistent with the National Strategy, with appropriate sanctions to ensure that delivery is made.

17. Do you have any comments on the proposal that other bodies would have to have regard to the EA's National Strategy and guidance? Do you consider that any other bodies should be added to the list in clause 23? In particular, how should the sewerage industry be brought into the new framework

36 The obligation to "have regard to" the strategies and guidance is not very strong and should be strengthened. One suggestion is including a statutory duty to ensure that any guidance issued includes specific and clear guidance to each relevant public body listed in clause 23.

37 We are not clear why there is a difference between the bodies listed at clause 23, 25 and 26 and it would seem to make sense for consistency between these bodies. In addition, we believe that the sewerage industry should be brought more clearly into the framework. Although a "relevant authority" under clause 23(2) includes a "water company", it is not clear that this would also include water companies with sewerage functions. The same also applies to clause 25(2).

18. Do you think that the EA should be required to consult as part of preparing or publishing its strategy?

38 We believe that the EA should be required to consult. Under the draft Bill the National Strategy will be a key policy document which will determine how the broad FCERM

functions are exercised by the EA and other authorities. Application of national and local strategies could have potentially huge social, economic and environmental impacts. It therefore seems crucially important for the EA to involve communities and interest groups in the process of formulating the strategy, so as to ensure impacts and interests are properly understood and taken into account, and to provide for some degree of accountability in the process.

39 As explicit requirement to consult on guidance is set out at clause 27. Such explicit requirements to consult should also be included in relation to guidance issued under clause 17 and 21, as these are the national and local guidance which everything relates back to.

19. Should the EA have a regulatory role in relation to coastal erosion risk management, in particular for consenting and enforcement as set out in paragraphs 103-105? What alternative arrangements might be preferable?

40 We consider that the Environment Agency is the most appropriate body to exercise this control as it has the ability to ensure consistency of approach between local authority areas and has access to appropriate resources to deal with the technical issues involved.

EA delivery and operational role

20. Should the Secretary of State have the power to direct the EA to undertake local flood risk management work in default of local authorities, and recover reasonable costs?

41 This power would not be necessary if the EA were made sole flood risk management authority (see introductory comments).

42 Under the split of responsibilities in the draft Bill, it seems sensible to make provision to intervene where local authorities are failing to discharge their functions. Looking at the power proposed in clause 35, it seems possible that in some instances the powers of the EA might not match those of the LAs and so, while the SoS may direct the EA to exercise a FCERM function, it may not have the relevant power. There may need to be express provision that the EA has the equivalent powers that the LPA would have in such circumstances.

43 However, more importantly, it would seem consistent with the policy of giving the EA a strategic overview role to give the EA itself a power to direct local authorities, rather than granting a power to the Secretary of State to direct the EA. Such a power at first blush may raise issues of democratic accountability, but these might be addressed for example by making provision for an appeal to the SoS/WAG or the requirement for prior consent from the Secretary of State/WAG.

Comments on clause 34 and clause 257

44 We consider that the ambit of clause 34 needs clarification. In its present form we consider it to be unacceptably wide in that the range of circumstances in which the power could be exercised seems huge, and there is no provision on the face of the Bill for prior consultation, owner consent, compensation, court supervision or other safeguards in relation to works on third party land.

45 We understand that the Environment Agency has on occasions carried out flood defence works on land owned by third parties without purchasing the land compulsorily or voluntarily. It has proceeded on the basis of serving a notice to enter the land concerned, purportedly under sections 165 and 172 of the Water Resources Act 1991. We do not consider that entry onto land under those provisions to construct new flood defences is lawful. Entry under those provisions is properly limited to entry for maintenance of existing structures only, as is made clear by section 155(4) of the Water Resources Act 1991. Entry onto land for the provision of new permanent structures would be an unlawful interference with a third party's human rights without a compulsory purchase order or compulsory works order being promoted, giving the affected third party the opportunity to object to the order, have his objection considered by an independent party (the Secretary of State's inspector) and receive compensation if entry is affected pursuant to a confirmed compulsory purchase or works order.

46 Entering onto private land by a public authority resulting in significant interference with the enjoyment of that land constitutes a potential breach of Article 8 (The Right to Privacy and Home Life) and Article 1, Protocol 1 (The Right to Property) of the European Convention of Human Rights. The courts have interpreted these provisions to mean that a public authority cannot interfere with a third party's right to enjoy his land unless this interference is in accordance with due legal process and is in the public interest. The process of making and advertising a compulsory purchase or works order together with the rights for a third party to object to the order and have his objections heard by an independent third party ensure compliance with the ECHR, along with the right to appropriate compensation in the event that the order is confirmed and entry is effected by the public authority pursuant to that order.

47 The application of clause 34 of the Bill should be clarified so that it is stated that these powers are restricted in a similar way to section 165(4) of the Water Resources Act 1991 and do not enable the Environment Agency to enter onto land in order to carry out the work concerned. These powers are given simply to describe the ambit of the Agency's general role in carrying out structural and environmental work but do not in themselves give the Agency the power to enter onto land to do so. A compulsory purchase order or a compulsory works order will still be needed for the carrying out of new permanent physical works on a third party's property.

21. Should the EA be able to undertake coastal erosion risk management works concurrently with local authorities where appropriate to support the delivery of the strategic overview role?

48 Whilst concurrent powers seem sensible in the context of the division of responsibilities in the draft Bill, there would be no need for this if the EA had primary responsibility (see our introductory comments).

22. The EA is drawing up a coastal map showing which operating authority will exercise FCERM powers on each length of coast. Should the EA maintain this and should the procedure for amending the map be the same as for main river maps, or should it be a non-statutory process?

49 The application of FCERM powers will have a significant effect on many people, therefore it is appropriate that plans for application of these powers are the subject of a statutory plan which is subject to public consultation, public debate and overall control by the Secretary of State.

50 The process used should be sufficiently flexible to allow for changes to be made promptly so that all authorities are clear on their responsibilities. What needs to be avoided is the situation where there could be both designated plans and in addition draft plans going through a process of change, both in existence over a long period of time concurrently. If this was to occur with coast map plans, this would increase the risk of the relevant authorities not being clear as to who has responsibility when a natural flooding event happens (the timing of which cannot be predicted). Whether existing processes for amending plans are appropriate (e.g. for Water Resource Management Plans or development plans) should be considered in the light of the purposed to be achieved in terms of clarity of responsibilities.

2.5 Local Flood Risk Management

Note: Questions under these sections overlap with general issues for the introductory paragraph to sections 2 and 3 on FCERM

24. The Government's response to Sir Michael Pitt's Review accepted that county and unitary local authorities should have the 'local leadership' role described above. Does the draft Bill implement this effectively and support the development of effective local flood management partnerships?

51 See our introductory comments at Part 1, on the division of FCERM functions between the EA and local/unitary/county authorities.

25. Do you have any comments on the proposal that the county and unitary local authorities will develop a strategy for local flood risk management and that district local authorities and IDBs would be required to act in a manner which is consistent with that strategy in delivering their FCERM functions?

52 See our introductory comments on the division of FCERM functions between the EA and local/unitary/county authorities. A duty to act "consistently" with the national strategy is not legally very tight and leaves considerable uncertainty as to whether the national strategy will

be implemented in the manner envisaged by the EA. For example, although local authorities should develop their development framework in accordance with Regional Spatial Strategies, there are instances where not everyone would agree that local authorities have so acted. Enforeceablity also becomes an issue where the duty is only to act "consistently".

53 If our recommendation that the EA be the sole authority was followed, this issue would not arise. However, if the Government is minded to follow a two tier process, then we would recommend that local authorities (and other public authorities which are capable of having an impact, including IDBs) should be under specific duties to further the purposes of both flood risk management plans and river basin management plans (under the Water Framework Directive).

27. Do you think that the county and unitary local authorities should be required to consult the public as part of preparing or publishing their strategy?

54 Yes, for reasons similar to those given on question 18.

28. Further to its duty to investigate flooding incidents, should the county or unitary local authority have powers to carry out works of an emergency nature? If so, what powers would be needed?

55 We consider it crucial that emergency action is not delayed. If an authority is not taking appropriate action in a flood situation, then it seems logical that there should be provision to enable them to be compelled to do so, coupled with emergency powers for another authority to do the necessary works itself (subject to clarity as to what is an emergency and safeguards for third parties).

29. Do you think that the EA and county and unitary local authorities should be able to gather information from private landowners and individuals about flood drainage assets related to their respective responsibilities? What if any sanction is needed to ensure information is provided?

56 The Environment Agency already has powers to require information from private landowners in the context of its CPO powers. The sanction is a criminal offence and a fine for failing to disclose information without reasonable excuse or giving false or misleading information. Equivalent provisions may be appropriate in this context.

57 Also, in line with the move towards a more flexible and purposive sanction system, possibly sanctions which give a power for an EA or local authority officer to enter onto private land to inspect the assets in question would address the mischief without the need to commence lengthy criminal proceedings.

30. Should county and unitary local authorities be legally required to produce annual reports on the way that they are managing local flood risk? Should this requirement be annual?

58 It is not clear what the purpose of such an annual report is, and to whom it is to be issued. An annual report to the RFCC for presumably peer review would seem to take away resources and time away from the local authority which could be better spent on taking the actions required. A report prepared for the local electorate may improve democratic accountability, but again the question of appropriate application of limited resources needs to be considered.

59 Whether an annual report is for peer review or accountability purposes, we have doubts as to whether annual reports from a multiplicity of authorities would be of value or a useful application of local authority resources. The EA could provide annual reports of the actions taken by local authorities in accordance with its national strategy, preferably on a RBMP or sub-catchment basis (or a living register of actions taken further to the national strategy).

33. Should Regional Flood and Coastal Committees (or another body) be involved in peer reviewing any annual reports produced by local authorities?

60 Although we can see the reason for this, this may be quite a large administrative burden. Some form of supervisory role may be appropriate but the focus of the RFCC should be on providing advice to the EA. Also, the purpose of the annual reports needs to be clear (see Q.30)

34. Should district local authorities and IDBs continue to manage flood risk from ordinary watercourses, taking account of Local and National Strategies?

61 IDB's will need to continue to manage flood risk within their areas within a flood risk management plan set by the operating authority, which should be the EA. Mechanisms are required to be put in place under which actions of the IDB's which incur cost which would not otherwise be incurred are reimbursed. This could be done by the IDB's being constituted agents for the EA in relation to specific actions directed by the EA.

35. Should county and unitary local authorities have powers, concurrent with district local authorities and IDBs, to manage flood risk from ordinary watercourses in their areas? Or should they remain able to act only in default?

62 Given that the EA has emergency action capabilities, and can call local authorities in aid on an agency basis or otherwise, concurrent powers appear unnecessary.

2.5 Duty to cooperate and share information

40. As agreed in the Government response to Sir Michael Pitt's Review, there will be a duty on relevant organisations to cooperate and share information. Do you think the list of relevant authorities to whom this applies is comprehensive?

63 In some instances the EA may require information regarding planning applications in order to fulfill its role (see the DCLG review of the effectiveness of PPS 25 (June 2009), which notes inter alia that LPAs are failing to notify the EA of decided applications, as PPS 25 recommends.) The types of information to be provided under this duty of co-operation could be set out, in a similar way to examples of "risk management" at clause 7(3).

41. Should the EA and county and unitary local authorities be able to specify the format and standards for information to be shared between organisations?

64 We believe that standard formats and standards should be set. To be effective, the standard formats and standards should be set by the EA as the strategic authority, so that all formats and standards are then consistent with the EA's and the EA's support software.

2.6 Sustainable Drainage Systems

45. Does the process for adoption and connection described here provide a clear and workable approach for developers, local authorities and water and sewerage companies? Do you have any suggestions which would make the process simpler, speedier or lower cost?

65 Clause 224 make no provisions for appeals against a refusal of approval and we believe that some form of appeal should be included. However, an appeal to the Secretary of State (as in a refusal of planning permission) may not be proportionate to the aim being achieved and an unconditional right of appeal may tie up the system.

66 If there is a need for a SUDS in a new development, possibly this being required by way of condition in a planning permission may make the process simpler, rather than a new form of consent over and above the planning permission.

46. Are there examples where a communal SUDS should not be adopted by the SAB?

67 We believe that communal SUDS should be adopted by the highway authority (where highway water is included), otherwise the district or unitary authority. Maintenance should be carried out on behalf of the SAB or to the satisfaction of the SAB. In relation to routine local maintenance, a regime could be set by the SAB as a condition of its approval in the first instance. Where there is an appropriate private sector mechanism, e.g. estate management, then SUDs maintenance by the private sector would appear to be acceptable.

49. What is the appropriate balance to enable good SUDS designs that work with the lie of the land, can discharge to watercourse, and can be accessed for maintenance and inspection, whilst protecting the rights of landowners?

68 A similar mechanism as required under Schedule 6 of the 2000 PPC Regulations could be implemented.

50. How wide should the SABs' ability to delegate be?

69 We suggest the SAB has the power to delegate all powers in relation to SUDs, other than approval.

51. Are additional enforcement powers needed – in particular, should the SAB have an independent power to enforce the approved SUDS? How would this work?

70 Conditions on SUDs approval could be made to be enforceable by the SAB, in the same ways as planning conditions or conditions on PPC permits can be enforced.

52. Views are welcomed on how best to ensure the maintenance of private SUDS, and ensure that they are not redeveloped.

71 The conditions on SUDs should bind successors in title. Any cut-off period for enforcement should be carefully considered.

53. Is there any legal impediment to prevent a SAB from adopting an existing SUDS?

72 Where existing SUDs have not been maintained to the appropriate level, the SAB should be granted powers to require the SUDs to be upgraded to the appropriate level and enable conditions to be imposed upon them, prior to adoption.

2.7 Regional Flood Defence Committees

56. Should RFCC status be predominantly advisory rather than executive?

73 Granting executive functions to the RFCC would help overcome any democratic deficit argument against the EA being made the sole FCERM authority.

58. Do you agree that the membership of RFCCs should be appointed as outlined above in future? If not, do you have any other proposals?

74 The RFCC should have as full a democratic representation as is consistent with the technical expertise requirements of membership.

59. Should RFCCs' levy-consenting powers be extended to coastal erosion issues?

75 We believe this is appropriate and logical.

2.8 EU Floods Directive

Introductory points

76 We regret that there is no possibility that transposition will be achieved by the 26 November 2009 Directive deadline.

77 We also note the draft Bill takes the unusual step of transposing a Directive through primary legislation, rather than through regulations under section 2(2) European Communities Act. It leaves important matters of detail to secondary legislation. If, as we think may well be the case, Defra decides to transpose through section 2(2) regulations, we would like to see, as far as possible, all aspects of transposition dealt with in a single statutory instrument. This would give consultees a complete picture of proposals to comment on in one go (avoiding the need for several consultations), and make the legislation more user-friendly and simple.

78 See also our comments above at Part 1 on the relationship between these provisions and the provisions for the national/local strategies.

61. Should flooding from sewerage systems caused solely by system failure be excluded from transposition of the Floods Directive? If not, how might such flooding be integrated?

79 We are not clear as to the logic behind excluding system failure of sewage systems as this involves the management of water flows. We see no basis for stating that this is de minimis.

62. Should the EA and county and unitary local authorities assume responsibility for implementing the Floods Directive, with the EA focusing on national mapping and planning and local authorities having specific responsibilities in relation to local flood risk? If not, what other arrangements would you suggest?

80 We consider that the division of responsibilities proposed is problematic for the reasons given in our introductory comments at Part 1 of this response. We would suggest that the EA is made the sole competent authority, thereby better enabling a coherent, river basin district wide approach.

81 An additional reason is that making the EA the sole competent authority ought to ensure better coordination with implementation of the Water Framework Directive (WFD), something that is required under Art 9 and facilitated through both Directives having the same implementation time-table. Flood risk management plans (and the prior, preparatory documents) could be prepared as part of the same exercise as preparation of river basin management plans (and the prior documents), and stakeholder meetings and consultations could consider both matters together where appropriate. This ought to enable better consideration of the interdependencies and overlaps, and avoid duplication of effort.

82 Under the draft Bill, to some extent the two processes run in parallel, rather than running together, with lead local authorities working on their flood risk management plans (FRMPs) whilst the EA work on their FRMPs and Water Framework Directive river basin management plans (RBMPs). Little time is allowed for consideration of the interrelationships between local authority FRMPs and EA FRMPs and RBMPs. Lead local authorities submit flood risk management plans (FRMPs) to the EA in June 2015 for publication in December 2015. By December 2015 the EA also has to publish its FRMPs, so there is only a 6 month window for these documents to be finalized taking into account all the interrelationships. There is an even shorter window of 3 months for the EA to review the interrelationships between local authority FRMPs and the EA's RBMPs, which must be submitted to the Secretary of State for approval by 22 September. This seems to us far too tight, given that during that three month period the EA must also review consultation response on the draft RBMPs.

63. Should county and unitary local authorities be responsible for delivering PFRAs for local flood risk as described above? If not, who should be responsible?

83 We consider that the EA should be responsible, as sole competent authority.

64. Is this framework a suitable approach for determining 'significant risk' or are there alternative approaches to consider?

84 We are doubtful whether guidance from EA to local authorities will achieve consistency in all cases. It would be simpler and more efficient if the EA made the determination as it does at present through the flood plain maps and non-statutory information.

65. Should county and unitary local authorities be responsible for determining significant local flood risk (ordinary watercourses, surface water and groundwater)? If not, who should be responsible?

85 We consider that the EA should be responsible.

66. Should the proposed selection of 'significant risk' areas by local authorities be moderated along the lines of the arrangements set out above?

86 With the EA determining itself, no moderation would be required.

69. Should the arrangements for FRMPs be as set out above? If not, what alternative arrangements do you suggest?

87 No. We support the production of coherent FRMPs by the EA, rather than reliance on a range of plans by a range of authorities that would need to be co-ordinated to ensure consistency.

70. Do you agree with the co-ordination arrangements set out above? If not, what alternative arrangements do you suggest?

88 See our answer to question 62 on time frames and running FD implementation together with WFD implementation rather than in parallel.

71. Should the first cycle PFRA be brought forward one year, as proposed above, to enable mapping to take up to two years in common with the rest of the mapping and planning cycle?

89 Yes.

72. Do you agree with the other proposals set out above for reporting and review? If not, what alternative arrangements do you suggest?

90 See our response to questions 62 and 70.

2.9 Water Framework Directive

73. Do you agree that the duty to act in accordance with WFD requirements should apply equally to all FCERM authorities?

91 Yes.

74. Do you think this approach provides a satisfactory mechanism for ensuring that the relevant bodies deliver the requirements of the WFD?

92 We would like to see a stronger and clearer duty on flood risk management authorities to secure the requirements of the Water Framework Directive. Such a duty applies now to the Environment Agency in the exercise of all of its functions so a corresponding duty should be imposed on the other operating authorities.

93 We also suggest that the Bill should make clear that any works and consenting powers of flood risk management authorities can be exercised and include any reasonable conditions in order to deliver Water Framework Directive requirements.

2.10 Third Party Assets

75. Should we introduce a system of third party asset identification and designation, as set out above?

94 The proposals appear to be a sensible approach in theory but their practical application is not addressed in the Bill itself and is presumably to be dealt with in subsequent statutory instruments. For example, what provisions will be introduced to compensate landowners for the restrictions placed on their property? How will such compensation be calculated? What process will be introduced for landowners to challenge a designation and refer the proposed designation to independent review before it is confirmed? Provisions covering all these matters would be important to ensure compliance of this procedure with the human rights of affected parties.

95 It should also be clarified that this power is only to apply to existing buildings, structures and features and nothing in this power gives authorities the power to enter land and construct new buildings, structures or features. Powers elsewhere in legislation must be used for such entry.

96 It is suggested that structures of critical importance in relation to flooding might be dealt with in a similar way to the process for Listed Buildings, whereby restrictions could be placed on development and private rights (subject to safeguards mentioned above). This would prevent the hasty removal of relevant structures. The notice provisions would only affect the use of land and, therefore, should be human rights compliant.

76. Is there a case for greater powers on third party assets than we have suggested?

97 Please see response to no. 78.

77. Are there assets that are not 'structures or natural/man-made features' that should also be

designated?

98 It is possible that ground, which could not be described as a "feature", could also be important in flood management, but, where this is so, it would be extremely difficult to identify precisely how much of it was relevant. There is also the theoretical possibility that anthropogenic causes then result in natural processes, and the combined product could not be described as neither a structure, a natural feature or a man-made feature, so perhaps "natural/man-made" could be dropped.

78. Should there be a duty on those responsible for third party assets in England and Wales to maintain them in a good condition?

99 The practical implications of this need to be well thought out, in particular the interference this has upon private interests and also who is to define what is the reasonable condition in which the asset should be maintained? Perhaps there could be power provided for the state to maintain third party assets at their expense. If the landowner has no further use of the asset, the state could be required to take responsibility for all future maintenance, comparable to a purchase notice.

2.11 Consenting and enforcement

79. Should regulation of the ordinary watercourse network (where there are no IDBs) transfer to county and unitary authorities? Or should this role in future sit with the district and unitary authorities?

100 In our view this should go to the Environment Agency. It is felt that the removal of EA consent to local authority operations is a significant retrograde step.

80. Should it be possible to make consents subject to reasonable conditions?

101 Yes.

2.12 Reservoir safety: questions 81-88

102 We generally support these proposals.

103 It should be possible to set a series of criteria and if a reservoir exceeds one, then it comes into high risk. It may also be necessary to have general discretion to exempt from/bring back into full regulatory requirements.

104 We favour the idea of insurance. In relation to non-regulated reservoirs, there should be a registration requirement and an insurance condition to be regularly evidenced to the registration authority.

3.1 Possible reforms to the role and governance of Internal Drainage Boards: questions 89-106

105 See our introductory comments at Part 1.

3.2 Current funding structure: questions 108-115

115. What additional steps or measures could be taken to make sure developers in England and Wales contribute towards the pressures new developments place on future local and central government budgets?

106 We consider that section 106 of the Town and Country Planning Act should be modified to enable the Environment Agency to become a party to section 106 agreements and to receive and enforce the benefits of planning obligations under section 106 where these contain obligations relating to flood defences for which the Environment Agency is responsible. This would enable the Agency to receive planning gain contributions directly and to directly enforce section 106 obligations where they concern sums of money or obligations for flood defences which the Agency has provided or will provide.

3.3 Reducing property owners' and occupiers' impact upon local flood risk: question 116-140

Question 116

107 This is a problem because the legal definition of a watercourse is so wide. Environmental searches will report on flood risk information provided by the Environment Agency, so that is probably the best way to convey the information to purchasers.

Question 119

108 The premise appears to be that statutory nuisance does not apply to flooding caused by restrictions on flow. This premise may be false. Section 259(1)(b) of the Public Health Act 1936 applies when the watercourse is "choked". It actually derives from specific adoptive legislation from 1875 and before, which is specifically directed at flooding. The perception that it refers to stagnant waters is wrong.

109 'Choked' as interpreted by Hodge J in R (Robinson) v Torridge District Council includes the restriction on flow caused by a highway authority bridge. In fact the appeal by Devon County Council against the abatement notice referred to in that case was rejected by magistrates and no appeal has been made by the council.

Question 129

110 For the reasons set out at 119 we query whether the premise is accurate. It is already a statutory nuisance for a watercourse to be so affected.

Question 130

111 The power is with environmental health authorities already. The question is whether it is moved. We are of the view that it should stay where it stands. The EHOs will consult with EA anyway, and any works (if not specified after consultation with EA) will require EA licensing.

Question 131

112 Such a new statutory nuisance for run-off risk would be valuable. It could effectively require retrofit of SUDs.

Question 135

113 The cost should fall on the owner. In default of the owner carrying out the work the local authority can execute it and place a charge on the property.

Question 138

114 This would be highly desirable. This type of restriction would also be beneficial in the context of the Water Framework Directive, and is consistent with enforcing good practice in the Codes in any event.

3.4 Single Unifying Act

115 As commented in answer to question 4, we welcome the proposal for a Single Unifying Act. Ideally, we would hope that this is implemented in the present Bill.

141. Do you agree that any proposed changes to the existing legislation, not contained in the draft Bill or covered elsewhere in this consultation document, should be discussed directly with relevant organisations in England and Wales so that changes might be introduced in the resulting legislation, without the need for further general consultation?

116 Yes, where possible.

142. If so, are there any particular or general issues on which you would want to be involved in this way?

117 Hopefully it is clear from our responses, above, with which issues we would wish to be involved.

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