



## **UKELA's response to Defra's December 2011 consultation on the Implementation of the Sustainable Drainage Systems provisions in Schedule 3 to the Flood and Water Management Act 2010**

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 advice to government 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 makes the following comments on the proposals.

### **General observations**

4. UKELA notes a lack of ambition for SuDS in the consultation proposals compared to the aspirations in the April 2009 consultation on the draft Flood and Water Management Bill. This is concerning because of the urgency of what is at stake. As the present consultation document notes, surface water flooding is a serious problem, as are the damaging effects of diffuse pollution. This is expected to increase due to climate change. Further, failure adequately to deal with these problems could result in breaches of European

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law requirements (including obligations under the Water Framework Directive, Habitats and Birds Directives), and consequent infraction risks.

5. This lack of ambition is apparent in particular in:
  - a. the proposed phased approach. This would confine SAB approval to large major and major size developments for the first three years. There was no suggestion of this in the April 2009 consultation. Rather, it envisaged addressing matters of scale in the National Standards (paragraph 178).
  - b. the proposal to exempt development under a Neighbourhood Development Order. This would exempt a further 5% of new developments from the SAB approval requirement.
  - c. the draft National Standards. These enable SAB approval for drainage systems that fail to meet SuDS design standards where this is not reasonably practicable or cost-effective, or is more expensive than conventional drainage.
6. We would expect this lack of ambition to restrict significantly the benefits of the SAB approval regime.
7. The economic evidence in the Impact Assessment suggests that the phased approach is less beneficial than applying the SAB requirement to all large major, major and minor size developments from the outset.
8. As lawyers whose clients include property developers, we would expect most developers will seek to avoid providing SuDS on the basis that it is not 'reasonably practicable' or 'cost-effective', or that it would be more expensive than providing conventional drainage. We are not clear whether the Impact

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Assessment has taken into account this aspect of the draft National Standards. Without realistic assumptions about the extent to which developers will seek to rely on these matters, the Impact Assessment is likely to have overestimated significantly the net benefits of the proposals. If developers successfully avoid providing SuDS then clearly take-up will be low as will be the associated benefits. Whether or not they succeed, arguments about reasonable practicability, cost-effectiveness and relative expense will add to costs both of developers (gathering evidence and making out their case) and SABs (considering the arguments). If, as we would expect, these issues are appealed, this will further add to costs. These consequences seem entirely counterproductive.

### **Comments on particular consultation questions**

9. We offer here comments on a few specific consultation questions, which relate to our key concerns set out above. In general, we agree with the proposed approach to determination of applications and appeals process (questions 8-29).

**Question 1:** we have based our proposals on the evidence, outlined in our Impact Assessment, of the impact of surface runoff on future development and the benefits of SuDS. Do you have any additional evidence that may alter the recommendations of the Impact Assessment?

10. See paragraph 8, above. We are unclear whether the Impact Assessment has taken into account the likelihood that most property developers will seek to avoid providing SuDS on the basis that it is not 'reasonably practicable' or 'cost-effective', or that it would be more expensive than providing conventional drainage.

**Question 2:** we propose that SAB approval will not be required for the first 12 months for: developments that already granted planning permission before

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commencement; or developments with one or more reserve matters where an application for approval of the reserve matter(s) is made; or a valid planning application that was submitted before commencement. Do you agree with this approach for transitional arrangements, if not please explain why?

11. These transitional arrangements seem fair.

**Question 3:** we propose implementing on the common commencement date of 1 October 2012; do you agree this is reasonable? If not would you prefer an implementation date of April 2013, October 2013 or after 2013?

12. We agree this is reasonable, given that developers have been aware of the SUDS requirement for some time.

**Question 4:** we understand that there may be capacity issues for SABs to meet their new duty to approve drainage. We are therefore considering whether to phase implementation of the requirement for approval. Do you think a phased approach is necessary?

13. We are not in a position to comment about the capability of SABs to meet their new duties. But we are concerned by the lack of ambition inherent in taking a phased approach: see comments above, paragraph 4-7.

**Question 5:** do you agree that development under a Neighbourhood Development Order should be exempt from the requirement of SAB approval?

14. We can see no good reason in the consultation document for exempting this kind of development. It seems to suggest that SuDS will be promoted effectively in any event through the planning system and (non-mandatory) National Standards. Yet past experience of reliance on planning policies is that SuDS are seldom incorporated in new developments (April 2009 consultation document, paragraph 166). We doubt that the National Planning Policy Framework presumption in favour of sustainable development will change things, given the emphasis on growth in the draft version (see our comments on that document in our October 2011 response to the DCLG consultation, available at [www.ukela.org/psdwp](http://www.ukela.org/psdwp)).

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**Question 7:** affordable sustainable drainage systems for surface runoff are comparable in costs with conventional alternatives. Do you agree?

15. We are not in a position to respond yes or no. But clearly if SuDS are not comparable in cost with conventional alternatives, or are more expensive, then the principle on affordability in paragraph 2.3 of the draft National Standards will seriously undermine the scope for SAB approval to deliver new developments with sustainable drainage. See further our comments above at paragraph 8.

**Question 9:** do you think guidance for calculating the amount required for a non-performance bond is necessary?

16. Yes, as a matter of fairness, transparency and certainty.

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