



House of Commons  
Environment, Food and Rural  
Affairs Committee

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# The Draft Flood and Water Management Bill

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**Sixth Report of Session 2008–09**

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## Environment, Food and Rural Affairs Committee

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## Summary

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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 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.

Given the limited Parliamentary time available before the next general election, we question whether such a lengthy Bill could reach the statute book in this Parliament. We are aware of the ground clearing work which the Environment Agency are already carrying out to start the development of flood and surface water management strategies. They report good progress with this work. With this in mind we conclude that there is therefore no need rush a piecemeal Bill through the House when there is a risk of losing the opportunity to introduce a truly comprehensive water management Bill. The uncertainty about the fate of the Bill affects the ability of stakeholders to plan and allocate resources.

The unlikelihood that a comprehensive Bill can be completed in the available time does present the Department with the opportunity to consolidate its thinking and consultation so as to present a comprehensive sustainable water management Bill in the next Parliament. That delay would give the Department an opportunity to further develop and refine the contents of the Bill.

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.

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 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.

# 1 Introduction

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1. In May 2008, the Government announced its intention to publish a draft Floods and Water Bill for consultation during the next Session.<sup>1</sup> On 21 April 2009, the Department for Environment, Food and Rural Affairs (Defra) published a document containing a draft Flood and Water Management Bill for England and Wales and an associated consultation document.<sup>2</sup> Both the consultation document and the draft Bill are divided into “flood” issues and “water” issues. We announced our inquiry on the day the draft Bill was published. We invited submissions on the following areas:

- whether the powers in the draft Bill are sufficient to enable full implementation of the Pitt Review recommendations;
- whether the draft Bill achieves the right balance between protecting the environment and protecting homes and businesses from flooding;
- whether the draft Bill’s proposals are necessary, workable, efficient and clear;
- whether there are any omissions in the draft Bill;
- whether the proposed institutional framework is appropriate and sufficient for the enforcement of measures contained in the draft Bill;
- whether the right balance had been struck between what had been included on the face of the draft Bill, and what was to go into Regulations and the Code of Practices;
- the likely financial and resource implications of the draft Bill;
- had the Government analysed the effects of the draft bill adequately, and had it taken sufficient account of consultation?<sup>3</sup>

2. There is limited value in simply restating all the concerns raised in the written evidence, which is published with this report. We have commented only on areas where we can best add value to that evidence. We urge Defra carefully to consider all the written and oral evidence received, in addition to considering and responding to the conclusions and recommendations of this report.

3. We held an informal private briefing with Defra officials, and took oral evidence from Anna Walker, chair of the independent review of household charging for water and sewerage services;<sup>4</sup> Professor Martin Cave, chair of the independent review of competition

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1 Office of the Leader of the House of Commons, *The Government’s Draft Legislative Programme 2008–09*, May 2008, Cm 7372, page 13.

2 HC Deb, 21 April 2009, col 5WS; *Draft Flood and Water Management Bill*, Cm 7582, April 2009. The document also included explanatory notes for the draft clauses and a summary Impact Assessment. The document was accompanied by four “factsheets”, a memorandum by Defra for the House of Lords Delegated Powers and Regulatory Reform Committee and 18 impact assessments. In this report the consultative parts of the document are referred to as the consultation document and references to the provisions in the draft clauses are referred to as the draft Bill.

3 See Environment, Food and Rural Affairs Committee press notice, Session 2008–09, 21 April 2009.

4 Accompanied by Mrs Sue Ellis, Head of Secretariat of the review.

and innovation in water markets;<sup>5</sup> the Consumer Council for Water; the National Flood Forum; the Environment Agency; Ofwat; water companies;<sup>6</sup> local authorities<sup>7</sup> and the Department.<sup>8</sup> In February, prior to the publication of the draft Bill, we held an evidence session with Sir Michael Pitt, Chair of the “Learning Lessons from the 2007 Floods Review”, on the Government’s response to his report,<sup>9</sup> and held an informal private briefing with the Environment Agency. We are very grateful to all those who helped us with our inquiry.

4. In addition to our pre-legislative inquiry on the draft Bill, we have also conducted a related, but separate, inquiry into the Ofwat price review 2009. Some of the evidence for that inquiry is also relevant to the draft Bill and is referred to in this report.<sup>10</sup>

## 2 Overview of the Bill

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5. The draft Bill and associated consultation document are both divided into ‘flood’ and ‘water’ sections. The Department is consulting both on the policy behind the clauses already drafted and policy proposals discussed in the consultation document but not set out in draft clauses.

### Implementation of the Pitt Review’s recommendations

6. The majority of the draft Bill’s provisions relate to flood and coastal erosion management and associated issues. The principal impetus for new flood legislation was the summer 2007 floods and their aftermath. 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.<sup>11</sup> Several reports into the floods have been published, including those by Ofwat, Gloucestershire County Council and Hull City Council.<sup>12</sup> In August 2007, the Government asked Sir Michael Pitt to conduct an independent review of the flooding. Sir Michael’s final report, containing 92 recommendations, was published in June 2008. In December 2008,

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5 Accompanied by Mr Alex Skinner, Head of Secretariat of the review.

6 Mr Jonathan Hodgkin, Director of Regulation and Investment, Yorkshire Water, Dr Tony Ballance, Director of Regulatory Finance, Severn Trent Water, Mr Peter Antolik, Strategy and Regulation Director, Thames Water, and Mr Richard Aylard, Director, Thames Water.

7 Mr Peter Jones, Deputy Chief Executive, Gloucestershire County Council, Mr Mark Parker, Head of Flood Risk, Gloucestershire County Council, Professor Carolyn Roberts, Professor of Environmental Sciences, University of Gloucestershire, Mr David Gibson, Assistant Chief Executive, Hull City Council, Councillor Andy Smith, Suffolk Coastal District Council and Mr Jeremy Schofield, Strategic Director, Suffolk Coastal District Council.

8 Huw Irranca-Davies MP, Minister for the Natural and Marine Environment, Wildlife and Rural Affairs, Mr Martin Hurst, Director of Water, and Mr Simon Hewitt, Divisional Manager, Flood and Water Legislation, Department for Environment, Food and Rural Affairs,

9 HC 245-i

10 Environment, Food and Rural Affairs Committee, Fifth Report of Session 2008–09, *Ofwat Price Review 2009*, HC 554.

11 Sir Michael Pitt, *Learning Lessons from the 2007 floods*, June 2008, p 3. This report is subsequently referred to as “The Pitt Review”.

12 For a summary of the other main reports produced on the summer 2007 floods see *2007 Summer Floods—Reports and Action*, Standard Note SN/SC/4608, House of Commons Library, February 2008.

the Government published its response to the Pitt Review, in which it accepted all 92 recommendations.<sup>13</sup> We published our report into the summer floods in May 2008.<sup>14</sup>

7. In February 2009, we held an evidence session with Sir Michael Pitt to discuss the Government's response to his review and the implementation of his recommendations. Sir Michael was "extremely pleased" that all of his recommendations had been accepted.<sup>15</sup> The most significant legislative change he wished to see was clarification of the roles of the Environment Agency and local authorities.<sup>16</sup> He noted that "a great deal can be achieved under existing arrangements", and that much that would become statutory duties under the legislation had already been instigated voluntarily. For example, Hull City Council told us that they were "getting on with" coordinating local action, citing their multi-agency flood forum and strategic drainage partnership which was already "trying to inform future investment planning".<sup>17</sup> Nevertheless, Sir Michael emphasised that his Review could "not be fully implemented until such time as that legislation is approved and gets Royal Assent".<sup>18</sup>

8. Defra provided us with a diagram illustrating some of the complexity of the current flood and water legislation and how the Bill relates to it.<sup>19</sup> One of Sir Michael's main recommendations was that "forthcoming flooding legislation should be a single unifying Act".<sup>20</sup> The Government's response supported that recommendation but noted that consolidating the existing legislation, much of which is spread across four main Acts "may not be possible".<sup>21</sup> The consultation document notes that although the draft provisions do not include consolidation provisions, Defra "intend carrying on work with a view to identifying the changes that are necessary to create a single unifying Act" with a view to the final Bill providing further consolidation provisions.<sup>22</sup>

**9. The draft Bill addresses 16 of the Pitt review's recommendations that require legislation but falls short of providing a Bill which also consolidates our principal water Acts. We recommend that Defra continue working to produce the comprehensive legislation that the Government has agreed is highly desirable, even if this delays the Bill until the next Parliament.**

## Water management and climate change predictions

10. The consultation document and draft Bill's 'water' sections cover a range of topics including regulation of the water industry and sustainable water management. The

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13 Department for Environment, Food and Rural Affairs, *The Government's Response to Sir Michael Pitt's Review of the Summer 2007 Floods*, December 2008.

14 Environment, Food and Rural Affairs Committee, Fifth Report of Session 2007–08, *Flooding*, HC 49-I

15 HC 245-i, Q 6

16 HC 245-I, Q 7

17 Q 229

18 HC 245-I, Q 8

19 The diagram is reproduced at Annex A

20 The Pitt Review, recommendation 28, p 139.

21 Defra, *The Government response to Sir Michael Pitt's Review of the summer 2007 floods*, December 2008, p 62.

22 Defra, *Government response to the Pitt Review*, pp 92–93.

consultation document invites views on significant water resource management policy proposals not included in the draft clauses such as the time limiting of abstraction licences. The Government set out its sustainable water policy in *Future Water*. That document noted the growing problem of water scarcity, particularly in south east England, which in 2004 suffered one of the most serious droughts in the last 100 years.<sup>23</sup>

11. On 18 June 2009, after we concluded our oral evidence, the Government published the climate change predictions for the UK up to the end of the century, modelling different scenarios depending on how far greenhouse gas emissions continue to rise.<sup>24</sup> These highlight the extent of changes, likely even under central estimates, in temperature and rainfall levels. Defra anticipates that all areas of the UK will get warmer, more so in the summer than in the winter, with, for example, increases of up to 4 degrees celsius in the south east by 2080. Summer precipitation is expected to decrease, for example by up to 23% in the south west, while winter rainfall will tend to increase across the UK, by up to 16% in the north west of England by 2080.<sup>25</sup> Furthermore there is an increased likelihood of more frequent extreme weather events, the intensity of which will challenge the ability of infrastructure and services to cope.<sup>26</sup> The Climate Change Act 2008 places requirements on Ministers and a range of bodies to develop long term adaptive strategies and these scenarios highlight the scale of the challenge for managing both surplus water in some seasons and water scarcity in others.

**12. The Bill has been drafted against the background that climate change will have an effect on both the availability of water and likelihood of more extreme weather events. We recommend that Defra work with the Environment Agency and the relevant bodies to ensure that the Bill's provisions properly reflect the recently updated climate change scenarios.**

### Potential further clauses on flood and water measures

13. The consultation document invites views on several additional policy areas that are not covered by the draft clauses but which could be included in the Bill when it is introduced into Parliament. Although the document invites views on specific questions the policies being consulted on are at various stages of development. Some, such as hydromorphology powers, are at an early stage of development.<sup>27</sup> Some, such as the implementation of the Cave and Walker reviews into competition in the water industry and household water and sewerage charges respectively, are not developed at all.<sup>28</sup> Nevertheless, the Minister for the Natural and Marine Environment, Wildlife and Rural Affairs, Huw Irranca-Davies, confirmed that some aspects of the Cave or Walker reviews could “feed into what we are

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23 HM Government, *Future Water; the Government's water strategy for England*, CM 7319, February 2008.

24 Defra, *Adapting to climate change: UK Climate Projections*, June 2009.

25 *Ibid*

26 *Ibid*

27 Defra, *Draft Flood and Water Management Bill*, Cm 7582, April 2009: consultation document, p 117.

27 Ev 103

28 Professor Cave's final report, *Independent Review of Competition and Innovation in Water Markets*, was published in April 2009. The interim report from the Walker Review, *The Independent Review of Charging for Household Water and Sewerage Services: Interim Report*, was published by Defra on 29 June 2009.

doing legislatively”.<sup>29</sup> Some of the proposals are half completed, such as the reform of Internal Drainage Boards (some additional powers are included in the Bill but further changes are being consulted on). Some of the policy proposals, such as on the time limiting of abstraction licences, are awaiting the conclusion of consultations. Defra described the consultation document as:

...structured in such a way that it makes a clear distinction between policy on which we have drafted clauses, and areas where wider consultation is needed as the policy is not so developed, or where policy will be determined later in the light of other consultations (time limiting abstraction licences) or reviews (Cave and Walker).<sup>30</sup>

14. The published draft Bill is weighty, with 265 clauses (and no schedules at present). Once further clauses are added to reflect views expressed during the consultation the Bill may run to more than 300 clauses. The draft legislative programme published on 29 June 2009 confirmed the Government’s intention to introduce the Bill in the final Session of the current Parliament.<sup>31</sup> There are unlikely to be more than a dozen sitting weeks for the legislation to be passed by both Houses of Parliament before the dissolution ahead of the next General Election.<sup>32</sup> Furthermore there are 10 other Bills competing for Parliamentary time.<sup>33</sup> This raises questions about the feasibility of a lengthy Bill completing all of its Parliamentary stages in time to pass into statute within the current Parliament.

15. In February 2009, Sir Michael Pitt told us that—while his preferred option was for a comprehensive bill, consolidating floods legislation—he would rather have a slimmed-down Bill than no Bill at all.<sup>34</sup> We asked several of our witnesses what, if it became necessary, would they wish to see in a slimmed-down bill. Naturally, different stakeholders have different views on what is the “core” of the legislation, and many also point out that much of what will be required statutorily under the Bill has already been voluntarily set in train. The Rt Hon Lord Smith of Finsbury, Chairman of the Environment Agency, said that the Agency’s priorities would be the specification of powers and duties for the Agency, local authorities and water companies on surface water flooding; and “clarity as to who is responsible for what and how it all works together”.<sup>35</sup> Lord Smith also confirmed that the Environment Agency would much prefer a complete and comprehensive Bill rather than taking a piecemeal approach.<sup>36</sup> Mr Richard Aylard, Director, Thames Water, giving evidence alongside representatives of Yorkshire Water and Severn Trent Water, put sustainable drainage, including removing the automatic right of connection, misconnections and regulations about water restrictions as his company’s main priorities

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29 HC 554-vi, Q 238

30 Ev 103

31 HC Deb, 29 June 2009, col 5W5.

32 The draft Flood and Water Management Bill is 104 pages long. For comparison, in the last Parliamentary Session, the 27 page Statute Law Repeals Bill [HL], had no amendments tabled and took five months to complete its Parliamentary stages. The more controversial, 67 page Climate Change Bill took 12 months and 12 days to complete its Parliamentary proceedings.

33 The Prime Minister by command of Her Majesty, *Budget 2009: Building Britain’s Future*, Cm 7654, June 2009.

34 HC 245-i, Q 12

35 Q 62

36 Q 63

for legislation.<sup>37</sup> Mr Aylard added that provisions relating to bad debt and removing the special merger provisions for the water industry should be in the legislation.<sup>38</sup> Equally, the majority of organisations' written evidence listed their priorities for the Bill.<sup>39</sup> There is an engaged and knowledgeable public which has high expectations that legislation will be introduced to solve the problems which led to the flooding of 2007 having such significant impacts.

**16. 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 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.**

**17. 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. However, if Defra finds it has no alternative but to introduce a slimmed-down bill, it should consult stakeholders as soon as possible on which provisions should be included.**

**18. The inevitable uncertainty caused by a 'work in progress' draft Bill could have an impact on Ofwat's final price review 2009 price determinations. We recommend that at the earliest opportunity (even during the remaining part of the Summer recess) Defra make clear its intentions. If it opts for a slimmed down Bill we recommend that rapid consultation with the Environment Agency and the industry about what must be in and what could be left out of the legislation. Our view remains 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.**

## **Territorial extent**

19. The consultation document describes the territorial extent of the legislation.<sup>40</sup> The Welsh Assembly Government was involved in the draft Bill's development.<sup>41</sup> Defra explained that the draft Bill is drafted "to implement new policy in England only, while maintaining the status quo in relation to Wales, pending Welsh Ministers' policy

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37 Q183

38 Q 183

39 For example, Ofwat (Ev 71), the National Farmers Union (Ev 135), Waterwise (Ev 154) Natural England (Ev 158).

40 Defra, *Draft Flood and Water Management Bill*, Cm 7582, April 2009, paras 41–45, Annex A.

41 Ev 119

decisions”.<sup>42</sup> Those decisions will be informed by a consultation on the provisions relating to Wales and policy areas where there is potential divergence between England and Wales.<sup>43</sup> The draft Bill does not extend to Scotland, which has recently enacted its own flooding legislation,<sup>44</sup> with the exception of a minor provision abolishing the Scottish Fisheries Committee.<sup>45</sup>

**20. The adoption of a river catchment based planning approach means that close cooperation will have to be achieved between legislative bodies both north and south of the boarder and in Wales. We recommend that, in light of the fact that each legislature has a different approach to water matters, Defra urgently assess how harmonisation of the measures can be achieved. Given the Welsh Assembly’s involvement in developing this draft Bill we believe that there is merit in the Welsh Affairs select committee examining their position on this matter at the earliest opportunity.**

## 3 Flood and Coastal Erosion Risk Management

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### Key concepts and definitions

21. Clauses 3 to 14 set out 17 definitions used in the draft Bill. Further definitions are provided within other provisions throughout the draft Bill, such as the definition of “sustainable drainage” in Clause 219. Although there is a long list of definitions, there is no definition of “strategy” or indication of what elements this must contain, despite the Environment Agency’s national flood and coastal erosion risk management strategy being arguably the principal element of the flooding parts of the draft Bill.

22. Clause 12 defines “lead local flood authority”. The effect of this provision is to establish the roles of local authorities. The Environment Agency is content that the draft provisions would provide sufficient clarity on the respective roles.<sup>46</sup> Local authorities broadly welcome the proposal for them to take a lead role but the Local Government Association warned that “this is a new role and will require additional capacity”.<sup>47</sup> The Association made a number of points about the need for coordination to be managed effectively, including agreement locally in two-tier areas on how the lead role and delivery of particular functions is to be undertaken.<sup>48</sup> It highlighted the need for effective partnerships and collaborative working,<sup>49</sup> but noted that “persuasion by and of local authorities is not a reliable lever” and could lead to inefficiencies.<sup>50</sup> The Regional Flood Defence Committees considered that the

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42 Ev 119

43 Ev 119

44 Flood Risk Management (Scotland) 2009, asp 6.

45 Clause 259.

46 Q 77

47 Ev 163

48 Ev 164

49 Ev 165

50 Ev 165

lead local authority role should “include an expectation that partnerships will be established”, with the Environment Agency taking responsibility via the Regional Flood and Coastal Committees (RFCCs) “as democratically based committees” for ensuring that “such partnerships are ‘fit for purpose’”.<sup>51</sup>

23. Councillor Smith of Suffolk Coastal District Council told us about the Blyth Estuary as an example of how local solutions could work. He told us that:

...we got together with the county council and the EA, really closely working with local landowners. The new money there is that the local landowners are now, under the EA’s guidance and consistent with all EA policies, building new river banks with topsoil from building sites which those guys would have to pay to go to landfill. The landowner ends up building the river banks on behalf of the EA and is being paid to do it by the people bringing the material. There are new ways of doing things if we can put ourselves in association with the local authorities, the EA, Natural England and the other main players in a situation where locally we can manipulate and evolve solutions to meet local circumstances within an overall EA funding stream, and use that mechanism amongst other things to be the route to the EA’s board, which at the end of the day might give you some of the money sometimes for some of the projects.<sup>52</sup>

**24. We recommend that Defra redraft Clause 12 to clarify the roles of the different tiers of local authorities and their responsibilities, while allowing the flexibility for pragmatic local solutions and partnerships. We further recommend that the Bill include an order making power, under which the Secretary of State may alter the tasks to be undertaken by local authorities, following full consultation with interested bodies.**

## National flood and coastal erosion risk management strategy

25. The Environment Agency will be required, under Clause 15, to develop a strategy for Flood and Coastal Erosion Risk Management in England. As noted above the term ‘strategy’ is not defined in the draft Bill; furthermore Natural England noted that the draft Bill “is silent on the approach and content of the proposed National Flood and Coastal Erosion Risk Management Strategy”.<sup>53</sup> Clause 15 does state that the FCERM strategy should “have regard” to the desirability of “minimising detrimental effects on the chemical, biological and other characteristics of water”. Lord Smith agreed that “the greater the degree of clarity from Government on [the National Strategy] the better”.<sup>54</sup> However, he appeared to be unconvinced that defining ‘strategy’ would “make whatever strategy is put in place better...”; although in the course of our exchanges he did provide some sense of what such a definition would need to encompass.<sup>55</sup> For example, he said that the Agency would “...produce the very best assessment of the current position, assessment of the likely

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51 Ev 183

52 Q 239

53 Ev 159

54 Q 70

55 Q 83, Qq 82–86

risks, assessment of the impact of climate change, assessment of the investment needs which we have identified and the long-term strategy to address those”.<sup>56</sup>

26. There are precedents for strategies or policy statements being defined in legislation, for example the provisions for Marine Policy Statements in Part 3 of the Marine and Coastal Access Bill, and Part 2 of the Planning Act 2008 contains provision for the Government to produce National Policy Statements. We note that Clause 18 provides for an order making power under which the Secretary of State may specify the content of a report on flood and coastal erosion risk management.

**27. Clarity on the form of the National Flood and Coastal Erosion Risk Management Strategy should be clearly provided on the face of the Bill; or through an order making power subject to the affirmative Parliamentary procedure. We further recommend that the Bill provides for the strategy being reported to Parliament.**

**28. We recommend that Defra publish now details of how the strategy will be prepared, scrutinised and how, and over what cycle, it will be reviewed.**

### Local authorities’ strategies

29. Clause 19 requires a lead local authority in England to develop and apply a local strategy consistent with the national strategy. Local authorities recognised the need for a “coherent overarching structure” but considered that the Bill fell short in “how it is subsequently delivered on the ground”.<sup>57</sup> Councillor Smith, Deputy Leader of Suffolk Coastal District Council, said that whereas in the past there was direct interaction between Defra and the local authority, now decisions were taken by the non-elected Environment Agency Board.<sup>58</sup> He argued that the Bill would “institutionalise [...] a situation where [there is a] disconnect between us and our electorate as to what needs to be done and what the pros and cons are and all the socio-economic effects of doing a scheme or not doing a scheme...”.<sup>59</sup> He told us that:

...there must be a better way to reinstate somehow a different governance model for the link between the EA’s decision-taking role at the top and ourselves as both the operating authority for erosion and the democratic and planning authority and all the rest of it, including for coastal flooding, to try and find a more flexible way which can be tailored locally to reinstate that link.<sup>60</sup>

Mr Peter Jones, Deputy Chief Executive of Gloucestershire County Council, referred to “a gap between where local accountability sits and strategic decisions are made”.<sup>61</sup>

30. Mr Jones set out the complexities of his council’s local geography which contained three regions of the Environment Agency, four water authorities, an Inland Drainage

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56 Q 83

57 Q 222

58 Q 222

59 Q 222

60 Q 222

61 Q 223

Board, and six district councils. He therefore considered it essential for there to be a mechanism sufficiently flexible to reflect local differences, for example a joint management board.<sup>62</sup> He said that the council wished to see a “point of contact” where local communities can influence decisions.

31. Several organisations expressed reservations about the use of administrative boundaries. The Local Government Flood Forum said that the Bill would not be workable if it “omits the issue of geographic and administrative boundaries”.<sup>63</sup> The Natural Environment Research Council (NERC) considered that the emphasis on catchment areas in the flooding aspects of the Bill was “certainly in the spirit of the Pitt review” and catchment scale approaches made it easier to “apply hydrological and ecological science” to protecting river ecosystems.<sup>64</sup> The National Farmers’ Union also supported catchment scale management and said it was “still not clear how the Government is going to join things up across local authorities’ boundaries”.<sup>65</sup> The Regional Flood Defence Committees believed that the administrative framework would introduce a “big practical gap” with well over 100 local authorities and a single national agency.<sup>66</sup>

32. Councillor Andy Smith, Deputy Leader of Suffolk Coastal District Council, differentiated between local authorities that were principally concerned with flooding and councils, such as Suffolk Coastal, that were concerned with coastal erosion. He described flooding as “traumatic” but temporary, whereas coastal erosion was “terminal”.<sup>67</sup> Lord Smith explained that managed realignment (or managed retreat), whereby an area that was not previously exposed to flooding by the sea is allowed to flood by removal of coastal protection, was not a preferred option but was necessary in some instances. He added that it needed:

...to be looked at in detail in each specific instance together with local communities which may be affected. These are not decisions just for us alone, these are decisions which have to be taken together with the people in communities that might be affected and that is a point which we have been making very strongly to Government.<sup>68</sup>

33. Councillor Smith noted that ‘managed retreat’ could refer either to positive circumstances where land is flooded for ecological and other purposes, or to circumstances where budgets “cannot fund anything”. He urged that “irreversible long term decisions” should not be taken “based on short term funding issues”.<sup>69</sup>

34. A challenge for Defra is reconciling the Bill’s aim of clarity in assigning responsibilities with the flexibility to enable locally appropriate solutions to be implemented. It was clear to

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62 Q 223

63 Ev 130

64 Ev 169

65 Ev 135

66 Ev 183

67 Q 262

68 Q 72

69 Q 258

us during our inquiry into the 2007 floods that local authorities were well placed to lead on local flood and coastal erosion risk management. Local authorities' existing responsibilities, such as for highways and planning, touch on a wide range of activities associated with flooding. Furthermore, local authorities are democratically accountable. In our *Flooding* report we noted that while local authorities frequently had the experience and local knowledge, they lacked the powers to ensure cooperation and compliance.<sup>70</sup> That deficiency has been addressed in the draft Bill. **We are concerned that the draft Bill establishes a rigid vertical structure, which potentially precludes pragmatic cross-boundary area-based approaches that accommodate local people's views and knowledge. We are concerned that local people do not have a seat at the table and the Bill's proposals will dilute the ability of an articulate community to influence decision making.**

35. Clause 16 requires that the Environment Agency publish its national strategy. Similarly, Clause 20 requires a summary of each local strategy to be published. Clause 20 states that the summary can include information about arrangements made for coordinating with others. Ofwat expressed concern that:

...the proposal that the national and local flood risk management strategies will not be in the public domain (because the Environment Agency and local authorities only have a duty to publish summaries of the strategies). The Environment Agency and local authorities also appear to have no duty to consult those who might be affected when devising strategies.<sup>71</sup>

36. The Minister pointed to the fact that the Environment Agency's strategy would not necessarily be one document, but is highly likely to be a "series of documents, policy statements, guidance notes, maps, plans etc".<sup>72</sup>

**37. Subject to any concerns on national security grounds, the national flood risk management strategy should be published in full to guide the many organisations and bodies who will need to refer to it. Similarly we see no reason for local authority plans not to be published.**

38. Clause 22 requires a "relevant authority", when exercising its flood and coastal risk management functions, to "act in a manner which is consistent with the Environment Agency and local authority strategies and the guidance issued in relation to those strategies". Clause 23 requires a wide range of bodies as specified in subsection (2) to act in the exercise of any of its functions that may affect flood or coastal erosion risk to have regard to the national and local strategies and any associated guidance provided under Clauses 17 and 21.

39. Ofwat argue that Clause 22 could enable the Environment Agency and local authorities to impose obligations on water companies, which could have consequential affect on customers' bills. The regulator expressed concern that "there is no clear mechanism for testing and ensuring that the costs of any obligations these provisions create would be

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70 Environment, Food and Rural Affairs Committee, Fifth Report of Session 2007–08, *Flooding*, HC 49-I.

71 Ev 75

72 Q 313

justified by the benefits, or for accountability on the part of local authorities in this context”.<sup>73</sup> Ms Regina Finn, Chief Executive of Ofwat, said that “we think there is an opportunity to work to make this part of the Bill work quite a bit better and ensure that those people who take decisions understand the cost implications and there is accountability and responsibility better balanced”.<sup>74</sup>

**40. The provisions in Clause 22 provide the Environment Agency and local authorities with a broad power over potentially a wide range of public bodies and private individuals. 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.**

### Conclusions

41. We are concerned that the Bill lessens democratic input into policy making by both ceding power from the Secretary of State to the Environment Agency, a non-elected body, and weakening the roles of local politicians. The draft Bill comes down on the side of centralising power at the expense of local democratic engagement. There appears to be no requirement for the Environment Agency to consult on the content of its strategy. Local strategies will be subject to democratic accountability but the Bill does not provide for scrutiny of the national strategy or provide for the Environment Agency to be accountable for its content. Flood risk management directly impacts upon spatial planning for the 16% or so of the country which is at risk of flooding, and the remaining part of the country which generates the run-off that results in flooding. Flood risk management is part of the spatial planning process. Local authorities could usefully build on the experience and innovations of councils such as Suffolk Coastal District Council who have demonstrated how this objective can be achieved.

**42. 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.**

### Cooperation

43. Clauses 24 to 30 require a long list of bodies, and potentially individuals, to cooperate with one another in relation to flood and coastal erosion risk management, including sharing information and delegation of functions. There is an inherent tension in ordering people to cooperate; to get effective cooperation it is first necessary to establish trust. The underlying conceptual basis of the over centralising approach is that optimum flood risk management can be achieved by experts applying objective criteria to determine what

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73 Ev 75

74 Q 205

needs to be done and then giving them the powers to do it. However there will be circumstances where value judgements must be made and this requires a collaborative, consultative approach and clarity over the basis on which decisions are being made.

44. The water industry and the regulator expressed some concerns about the safeguards surrounding the requirements to share data. Water UK explained that it had developed, with the Environment Agency, a protocol on the principles of data sharing, which might be extended to include local authorities.<sup>75</sup> Ofwat have argued for regulations governing the provision of sewerage information to local authorities, by water and sewerage companies, for the purposes of local flood risk management and surface water management plans. Ofwat considered such regulations should ensure that the information is technically sufficient for the purposes of surface water management planning, but excludes commercially or privately sensitive information or restricts its use or disclosure.<sup>76</sup>

**45. We commend the water industry and Environment Agency for initiating work to improve data sharing. We recommend that Defra consider whether guidance on data sharing, including the safeguards that should be in place, should be provided for in secondary legislation.**

### Supplemental powers and duties

46. Clauses 34 to 41 set out supplemental powers and duties of the Environment Agency. Clauses 42 to 49 set out supplemental powers for local authorities. 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".<sup>77</sup> For example, Clause 41 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 stand-alone power should not feature in this Bill and should be removed".<sup>78</sup> Lord Smith described the potential conflict in the draft Bill as reflecting "a potentially conflicting case of objectives on the ground".<sup>79</sup> Lord Smith said that he was determined that there should be discussion with communities to reach an agreed conclusion rather than imposing a solution.<sup>80</sup>

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75 Ev 170

76 Ev 77

77 Ev 135

78 Ev 135

79 Q 92

80 Qq 93, 94

47. Clause 34 confers a power on the Environment Agency to carry out works. The consultation document states that Clause 34:

will be accompanied by various protective measures, such as a requirement on those bodies to give notice of intended works, provisions for members of the public to make objections, appropriate compensation provisions and provision that will enable the compulsory purchase of land.<sup>81</sup>

48. The word “appeal” is not specifically mentioned as a protection to be introduced. The potential limitations on the powers to carry out works causing flooding or coastal erosion (in Clause 6(3)) imply that decisions to carry out such works will involve balancing the public interest in creating flooding or coastal erosion with private rights, for example over property. However, without a full right of appeal to an independent tribunal or court capable of determining the facts, this would not satisfy Article 6 of the European Convention on Human Rights (right to a fair hearing). In its recent consideration of the coastal access provisions in Part 9 of the Marine and Coastal Access Bill, the Joint Committee on Human Rights said that:

...where the determination of the civil right requires the determination of prior factual questions, the decision of the European Court of Human Rights in *Tsfayo v UK* makes clear that the availability of judicial review alone is not sufficient: there must be an independent court or tribunal with jurisdiction to determine the factual question in issue.<sup>82</sup>

49. Those affected by flooding and coastal erosion have vital concerns at stake and will necessarily want to argue their case, whether or not public engagement is wanted. The reality is that flood risk management concerns people’s homes and livelihoods, and, in some circumstances, their lives. There will be occasions when local communities’ wishes run contrary to flood and coastal erosion risk management strategies. For example, it will be necessary to abandon or retire some flood and coastal defences as climate change requires that we adapt to higher flood flows and sea levels. However, local communities must have an opportunity to become involved in the decision making process rather than be left with what they will see as a *fait accompli*. Evidence from local community groups to our inquiry into the 2007 flooding complained about the inadequacy of consultation over the preparation of the local Shoreline Management Plans. There is a risk that local communities will see the courts as the first and only remedy rather than the last resort, and will approach the Agency as an adversary. The approach to flood risk management should seek to reconcile necessarily conflicting interests and the Bill must ensure that powers are matched by the appropriate opportunities for individuals or communities to appeal against decisions. **We do not consider the protections referred to in the consultation document to be sufficient. We recommend that Defra include provisions that establish appeal mechanisms against the powers of the Environment Agency and local authorities set out in Clauses 34 to 49. Such mechanisms must provide for an independent court or tribunal to decide appeals.**

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81 Defra, *Draft Flood and Water Management Bill*, Cm 7582, April 2009, consultation document, para 69.

82 Joint Committee on Human Rights, Eleventh Report of Session 2008–09, *Legislative Scrutiny: Health Bill: Marine and Coastal Access Bill*, HC 396, para 2.4.

## EU Floods Directive

50. According to the consultation document, Clauses 50 to 63 transpose the EU Floods Directive into domestic legislation.<sup>83</sup> Defra told us that the EU Floods Directive must be transposed by 26 November 2009 or “infraction proceedings would formally begin”, although provided legislation was in train it was “very unlikely” the Commission would take any action.<sup>84</sup>

51. If there is insufficient Parliamentary time to transpose the Directive through primary legislation in a Flood and Water Management Bill, an alternative approach is to enact the provisions through Section 2(2) of the European Communities Act 1972.<sup>85</sup> Defra told us that the Section 2(2) approach would need to include Clauses 50 to 63 with the associated definitions, plus some other provisions such as the ‘Duty to Co-operate’ and ‘Powers to Acquire and Share Information’. Defra said it was possible that, to be fully effective, the arrangements set out in any such regulations would also need certain pieces of Environment Agency guidance to be in place (on national strategies) in relation to the assessment of significant risk. These strategies are currently mentioned in Clauses 15 and 19 of the draft Bill. Defra said, however, that such guidance and strategies can be produced by the Environment Agency without legislation requiring them to do so. Therefore it may not be necessary to replicate parts of these provisions in any Section 2(2) measure.<sup>86</sup>

52. It is not uncommon for provisions required under European Union Directives to be enacted via the Section 2(2) route, which is quicker and less onerous for Government than pursuing primary legislation, but is subject to less Parliamentary scrutiny. Defra told us that:

Regulations under s.2(2) may not themselves create powers to make further secondary legislation. Currently, clauses 50 to 63 of the draft Bill contain several powers to make further orders or regulations, all of which we propose should be subject to the negative resolution procedure. If we use the s.2(2) approach, the provisions that might have been made under delegated powers in the draft Bill (once law) would have to be included in the regulations themselves. In either case, therefore, these detailed measures would be subject to Parliamentary approval through the negative resolution procedure.

Defra gave a commitment that if the Section 2(2) approach were used, it would not make the regulations until the autumn, once the House is sitting, so that “we could give the maximum consideration to the results of pre-legislative scrutiny and ensure that Parliament had the greatest opportunity to scrutinise those regulations”.<sup>87</sup> We agree with Defra that it would be preferable for the transposition of the EU Floods Directive to be achieved through a Floods and Water Management Act. If the Government is unable to pass the necessary primary legislation, the Section 2(2) of the European Communities Act

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83 Clauses 50 to 54 cover preliminary flood risk assessments; Clauses 55 to 63 cover significant flood risk documents.

84 Ev 103

85 Ev 103

86 Ev 103

87 Ev 103

1972 route is available, although it is very much second best. **We recommend that Defra make clear to the European Commission the benefits of including the provisions of the Directive in comprehensive legislation and seek assurances that the UK will not be subject to infraction proceedings before the Bill passes into law.**

## Regional Flood and Coastal Committees

53. Clauses 66 to 73 relate to Regional Flood Defence Committees (RFDCs), which would be renamed Regional Flood and Coastal Committees (RFCCs). The draft Bill's provisions specify the membership arrangements for the committees, and their role advising the Environment Agency. 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".<sup>88</sup> 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.<sup>89</sup>

54. Local authorities, including Gloucestershire County Council, however, questioned the value that existing RFDCs brought and noted that their public accountability could be improved.<sup>90</sup> Our witnesses from local authorities favoured catchment area flooding boards.<sup>91</sup> 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".<sup>92</sup> 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.<sup>93</sup>

**55. We consider that the local authority proposal for catchment area flood management boards, similar to Regional Flood Defence Committees, has much to recommend it. We recommend that Defra explore this approach with local authorities and bring forward provisions that would enable the creation of catchment area flood management boards. The Bill should require decision making bodies to explain how they have taken into account any advice from regional advisory bodies, or their reasons for rejecting it.**

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88 Evs 183, 184

89 Ev 133

90 Q 264

91 Q 223

92 Ev 183

93 Q 97

## 4 Designation of features

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56. The National Audit Office’s June 2007 report on the construction and maintenance of flood defences in England found significant regional variations in the proportion of assets maintained by third parties.<sup>94</sup> For example, of the approximately 11,000 flood risk assets in the Thames region, the Environment Agency own around 10–15%.<sup>95</sup> 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.

57. Part 2 of the draft Bill (clauses 75 to 97) 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.<sup>96</sup> We asked our witnesses from local authorities and the Environment Agency about these powers. None seemed sure what a “thing” was. Mr Runcie referred to culverts.<sup>97</sup> Mr Gibson from Hull City Council suggested that features such as “mounds or ridges” should potentially be included.<sup>98</sup> Mr Gibson added that uncertainty about what constituted a relevant structure was compounded by the fact that many structures, such as walls to stop pedestrians falling into rivers, did not principally have a flood management role. 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.<sup>99</sup>

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.<sup>100</sup> Mr Runcie, from the Environment Agency, explained that the Agency

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94 Report by the Comptroller and Auditor General, *Environment Agency: building and maintaining river and coastal flood defences in England*, HC 528 (2006–07), p 16.

95 *EA Asset Management Conditions Targets*, Thames Regional Flood Defence Committee Report No. T/RFDC/09/23

96 Clause 80

97 Q 100 [Mr Runcie]

98 Q 268

99 Q 109

100 Q 210

already recorded these assets and that the purpose of the provisions was to enable them to collect information on the ownership of those assets.<sup>101</sup>

**59. 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.**

60. The third party owners of designated assets would not be able to remove, alter or damage them without prior consent.<sup>102</sup> The consenting process would enable any approved works to be carried out in line with any reasonable conditions imposed. Unauthorised works on designated structures, might lead to an enforcement notice to remedy the situation, and failure to comply with this notice would amount to an offence. The consultation document seeks views on whether third parties should be required to maintain such assets in proper condition.<sup>103</sup>

61. Appeals against: designations; refusals of consent for alterations; refusals to cancel; and enforcement notices will be provided for in secondary legislation that will “confer jurisdiction on the Minister, a court or a tribunal”.<sup>104</sup> The Joint Committee on Human Rights (JCHR) has consistently taken the view that, where it is likely that safeguards, and in particular provisions for appeal, are necessary to satisfy the right of access to an independent and impartial tribunal guaranteed by Article 6(1) of the European Convention on Human Rights (ECHR), these safeguards should be expressly provided for on the face of the Bill.<sup>105</sup> The JCHR also said:

In order to be considered adequately independent and impartial to satisfy the requirements of Article 6(1) ECHR, the relevant “tribunal” must be independent of the executive, the parties and the legislature.<sup>106</sup>

**62. Clause 95 provides that the regulations can confer jurisdiction on the Minister or a court or tribunal. The Minister is clearly not an independent body. 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.**

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101 Qq 107–108

102 Clause 81

103 Defra, *Draft Flood and Water Management Bill*, Cm 7582, April 2009, consultation document, paragraphs 308–312.

104 Clause 95(2)

105 Joint Committee on Human Rights, Fifth Report of Session 2005–06, *Legislative Scrutiny: Second Progress Report*, HL Paper 90/HC 767, paras 3.25–3.26.

106 *Campbell and Fell v United Kingdom* (1984), 7 EHRR 165, para 78.

## 5 Reservoirs

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63. Part 3 of the draft Bill implements an undertaking in the Government response to the Pitt Review to update existing reservoir safety legislation. Sir Michael's recommendations relating to reservoir safety drew on the lessons learnt following the incident at Ulley reservoir near Sheffield during the summer 2007 floods. Unprecedented levels of rainfall led to excessive water flow through a spillway and a very real threat that the dam would fail.<sup>107</sup> The draft Bill's provisions make changes to the Reservoirs Act 1975:

- to require all reservoirs above a minimum volume capacity (10,000 cubic metres above the natural level of any part of the surrounding land) to be included on an Environment Agency register;<sup>108</sup>
- to require the Environment Agency to classify each relevant reservoir according to whether they pose a threat to human life, or meet technical conditions (to be specified) which in effect reduce the risk to a negligible level;
- to specify the duties of reservoir managers; and
- to specify panel engineers' duties in relation to reservoirs based on the level of risk.

64. Yorkshire Water and the NFU welcomed the shift to risk based management but both considered the proposed structure unduly clumsy and burdensome. The NFU explained that many small reservoirs were on farms and provided an efficient way of reducing summer abstractions, a practice encouraged by the Environment Agency. The NFU argue that Defra's proposals would require a substantial amount of time and money to be spent to compiling and submitting the information required for the Environment Agency to determine whether the reservoir represents a low or high risk. The NFU suggest a pre-registration process would allow those reservoirs that are low risk to be filtered out.<sup>109</sup>

65. Yorkshire Water echoed the NFU's comments. Mr Hodgkin told us that the company had not been consulted on the reservoir provisions, and that:

As currently drafted we would be required to provide quite a lot of information and plans for what to do if things go wrong, if I can put it in those terms, for all reservoirs, whether they are high or low risk, and we think it will be more sensible to first of all work out which of the reservoirs are high risk and then do the detailed work on the high risk [ones] rather than doing it for all of them.<sup>110</sup>

The Country Land & Business Association also had misgivings about the potential administrative burden of the provisions and found “no logical reason to move away from the current 25,000 cubic metre threshold, especially when there is clear evidence from the

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<sup>107</sup> See Pitt Final Report pages 301ff and the Environment Agency: Review of Summer 2007 Floods case studies: Reservoir safety—learning from Ulley.

<sup>108</sup> A 10,000 cubic metre reservoir is the size of four Olympic swimming pools, by comparison Kielder Water is 200 million cubic metres.

<sup>109</sup> Ev 137

<sup>110</sup> Q 196

Environment Agency demonstrating that there have been no significant failures within the last 40 years”.<sup>111</sup>

66. The Environment Agency expressed a willingness to discuss with the NFU potentially tying together the emergency plan requirements under the draft Bill with the plans that are already prepared by the Local Resilience Forums.<sup>112</sup> In terms of the scope for exempting farm reservoirs more generally from the draft Bill’s provisions, however, the Agency appeared to be less flexible.<sup>113</sup> The Agency emphasised that although the thresholds for registering reservoirs would be reduced to 10,000 cubic metres, “only those that pose a risk to life would be required to have the same level of supervision and periodic inspections by qualified civil engineers as at present”.<sup>114</sup> **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.**

67. Whatever the extent of the extra potential burden for individual reservoirs, the number of reservoirs brought within the scope of registration would be increased. Mr Hodgkin said that under the definition of reservoir used in the draft Bill, the number of reservoirs across the country would more than double, and that that would have implications for “already very stretched” engineer resources.<sup>115</sup> Water UK also cast doubt on the impact assessment’s estimation of the costs of implementing the draft Bill’s reservoir safety provisions due to the number of reservoirs that would fall under the regime.<sup>116</sup>

68. The risk associated with reservoir failures (both the probability of failure and the consequences of failure) are comparable with the risks assessed for chemical and nuclear industry sites. There is already a long standing emergency planning system for major chemical plants (the COMAH regulations).<sup>117</sup> These require local authorities to prepare and publicise an offsite emergency plan for designated sites; a plan which is usually prepared by the Local Resilience Forum. Such plans include advising those at risk what to do in the event of an alarm and how they will be warned. **Defra should consider whether the existing COMAH regulations might be extended to include reservoirs.**

69. Reservoirs may be covered by general business-wide insurance policies. Where reservoirs are itemised as discrete insurable risks the inspection and maintenance obligations imposed by the legislation could reduce insurance premiums, thereby offsetting some of the additional costs imposed by the Bill. If the Bill’s provisions were tuned to meet the requirements of the insurers the cost of premiums might be lower still.

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111 Ev 151

112 Qq 119–120

113 Ev 28

114 Ev 33

115 Q 197

116 Ev 169

117 The Control of Major Accident Hazard Regulations (SI 1999/743) as amended.

**70. 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.**

71. Part 3 of the draft Bill introduces several offences, which are similar to offences in the Reservoirs Act 1975, that will be repealed in its entirety by this legislation. For example, it will be an offence to obstruct a person authorised by the Environment Agency to enter land on which a reservoir is situated to carry out an inspection, survey or other operation to determine whether any provisions of the legislation apply.<sup>118</sup> Several of the offences under Part 3 are imprecisely defined, for example:

- it is an offence for a reservoir manager to fail to “keep a flood plan under review” (clause 142(6)), and
- it is an offence to fail to take safety measures “as soon as practicable after receiving the report” (clause 135(3)).<sup>119</sup>

**72. 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.**

## 6 Sustainable drainage

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73. Part 5 of the draft bill sets out provisions relating to sustainable drainage systems (known as SUDS).<sup>120</sup> Clause 219 defines “sustainable drainage” as “managing rainwater” with the aim of reducing damage from flooding of all kinds; improving water quality; protecting and improving the environment; protecting health and safety; and ensuring the stability and durability of drainage systems. However, the extent to which any or all of the those six purposes must be met for qualification as ‘sustainable drainage’ will be set out in guidance rather than on the face of the Bill. There is also no definition in the Bill of how a SUDS “thing” might be designated under Clause 80.

74. The evidence we have received indicated widespread support for SUDS. The Environmental Industries Commission (EIC) considered the Bill should give greater emphasis to SUDS.<sup>121</sup> The Local Government Association, while supporting the Pitt Review recommendations on SUDS, said that they are not a panacea. The Association emphasised that there can be “technical difficulties depending on ground conditions” and that in some places “positive drainage (surface water sewers and drainage channels) will be the preferred solution”.<sup>122</sup> According to the Institute of Civil Engineers, SUDS by themselves are “unlikely to have a significant effect on extreme event flooding and that

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118 Clause 152

119 Other offences which are not specifically defined include failure to comply with clauses 135(3), 142(5) and (6), 127(3), 114(4).

120 SUDS is also a commonly used acronym for Sustainable Urban Drainage.

121 Ev 173

122 Ev 163

needs to be recognised (though they can have a beneficial effect during less severe events, and during these also address some of the water quality issues)”.<sup>123</sup>

75. Clauses 222 to 230 set out provisions relating to approval of new SUDS and their construction. Clauses 231 and 232 relate to the adoption of 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.<sup>124</sup> 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.<sup>125</sup>

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”.<sup>126</sup> 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”.<sup>127</sup> 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.<sup>128</sup> 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”.<sup>129</sup>

**77. These Clauses provide a starting point to resolve the long-standing difficulties associated with the introduction and management of SUDS. The wide-spread implementation of SUDS is a critical part of future water management and therefore we welcome Defra’s work in taking SUDS forward. However, the current provisions leave several questions unanswered on: the capacity of SUDS, the transfer of approval powers, funding arrangements for the adoption and maintenance of SUDS, and the potential for retro-fitting SUDS. The Government should take the opportunity presented by the Bill to encourage individuals and businesses to adopt sustainable water management, such as rainwater harvesting and grey water systems. The Government should also consider how flood and water management and the planning system might together more effectively prevent the reduction of permeable surfaces in flood risk areas.**

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123 Ev 141

124 Ev 172

125 Ev 112

126 Q 114

127 Q 185, HC 555-iv

128 Q 207

129 Q 207

78. The Government should ensure that the legislative framework provides sufficient incentives for households and businesses to install rainwater harvesting and grey water systems; and also prevents further erosion of permeable surfaces.

## 7 Flooding issues consulted on but not included in the draft Clauses

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### Reform of the Internal Drainage Boards

79. Internal Drainage Boards (IDBs) are independent statutory bodies responsible for land drainage in areas of special drainage need. The Land Drainage Act 1930 established the principles governing the boundaries of IDBs areas.<sup>130</sup> IDBs have powers under the Land Drainage Act 1991 to undertake work to secure drainage and water level management of their districts, including flood defence works on ordinary watercourses. Much of their work involves the improvement and maintenance of rivers, drainage channels and pumping stations.<sup>131</sup> Part 1 of the draft Bill includes some changes to the powers and duties of IDBs in line with the overall flood and coastal erosion risk management approach. Paragraphs 364 to 401 of the consultation document discuss possible further reforms to Internal Drainage Boards. Concern has been expressed about the potential loss of IDB's levying powers allied to the removal of their supervisory role. Furthermore, the requirement that IDBs will have to seek consent from the Environment Agency for basic maintenance work is unnecessarily restrictive.

80. Under existing legislation the Secretary of State has the powers to alter, by way of secondary legislation, the boundaries of individual IDBs. The consultation document seeks views on whether the Secretary of State should have powers to reform the structures, size and shape of IDBs as a whole rather than in a piecemeal way.<sup>132</sup> The consultation document proposes that: IDBs have additional powers to undertake work on surface water and groundwater at the request of the county or unitary local authority (and on main river and sea flooding and coastal protection at the request of the Environment Agency); continue to lead on managing water levels and flood risk in their areas, but subject to a duty to be consistent with any strategy or supplementary guidance issued by the county or unitary local authority; and be required to co-operate and share information with the Environment Agency and local authorities. The consultation document also proposes changes to the membership of IDBs, so that there would be no limit to the number of local authority representatives on Boards.<sup>133</sup>

81. According to Defra, “there have been concerns in recent years that some IDBs operate solely or primarily for the benefit of farmers, focusing on effective land drainage and hence

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<sup>130</sup> Commonly in non-tidal areas agricultural land up to the 8 feet about the highest known flood level and up to flood level in urban areas. In urban tidal areas up to the level of the ordinary spring tides and for agricultural land in tidal areas up to 5 feet above that level. Land above these levels may be included in a drainage district under the principles set out in the 'Medway letter'. See Cm 7582, pp 74–75

<sup>131</sup> *Draft Flood and Water Management Bill*, Cm 7582, April 2009, consultation document, p 72.

<sup>132</sup> Ev 115

<sup>133</sup> *Draft Flood and Water Management Bill*, Cm 7582, April 2009, consultation document, paras 388- 391.

agricultural efficiency, to the detriment of nature conservation. ... Their accountability and accessibility have also been questioned<sup>134</sup> The National Trust and RSPB put that case more strongly. They both welcomed the proposal to recast IDBs as Water Level Management Boards.<sup>135</sup> The National Trust's evidence stated that:

IDBs are statutory bodies with a history rooted in single-minded pursuit of agricultural land drainage. Even today, after numerous attempts at reform, their environmental performance remains poor. Re-constituting IDBs as Water Level Management Boards in both name and practice would be a key step in reforming these statutory bodies.<sup>136</sup>

82. The National Farmers' Union defended the existing composition of IDBs:

We are concerned that if taken up in their entirety, the Government's proposals could severely curtail the ability of IDBs to fulfil their role. We are referring in particular to the proposed changes to the IDBs' supervisory role over land drainage and their control over funding; it is the cumulative effect of the proposals that is worrying. ... the proposed removal of the limit on the number of local authority representatives on IDB Boards has the potential to reduce the effectiveness of decision-making. It is the farmer members of Boards who have the expertise and local knowledge which is vital to sound planning in this somewhat specialist area.<sup>137</sup>

The Campaign to Protect Rural England were also concerned about the consequences of possible changes in priorities of the IDBs:

Change will need to be managed carefully and the investment cycle of the farming community taken into account. We are concerned that the discussion about a shift needed from the Boards' historical drainage function to a broader flood risk management role does not give due weight to protecting high quality farmland for food production. ... The IDBs need to reconcile nature conservation interests with the protection of high quality farmland and settlement protection, and should not automatically give primacy to one over the other.<sup>138</sup>

83. The Association of Drainage Authorities thought the Government's proposals represented "a considerable modification" of the functioning of IDBs.<sup>139</sup> They welcomed the prospect of IDBs having powers to share services, form and participate in consortia and form corporate bodies. This, they told us, was an urgent requirement, and the absence of appropriate provisions in the draft Bill itself is "a serious omission".<sup>140</sup> The Association noted the strong ties IDBs have across local government and in particular with planning authorities.

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134 *Draft Flood and Water Management Bill*, Cm 7582, April 2009, consultation document, para 366.

135 Evs 148, 151

136 Ev 148

137 Ev 137

138 Ev 172

139 Ev 131

140 Ev 133

84. **The relationship between IDBs and local authorities remains crucial to effective local flood risk management. Defra’s proposals are a blunt instrument if the intention is to enhance IDBs’ environmental protection role and give local authorities greater say over the work of IDBs. While we accept the importance of IDBs working with local authorities to deliver local flood and coastal erosion risk management strategies, it is vital that IDBs’ experience and expertise in preserving high quality agricultural land is maintained. Defra should consult with local authorities to establish whether the statutory framework governing IDBs provides sufficient flexibility to enable them to work effectively.**

### **Reducing property owners’ and occupiers’ impact upon local flood risk**

85. The consultation document discusses whether the failure to maintain the flow of water through watercourses (paragraphs 482 to 486) or allowing flooding from surface run-off (paragraphs 488 to 490) should be described in law as a statutory nuisance; and if so whether the provisions should be administered by local authorities or Agricultural Land Tribunals.

86. The National Farmers’ Union acknowledged the reasons for the Government’s proposals but did not consider that failure to maintain the flow of water through a watercourse was comparable to the existing statutory nuisances, such as those caused by noise or smoke. The NFU stated that “blockages along stretches of watercourse are more complex; there may be various contributory factors in play and action by one responsible party may not solve the problem”.<sup>141</sup> The NFU were also concerned that against the backdrop of the contribution of surface run-off to the 2007 floods, enforcing authorities might “over-react” to the risk posed by run-off from agricultural land and “rush to enforce rather than encourage” run-off reduction zones and better land management practices.<sup>142</sup> Mary Dhonau of the National Flood Forum strongly favoured the creation of a statutory nuisance provision, because at the moment “so many people are flooded by other people and there is nowhere for them to go; there is no redress”.<sup>143</sup>

**87. There is a compelling argument that those who cause flooding should bear some responsibility for their actions, or failure to act. We recommend that Defra should include provisions in the Bill to encompass causing flooding as a statutory nuisance. Those provisions should provide the necessary protection for householders, while not creating an overly proscriptive regime for the farming community. Defra should ensure farmers and landowners have clear guidance and advice on the practicalities of minimising flood risk from their land.**

88. The consultation document (paragraphs 449 to 451) notes that while the Environment Agency deals with the maintenance of most ‘main rivers’, the management of ‘ordinary watercourses’ relies more heavily on the active involvement of riparian owners. The consultation document poses a question as to how riparian owners might be made more

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141 Ev 138

142 Ev 138

143 Q 59

aware of their responsibilities. Those responsibilities exist under Common Law (where riparian owners have a duty to keep watercourses free of obstruction) and under the Land Drainage Act 1991 (which refers to riparian owners' responsibilities for non-main rivers). Laurence Waterhouse of the National Flood Forum wanted to see much more clarity in the regulations on riparian ownership and also on responsibilities.<sup>144</sup> **We recommend that Defra provide clear guidance on the obligations and responsibilities of riparian owners and provide practical advice on how they can meet their responsibilities for the maintenance of watercourses, rather than leaving these to emerge only through case law.**

## Resilience

89. Establishing a statutory nuisance provision might serve to reduce the likelihood or severity of flooding, but it was clear from the National Flood Forum that those at risk wanted also to take control of their own destiny as much as possible. People wanted to protect their homes from flooding, and if that were not possible then to make them resilient to its effects. Our National Flood Forum witnesses impressed us with their own resilience, not just in their own personal stories of flooding but also in terms of their determination to battle the system to get flood defence and resilience moved up the agenda.

90. Mary Dhonau had concluded that for homes at risk no amount of flood barrier would provide protection for ever—she wanted to “ban the sandbag”.<sup>145</sup> The focus needed to be more on ‘resilience’ than on ‘resistance’, but for resilience “there is very very little information [and] evidence out there”.<sup>146</sup> Laurence Waterhouse was concerned about the utility of some flood defence products on the market:

...we are getting round to the sort of double glazing scenario of the sixties and seventies where flood products, food resilience products, et cetera, are seen as the new double glazing in some respects. Many, many people try to get in on the market. Many things are good, many things are bad, obviously, and there is a need for much more advice, much more regulation.<sup>147</sup>

91. Our NFF witnesses highlighted the high cost of getting solutions ‘kite-marked’, and indicated that as important was good advice on what things worked and what did not.<sup>148</sup> They told us that they had discussed the possibility of becoming something akin to a ‘consumer association’ but they were a small organisation needing resources to undertake their work.<sup>149</sup>

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144 Q 58

145 Q 47

146 Qq 37, 46

147 Q 47

148 Q 52

149 Qq 49–52

92. Defra should do more to promote flooding resilience at the most local level. The Bill should include a requirement on the Environment Agency and local authorities to include in their flood risk management plans a duty to promote resilience.

93. The National Flood Forum is an example of what ordinary people can and will do to influence and control their flood risks. Those at risk of flooding need good information about what products and advice are available. Defra should consult the National Flood Forum and other local groups about the scope for more comprehensive advice for those at risk of flooding. The Department should explore the scope for these groups developing, with Defra funding if necessary, a system for reviewing and rating the effectiveness of flood defence products.

## 8 Water sector

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### Water Administration Regime

94. Clauses 193 to 216 provide a revised special administration regime for water and sewerage undertakers and licensed water suppliers, to be known as the ‘water administration regime’, in place of the administration regime in Schedule B1 to the Insolvency Act 1986 that applies to companies in general. As with other regulated sectors such as energy and rail, the existing regime is designed to ensure that, where a water company ‘fails’, its assets and infrastructure will continue to be used to provide essential water and sewerage services to its customers. Currently the arrangements only allow the transfer of an entire failing company to one or more owners. They do not permit the special administrator to attempt to rescue the business as a going concern, such as through arranging refinancing or improving the management or structure of the company.<sup>150</sup>

95. According to Defra, the provisions create a special administration scheme that would allow “more flexibility to rescue businesses”.<sup>151</sup> Ofwat echoed that view.<sup>152</sup> Water UK considered that more clarification was needed of the potential impacts of the proposal on investor and customer protections, and investor perceptions of any possible impact on the effectiveness of those protections.<sup>153</sup> Individual water companies told us that they considered the proposed measures appropriate, “particularly given recent difficulties in the financial markets”.<sup>154</sup>

96. **The proposals for the water administration regime appear appropriate. We note the water industry’s concerns that the provisions may affect investor perceptions. However, those concerns are common to many proposed changes to the regulation or administration of the industry and should not prevent the inclusion of provisions intended to protect consumers and preserve water supply. The principal purpose of the water industry is the supply of potable water and removal of wastewater. The regulator**

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150 Defra, *Draft Flood and Water Management Bill*, Cm 7582, April 2009, consultation document, p 100

151 *Ibid* Defra, *Draft Flood and Water Management Bill*, Cm 7582, April 2009, consultation document, p 100

152 Q 217

153 Ev 170

154 Evs 54, 60, 66

**and the industry have a duty of care to ensure that those core functions are not jeopardised by water companies taking on other trading activities.**

## Water Industry Regulation

97. Part 6 of the draft Bill covers water industry regulation. The issues raised in the evidence we received will have an effect on future price reviews and therefore some of our recommendations are directed to Ofwat as well as the Government. In our report on the Ofwat Price Review 2009, we discussed the impact of changes to the regulatory regime on the cost to water companies of raising finance. **We recommend that when the Bill is introduced to Parliament it is accompanied by a statement setting out Ofwat’s assessment of the risks to water industry investors of the Bill’s proposed changes to the regulatory regime.**

### *Licence conditions*

98. Evidence from the water industry expressed concerns about Clause 234, which would enable Ofwat to modify conditions in the water companies’ licences with a lower threshold for agreement to amend than in the current legislation. The companies were concerned about the lack of consultation on the proposed changes and told us that changes to standard licence conditions should only be introduced with the industry’s agreement.<sup>155</sup>

99. Several companies referred to the higher threshold for agreement in the electricity sector, which Severn Trent Water said seems to work well.<sup>156</sup> Thames Water highlighted the different scale of ‘majority’ agreement envisaged (an 80% agreement in the energy sector, compared with a proposed simple majority in the water sector) and the lack of appeal to the Competition Commission.<sup>157</sup> The company told us that it could “see no justification for this proposed change, which was not discussed with the industry in any shape or form prior to Defra’s publication of the draft Bill”.<sup>158</sup>

100. In our inquiry into the Ofwat Price Review 2009, we considered how investors’ and credit rating agencies’ assessments influence companies’ cost of capital.<sup>159</sup> Thames Water suggested that Clause 234 could have an adverse effect on investors’ perceptions:

...the real issue here is potentially one of, subtly but importantly, changing the risk that shareholders and other investors take when they invest in companies. If changes can happen to the company’s operating environment through the licence which they were not expecting and which apparently are done without the company’s consent and without due right of appeal, that is quite an important shift for investors if they think they have a protection through a right of appeal and that suddenly goes.<sup>160</sup>

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155 Evs 46, 170

156 Q 201

157 Q201

158 Ev 48

159 Environment, Food and Rural Affairs Committee, Fifth Report of Session 2008–09, *Ofwat Price Review 2009*, HC 554.

160 Q201

101. Ofwat defended the proposals on the grounds that a sensible licence condition change should not be blocked by a single company.<sup>161</sup> Ofwat assured us that they were “not going to be able, at a moment’s notice, to dictatorially change licence conditions”.<sup>162</sup>

**102. We accept the rationale for a process to alter standard licence conditions without excessive bureaucracy. However, we consider it proportionate for the provisions of Clause 234 to be balanced by a clear appeal mechanism that should be set out on the face of the Bill.**

### **Penalties**

103. Clause 235 (Penalties) amends the Water Industry Act 1991 to extend the period of time within which Ofwat can impose a financial penalty on a company from one year to five years. According to the explanatory notes to the draft Bill, the transitional provision in Clause 235 ensures that “the information submitted by the companies as part of the review of price controls in 2009 remains within the scope of the revised legislation”.<sup>163</sup>

104. Ofwat argued that the amendment was necessary as irregularities may only become apparent during the quinquennial price review. The regulator told us that under the current legislation “...we can only fine for the year within which we find that failure, so we have a 12-month window. ... Because we have a five-year price review, ... we could find a misdemeanour or something wrong and we could be timed out and be able to do nothing about that...”.<sup>164</sup>

105. The water industry argued that the provisions should be balanced by an effective mechanism for appeals, such as an appeal to the Competition Appeals Tribunal.<sup>165</sup> Severn Trent Water noted that such an addition to the draft Bill would be consistent with the House of Lords Constitution Committee recommendations that appeals should be heard based on merits and by a separate appeals tribunal.<sup>166</sup> Thames Water again raised concerns about the impact of the provisions on water companies’ financial standing and cost of capital.<sup>167</sup> The company described the Clause as “a significant change to the enforcement regime and a marked increase in companies’ exposure to financial risk from regulatory enforcement”.<sup>168</sup>

**106. We agree that the period during which penalties can be imposed by the regulator should be extended. However, we consider it proportionate for the provisions of the Clause to be balanced by a clear appeal mechanism separate from the regulator. We recommend that Ofwat assess how the imposition of penalties affects companies’ cost of capital and that any increase in the cost of capital at future price reviews attributed to**

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161 Q 209

162 Q 209

163 *Draft Flood and Water Management Bill*, Cm 7582, April 2009, explanatory notes, p 44.

164 Qq 213–214

165 Ev 170

166 Ev 46; Constitution Committee, Sixth Report of Session 2003–04, *The Regulatory State: Ensuring its Accountability*, HL 68, paras 227–232.

167 Ev 47

168 Ev 48

**the imposition of penalties should not be passed on to the customer in the regulator’s final determination.**

### Hosepipe bans

107. Clause 254 replaces and strengthens the provisions in the Water Industry Act 1991 to enable water companies to temporarily prohibit or restrict specified uses of water. The Clause was welcomed by the water efficiency NGO, Waterwise, the National Trust and Water UK.<sup>169</sup> However, Water UK was concerned that the provisions might not have the desired result in practice.<sup>170</sup> 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.<sup>171</sup> **We welcome the provisions in Clause 254. 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 under Clause 254, Ministers and water companies consider measures to mitigate the impact on agriculture.**

## 9 Water issues consulted on but not included in the draft Clauses

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### Time limiting abstraction licences and water efficiency

108. Paragraphs 653 to 654 of the consultation document discuss the desirability of time limiting abstraction licences. Professor Cave came to the conclusion that trading abstraction licences was a sensible approach to help manage water resources sustainably. He considered that in the longer term the Environment Agency should be able to “flex the prices for abstraction and also to deal rather more rigorously with cases where there is over-abstraction”. He envisaged that in water scarce areas the price of abstraction would rise, but in water abundant areas people would be encouraged to abstract. He noted that “the degree to which they do it would obviously depend upon the cost of transport” and people could become innovative in looking at “smart investment that we could do, using perhaps natural mechanisms for transporting water around”.<sup>172</sup> The use of prices would not be immediate since it would “take a bit of time to set up a properly competitive market in abstraction” but it would “give signals to get people to behave in particular ways which benefit the environment”.<sup>173</sup>

109. Natural England highlighted in their evidence to our Ofwat Price Review 2009 inquiry that reforming the abstraction licensing system could “signal” the regional economic cost and scarcity of water.<sup>174</sup> Severn Trent Water also supported trading of the licences, but not

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169 Evs 148, 155, 171

170 Ev 171

171 Ev 171

172 Q 163

173 *Ibid* Q 163

174 Environment, Food and Rural Affairs Committee, Fifth Report of Session 2008–09, *Ofwat Price Review 2009*, HC 544-II

time limiting them since this potentially impeded trading by diminishing licence value and creating uncertainty around long term investments.<sup>175</sup>

110. Paragraphs 657 to 659 of the consultation document discuss the desirability of provisions that would place a water efficiency obligation on the water companies. Currently, domestic demand is around 148 litres per person per day. Water companies have a duty to promote the efficient use of water and Ofwat has introduced water efficiency targets on a trial basis.<sup>176</sup> However, the targets are not stretching in comparison to achievements elsewhere in Europe. In Germany, for example, per capita consumption was already down to 129 litres per day in 1998—the target the UK is aiming to achieve by 2030.<sup>177</sup>

111. Regina Finn, Chief Executive of Ofwat, emphasised that water efficiency was a key area since “the challenging thing for us all in the longer term is how do we ensure that both the industry and customers properly value this really essential life resource” and establish incentives for the “right behaviours”.<sup>178</sup> Anna Walker recommended in her interim report, published in June 2009, that companies be required to develop their own water efficiency programmes which would contribute to their enforceable water efficiency target, with priority given to low income customers in debt or in receipt of Council Tax Benefit.<sup>179</sup>

112. Some witnesses thought that the draft Bill’s water efficiency measures were insufficient. The National Trust said that it was disappointed that there was no water efficiency commitment in the Bill and urged the introduction of a “water service rather than a water supply culture”. Waterwise was disappointed that, apart from proposals on updating hosepipe ban legislation, water efficiency measures were absent from the Bill and recommended a “step change in water efficiency programmes...linked to energy efficiency retrofit programmes”.<sup>180</sup> Waterwise did note that Ministers intended to reflect some of the Cave and Walker recommendations in the Bill in due course.<sup>181</sup>

**113. Ofwat’s price review mechanism does not provide sufficient incentives for water efficiency savings. We recommend that Defra include provisions in the Bill providing for time limiting of abstraction licences and water efficiency obligations on water supply companies. Such provisions are essential to achieve the vision set out in Future Water. In drafting these provisions Defra should consider their potential impact on the cost of water companies raising finance which would be borne by their customers. Defra together with the regulator, companies and financial institutions should consider how the legislation can be drafted to ensure the least detrimental affect on the water companies’ ability to raise finance.**

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175 Ev 57

176 Ofwat, *Water supply and demand policy*, November 2008. Within current operating budgets companies are required to undertake activity to save 1 litre per property per day, for household and non-household customers. Above this baseline an allowance will be made in price limits for companies pursuing additional water efficiency measures.

177 <http://www.ifpri.org/media/water2025.htm>

178 Q 202

179 Anna Walker, *The Independent Review of Charging for Household Water and Sewerage Services: Interim Report*, June 2009, p 15.

180 *Ibid*

181 Ev 154

## Cave and Walker Reviews

114. The Cave Review brought forward the Government's commitment to review the eligibility threshold for non-household customers to choose suppliers introduced as part of the Water Act 2003. The final report makes recommendations in relation to abstraction and discharge; competition in retail and upstream services; the water industry's structure and innovative capacity.

115. We considered the arguments for competition in our report on the Ofwat Price Review 2009.<sup>182</sup> If the Government decides to press ahead with retail competition, Professor Cave was confident that the necessary legislative provisions could be drafted and included into a Bill "fairly simply".<sup>183</sup>

116. The Walker review considered the charging of household water and sewerage services. The review is focussing on issues of affordability and the arguments for metering. The interim report refines some of the questions that need to be answered in the final report, which is due to be published in October 2009. Given the timing of the Walker final report it is questionable whether any legislative provisions necessary to implement recommendations accepted by the Government will be drafted in time to be included in the final Bill if it is introduced as a result of the 2009 Queen's Speech.

117. Central to both the Cave and Walker reviews is the need for new ways of valuing water (both potable and waste). Water scarcity will become a more frequent and widespread problem. If we are to meet the challenges posed by climate change the Government needs to reach conclusions on how to value water and implement the necessary changes as soon as possible.

## Special mergers regime

118. The consultation document does not include proposals to alter the current merger regime, but does refer to including recommendations from the Cave Review where appropriate. The current merger provisions for water companies are strict as they are intended to preserve enough entities to enable a price control system based on cost comparisons between companies to be effective. Professor Cave has proposed that the merger regime could be improved, and told us that allowing mergers between companies would spur innovation and help spread best practice. He suggested that merger of smaller companies should not trigger automatic referral to the Competition Commission and that for larger companies "the regulator should indicate more clearly than has been the case in the past what the kind of threshold payment would have to be [made] to consumers in order to allow the merger to go ahead".<sup>184</sup>

119. Thames Water told us that it supported Professor Cave's proposals as efficiency and environmental benefits from competition were "lost by inclusion of the water industry in

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182 Defra, *Adapting to climate change: UK Climate Projections*, June 2009.

183 Qq131 –132

184 HC 555-iii, Q 181

the provisions of the special merger regime”. The company suggest that mergers would enable economies of scale resulting in water bill reductions of around 6%.<sup>185</sup>

120. Thames Water pointed out that “no special provisions exist to protect mergers in the gas, electricity, telecoms, aviation or postal service sectors—all industries currently subject to price control regulation and with [fewer] comparators than the water industry”.<sup>186</sup> Thames Water suggested that the special merger provisions put the water industry on a par with the needs for plurality of media sources and national security, “which makes no sense”.<sup>187</sup> They said it was not defensible for the water sector to be treated differently simply to enable Ofwat to undertake its work by comparing water companies.<sup>188</sup>

121. We raised the issue of the continuation of the special merger regime with Ofwat. Regina Finn explained how if ‘market forces’ could be used to help protect consumers’ interests, then there was scope to relax the special mergers provision.<sup>189</sup> **In a market without competition, Ofwat is right to be cautious about the impact of mergers on customers’ interests. It appears that the Government and Ofwat are committed to competition in some form. However, it would be inappropriate for the regulator to prevent mergers purely to maintain their ability to compare companies’ performance. Defra should review the water industry’s merger regime with the intention of relaxing its conditions when greater competition is introduced. Defra should ensure that any changes to the merger regime do not reduce the protection for consumers.**

## Surface water drainage charges

122. During our inquiry into the Ofwat Price Review 2009 we received evidence from several not-for-profit organisations about the increases in water bills associated with changes to the method of charging for surface water drainage. Ofwat argued that the difficulties experienced by these groups was due to the way that water companies had implemented the change in charging method. We concluded that Ofwat should have taken an active role in managing the issue, rather than laying the blame at the industry’s door. United Utilities has been the company most found to be at fault. The company acknowledges the errors that it has made in implementing surface water drainage charging on the basis of area rather than rateable value. The consultation document does not consider this issue. However, we consider that this Bill is an opportunity to provide a legislative solution.

123. **We do not accept Ofwat’s argument that there is sufficient transitional flexibility in the regulatory regime to accommodate changes in charging schemes. We recommend that Defra explore including provisions in the Bill that create a subset of customers that could be excluded from the new charging method and which recognise**

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185 Ev 49

186 Thames Water pointed out that there are 14 comparators in the electricity distribution industry, 8 in the gas distribution industry and 22 in the water industry (Ev 49).

187 Q 183

188 Ev 49

189 Q 212

the real world financial situation of not-for-profit organisations such as the Scouts, Churches and village halls.

## 10 Resources and skills

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### Funding

124. The draft Bill’s summary ‘Impact Assessment’ (IA) estimates an overall net present value (NPV) net benefit of £5.12 billion.<sup>190</sup> This figure should be treated with some caution because not all of the potential monetary costs and benefits within the individual Impact Assessments have been quantified. In addition, the IAs provide little detail on the variations in the cost and benefit ranges and rarely explain why a particular figure from within the Evidence Base has been used as the ‘best estimate’.<sup>191</sup>

125. Excluding the costs, the overall present value benefit of the measures in the draft Bill comes to £8.55 billion. More than four-fifths of that benefit is derived from the estimated savings from the reduced cost of potential future flooding over the next 43 years. The measures associated with Local Flood Risk Management account for £4.3 billion (84%) of the total NPV net benefit figure. However, this figure is the upper (most favourable) limit of the NPV ‘best estimate’ net benefit range provided in the IA: the lower limit is £800 million. If the lower figure were used, the overall NPV net benefit of the draft Bill would be approximately £1.5 billion. The figures are based on two distinct scenarios from the Government’s 2004 *Foresight* study—a ‘Local Stewardship’ scenario and a ‘World Markets’ scenario.<sup>192</sup> The 2004 *Foresight* study was published in a time of relative economic prosperity, prior to the publication of a large range of work on climate change (for example the Stern Report and the Climate Change Act 2008), and also prior to the widespread flooding in England in 2007. Yet the IA appears to take little account of the implications of these publications and events, nor the current and future economic situation. Therefore, there is uncertainty surrounding the likelihood, extent, and impact of future flooding, and the benefits of reduced flooding are subject to unknown future environmental and socio-economic conditions.

126. When we put this to Defra, they considered that developments since 2004 “suggest that, if anything, benefits of investment and risk management activity—in terms of avoiding or reducing the costs of future flood events—could be even higher than those set out in the IAs.<sup>193</sup> The recently published, more pessimistic, UK Climate Projections also bear that out.<sup>194</sup> Mr Hewitt told us that the *Foresight* work is now looking “somewhat conservative”.<sup>195</sup>

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190 *Draft Flood and Water Management Bill*, Cm 7582, April 2009, cConsultation document p 8.

191 Ev 107

192 These are the two scenarios from the study with the lowest and highest future flood damages. The Local Stewardship scenario is characterised by lower growth, moderate to low emissions and high intervention and lower flood risk. World Markets reflects high growth and housing development which more recently is looking less likely at least in the short term with a downturn in the economy.

193 Ev 108

194 Defra, *Adapting to Climate Change: UK Climate Projections*, June 2009.

195 Q 296

127. The IAs identify a net benefit for local authorities from the transfer of responsibility for maintenance of private sewers to sewerage companies.<sup>196</sup> The consultation document contends that funds released by that transfer and the savings from reduced costs of future floods will “more than cover” the additional costs to local authorities.<sup>197</sup> The LGA took issue with this assertion, telling us that the position would differ between individual authorities, and that they doubted the calculations:

The draft Bill states (p 212) that “From April 2011, local authorities are expected to benefit substantially from savings arising from the transfer of private sewers to the sewerage companies”. [Local] authorities advise that the costs involved in managing private sewers are not always significant, indeed some local authorities have very few if any private sewers.<sup>198</sup>

... we have serious concerns over the financing of the [local authority] lead role. Insufficient work has been undertaken by any of the organisations involved in flood risk management to be certain of the costs involved.<sup>199</sup>

Generally, the draft Bill does not acknowledge either the initial costs for local authorities of taking on additional responsibilities or some of the long term costs. To suggest that the leadership role will be cost neutral is extremely unrealistic, when it is clear that local authorities will be taking on significant new burdens, including the need to expand existing teams, set up and administer strategic partnerships and undertake skills and training to meet co-ordination roles.<sup>200</sup>

128. The LGA argued that reduced additional expenditure was not the same as reduced expenditure. The benefits implied by the impact assessments for local flood risk management are based on extra expenditures after a flood but at a lower level than would otherwise be the case. The LGA told us:

[Local] authorities see very few savings in the proposals. Those that exist are saved in Districts and incurred in Counties. What are mainly cited as savings are from a budget perspective, namely cost avoidance rather than cost-savings. Councils do not budget for the sort of clear-ups that have occurred after recent floods. Other things do not get done—apart from some contingency money. The reality is that individual householders—whether consumers, council tax payers or tax payers—will incur more expenditure.<sup>201</sup>

129. Overall, the LGA wanted to see a much clearer evidence base for the presumed cost savings for local authorities in managing local flood risk.<sup>202</sup> We therefore sought assurances from Defra on the financial impact for local authorities. The Department told us that Local

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<sup>196</sup> The Impact Assessment on the transfer of private sewers and lateral drains to statutory water and sewerage companies. <http://www.defra.gov.uk/environment/water/industry/sewers/pdf/impact-assessment-private-sewers.pdf>

<sup>197</sup> Defra, *Draft Flood and Water Management Bill*, Cm 7582, April 2009, consultation document, p 48, para 213.

<sup>198</sup> Ev 167

<sup>199</sup> Ev 163

<sup>200</sup> Ev 166

<sup>201</sup> Ev 166

<sup>202</sup> Ev 166

flood risk management costs for local authorities were £27m for the three years to 2010–11, plus £42m in 2011–12 which was assumed to be the first year that all 150 county and unitary authorities will take on the local leadership role. The higher cost in 2011–12 would be met by a combination of: ongoing spend, benefits to local authorities from better national and local flood risk management, and the savings to authorities from the transfer of private sewers.<sup>203</sup>

130. The Department’s “conservative estimate” is that local authorities in England will between them save £50m a year at today’s prices as a result of the transfer of responsibility for private sewers to the water and sewerage companies. Defra told us that:

Savings to local authorities in the early years from better flood risk management are assumed to be relatively modest. ...In the longer-term it is assumed that overall benefits equivalent to around two-thirds of local authorities’ own investment will be recouped within three years through fewer and less severe flooding incidents occurring than otherwise would be the case. ...Proposals are being taken forward through the Settlement Working Group to correctly account for these savings within the local government finance system and make sure, as far as possible, that funds are provided to local authorities in accordance with their relative need, to fulfil the new roles proposed.<sup>204</sup>

131. The Department 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.<sup>205</sup> Defra told us that overall:

The Government is committed to ensuring that all new burdens falling on local authorities are fully and properly funded. Any policy which increases the cost of providing local authority services is subject to the new burdens doctrine and, where appropriate, funding is provided through the formula grant system or through specific grants. The costs and benefits of the Bill will be kept under review as policy and implementation develops.<sup>206</sup>

132. It is questionable whether local authorities will need, or be able to spend, the sums allocated for flood risk management. Defra explained that ultimately expenditure on flood risk management is discretionary and a matter for local authority prioritisation. Defra’s role was to ensure that unfunded new burdens and expectations are not placed on local authorities, as set out in the Government’s new burdens doctrine that seeks to avoid pressure being put on council tax bills. Defra told us that in the early years of the next

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203 Ev 111

204 Ev 112

205 Ev 113

206 Ev 108

Spending Review period (2011–14), the current new burdens assessment shows an initial £20m annual saving to local authorities overall, and annual costs would have to rise by £20m or annual benefits fall by £20m before burdens become unfunded.<sup>207</sup> Mr Hurst noted that local authorities had spent more than the sums allocated from central government for flood risk management work, by “putting their own money forward”.<sup>208</sup> However, local authorities recognise that, with public expenditure being under pressure over the next few years as a result of the current financial crisis, their flood risk management budgets will be under pressure from competing priorities.<sup>209</sup>

133. Defra acknowledged the variability of the estimates in the IAs.<sup>210</sup> The department argued that the estimate attached to the most likely outcome had been used.<sup>211</sup> Before legislation is introduced into Parliament, Defra’s Chief Economist will conduct a further internal peer review of the Impact Assessments, which will also be scrutinised by the Treasury and the Better Regulation Executive.<sup>212</sup> The Minister told us that he recognised that the evidence base needed further development and that the final Bill and its Impact Assessment would benefit from further information gained from the responses to the consultation.<sup>213</sup>

**134. The provisions in this legislation can only be justified if the calculations in the impact assessments produce an overall net financial benefit. Despite Defra’s assurances, we remain concerned that the impact assessments are insufficiently precise and provide meagre evidence to support their cost and benefit calculations. We note that Defra intends to do further work on the impact assessments—that is essential. Parliament will expect that, when the Bill is introduced, its accompanying impact assessments provide a clear, accurate exposition of the costs and benefits and how the funding will work, particularly in relation to the new roles and responsibilities for local authorities.**

**135. We are not convinced that local authorities will benefit from the transfer of sewers to the degree anticipated in the impact assessments. There remains some uncertainty about the costs of adopting and maintaining SUDS—until these questions are answered doubts remain about the impact assessments’ robustness.**

## Skills

136. The Environmental Industries Commission and the Association of Drainage Authorities expressed concern that local authorities lacked the necessary expert staff to fulfil their local leadership role.<sup>214</sup> The Local Government Association (LGA) also had

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207 Ev 113

208 Q317

209 Qq 253–255

210 For example, in the summary Impact Assessment phrases such as “cost estimates could be made more robust” and “no quantification has been attempted of the consequences or implications of some change” are commonly used.

211 Ev 107

212 Ev 107

213 Q 292

214 Evs 137, 173

“serious concerns” about current and future skills gaps, even with more collaborative working between local authorities and public and private sector partners.<sup>215</sup> A joint LGA and Defra survey of all local authorities in England found serious gaps in planning and engineering capacity, with more than a quarter of authorities finding it difficult to attract suitably qualified or experienced staff.<sup>216</sup> The Institution of Civil Engineers reported in 2008 that local authorities and the Environment Agency may not be able to offer the remuneration to recruit and retain the numbers of staff required.<sup>217</sup> Similarly, Severn Trent Water doubted local authorities have the “required resources, skills and experience to operate effectively from the outset”.<sup>218</sup>

137. Sir Michael Pitt, when giving evidence on the implementation of his review’s recommendations, noted the potential skills gap and envisaged local authorities commissioning work externally.<sup>219</sup>

138. Defra have been working with the Local Government Association to assess the capacity and expertise of local authorities to undertake their flood risk management role.<sup>220</sup> On 8 June, the Department announced that, from autumn 2009, it would be funding local authority staff participating in the Environment Agency’s foundation degree programme; and that, together with other stakeholders, the department was developing apprenticeships to start in autumn 2010.<sup>221</sup>

**139. We welcome the Government’s announcement of funding to improve local authorities’ skills. In its response to this report, Defra should provide an estimate of how many local authority staff will benefit from the additional funding; and how long it will take before local authorities have sufficient numbers of appropriately trained and qualified staff.**

## 11 Conclusions

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140. Pre-legislative scrutiny provides a valuable opportunity to expose the Government’s legislative policy proposals to political consideration while there is still time to make amendments before a bill’s introduction into Parliament. Defra has been committed to the process and engaged enthusiastically with us. This draft Bill, however, has not been an ideal candidate for pre-legislative scrutiny because of the lack of detail in several areas. As is frequently the case, there has also been insufficient time to pursue all of the issues as we might have wished.

141. The key question for this Bill is: will it deliver sustainable water management? It is difficult to answer that question due to significant gaps in the provisions—not least the

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215 Ev 163

216 Ev 166

217 Ev 144

218 Ev 43

219 Q 34, HC 245-i

220 Ev 119

221 Ev 119

uncertainty that remains around implementing recommendations from the Walker and Cave reviews. The financial impacts of the legislation are also unclear. There are significant concerns about whether local authorities will have the resources to deliver what is being asked of them. In addition, several of the Bill's proposals could have an impact on consumers. We note Ofwat's concerns that:

...the current clauses potentially expose water customers to unquantified costs for uncertain benefits. We also consider that the new powers for local authorities may circumvent and conflict with the framework for economic regulation of sewerage services, which safeguards the wider interests of all customers.<sup>222</sup>

**142. Defra has further work to do on the Bill and time is short. Even if Defra have a Bill prepared for introduction immediately after the Queen's Speech there is little realistic chance of it reaching the statute book before the next general election. As a result Defra might welcome more time to consider how to improve the current provisions; as well as the inclusion of provisions to implement the Cave and Walker reviews' recommendations; and consolidate existing legislation as recommended by Sir Michael Pitt.**

## Conclusions and recommendations

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### Implementation of the Pitt Review's recommendations

1. The draft Bill addresses 16 of the Pitt review's recommendations that require legislation but falls short of providing a Bill which also consolidates our principal water Acts. We recommend that Defra continue working to produce the comprehensive legislation that the Government has agreed is highly desirable, even if this delays the Bill until the next Parliament. (Paragraph 9)

### Water management and climate change predictions

2. The Bill has been drafted against the background that climate change will have an effect on both the availability of water and likelihood of more extreme weather events. We recommend that Defra work with the Environment Agency and the relevant bodies to ensure that the Bill's provisions properly reflect the recently updated climate change scenarios. (Paragraph 12)

### Potential further clauses on flood and water measures

3. 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 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. (Paragraph 16)
4. 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. However, if Defra finds it has no alternative but to introduce a slimmed-down bill, it should consult stakeholders as soon as possible on which provisions should be included. (Paragraph 17)
5. The inevitable uncertainty caused by a 'work in progress' draft Bill could have an impact on Ofwat's final price review 2009 price determinations. We recommend that at the earliest opportunity (even during the remaining part of the Summer recess) Defra make clear its intentions. If it opts for a slimmed down Bill we recommend that rapid consultation with the Environment Agency and the industry about what must be in and what could be left out of the legislation. Our view remains 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. (Paragraph 18)

## Territorial extent

6. The adoption of a river catchment based planning approach means that close cooperation will have to be achieved between legislative bodies both north and south of the boarder and in Wales. We recommend that, in light of the fact that each legislature has a different approach to water matters, Defra urgently assess how harmonisation of the measures can be achieved. Given the Welsh Assembly's involvement in developing this draft Bill we believe that there is merit in the Welsh Affairs select committee examining their position on this matter at the earliest opportunity. (Paragraph 20)

## Key concepts and definitions

7. We recommend that Defra redraft Clause 12 to clarify the roles of the different tiers of local authorities and their responsibilities, while allowing the flexibility for pragmatic local solutions and partnerships. We further recommend that the Bill include an order making power, under which the Secretary of State may alter the tasks to be undertaken by local authorities, following full consultation with interested bodies. (Paragraph 24)

## National flood and coastal erosion risk management strategy

8. Clarity on the form of the National Flood and Coastal Erosion Risk Management Strategy should be clearly provided on the face of the Bill; or through an order making power subject to the affirmative Parliamentary procedure. We further recommend that the Bill provides for the strategy being reported to Parliament. (Paragraph 27)
9. We recommend that Defra publish now details of how the strategy will be prepared, scrutinised and how, and over what cycle, it will be reviewed. (Paragraph 28)

## Local authorities' strategies

10. We are concerned that the draft Bill establishes a rigid vertical structure, which potentially precludes pragmatic cross-boundary area-based approaches that accommodate local people's views and knowledge. We are concerned that local people do not have a seat at the table and the Bill's proposals will dilute the ability of an articulate community to influence decision making. (Paragraph 34)
11. Subject to any concerns on national security grounds, the national flood risk management strategy should be published in full to guide the many organisations and bodies who will need to refer to it. Similarly we see no reason for local authority plans not to be published. (Paragraph 37)
12. The provisions in Clause 22 provide the Environment Agency and local authorities with a broad power over potentially a wide range of public bodies and private individuals. 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. (Paragraph 40)

## Conclusions

13. 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. (Paragraph 42)

## Cooperation

14. We commend the water industry and Environment Agency for initiating work to improve data sharing. We recommend that Defra consider whether guidance on data sharing, including the safeguards that should be in place, should be provided for in secondary legislation. (Paragraph 45)

## Supplemental powers and duties

15. We do not consider the protections referred to in the consultation document to be sufficient. We recommend that Defra include provisions that establish appeal mechanisms against the powers of the Environment Agency and local authorities set out in Clauses 34 to 49. Such mechanisms must provide for an independent court or tribunal to decide appeals. (Paragraph 49)

## EU Floods Directive

16. We recommend that Defra make clear to the European Commission the benefits of including the provisions of the Directive in comprehensive legislation and seek assurances that the UK will not be subject to infraction proceedings before the Bill passes into law. (Paragraph 52)

## Regional Flood and Coastal Committees

17. We consider that the local authority proposal for catchment area flood management boards, similar to Regional Flood Defence Committees, has much to recommend it. We recommend that Defra explore this approach with local authorities and bring forward provisions that would enable the creation of catchment area flood management boards. The Bill should require decision making bodies to explain how they have taken into account any advice from regional advisory bodies, or their reasons for rejecting it. (Paragraph 55)

## Designation of features

18. 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. (Paragraph 59)
19. 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. (Paragraph 62)

## Reservoirs

20. 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. (Paragraph 66)
21. Defra should consider whether the existing COMAH regulations might be extended to include reservoirs. (Paragraph 68)
22. 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. (Paragraph 70)
23. 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. (Paragraph 72)

## Sustainable drainage

24. These Clauses provide a starting point to resolve the long-standing difficulties associated with the introduction and management of SUDS. The wide-spread implementation of SUDS is a critical part of future water management and therefore we welcome Defra’s work in taking SUDS forward. However, the current provisions leave several questions unanswered on: the capacity of SUDS, the transfer of approval powers, funding arrangements for the adoption and maintenance of SUDS, and the potential for retro-fitting SUDS. (Paragraph 77)
25. The Government should ensure that the legislative framework provides sufficient incentives for households and businesses to install rainwater harvesting and grey water systems; and also prevents further erosion of permeable surfaces. (Paragraph 78)

## Reform of the Internal Drainage Boards

26. The relationship between IDBs and local authorities remains crucial to effective local flood risk management. Defra's proposals are a blunt instrument if the intention is to enhance IDBs' environmental protection role and give local authorities greater say over the work of IDBs. While we accept the importance of IDBs working with local authorities to deliver local flood and coastal erosion risk management strategies, it is vital that IDBs' experience and expertise in preserving high quality agricultural land is maintained. Defra should consult with local authorities to establish whether the statutory framework governing IDBs provides sufficient flexibility to enable them to work effectively. (Paragraph 84)

## Reducing property owners' and occupiers' impact upon local flood risk

27. There is a compelling argument that those who cause flooding should bear some responsibility for their actions, or failure to act. We recommend that Defra should include provisions in the Bill to encompass causing flooding as a statutory nuisance. Those provisions should provide the necessary protection for householders, while not creating an overly proscriptive regime for the farming community. Defra should ensure farmers and landowners have clear guidance and advice on the practicalities of minimising flood risk from their land. (Paragraph 87)
28. We recommend that Defra provide clear guidance on the obligations and responsibilities of riparian owners and provide practical advice on how they can meet their responsibilities for the maintenance of watercourses, rather than leaving these to emerge only through case law. (Paragraph 88)

## Resilience

29. Defra should do more to promote flooding resilience at the most local level. The Bill should include a requirement on the Environment Agency and local authorities to include in their flood risk management plans a duty to promote resilience. (Paragraph 92)
30. The National Flood Forum is an example of what ordinary people can and will do to influence and control their flood risks. Those at risk of flooding need good information about what products and advice are available. Defra should consult the National Flood Forum and other local groups about the scope for more comprehensive advice for those at risk of flooding. The Department should explore the scope for these groups developing, with Defra funding if necessary, a system for reviewing and rating the effectiveness of flood defence products. (Paragraph 93)

## Water Administration Regime

31. The proposals for the water administration regime appear appropriate. We note the water industry's concerns that the provisions may affect investor perceptions. However, those concerns are common to many proposed changes to the regulation or administration of the industry and should not prevent the inclusion of provisions intended to protect consumers and preserve water supply. The principal purpose of

the water industry is the supply of potable water and removal of wastewater. The regulator and the industry have a duty of care to ensure that those core functions are not jeopardised by water companies taking on other trading activities. (Paragraph 96)

32. We recommend that when the Bill is introduced to Parliament it is accompanied by a statement setting out Ofwat's assessment of the risks to water industry investors of the Bill's proposed changes to the regulatory regime. (Paragraph 97)

### **Licence conditions**

33. We accept the rationale for a process to alter standard licence conditions without excessive bureaucracy. However, we consider it proportionate for the provisions of Clause 234 to be balanced by a clear appeal mechanism that should be set out on the face of the Bill. (Paragraph 102)

### **Penalties**

34. We agree that the period during which penalties can be imposed by the regulator should be extended. However, we consider it proportionate for the provisions of the Clause to be balanced by a clear appeal mechanism separate from the regulator. We recommend that Ofwat assess how the imposition of penalties affects companies' cost of capital and that any increase in the cost of capital at future price reviews attributed to the imposition of penalties should not be passed on to the customer in the regulator's final determination. (Paragraph 106)

### **Hosepipe bans**

35. We welcome the provisions in Clause 254. 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 under Clause 254, Ministers and water companies consider measures to mitigate the impact on agriculture. (Paragraph 107)

### **Time limiting abstraction licences and water efficiency**

36. Ofwat's price review mechanism does not provide sufficient incentives for water efficiency savings. We recommend that Defra include provisions in the Bill providing for time limiting of abstraction licences and water efficiency obligations on water supply companies. Such provisions are essential to achieve the vision set out in Future Water. In drafting these provisions Defra should consider their potential impact on the cost of water companies raising finance which would be borne by their customers. Defra together with the regulator, companies and financial institutions should consider how the legislation can be drafted to ensure the least detrimental affect on the water companies' ability to raise finance. (Paragraph 113)

### Special mergers regime

37. In a market without competition, Ofwat is right to be cautious about the impact of mergers on customers' interests. It appears that the Government and Ofwat are committed to competition in some form. However, it would be inappropriate for the regulator to prevent mergers purely to maintain their ability to compare companies' performance. Defra should review the water industry's merger regime with the intention of relaxing its conditions when greater competition is introduced. Defra should ensure that any changes to the merger regime do not reduce the protection for consumers. (Paragraph 121)

### Surface water drainage charges

38. We do not accept Ofwat's argument that there is sufficient transitional flexibility in the regulatory regime to accommodate changes in charging schemes. We recommend that Defra explore including provisions in the Bill that create a subset of customers that could be excluded from the new charging method and which recognise the real world financial situation of not-for-profit organisations such as the Scouts, Churches and village halls. (Paragraph 123)

### Funding

39. The provisions in this legislation can only be justified if the calculations in the impact assessments produce an overall net financial benefit. Despite Defra's assurances, we remain concerned that the impact assessments are insufficiently precise and provide meagre evidence to support their cost and benefit calculations. We note that Defra intends to do further work on the impact assessments—that is essential. Parliament will expect that, when the Bill is introduced, its accompanying impact assessments provide a clear, accurate exposition of the costs and benefits and how the funding will work, particularly in relation to the new roles and responsibilities for local authorities. (Paragraph 134)
40. We are not convinced that local authorities will benefit from the transfer of sewers to the degree anticipated in the impact assessments. There remains some uncertainty about the costs of adopting and maintaining SUDS—until these questions are answered doubts remain about the impact assessments' robustness. (Paragraph 135)

### Skills

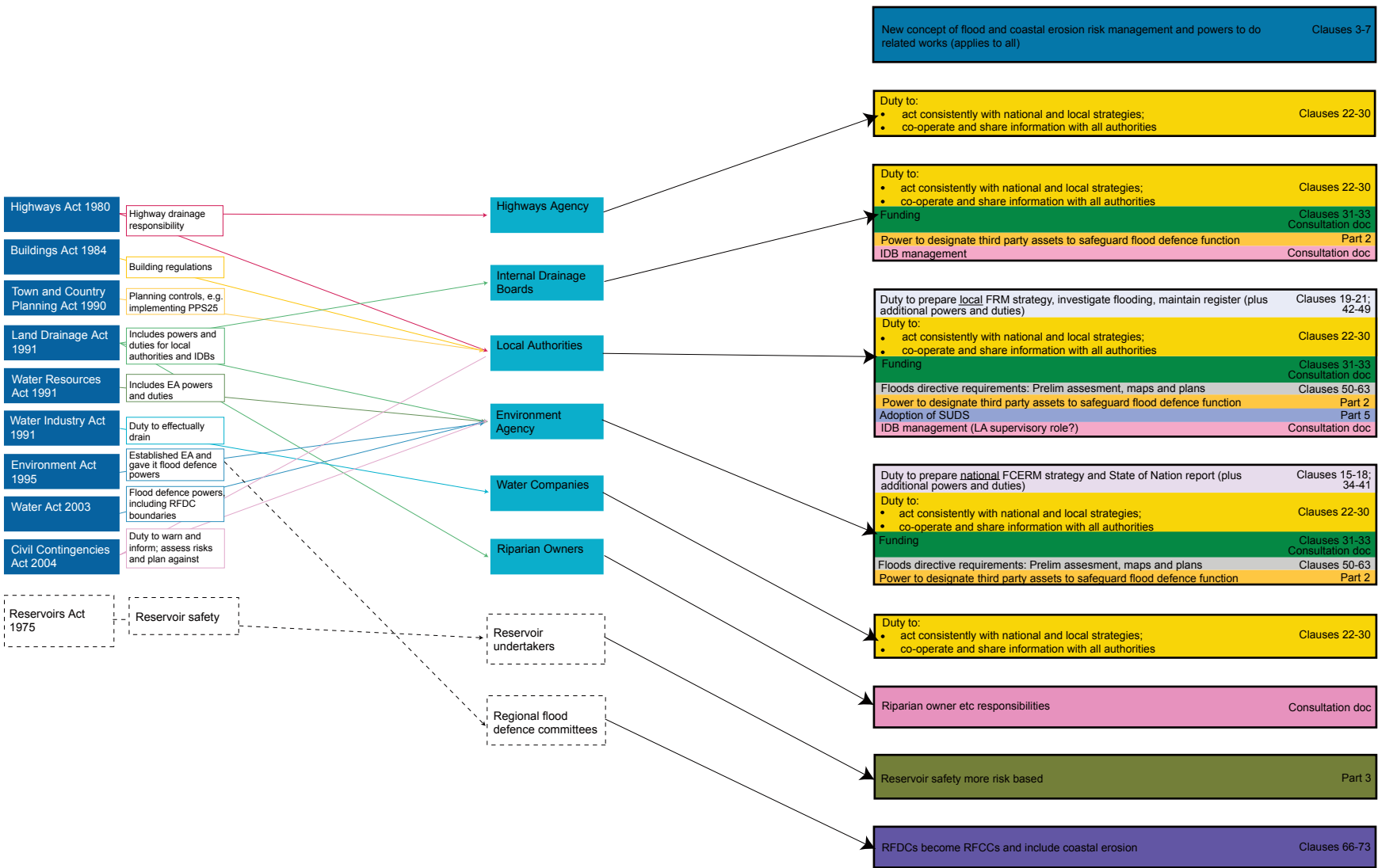
41. We welcome the Government's announcement of funding to improve local authorities' skills. In its response to this report, Defra should provide an estimate of how many local authority staff will benefit from the additional funding; and how long it will take before local authorities have sufficient numbers of appropriately trained and qualified staff. (Paragraph 139)

### Conclusions

42. Defra has further work to do on the Bill and time is short. Even if Defra have a Bill prepared for introduction immediately after the Queen's Speech there is little

realistic chance of it reaching the statute book before the next general election. As a result Defra might welcome more time to consider how to improve the current provisions; as well as the inclusion of provisions to implement the Cave and Walker reviews' recommendations; and consolidate existing legislation as recommended by Sir Michael Pitt. (Paragraph 142)

# Annex A: Diagram illustrating relationships between current legislation and the Draft Bill



# Formal Minutes

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**Wednesday 16 September 2009**

Members present:

Mr Michael Jack, in the Chair

Mr Geoffrey Cox  
Mr David Drew  
Lynne Jones

Miss Anne McIntosh  
Dr Gavin Strang  
David Taylor

Draft Report (Pre-legislative scrutiny of the Draft Flood and Water Management Bill), proposed by the Chairman, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 142 read and agreed to.

Summary agreed to.

*Resolved*, That the Report be the Sixth Report of the Committee to the House.

*Ordered*, That the Chairman do make the Report to the House.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No.134.

Written evidence was ordered to be reported to the House for printing with the Report.

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[Adjourned till a time and date to be fixed by the Chairman

# Witnesses

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## Wednesday 20 May 2009

Page

**Ms Anna Walker**, Chair and **Mrs Sue Ellis**, Head of Secretariat, Independent Review of Household Charging for Water and Sewerage Services Ev 1

## Monday 1 June 2009

**Dame Yve Buckland**, Chair and **Mr Tony Smith**, Chief Executive, Consumer Council for Water Ev 7

**Ms Mary Dhonau**, Chief Executive and **Mr Laurence Waterhouse**, Chairman, National Flood Forum Ev 9

## Wednesday 3 June 2009

**Rt Hon Lord Smith of Finsbury**, Chairman, **Dr Paul Leinster**, Chief Executive, **Mr Robert Runcie**, Director of Flood and Coastal Risk Management, and **Mr Ian Barker**, Head of Water, Environment Agency Ev 20

**Professor Martin Cave**, Head and **Mr Alex Skinner**, Head of Secretariat, Cave Review of Competition and Innovation in Water Markets Ev 33

## Monday 8 June 2009

**Mr Jonathan Hodgkin**, Director of Regulation and Investment, Yorkshire Water, **Dr Tony Ballance**, Director of Regulatory Finance, Severn Trent Water, **Mr Peter Antolik**, Strategy and Regulation Director and **Mr Richard Aylard**, Director, Thames Water Ev 50

## Wednesday 10 June 2009

**Ms Regina Finn**, Chief Executive and **Mr Keith Mason**, Director of Regulatory Finance, Ofwat Ev 77

## Monday 15 June 2009

**Mr Peter Jones**, Deputy Chief Executive and **Mr Mark Parker**, Head of Flood Risk, Gloucestershire County Council, **Professor Carolyn Roberts**, Professor of Environmental Sciences, University of Gloucester, **Mr David Gibson**, Assistant Chief Executive, Hull City Council, **Councillor Andy Smith** and **Mr Jeremy Schofield**, Strategic Director, Suffolk Coastal District Council Ev 89

## Wednesday 17 June 2009

**Huw Irranca-Davies MP**, Minister for the Natural and Marine Environment, Wildlife and Rural Affairs, **Mr Martin Hurst**, Director of Water and **Mr Simon Hewitt**, Divisional Manager, Flood Management Division, Department for Environment, Food and Rural Affairs Ev 120

## List of written evidence

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Association of British Insurers	Ev 139
Association of Drainage Authorities	Ev 130
AXA Insurance	Ev 156
Martin Blaiklock	Ev 179
British Marine Federation	Ev 185
Campaign to Protect Rural England	Ev 172
Consumer Council for Water	Ev 5
Country Land and Business Association	Ev 151
Department for Environment, Food and Rural Affairs	Evs 103, 107
English Heritage	Ev 175
Environment Agency	Evs 16, 28
Environmental Industries Commission	Ev 173
Gloucestershire County Council	Ev 84
Home Builders Federation	Ev 188
Institution of Civil Engineers	Ev 141
David Kidney MP	Ev 177
Local Government Association	Ev 163
Local Government Flood Forum	Ev 176
National Farmers' Union	Ev 135
National Trust	Ev 146
Natural England	Ev 158
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Royal Society for the Protection of Birds	Ev 149
Severn Trent Water	Evs 43, 56
Southern Water	Ev 187
Thames Water	Evs 20, 66
Water Industry Commission for Scotland	Ev 177
Water UK	Ev 168
Waterwise	Ev 154
Yorkshire Water	Evs 42, 53

## List of Reports from the Committee during the current Parliament

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The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

### Session 2008–09

Fifth Report	Ofwat Price Review 2009	HC 544-I
Fourth Report	Securing food supplies: the challenges faced by the UK up to 2050	HC 213-I
Third Report	Energy efficiency and fuel poverty	HC 37
Second Report	Work of the Committee in Session 2007–08	HC 95
First Report	The English pig industry	HC 96

### Session 2007–08

Fifth Special Report	Energy efficiency and fuel poverty: written evidence	HC 1099
Eleventh Report	The potential of England's rural economy	HC 544-I (HC 155, 08–09)
Tenth Report	Badgers and cattle TB: the final report of the Independent Scientific Group on Cattle TB: Government response to the Committee's Fourth Report of Session 2007–08	HC 1010 (HC 1178)
Ninth Report	Draft Marine Bill: Coastal Access Provisions	HC 656-I (CM 7422)
Eighth Report	British Waterways: follow-up	HC 438 (HC 1081)
Seventh Report	Implementation of the Nitrates Directive in England	HC 412 (HC 1080)
Sixth Report	The Veterinary Surgeons Act 1966	HC 348 (HC 1011)
Fifth Report	Flooding	HC 49-I (HC 901)
Fourth Report	Badgers and cattle TB: the final report of the Independent Scientific Group on Cattle TB	HC 130-I (HC 1010)
Third Report	The work of the Committee in 2007	HC 250
Second Report	Climate change: the "citizen's agenda": Government response to the Committee's Eighth Report, Session 2006–07	HC 189
First Report	The UK Government's "Vision for the Common Agricultural Policy: Government response to the Committee's Fourth Report, Session 2006–07	HC 48

### Session 2006–07

Eighth Report	Climate change: the "citizen's agenda"	HC 88-I (HC 189 07–08)
Seventh Report	British Waterways	HC 345-I (HC 1059)
Sixth Report	The Implementation of the Environmental Liability Directive	HC 694 (HC 1058)
Fifth Report	Draft Climate Change Bill	HC 534-I (CM 7225)
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