INTRODUCTION

1. These explanatory notes relate to the Flood and Water Management Bill which was introduced in the House of Commons on 19 November 2009. They have been prepared by the Department for Environment, Food and Rural Affairs in order to assist the reader of the Bill and to help inform debate on it.

2. The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.
SUMMARY AND BACKGROUND

3. The Bill takes forward some of the proposals in three previous strategy documents published by the UK Government - Future Water¹, Making Space for Water² and the UK Government’s response to the Sir Michael Pitt’s Review of the Summer 2007 floods³. The Bill also takes forward parts of the draft Flood and Water Management Bill⁴ and takes into account pre-legislative scrutiny of the draft Bill by the Environment, Food and Rural Affairs Committee.


OVERVIEW OF THE STRUCTURE OF THE BILL

5. The Flood and Water Management Bill has three Parts:

Part 1: Flood and Coastal Erosion Risk Management

6. This Part gives the Environment Agency a strategic overview of the management of flood and coastal erosion risk in England, and a similar role in Wales to Welsh Ministers. It also, in accordance with the Government’s Response to the Pitt Review, gives upper tier local authorities in England, and local authorities in Wales, responsibility for preparing and putting in place strategies for managing flood risk from groundwater, surface water and ordinary watercourses in their areas.

7. The Environment Agency, local authorities and other bodies are given duties and powers that relate to these responsibilities, through amendment to the Water Resources Act 1991, the Land Drainage Act 1991 and the Coast Protection Act 1949, and directly through this Act.

8. This Part amends the Coast Protection Act 1949 to give the Environment Agency powers in relation to coastal erosion risk management to add to their current powers on coastal flooding.

9. It also converts Regional Flood Defence Committees from decision-making bodies to advisory committees, except in relation to the local levy where they retain their decision-making powers, and extends their remit to cover coastal erosion as well.

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

Part 2: Miscellaneous

11. This Part includes clauses on sustainable drainage, reservoirs, special administration, provision of infrastructure, temporary bans, civil sanctions, sustainable development, incidental flooding or coastal erosion, compulsory works orders, agreements on new drainage systems, concessionary surface water drainage charges for community groups and the abolition of the Fisheries Committee (Scotland).

Part 3: General

12. This Part sets out various supplementary provisions which apply generally to the Bill.

TERRITORIAL EXTENT AND APPLICATION

13. The Bill extends to England and Wales.

14. Ministerial powers in flood and water policy areas do not always follow the geographical boundary of England and Wales. The extent of the Secretary of State’s and Welsh Ministers’ jurisdictions may instead follow, for example, water and sewerage undertakers’ areas of appointment rather than the national boundary.

15. The Bill does not generally extend to Scotland. However, it includes a clause for the abolition of the Fisheries Committee (Scotland), a Scottish Body concerned with advising on the effects of hydroelectric power activities on water quality and fish stocks in freshwater fisheries in Scotland. The functions of that Committee are now carried out by the Scottish Environment Protection Agency. The provision does not fall within the terms of the Sewel Convention.
16. At introduction the Bill will contain one provision that triggers the Sewel Convention. The provision relates to cross-border reservoir safety and will create an enabling power to make provision by order for responsibility for any future cross-border reservoirs to be established based on the particular circumstances.

17. The Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. If there are amendments during the passage of the Bill relating to such matters which trigger the Convention, the consent of the Scottish Parliament will be sought for them.

18. The Bill does not extend to Northern Ireland.

COMMENTARY

Part 1: Flood and Coastal Erosion Risk Management

Key concepts and definitions

Clause 1: “Flood” and “coastal erosion”

19. Subsection (1) defines a “flood” as including cases where land not normally covered by water becomes covered by water. Subsection (2) indicates some of the sources from which a flood could occur. This list is not exhaustive or limiting.

20. Subsection (3) excludes certain forms of flooding from the definition of “flood”. The first exclusion is flooding from any part of a sewerage system, unless caused by increases in volume from rainfall (including snow or other precipitation). Flooding from a sewerage system would be dealt with under s94(1)(a) of the Water Industry Act 1991. The second exclusion is flooding from a burst water main (as defined in section 219 of the Water Industry Act 1991). Flooding from a water main is covered by s37(1)(b) of that Act.

21. Subsection (4) defines “coastal erosion” as covering the coast of England and Wales.

Clause 2: “Risk”

22. Subsection (1) defines “risk”. This is a component of the concept of flood and coastal erosion risk management. Risk is defined so that it relates to both the probability of an occurrence and the seriousness of its consequences.

23. Subsection (2) and (3) define “flood risk” and “coastal erosion risk”.

24. Subsection (4) sets out examples (not an exhaustive list) of potential harmful consequences that should be considered when assessing risk.
Clause 3: “Risk management”

25. This clause sets out what “risk management” means in relation to flooding and coastal erosion. Subsection (1) sets out the range of purposes for which actions may be undertaken in order to address risk. Risk management can include practices that increase the likelihood of flooding or coastal erosion in a specific area, either to achieve particular outcomes in that location or to manage the effect of flooding or coastal erosion elsewhere.

26. Subsection (2) lists two examples of what is included within the definition of risk management to illustrate the scope of the concept. Subsection (3) lists examples of things which might be done to manage flood risk or coastal erosion risk. Neither list is exhaustive or limiting.

Clause 4: “Flood risk management function”

27. This clause defines a “flood risk management function” as including existing functions from specified Acts as well as functions under Part 1 of the Bill. The effect of defining a function as a flood risk management function is to bring it within the scope of certain provisions in the Bill which require such functions to be performed in specified ways. For instance under clauses 11 and 12 such functions must be carried out in a manner which is consistent with the strategies provided for in clauses 8 to 10 and by virtue of clause 13 bodies exercising those functions must cooperate with one another. The Secretary of State in England and Welsh Ministers in Wales may by order specify further functions to be within the definition of a flood risk management function. The functions of water companies are not included within the list of flood risk management functions listed in the Bill but these may be included by order.

Clause 5: “Coastal erosion risk management function”

28. This clause defines a “coastal erosion risk management function” as a function under Coast Protection Act 1949 as well as functions under Part 1 of the Bill. The effect of this definition is the same in clause 4. The Secretary of State in England and Welsh Ministers in Wales may by order specify further functions to be within the definition of a coastal erosion risk management function.

Clause 6: “Other definitions”

29. Subsections (1) to (5) define terms that relate to the various sources of flood risk. The definition of groundwater is different from that in Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (known as the Water Framework Directive). In the Bill it is defined in a way that is relevant to flood risk management so as to include any water which is below the surface of the ground and in contact with the ground or subsoil. This does not include water in buried pipes or other containers.
30. The definition of surface runoff means that lead local flood authorities do not have responsibility for water that has entered a watercourse, drainage system or the sewerage system. In particular once water has entered a sewerage system the responsibility for managing it rests with water companies. Subsection (6) brings lakes, ponds, or other areas of water that flow into a watercourse within the meaning of a watercourse for the purpose of the definition of surface runoff. Drainage system has the same meaning as in paragraph 1 of Schedule 3 to the Bill.

31. Subsections (7) to (13) define various bodies which are “risk management authorities”. Subsection (9) introduces the concept of a “lead local flood authority”, which is the unitary authority or, where there is no unitary authority, the county council for an area in England, and the county council or the county borough council in Wales. These bodies lead on the local flood risk management strategy. The bodies which exercise flood or coastal erosion risk management functions or related functions are collectively defined as “risk management authorities” under subsection (13).

**Strategies, co-operation and funding**

**Clause 7: National flood and coastal erosion risk management strategy: England**

32. This clause (see subsection (1)) requires the Environment Agency to develop a national strategy (“the strategy”) for flood and coastal erosion risk management in England, to maintain it (which includes reviewing and updating it), and monitor its application.

33. Subsection (2) requires that the Strategy must set out at least:
   - who the risk management authorities are in England;
   - their functions;
   - the objectives of the Strategy;
   - the measures proposed to achieve those objectives;
   - how and when the measures are to be implemented;
   - the approximate costs and benefits of these measures and how they will be paid for;
   - the assessment of risk that is relied on in preparing the strategy as well as the current and predicted impact of climate change on managing these risks; and
   - how the strategy will contribute to wider environmental objectives. This relates to the sustainable development duty at clause 28 and the environmental works powers at clauses 40 and 41.

34. The Environment Agency must also publish a summary of this Strategy (see subsection (4)).
35. The Environment Agency must consult the general public as well as the other risk management authorities, and the Scottish Executive and Welsh Ministers where their territory may be affected, in drawing up the Strategy (see subsection (3)).

36. Subsections (5) and (6) provide for the Agency to issue guidance about the application of the strategy which may in particular include guidance about the exercise of the duties to cooperate and the powers to enter into arrangements and to require information.

37. The strategy and any guidance must be reviewed and approved by the Secretary of State before it can be made final. The approved strategy and any guidance must be laid before Parliament by the Secretary of State (subsections (7) to (9)).

**Clause 8: National flood and coastal erosion risk management strategy: Wales**

38. This clause requires the Welsh Ministers to develop, maintain and apply a national strategy for flood and coastal erosion risk management in Wales. They are not required to monitor the strategy as in England.

39. Subsection (2) lists the matters that should be included in the strategy as a minimum requirement. These are the same as required for the national flood and coastal erosion risk management strategy for England.

40. Subsection (3) requires the Welsh Ministers to consult the Secretary of State in England about matters with an impact on England. Subsections (5) and (6) also allow Welsh Ministers to issue guidance in particular in relation to the duties to co-operate, and the powers to enter into arrangements and to require information. Subsection (4) requires the Welsh Ministers to publish a summary of the strategy.

41. The Welsh Ministers are required to lay the strategy before the National Assembly for Wales (subsection (7)).

**Clause 9: Local flood risk management strategies: England**

42. This clause requires all lead local flood authorities in England to develop, maintain (which includes updating and reviewing), apply, and monitor the application of, a strategy for local flood risk in their area. They must also prepare a summary of the strategy (see subsections (1) and (7)).

43. The strategy must at least set out who the risk management authorities are in the area and their relevant functions, the authority’s objectives for managing flood risk, as well as proposed measures to deliver the objectives, and timescales for implementation of the measures; how those measures are to be paid for as well as their costs and benefits, how and when the strategy will be reviewed, and how the strategy contributes to the achievement of wider environmental objectives (see subsection (4)(a)–(i)).
44. Local flood risk is defined as a risk of flood arising from surface runoff, groundwater, or an ordinary watercourse, which for these purposes includes a lake or pond which flows into an ordinary watercourse (see subsections (2) and (3)).

45. A lead local flood authority must consult affected risk management authorities and the public about its strategy (subsection (5)).

46. Subsection (7) provides a power to a lead local flood authority to provide guidance about the application of the strategy in its area and subsection (8) requires the authority to have regard to any guidance issued by the Secretary of State about the strategy and any associated guidance issued by the authority.

Clause 10: Local flood risk management strategies: Wales

47. This clause requires the lead local flood authorities in Wales (county and county borough councils) to develop, maintain, apply and monitor strategies for local flood risk management and coastal erosion risk management within their areas. Local flood risk is defined in subsection (2) in the same way as for England. The minimum content of the strategy is detailed in subsection (4) and is also the same as in England.

48. The lead local flood authority is required to publish a summary of the strategy and enables it to publish guidance on the application of the strategy within its area. Strategies must be submitted to the Welsh Ministers for review who may approve, reject or vary it.

49. Lead local flood authorities are required to consult risk management authorities and the public in developing their strategies.

Clause 11: Effect of national and local strategies: England

50. This clause requires risk management authorities in England with the exception of water companies, in exercising their flood and coastal erosion risk management functions, to act in a manner consistent with the national flood and coastal erosion risk management strategy, relevant local flood risk management strategies and related guidance issued under clauses 7 and 9.

51. This requirement does not apply to the Environment Agency in the exercise of its functions under clause 7(1) (see subsection (2)), although as a public authority it would none the less be required to take into account all relevant considerations in deciding how to exercise those functions.

52. Risk management authorities are required to have regard to these strategies in exercising any other function that may affect a flood risk or coastal erosion risk in England (subsection (4)).
53. Water companies are required to act in a manner consistent with the national strategies and guidance, and to have regard to local strategies and guidance (subsection (3)).

54. Subsection (5) gives the Secretary of State power by order to require a specified person to have regard to the strategies and guidance when exercising a statutory function, under this Bill or any other enactment, which could impact on flood risk or coastal erosion risk in England. This power will be exercised to require other bodies, whose activities affect flood or coastal erosion risk, to have regard to relevant strategies.

**Clause 12: Effect of national and local strategies: Wales**

55. This clause requires, as in England, the risk management authorities, other than water companies, in Wales to act in a manner which is consistent with the national and local strategies and guidance under clauses 8 and 10 when exercising their flood and coastal erosion risk management functions. These authorities are required to have regard to these strategies in exercising any other function that may affect a flood risk or coastal erosion risk in Wales.

56. Subsection (2) requires a water company for an area in Wales, to, when exercising its flood and coastal erosion risk management functions to act in a manner which is consistent with the national strategies and guidance, and to have regard to the local strategies and guidance.

57. Subsection (4) allows for the Welsh Ministers by order to require a specified person to have regard to the strategies and guidance when exercising a statutory function, as defined in subsection (3), which could impact on flood risk or coastal erosion risk in Wales.

**Clause 13: Co-operation and arrangements**

58. This clause requires a relevant authority to co-operate with any other relevant authority which is exercising flood or coastal erosion risk management functions. Relevant authorities are defined in subsection (3) and include risk management authorities (defined in clause 6) and Welsh Ministers.

59. Subsection (2) gives risk management authorities the power to share information, in response to a request or voluntarily, where this is for the purpose of a risk management authority fulfilling its duty to co-operate.

60. Subsection (4) allows a risk management authority to arrange for a flood risk management function to be exercised on its behalf by another risk management authority or a navigation authority. However, subsection (5) specifically excludes the functions relating to a national strategy for England or local strategies (under clauses 7, 9 and 10) from being exercised by another body. This does not prevent a lead local authority entering into arrangements for another
body to prepare its strategy, or carry out any other work that relates to its duties under clause 9, as long as the lead local authority remains the decision-maker.

61. Subsections (5) and (6) allow a coast protection authority, with the consent of the Environment Agency, to make arrangements for any of its coastal erosion risk management functions to be exercised on its behalf by another coast protection authority, lead local flood authority or internal drainage board and for the Environment Agency to make arrangements for any of its coastal erosion risk management functions to be exercised on its behalf by one of those same bodies.

62. The effect of this clause gives risk management authorities flexibility to act on behalf of one another and to form informal partnerships. Guidance provided by the Environment Agency under clause 7 is intended to assist this process.

Clause 14: Power to request information

63. This clause empowers the Environment Agency and lead local flood authorities to request a person to provide information in connection with that body’s flood and coastal erosion risk management function (see subsections (1) and (2)). It provides a similar power for the Welsh Ministers.

64. Subsection (4) provides that the information must be provided in the form, manner and time period specified.

Clause 15: Civil Sanctions

65. This clause provides a non-criminal sanction to encourage compliance with clause 14. It allows an authority to serve an enforcement notice if a request under clause 14 to provide information is not complied with. The enforcement notice must restate what information is required and inform the recipient that the authority may impose a penalty if they do not provide the information. It must also state that representations can be made (subsections (1) and (2)).

66. If the information is not received within a period specified in the enforcement notice (which must be at least 28 days) then the authority may impose a penalty of up to £1000. The authority must have regard to any representations and any partial compliance with the information request when determining whether to impose a penalty and how big it should be. The penalty notice must say why the penalty was imposed, and contain information about how to appeal (see subsections (3) to (6)).

67. A right of appeal is to be provided by regulations made under this section. The penalty is recoverable as a debt. (see subsections (7) to (10)).
Clause 16: Funding

68. This clause enables the Environment Agency to pay grants to any person in respect of expenditure incurred or expected to be incurred in connection with flood or coastal erosion risk management in England and provides the Welsh Ministers with the same power in relation to Wales. Subsection (3) allows such grants to be made subject to conditions, including conditions for repayment and interest.

Clause 17: Levies

69. This clause enables the Environment Agency to issue a levy to a lead local flood authority in respect of flood and coastal erosion risk management functions carried out in that local authority’s area by the Environment Agency.

70. Levies must be issued in accordance with regulations made under section 74 of the Local Government Finance Act 1988 and its issue is subject to the Environment Agency obtaining the consent of the appropriate Regional Flood and Coastal Committee under clause 23.

Supplemental powers and duties

Clause 18: Environment Agency: reports

71. This clause requires the Environment Agency to report about flood and coastal erosion risk management to the Minister (who may by way of regulations specify the times or intervals of the report being made and the information it should contain). The report must include information about the application of the national flood and coastal erosion risk management strategies under clauses 7 and 8.

Clause 19: Local authorities: investigations

72. This clause requires a lead local flood authority to investigate flooding incidents in its area in order to: (a) identify which risk management authority has flood risk management functions in respect of the flooding; and (b) establish whether that authority has responded or is proposing to respond to the flood. While the management responsibility for a flood may be clear in many cases, there may be occasions where this is not so and the purpose of this provision is to require in such situations that the lead local flood authority has a duty to investigate so as to try and ascertain where responsibility for managing the flood lies and what is being done about it. The lead local flood authority must publish the results of its enquiry and notify any relevant risk management authority of those results.
Clause 20: Ministerial directions

73. This clause allows the Minister in England or Wales to direct a risk management authority to exercise a flood or coastal erosion risk management function on behalf of another authority (see subsection (1)). The Ministers can act separately in respect of risk management authorities in England or Wales or jointly in respect of a risk management authority that operates in both England and Wales.

74. This may only be done where the Minister is satisfied that the defaulting authority has failed to exercise the function either at all, or in a way that accords with national or local strategies issued under clauses 7 or 9 (see subsection (2)).

75. The Minister has the power to include a provision in the direction as to the recovery of costs (see subsection (3)).

76. The Minister must send a copy of any direction to the authority concerned, and publish the direction (except where this might be contrary to the interests of national security) (subsections (4) and (5)).

Clause 21: Lead local authorities: duty to maintain a register

77. This clause requires lead local flood authorities to establish and maintain a register of structures or features which may significantly affect a flood risk in their area and also a record of information about such structures and features including ownership and state of repair. The Minister may make regulations about the content of the register and record and also describe information to be excluded from them (subsections (2) and (4)).

78. Subsection (3) provides that the register must be available for public inspection at all reasonable times. This requirement does not apply to the record which may contain personal data. The method by which inspection of the register is provided is not specified in the legislation and so a lead local flood authority will have discretion as to whether the register should for instance be placed on its website or to provide access by some other means.

Regional Flood and Coastal Committees

Clause 22: Establishment

79. This clause requires the Environment Agency to establish Regional Flood and Coastal Committees (RFCCs). To do so, it must divide England and Wales into regions. The Environment Agency also has the power to alter these boundaries in accordance with the procedure also laid down by the Minister in regulations.
80. The Minister is given the power to set out in regulations the procedure that must be followed by the EA doing the above which may include provisions in respect of consultation and appeals.

81. These committees will replace Regional Flood Defence Committees (RFDCs) and the Minister is given power by order to make transitional provision for this change.

**Clause 23: Consultation and consent**

82. This clause requires the Environment Agency to consult an RFCC about the way in which it intends exercise its flood and coastal erosion risk management functions in the Committee’s region, and to take into account any representations made.

83. Subsection (2) requires the Environment Agency, before it issues any levy under clause 17, to first obtain the consent of the relevant RFCC. The Environment Agency must also obtain the consent of the relevant RFCC before spending any revenue raised under section 118 of the Water Resources Act 1991.

**Clause 24: Membership**

84. This clause gives an order making power to the Minister to set out requirements relating to membership of the Regional Flood and Coastal Committees. The order may provide for the number of members of a Committee, conditions of eligibility, their method of appointment, and proceedings of a Committee including as to quorum and the extent of the majority needed for different decisions. This power may be used to enable the Minister to provide for a majority of local authority representatives on an RFCC to approve in order for the RFCC to provide the consent required in clause 23 for the Environment Agency to issue a levy or spend revenue.

**Clause 25: Money**

85. This clause allows the Minister to direct the Environment Agency to make specified payments to Regional Flood and Coastal Committee Chairs (and former Chairs). The Environment Agency may also pay allowances to members of these committees. The Minister has the power to determine the amounts or maximum amounts that may be paid under this clause (see subsections (1) to (3)).

**Clause 26: “The Minister”**

86. This clause defines “the Minister” as being the Secretary of State in relation to English Committees and Welsh Ministers in relation to Welsh Committees for the purpose of provisions in this Part relating to Regional Flood and Coastal Committees.
These explanatory notes refer to the Flood and Water Management Bill as introduced in the House of Commons on 19 November 2009 [Bill 9]

General

Clause 27: Sustainable development

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

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

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

Clause 28: Power to make further amendments

90. This clause allows the Minister to amend the Public Health Act 1936 (so far as relevant to water), the Coast Protection Act 1949, The Highways Act 1980 (so far as relevant to water) the Land Drainage Act 1991, the Water Resources Act 1991 and the Environment Act 1995 if the Minister considers this necessary or desirable in consequence of this Part of the Bill.

Clause 29: Restructuring

91. This clause gives the Minister the power to amend by order this Bill or any other enactment to reassign the responsibilities of lead local flood authorities, district councils and internal drainage boards for flood risk or coastal erosion risk.

92. Subsection (2) indicates particular types of amendment which may be made by use of this power but is not prescriptive or limiting. The purpose of this provision is to enable the Minister to redefine the meaning of lead local flood authority by including different authorities within the definition or to reallocate works powers to those authorities.

93. Subsection (4) specifies that the Minister must consult the authorities that would be affected by any changes. Subsection (5) states that an order made by the
Secretary of State must be laid before and approved by both Houses of Parliament before it comes into effect and that an order made by the Welsh Ministers must be laid before and approved by the National Assembly for Wales before it comes into effect.

Clause 30: Designation of features

94. Clause 30 introduces Schedule 1 Risk Management: Designation of Features.

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

Schedule 1 Risk Management: Designation of features

“Designating authority”

96. The Environment Agency, local authorities and internal drainage boards may designate features under this Schedule. Known as “designating authorities”, they will be responsible for managing the designation process, which includes issuing the appropriate notices to the owners of features being designated, and considering any representations made about a notice.

“Responsible authority”

97. Once a feature has been designated, the “responsible authority” (beside the owner) has an ongoing and exclusive role in exercising functions in respect of the feature. It is the responsible authority that will monitor and enforce the designation and it is the responsible authority that has the power to consent to the alteration, removal or replacement of a feature.

98. In effect, the designating authority becomes the responsible authority once the designation has been confirmed (by the issue of a designation notice). However, it is possible for an authority to enter into arrangements with other relevant authorities to carry out functions on its behalf. An example of this might be the establishment of a single designating unit for an area in the spirit of co-operation and the interests of efficiency. The relevant provisions can be found at clause 13.

99. A delegation will be made as part of an authority’s risk management activity; authorities may not transfer their designations to another authority except in exceptional circumstances. Specifically, a designation may be adopted by another authority with relevant functions if the responsible authority ceases to have relevant functions itself: the relevant functions will be in respect of the risk the designated feature affects. There are specific circumstances when this may
be the case, for example if a new unitary authority is established for an area which necessitates a transfer of responsibilities from a former district authority to a newly established unitary authority.

“Owner”

100. Paragraph 3 defines the “owner” of a feature that may be designated. The owner is either the owner of the land on which the feature is situated, or if different, the person that manages or controls the feature.

Designation

101. Paragraph 4 defines a feature as “a structure, or a natural or man-made feature of the environment”. It is a broad definition which may include things that affect flood or coastal erosion risk in an area but are unlikely to have protection under existing law. Examples may include (but are not limited to) features and structures such as walls, channels, culverts, sluices, raised ground and embankments.

102. A feature may be designated if:

- the designating authority must be of the opinion that the existence or location of the feature affects flood risk or coastal erosion risk,
- the designating authority has responsibility for the risk that is affected,
- the feature has not been designated already, including by another authority, and
- it is not owned by a designating authority.

Effect of a designation

103. Paragraph 5 prohibits a person from altering, removing or replacing a designated structure or feature without the permission of the responsible authority. If a person contravenes this requirement, the responsible authority may take enforcement action.

104. It also requires that a designation is registered as a local land charge by the designating authority. It does not empower the authority to recover costs from the owner of the feature. If the designation is cancelled, the responsible authority will remove the local land charge.

105. It does not provide for cost recovery in registering or cancelling a local land charge in respect of a designated feature.

Consent to alteration, removal or replacement

106. Paragraph 6 sets out that the responsible authority may give consent (permission) to alter, remove or replace a designated feature. Any such consent
must be given by notice to the owner. Notice may be given following an application by the owner, or if the responsible authority thinks it appropriate for another reason.

107. The responsible authority may by notice vary or withdraw consent that it has given; the notice to vary or withdraw consent may not be backdated.

108. The responsible authority may refuse to give consent, but it may only do so if it is of the opinion that the proposed alteration, removal or replacement would affect a flood risk or coastal erosion risk. If a person has been refused consent, they may appeal the decision of the responsible authority in accordance with regulations made under paragraph 15 of this schedule.

**Provisional designation notice: procedure**

109. Before a feature may be formally designated, the designating authority must first issue a provisional designation notice to the owner of the feature in question.

110. The provisional designation notice must provide important information about the provisional designation. As a minimum the notice must set out:

- the feature in question,
- the date from which the feature is provisionally designated,
- why the feature is being provisionally designated,
- how the owner of the feature may make representations to the designating authority in respect of the notice, and
- the period in which representations may be made.

111. During the period of notice, the owner has the right to make representations to the designating authority on the provisional designation, which the authority must consider before confirming a designation by means of a designation notice.

112. However, because the provisions are designed to protect the flood and coastal erosion risk management properties of the feature in question (by preventing changes from being made that could affect its flood or coastal risk management properties), the feature is to be treated as though it has been formally designated for the duration of the period of notice.

113. This means that no alteration, removal or replacement of the feature may be made without the written consent of the designating authority. The designating authority may issue an enforcement notice in respect of a person that contravenes a provisional designation notice and it is an offence to fail to comply with an enforcement notice in respect of a provisional designation as it is for a formal designation.

114. The designating authority may also cancel a provisional designation by issuing a notice to that effect.
Designation notice: procedure

115. Paragraph 8 sets out that a designation notice may be issued by the designating authority that confirms indefinitely the status of the provisional designation.

116. A designation notice may not be issued until the period of notice for making representations has expired. The designating authority must have regard to any representations made within the period of notice in deciding whether to confirm the designation.

117. The designation notice must be issued within 60 days of the date of issue of the provisional designation notice. After this time the provisional designation will cease to have effect. If the designating authority still wants to designate the feature after that time, then a new provisional designation notice is required. The designating authority may not confirm a designation or take any enforcement action in respect of a provisional designation once the period of notice has expired.

118. The designation notice must include certain particulars about the feature and designation including what is being designated and why, and give information about the appeals process.

119. The owner of the feature may appeal a designation notice, for example if the authority has not taken account of reasonable representations made in respect of the provisional designation that preceded the designation notice.

Cancellation

120. The responsible authority may cancel a designation (including a provisional designation). It may do so at the owner’s request or where it thinks it appropriate for another reason, for example if a new flood defence system has come on-line that negates the need for the designation. An owner may appeal if their request for a cancellation is denied.

121. Where the responsible authority intends to cancel a designation it must issue a notice to the owner that must specify the details of the feature to which it refers, the date on which it comes into effect, and the reason for the cancellation.

122. The responsible authority must remove the local land charge. The authority is not empowered to charge for a cancellation.

Notice to other authorities

123. Paragraph 10 requires the responsible authority to notify other authorities about a designation or cancellation where the other authority is likely to have an interest. This is in addition to requirements under clause 21 for the lead local
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authority to keep a register of features and a record of information about them, the duty to co-operate, and the power to enter into arrangements under clause 13.

**Enforcement notice**

124. The responsible authority for a designated feature has powers to enforce the designation. It is not an offence in the first instance to contravene paragraph 5(1) (the prohibition on altering, removing or replacing a designated feature without the consent of the responsible authority) but it is an offence not to comply with a subsequent enforcement notice, described below.

125. The responsible authority may issue an enforcement notice to the person that contravened paragraph 5(1), or the owner of the feature.

126. An enforcement notice must give instructions to the person on whom it is served, setting out the corrective measures the person must undertake and by when they should be completed in order to restore the feature to its proper state. If an enforcement notice is ignored the authority may carry out the remedial work and may recover costs incurred from the person on whom the enforcement notice was served.

127. An enforcement notice may be appealed in accordance with regulations made under paragraph 15 of this Schedule.

128. Paragraph 11 (4)(a) provides that it is an offence to fail to comply with an enforcement notice, and sets out that if found guilty, a person may be fined up to a maximum amount as set out in level 5 of the standard scale.

129. The enforcement powers also apply to a provisional designation notice until such time as it expires.

**Emergency powers**

130. Paragraph 12 includes specific powers for a responsible authority to act in an emergency.

131. This paragraph only applies if (a) a person carries out works to alter, remove or replace a designated feature without obtaining consent and (b) the responsible authority considers that this increases an immediate and serious flood or coastal erosion risk that warrants emergency action. In such an emergency situation the authority may take remedial action without the need to first serve an enforcement notice. Such emergency action includes entry to the land on which the feature is located (see paragraph 13).

132. The authority may recover from the owner any costs incurred in carrying out the emergency works.
Powers of entry

133. Paragraph 13 gives powers of entry to land for the following purposes:
   • to establish whether a person has altered, removed or replaced a designated feature without consent of the relevant authority,
   • to determine whether a person has complied with an enforcement notice,
   • to take the steps set out in an enforcement notice if the person on which it was served has not taken them, or
   • to act in an emergency.

134. The authority must give at least 7 days’ notice to the occupier of the land and state the reason for entry unless an emergency necessitates earlier intervention.

135. Anyone exercising the powers of entry must provide on request written proof of their authorisation to enter the land.

136. Paragraph 13(6) makes it an offence to obstruct a person authorised by the authority from entering land for the purposes of exercising default enforcement powers and emergency powers. Anyone found guilty is liable to up to (a) two years imprisonment or a fine or both (on indictment) or (b) a fine up to the statutory maximum (on summary conviction).

Compensation for owners and third parties

137. Paragraph 14 provides that an authority must pay compensation to a person in respect of damage to their land resulting from the exercise of the powers of entry.

138. However, compensation is not payable to a person who has altered, removed or replaced the feature without the relevant authority’s consent or has failed to comply with an enforcement notice.

Appeals

139. The owners of designated features will have a right of appeal in accordance with regulations made under paragraph 15 against:
   • a designation notice (but not a provisional designation notice, in respect of which representations may be made),
   • refusal of consent to alter, remove or replace a designated feature,
   • refusal to cancel a designation, and
   • receipt of an enforcement notice.

140. Subparagraph (2) makes provision about the regulations.

141. Subparagraph (3) stipulates that where an appeal is made: a) the designation remains in place until the appeal has been determined; and b) the person or legal body who hears and determines the appeal may cancel the designation.
142. Subparagraph (4) specifies that if someone appeals against an enforcement notice: a) the timescale for completion of the specified remedial action is temporarily suspended until the appeal has been determined; and b) the person or legal body who hears and determines the appeal may cancel the notice if appropriate.

**Notices and applications**

143. Paragraph 16 provides the Minister (as defined in paragraph 17 of this Schedule) may make regulations (by statutory instrument) about the serving of notices, and the form and procedure for applications under this Schedule.

**“The Minister”**

144. Paragraph 17 defines the “Minister” for the purposes of Schedule 1 as meaning the Secretary of State in England and Welsh Ministers in Wales.

**Clause 31: Amendments of other Acts**


146. Currently between them those Acts provide the legislative framework for flood defence and coast protection. Part 1 of the Bill establishes a risk management approach to flood and coastal erosion and that Part and the amended Acts taken together allocate responsibility for sources of flood and coastal erosion risk to certain bodies and providing powers to do works in order to manage the risks which go wider than “defence” and “protection”.

147. The amendments also apply existing provisions in the Acts to the flood and coastal erosion risk management regime. In particular these amendments apply existing consenting and enforcement provisions and also appeal, compensation, rights of entry and compulsory purchase provisions to the new powers. The Schedule also amends the Local Government Act 2000 so as to apply provisions of that Act to the actions of risk management authorities.

**Schedule 2: Amendment of other Acts**

**Coast Protection Act 1949 (CPA)**

148. Paragraphs 1 to 24 concern amendments to the CPA.
149. Paragraphs 1 to 4 of Schedule insert new provisions after section 2 of the CPA, so as to grant the Environment Agency the same powers that are currently held (and which will continue to be held) by coast protection authorities (which are the district councils of each maritime district). In conjunction with the definition of coast protection work inserted by paragraph 24 (see below) the new provisions also widen the scope of works which can be done under the Act by both the Environment Agency and coast protection authorities to include anything done for the purpose of maintaining or restoring natural processes. However there are additional conditions that apply before the wider power can be used, namely: (i) the Environment Agency or authority must think the work is desirable having regard to the national flood and coastal risk management strategies under clauses 7 and 8; and (ii) the purpose of the work must be to manage a coastal erosion risk.

150. Paragraphs 5(5) and 5(6) provide for the Environment Agency to approve coast protection works under section 5 of the CPA rather than the Minister. Paragraph 5 also contains consequential amendments needed to ensure that the existing powers which are being extended to the Environment Agency are accompanied by an extension of the notification and objection provisions and protections. It also ensures that the extra powers that coast protection authorities are acquiring are similarly accompanied by these protections.

151. Paragraphs 6 to 9 make consequential amendments to sections 6, 8, 9 and 10 of the CPA to provide that the Environment Agency (and coast protection authorities in respect of their wider powers) have the existing powers of coast protection authorities to make works schemes.

152. Paragraphs 10 and 11 make consequential amendments to sections 12 and 13 of the CPA to provide that the Environment Agency (and coast protection authorities in respect of their wider powers) have the existing general powers to maintain and repair works of coast protection authorities, and to allow them the same cost recovery provisions with the same inbuilt protections.

153. Paragraph 12 makes consequential amendments to section 14 of the CPA to provide that the Environment Agency (and coast protection authorities in respect of their wider powers) have the same existing powers for the compulsory acquisition of land as coast protection authorities, and with the same inbuilt protections (such as the requirement for ministerial consent and dispute, appeal and compensation provisions).

154. Paragraph 13 makes consequential amendments to section 19 of the CPA to ensure that the Environment Agency (and coast protection authorities in respect of their wider powers) are subject to the existing compensation provisions related to people affected by the exercise of the powers being acquired.

155. Paragraphs 14 to 23 make further consequential amendments to sections 20, 21, 23, 24, 25, 26, 27, 28, 44 and 45 of the CPA to apply to the Environment
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Agency (and coast protection authorities in respect of their wider powers) other existing provisions which relate to those powers (such as power of entry provisions).

156. Paragraph 24 inserts a definition of “coast protection work into section 49 of the CPA. This effectively widens the scope of works which can be done under the Act by both the Environment Agency and coast protection authorities to include anything done for the purpose of maintaining or restoring natural processes.

**Land Drainage Act 1991 (LDA)**

157. Paragraphs 25 to 39 concern amendments to the LDA.

158. Paragraph 26 repeals Section 8 of the LDA, which currently allows the Environment Agency to exercise powers vested in internal drainage boards (IDBs) under sections 21 and 23 of that Act concurrently with the IDB and paragraph 27 repeals default powers of the Environment Agency under section 9(1) of the LDA insofar as they relate to flooding.

159. Paragraph 28 amends section 11 of the LDA which currently makes provision for the Environment Agency and internal drainage boards to enter into arrangements for the purposes of carrying out certain works and in particular for internal drainage boards to do and maintain drainage works on behalf of one another. This amendment provides in addition for internal drainage boards to provide administrative, professional or technical services to one another by agreement. This would allow internal drainage boards to operate as consortia.

160. Paragraph 29 amends the LDA by adding a new section 14A after section 14. The new subsection 14A(1) gives lead local flood authorities powers to carry out flood and coastal erosion risk management works provided that the authority considers this work to be desirable having regard to the local flood risk management strategy for the area and it is for the purpose of managing a flood risk from surface run-off or groundwater.

161. The new subsection 14A(1) gives lead local flood authorities powers to carry out flood and coastal erosion risk management works provided that the authority considers this work to be desirable having regard to the local flood risk management strategy for the area and it is for the purpose of managing a flood risk from surface run-off or groundwater.

162. The new subsections 14A(2) and (3) give internal drainage boards, district councils and lead local flood authorities (where there is no district council) powers to carry out flood and coastal erosion risk management works in respect of ordinary watercourses and the sea in their area, where they consider this work to be desirable having regard to the local flood risk management strategy for the area.
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163. These powers are wider than the existing powers in section 14 of the LDA in that they may be used to: (i) remove works; (ii) maintain, restore, and monitor natural processes; and (iii) reduce or increase the level of water in a place.

164. These new powers will be subject to the same compensation, compulsory acquisition, entry and appeal provisions as apply to the existing powers in section 14. The new powers are also subject to existing protections provided by the planning regime. This would be the main mechanism through which third parties might appeal against new works which might impact negatively upon them.

165. Paragraph 30 in repealing section 17 of the LDA removes the direct supervisory capacity that the Environment Agency exercises over local authorities in the carrying out of their drainage works powers. Instead the authorities are required to exercise their powers in accordance with the local flood risk management strategy.

166. Paragraph 31 amends section 21 of the LDA (which allows the internal drainage board or Environment Agency to take action to enforce obligations to maintain or repair any watercourse, bridge or other drainage work). The Environment Agency will no longer exercise this power in England or Wales. The internal drainage board (within its district) and otherwise the lead local flood authority for the area in question will exercise this power. (The Environment Agency will continue to exercise this power in both England and Wales so far as it relates to Main River under Section 107(2) of the Water Resources Act 1991.)

167. Paragraphs 32, 33 and 34 make various amendments to sections 23, 25 and 26 of the LDA.

168. Section 23 of the Land Drainage Act, prior to this amendment, prohibits the construction of certain kinds of obstructions in ordinary watercourses without the prior consent of the drainage board (currently the Environment Agency or internal drainage board (for works within its district)). The structures which are caught by this section are (a) mill-dams, weirs and other similar structures and (b) culverts which are likely to affect the flow of water in the watercourse. This means that only the construction of culverts which can be shown to affect the flow of a water course need consent. This implies that it is possible to construct a culvert which does not affect the flow, and that such a culvert would not require consent. The amendment in paragraph 32(2) therefore requires that any new culvert must have consent.

169. Subparagraph (3) of paragraph 32 amends section 23 of the 1991 Act to remove the Environment Agency as the consenting authority for watercourses outside of an internal drainage district, and replace it with lead local flood authorities. Internal drainage boards will remain the consent authority for watercourses within an internal drainage district.
170. Subparagraph (3) of paragraph 32 also amends section 23 to require lead local flood authorities and internal drainage boards to consult with the Environment Agency when they are consenting work that they are themselves proposing. This is to minimise the potential for conflict of interest. Drainage boards must also have regard to any guidance provided by the Environment Agency on consenting.

171. Subparagraph (4) of paragraph 32 amends section 23 to change the procedure by which fees may be determined. Instead of fees being changed by Ministerial order, they will be changed in accordance with a charging scheme that is prescribed by order. Subparagraph (6) amends the definition of “drainage board” that is used for sections 23 and 24 so that the Environment Agency’s role as a drainage board for watercourses outside of an internal drainage district is taken over by lead local flood authorities. Subparagraph (5) applies this amended definition of “drainage board” to sections 24 and 25. Subparagraph (7) applies the definition of “lead local flood authority” in the Bill to the use of the term in LDA.

172. Paragraph 33 amends section 25 of the LDA (Powers to require works for maintaining flow of watercourse) to give the powers of the Environment Agency to lead local flood authorities. Internal drainage boards retain their powers. Section 26, which deals with competing jurisdictions, is repealed by paragraph 34.

173. Paragraphs 35 and 36 amend sections 33 and 34 of the LDA which currently provide for the Environment Agency and drainage boards to commute (with Ministerial consent) land drainage obligations not related to Main Rivers. The amendment is to remove the Environment Agency’s power to commute obligations and provide that: (i) where the obligations relate to an area which forms part of an internal drainage district then the drainage board for the district will have the power; (ii) for any other area, a lead local flood authority will have the power. Paragraph 37 omits subsection (4)(c) from section 59 of the LDA leaving that section to apply in relation to grants for drainage works.

174. Paragraph 38 amends section 66 of the LDA to give bylaw making powers to the relevant authorities which are empowered to carry out works under section 14 of the LDA as result of the amendments made by this Bill, and extends the purposes for which byelaws can be made. The purposes for which byelaws can now be made are in addition to (i) securing the efficient working of a drainage system; and (ii) regulating the effect on the environment of a drainage system, to (a) to secure the effectiveness of flood risk management works, with the meaning of section 14A of the LDA as inserted by the Bill; and (b) to secure the effectiveness of works done under section 38 or 39 of the Bill.

175. Paragraph 39 introduces a definition of “culvert”, defining it as a covered channel or pipe designed to prevent the obstruction of a watercourse or drainage path by an artificial construction. There is no definition in current legislation.
176. Paragraphs 40 to 49 concern amendments to the WRA.

177. Paragraph 41 repeals section 106 of the WRA so that the Environment Agency no longer has to carry out its flood management functions through the Regional Flood Defence Committees. Under clause 23 of this Bill, those Committees will have an advisory function instead.

178. Paragraph 42 amends section 110 of the WRA to change the procedure by which fees may be determined. Instead of fees being changed by Ministerial order, they will be changed in accordance with a charging scheme that is prescribed by order.

179. Paragraph 43 amends section 118 of the Water Resources Act, which states how revenue raised by the Environment Agency can be spent, to replace the reference to “flood defence” functions with a reference to the broader concept of “flood and coastal erosion risk management” which this Act introduces. It also replaces references to local flood defence districts and flood defence districts with “flood risk management region” which are the regions that are to be created by the exercise by the EA of its powers under clause 22. It repeals section 118(6) which relates to local flood defence districts which will no longer exist. Paragraph 44 repeals section 133 of the WRA in consequence of clause 17.

180. Paragraphs 45 and 46 amend sections 159 and 160 of the WRA, and allow existing pipe laying powers to be used for flood risk management purposes.

181. Paragraph 47 adds new provisions to the beginning of section 165 of the WRA. The new provisions allow the Environment Agency to carry out flood and coastal erosion risk management works provided that: (a) the Agency thinks that the work is desirable having regard to the national flood and coastal erosion risk management strategy (under clauses 7 and 8 of the Bill); and (b) that the purpose of the works is to manage a flood risk from the sea, or a main river (although for certain works only the first condition need be satisfied). “Main river” includes a reference to a lake, pond or other area of water which flows into a main river.

182. Flood and coastal erosion risk management works include anything done to: (a) maintain existing works, including cleansing, repairing or otherwise maintaining the efficiency of any existing watercourse or drainage work, (b) operate existing works, (c) improve existing works, including anything done to deepen, widen, straighten or otherwise improve any existing watercourse or remove or alter mill dams, weirs or other obstructions to watercourses, or to raise, widen or otherwise improve any drainage work; (d) construct new works, including anything done to make any new watercourse or drainage work or erect machinery; (e) maintain or restore natural processes; (f) monitor, investigate or
survey a location or a natural process; (g) reduce or increase the level of water in a place; (h) alter or remove any works.

183. These new powers are subject to the same compensation, compulsory acquisition, entry and appeal provisions as apply to the existing powers in section 165. It should be noted that the new powers are also subject to existing protections provided by the planning regime. This would be the main mechanism through which third parties might appeal against new works which might impact negatively upon them.

184. The new powers are wider than the existing powers in section 165 in the same way that the powers inserted by paragraph 26 into the LDA are wider, in that they may be used to: (i) remove works; (ii) facilitate the cessation of use for works (e.g. remove bits which may break off if the works are abandoned); (iii) maintain, restore, and monitor natural processes; (iv) reduce or increase the level of water in a place. However their use is restricted in that the conditions (a) and (b) mentioned above do not apply to the existing power.

185. Subparagraphs (3) to (6) make consequential amendments to section 165 of the Water Resources Act.

186. Paragraphs 48 and 50 (see under Water Industry Act 1991 below) respectively amend section 204(2) of the WRA and 206(3) of the Water Industry Act 1991. These sections create a number of exceptions to the general prohibition on disclosure of information gained by companies or individuals under those Acts. These amendments to those sections add the provision of information in response to a request under clause 14 to those exceptions from that prohibition.

187. Paragraph 49 amends Schedule 25 paragraph 5(1) of the WRA to extend the powers of the Environment Agency to make byelaws. Currently byelaws may be made for the purposes of securing the efficient working of a drainage system and regulating the effect on the environment of a drainage system. This amendment provides in addition for byelaws also to be made for the purposes of securing the effectiveness of flood risk management works, within the meaning of section 165 of the WRA, as amended by the Bill and securing the effectiveness of works done under section 39 or 40 of the Bill.

Water Industry Act 1991

188. See under Water Resources Act 1991 in relation to paragraph 48 of Schedule 2 to the Bill.

Environment Act 1995

190. Paragraph 52 amends section (6) of the Environment Act 1995 to provide the Environment Agency with general supervision over all flood and coastal erosion risk management matters.

191. Paragraph 53 repeals sections 14 to 19 and schedules 4 and 5, in the light of provisions for Regional Flood and Coastal Committees under clauses 22 to 26 of this Bill.

Local Government Act 2000

192. Paragraph 54, by adding a new section 21F to the Local Government Act 2000, extends the powers of overview and scrutiny committees in England under the Local Government Act 2000. It provides powers to lead local flood authorities to allow for the scrutiny of risk management authorities as to the exercise of their flood and coastal erosion risk management functions.

193. It gives risk management authorities a duty to comply with requests for information or responses to reports from the overview and scrutiny committees.

194. It provides for the Secretary of State to make regulations about the duties set out above. This can include provisions about procedures, notices, exemptions, requirements to provide information orally, the nature of information and publication.

195. Risk management authorities must have regard to the reports and recommendations of the overview and scrutiny committees.

196. This provision also provides for the Secretary of State’s existing powers to make regulations in respect of joint overview and scrutiny committees to be used in respect of scrutiny under this new provision.

Part 2: Miscellaneous

Clause 32: Sustainable drainage

197. Clause 32 introduces Schedule 3: Sustainable Drainage.

Schedule 3: Sustainable drainage

198. This Schedule to the Bill introduces standards for the design, construction, maintenance and operation of new rainwater drainage systems, and an ‘approving body’. The body, which will generally be a unitary, county or county borough local authority, will be required to approve most types of rain-water drainage systems before work can start. Where the system affects the drainage of more than one property, the approving body will be required to adopt and maintain the system upon satisfactory completion. The Schedule also amends section 106 of
the Water Industry Act 1991 to make the right to connect surface water run-off to
public sewers conditional on the approval of the drainage system by the
approving body.

“Drainage system”

199. This paragraph defines “drainage system” for Schedule 3 as a structure
designed to receive rainwater, other than a public sewer or a natural watercourse.

“Sustainable drainage”

200. This paragraph defines the term “sustainable drainage” for the purposes of this
Schedule.

Cross-border systems

201. This paragraph states that in situations where part of a drainage system is in
Wales and part in England than the parts will be treated as separate systems for
the purposes of this Schedule. However, decisions on one part should be taken
with regard for the other part.

“The Minister”

202. This paragraph defines the Minister as the Welsh Ministers, for drainage
systems in Wales, and the Secretary of State, for drainage systems in England.

National Standards

203. This paragraph imposes a duty on the relevant Minister to publish national
standards about how drainage systems should be designed, constructed,
maintained and operated for the purpose of implementing sustainable drainage.
These national standards are referred to in other paragraphs in this Schedule.

204. Subparagraph (3) provides that the standards may permit or require approving
bodies to form judgments on drainage systems using specific criteria. Approving
bodies must also take account of any guidance which is issued by the Minister.

205. The Ministers must consult before publishing the standards.

Approving body

206. This paragraph sets out who is to act as “Approving Body” for drainage
systems for an area. In the first instance, the Approving Body is to be the unitary
or county council for the area.

207. Subparagraphs (3) to (5) provide that the relevant Minister may appoint
another body to be the Approving Body in a specified area instead of the council.
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This must be done by order which would be subject to the negative resolution procedure.

208. When appointing a different body to act as the Approving Body for a particular area, the order may also confer additional powers on that body that would assist them in acting as the Approving Body. It may only confer powers which are already available to a unitary or county council. For example, this might be used to give local authority powers of entry to the new Approving Body for maintenance purposes so as to put them in the same position as the unitary or county council would have been. Where additional powers are conferred on the Approving Body, the order will be subject to the affirmative resolution procedure either in Parliament or the National Assembly for Wales.

**Requirement for approval**

209. This paragraph provides that approval by the Approving Body is required before commencement of any construction work which has drainage implications. This paragraph defines construction work as anything done by way of or in connection with or in preparation for the creation of a building, including any structure that covers land (such as a patio). Construction work has drainage implications if the building or structure will affect the ability of the land to absorb rainwater. Approval for construction work is not required if that construction work is a nationally significant infrastructure project, as defined in section 31 of the Planning Act 2008. These projects will require approval from the Infrastructure Planning Commission.

210. Subparagraph (4) allows Ministers to define what is to be treated as construction work, or as having drainage implications, and therefore what requires approval. It also enables the Minister to set exemptions to the requirement for approval. This power is exercisable by order and will be subject to the negative resolution procedure.

**Applications for approval**

211. This paragraph provides for two approaches for applying for approval from the Approving Body. Where planning permission under the Town and Country Planning Act is not required, then the application is to be made as a “free-standing” application, directly to the Approving Body. Where planning permission is required then the applicant can choose to make a combined application with planning permission, by lodging both applications to the planning authority at the same time.

**Free-standing application for approval**

212. This paragraph provides the procedure for free-standing applications. The Approving Body may require applications to be made in a particular form, and applications must contain any information that the Approving Body requires in
order to determine the application. If a fee is payable then it must also be accompanied by that fee.

Combined applications

213. This paragraph provides the procedure where an applicant chooses to have their application for approval combined with planning permission. In a case like this, the applicant must give the planning application and the application for approval required by this Schedule to the planning authority. The application for approval of the drainage will need to contain the same information, be in the same form, and be accompanied by a fee in the same way as if a free standing application were made.

214. The planning authority will be obliged to consult with the Approving Body (if it is a different body than the planning authority), so that the Approving Body can determine the drainage application. The planning authority must inform the Approving Body of its final decision on the planning application. The planning authority must also inform the applicant of the final decision of the approving body on the drainage system at the same time as it informs the applicant of its final decision on planning permission.

Determination of application for approval

215. This paragraph provides the process for determining an application for approval. An Approving Body must grant an application if it is satisfied that the drainage system complies with the national standards for sustainable drainage. If it is not satisfied then it must refuse the application. Approval may be granted subject to conditions on the construction, or modifications to the original proposals. The Approving Body may grant approval on the condition that the applicant provides a non-performance bond. This is explained further below. In such a case, the approval only takes effect once the applicant has provided the non-performance bond. Grant of approval may relate to inspection of the drainage system or there may be a condition which requires payment of fees payable for the processing of the application for approval of a drainage system.

216. Before determining an application the Approving Body must consult a number of relevant bodies. If a connection to the sewer is proposed, it must consult the relevant sewerage undertaker; if the drainage system will discharge to a watercourse, it must consult the Environment Agency; if the drainage system is likely to affect a road, it must consult the relevant highway authority; and finally if the drainage system is to discharge under, or directly or indirectly into a waterway managed by British Waterways, it must consult British Waterways. The Approving Body must notify the applicant and any relevant consultees as of their decision as soon as they reasonably can.
Non-performance bonds

217. This paragraph explains what a non-performance bond is. When approving an application, the Approving Body may require the applicant to deposit a non-performance bond as a condition of granting approval. The value of the bond will be decided by the Approving Body, but it cannot exceed the best estimate of the most that it will cost to build the drainage system in line with the approved proposals.

218. If the Approving Body certifies that the drainage system has not been constructed in accordance with approved proposals or is unlikely to be completed, it may give a certificate leading to forfeit of the bond. Before doing this it must consult the applicant about whether it should do this. Once it has decided to forfeit the bond, it must then use the money to complete the drainage work in compliance with national standards. If any money is left over, the Approving Body must pay the remaining amount back to the applicant.

Fees

219. The Minister is able to make regulations to set fees for applications for drainage approval. The provisions allow for the regulations to set fees dependent on criteria specified in the regulations, for instance the extent or nature of the construction works. The regulations can also set fees taking into account the costs of work done by the authority to process the approval. In making the regulations, the Minister must have regard to the desirability that the income from fees does not significantly exceed the costs incurred in processing an approval.

Enforcement

220. This paragraph requires the Minister to make an order to make provision about enforcement of the requirement for approval under this Schedule. The order can be used to make provision for taking enforcement action in cases where construction starts without approval of its drainage system, where any of the conditions that the approval was based on are breached or where construction of the drainage system does not follow the approved proposals.

221. The order can include provisions about notices including enforcement notices, stop notices, temporary notices and breach of condition notices; allowing for applications to be made to a court or tribunal; confer powers including discretionary powers on the Minister or other authorities, powers of entry, powers of inspection and powers to undertake and charge for remedial work; and provisions about the consequences of failure to comply with the order itself or notices produced under it. If the Minister wishes, the order can apply or make provisions similar to provision in the Town and Country Planning Act 1990.
222. The order under this paragraph will be subject to the affirmative resolution procedure.

**Sewers and roads**

223. This paragraph amends section 106A of the Water Industry Act 1991. The effect of this amendment is to limit the existing right to connect to the public sewer in certain cases. Where the connection to the sewer is part of a drainage system which requires approval under this Schedule, connection will only be allowed where the application for approval of the drainage plans proposes a connection to the public sewer, and that application is approved by the Approving Body.

224. At present, under section 106(4) of the Water Industry Act, a sewerage company may refuse to allow a connection to the public sewer if it thinks that the connection would be prejudicial to its sewerage system. This paragraph provides that the sewerage company will no longer be able to refuse a connection on these grounds in a case where the sewer connection is part of the approved drainage system. It also provides that a connection to the sewer may not be refused on the grounds that drainage system drains more than one property or sewer, or absorbs water from other land as well as from premises and sewers.

225. Subparagraph 3 inserts a new subsection into section 115 of the Water Industry Act to require a sewerage undertaker to accept any drainage from a highway drain which is in accordance a drainage system which is approved under this Schedule.

**Duty to adopt**

226. This paragraph imposes a duty on the approving body to adopt any new drainage system which meets these conditions.

   a. Condition 1 is satisfied where the drainage system has been constructed in line with an approved drainage plan which conforms to the national standards.

   b. Condition 2 is satisfied where the approving body is satisfied that the drainage system has been built and functions in accordance with the approved plan (and complies with any conditions or approval) or alternatively where the approving body can or has issued a certificate that the non-performance bond will be used to complete the drainage system, for the reasons described under non-performance bonds. The Approving Body must also have regard to any guidance issued by the Minister on this condition

   c. Condition 4 is satisfied if the system is a “sustainable drainage system”, as defined by regulations made by the Minister.
227. Where part of a drainage system is exempt from adoption, this duty to adopt continues to apply to the rest of the system as if it were a whole drainage system in its own right.

**Exception 1: single property systems**

228. This paragraph provides that the Approving Body is not under a duty to adopt any drainage system, or part of a drainage system, which only provide drainage for single properties. The Minister can make regulations to define when a drainage system or part of a drainage system provides drainage for a single property.

**Exception 2: Roads**

229. This paragraph provides that the Approving Body is not under a duty to adopt drainage systems, or parts of a drainage system which are also a publicly maintained road.

230. Where part of an adopted drainage system is a publicly maintained road, the road maintaining authority (the highways authority), must exercise its functions in accordance with the approved plan for the drainage system (including any conditions of approval) and in accordance with national standards. The functions affected would include the highways authority’s functions of maintaining a road, and arranging for it to be properly drained under the Highways Act 1980.

231. If a road is part of a drainage system (for example, by being constructed of permeable paving) but is privately maintained, then that part of the drainage system will need to be adopted by the Approving Body in the same way as the rest of the system. If a private road which is part of a drainage system subsequently becomes adopted by the highway authority (and therefore becomes a publicly maintained road) the Approving Body’s adoption of that part of the drainage system will lapse.

**Additional exceptions**

232. This paragraph allows the Minister to provide additional exceptions to the duty to adopt a drainage system. This power must be exercised by order and would be subject to the negative resolution procedure.

**Power to Adopt**

233. This paragraph enables the approving body to voluntarily adopt a sustainable drainage system, where it is not under a duty to do so. The relevant Minister may make regulations defining the types of sustainable drainage systems which may be voluntarily adopted.
These explanatory notes refer to the Flood and Water Management Bill as introduced in the House of Commons on 19 November 2009 [Bill 9]

Effect of adoption

234. This paragraph provides that where an approving body adopts a drainage system, it must maintain the drainage system in line with the National Standards.

Process of adoption in pursuance of duty to adopt

235. This paragraph details the process of adoption where the Approving Body is under a duty to adopt the drainage system. The person who applied for approval, referred to as “the developer” can formally request the Approving Body to adopt a drainage system (for example when it considers that it has completed the system in line with the approved plans). But the Approving Body does not need to wait for a formal request to be made if it considers on its own initiative that it is under a duty to adopt the drainage system.

236. The Approving Body may prescribe the form required for the developer to make formal requests for adoption. Where an Approving Body receives a formal request for adoption, it must determine the request within any time limit imposed by the Minister by order. The Approving Body must notify the developer of its decision, and of its right to appeal as soon as is reasonably practicable.

237. Where an approving body give notice of adoption it must ensure that the notice specifies the extent of the drainage system being adopted. The notice must be copied to the relevant sewerage undertaker. The notice (together with details of the arrangements for access and maintenance in the approved plans) must be copied to anyone appears to owns land on which the drainage system is located, and anyone whose property appears to be drained by the system. The notice must also be copied to the developer and any other statutory consultees to the approval process.

238. The Approving Body must also include the drainage system in the local authority register which is established under Part 1 of the Bill, and designate any parts of the drainage systems which are eligible for designation and not owned by the approving body.

239. Finally it must also release any unused non-performance bond which was paid as a condition of approval back to the developer.

240. The Minister can make regulations about timing and manner of compliance with these obligations. These regulations are subject to the negative resolution procedure.

Process of Voluntary adoption

241. This paragraph sets out what happens where the duty of adoption does not apply to a drainage system, but the Approving Body nonetheless decides to adopt it. When doing so it must notify the relevant sewerage undertake and anyone who
owners land on which the drainage system is located or from which the drainage system will drain water. The notification must specify the extent of the drainage system which is being adopted.

242. The Approving Body must also include the drainage system in the local authority register which is established under Part 1 of the Bill, and designate any parts of the drainage systems which are on third party land and which are eligible to be designated under Schedule 1 of the Bill.

243. The Minister can make regulations about the timing and manner in which notification, registration and designation are carried out. Any such regulations will be subject to the negative resolution procedure.

**Appeals**

244. This paragraph requires the Minister to make regulations providing a right of appeal against decisions about applications for approval (including decisions about conditions), and decisions about the duty to adopt. The regulations must specify jurisdiction for appeals on the Minister, a court or tribunal, and make provision for the procedures and circumstances for appeal.

**Building Act 1984**

245. This paragraph provides for changes to the Building Act 1984.

246. Section 21 of the Building Act provides that when a developer deposits plans of a building or extension in accordance with Building Regulations, the local authority can direct that the building be connected to a sewer. This paragraph amends section 21 so as to provide that where the construction work requires approval under this Schedule, the power in section 21 will no longer apply.

247. Section 59(1)(c) of the Building Act provides that where a cesspool, private sewer, drain or other specified types of drainage work which are provided for a building is in such a condition so as to be prejudicial to health or a nuisance, the local authority may require the owner of the building to carry out work on. This paragraph extends the power in this section so that it also applies to sustainable drainage systems (whether or not they are adopted) in the same way as it applies to cesspools, sewers, drains etc. Insofar as it relates to sustainable drainage systems, the power may be exercised by the Approving Body – under the Building Act the powers are only available to district councils, whereas Approving Bodies will generally be county councils.

248. Finally, section 84(1) of the Building Act provides that if certain courts, yards or passages related to buildings so as to allow for the satisfactory drainage of its surface or subsoil to a proper outfall, the local authority may serve a notice requiring the owner of the buildings to carry out work to remedy the defect. This paragraph removes the words “to a proper outfall”. The effect of this amendment
is that if the court, yard or passage is effectively drained, the local authority cannot serve a notice, irrespective of whether the drainage is via a proper outfall. This will allow drainage to take place via a sustainable drainage system as (for example) permeable paving might not be regarded as a proper outfall.

**Clause 33: Reservoirs**

249. This clause introduces Schedule 4: Reservoirs. This Schedule makes various amendments to the Reservoirs Act 1975 so as to introduce a risk-based approach to reservoir safety in England and Wales reflecting the danger that reservoir failures might pose to human life. It provides the Environment Agency with enforcement powers to support this.

**Schedule 4: Reservoirs**

**Introduction**

250. Paragraph 1 introduces the specific amendments to the Reservoirs Act 1975 in England and Wales. References below to the Minister are to the Secretary of State in relation to England and the Welsh Ministers in relation to Wales.

“Large raised reservoir”

251. Paragraph 2 amends the definition of “large raised reservoir” for the purposes of the Reservoirs Act 1975. It inserts new section A1 before section 1 of the Reservoirs Act 1975 and removes section 1(1) to (3) from the Reservoirs Act 1975.

252. The new definition of “large raised reservoir” is contained in new section A1(1) and provides that a large raised reservoir is (a) a large, raised structure designed or used for collecting and storing water; and (b) a large, raised lake or other area capable of storing water which was created or enlarged by artificial means. New section A1(1)(a) includes non-impounding, bunded reservoirs (reservoirs made up of an embankment which is filled from for example river or groundwater sources and rain). New section A1(1)(b) includes impounding reservoirs (formed by the construction of an embankment across a watercourse or lake).

253. The terms “raised” and “large” are further defined in subsection (2) and (3) of new section A1. A “raised” structure or area will be “large” if it is capable of storing 10,000 cubic metres of water or more above the natural level of any part of the surrounding land. The volume may be amended by order by the Minister under subsection (7) of new section A1.

254. Subsection (4) of new section A1 allows the Minister to make regulations specifying in more detail how the capacity of a large raised reservoir is to be calculated for the purposes of the Reservoirs Act 1975. This will enable the
Minister to provide clarification to engineers and reservoir undertakers on how to calculate the volume capacity of a reservoir for the purposes of determining whether a structure or area falls within the new definition of large raised reservoir.

255. Subsection (5) of the new section A1 enables the Minister to make regulations to provide for a structure which is designed or used for collecting and storing water or an area capable of storing water which was created or enlarged by artificial means to be treated as “large” by reason of its proximity to, or actual or potential communication with another such structure or area. The power will enable the Minister to specify those cases where an area or structure which is not capable of storing 10,000 cubic metres of water is nevertheless to be treated as a large raised reservoir because it is in a “cascade”. Such a structure or area may, for example, be capable of releasing 10,000 cubic metres of water or more if an upstream reservoir breaches or fails and may therefore pose the same danger as a large raised reservoir.

256. Subsection (6) of the new section A1 requires the Minister to aim to ensure, when making these regulations, that such a structure or area is treated as “large” only if 10,000 more cubic metres of water might be released as a result of this proximity or communication.

257. Subsection (8) allows the Minister to make regulations providing for specified things not to be treated as large raised reservoirs for the purposes of the Reservoirs Act 1975.

258. Subsection (9) of the new section A1 defines a large raised reservoir further to include anything used or designed to contain the water or its flow.

259. Orders made under subsection (7) and regulations made under subsection (8) of new section A1 are subject to the affirmative resolution procedure. Regulations made under subsections (4) and (5) are subject to the negative resolution procedure. See further paragraph 38 of Schedule 4.


Registration

261. Paragraph 4 inserts additional provisions after section 2(2A) of the Reservoirs Act 1975. Section 2(2) requires the Environment Agency to establish and maintain a register of large raised reservoirs and a record of information about each.

262. New section 2(2B) requires the undertaker to register a large raised reservoir with the Environment Agency. New section 2(2C) allows the Minister to make regulations about registration, including the information to be registered and the time by which information, or changes to it, must be registered.
263. Paragraph 5 makes a consequential amendment to the Reservoirs Act 1975.

264. Paragraph 6 inserts section 22(1)(A1) before section 22(1) of the Reservoirs Act 1975. Under new section 22(1)(A1) it is an offence to fail to comply with the requirements of new section 2(2B) or a requirement specified in regulations under new section 2(2C). New section 22(1)(A2) sets out the penalty for an offence under section 22(1)(A1).

265. Regulations made under new section 2(2)(C) are subject to the negative resolution procedure (see further paragraph 38 of Schedule 4).

*High-risk reservoirs*

266. Paragraphs 7 and 8 insert new sections 2A to 2E after section 2 of the Reservoirs Act 1975 and make consequential amendments.

267. New section 2A(1) and (2) require the Environment Agency, as soon as reasonably practicable after a large raised reservoir has been registered under new section 2(2B), to consider whether it is to be designated as a “high-risk reservoir”. Where the Environment Agency proposes to designate a large raised reservoir as a high-risk reservoir, it must notify the undertaker of its provisional designation, including the reasons for this designation, and how and within what period representations to the Agency can be made.

268. New section 2B(1) and (2) empowers the Environment Agency to designate a large raised reservoir as a high risk one by giving notice confirming a provisional designation.

269. New section 2C sets out the criteria by reference to which the Environment Agency may determine that a large raised reservoir is a high-risk reservoir. Under subsection (1) of new section 2C the Agency may determine that a large raised reservoir is a high-risk reservoir if the Agency thinks that, in the event of an uncontrolled release of water from the reservoir, human life could be endangered unless the reservoir satisfies any conditions specified in regulations that may be made by the Minister. Subsection (2) of new section 2C gives an indication of the conditions that may be specified in regulations made under new section 2C(1)(b).

270. The undertaker of a high-risk reservoir will be required to comply with sections 10, 11 and 12 of the Reservoirs Act 1975 (as amended).

271. Where a large raised reservoir has not been designated as a high-risk reservoir following its registration, new section 2D requires the Environment Agency to carry out a review if it later thinks that it may be appropriate to designate the reservoir as a high-risk reservoir because, for example, development has taken place downstream or alterations to the reservoir have affected the reservoir’s
inundation zone. The Environment Agency must also carry out a review if it thinks that the designation of a large raised reservoir as a high-risk reservoir may have ceased to be appropriate. The procedure that applies to the Agency’s determination following a review is the same as the procedure that applies when a large raised reservoir is first designated.

272. New section 2E requires Ministers to make regulations providing a right of appeal against designations made under new section 2B and associated procedures. Under subsection (3) of new section 2E a designation is suspended pending the outcome of the appeal.

Panels of Engineers

273. Paragraph 9 adds new subsections (10) and (11) to section 4 of the Reservoirs Act 1975 to enable the Secretary of State and Welsh Ministers jointly to establish one or more panels of engineers. Engineers on the panel(s) would be appointed to act as construction, inspecting or supervising engineers for the purposes of the Act.

Construction and alteration

274. Paragraphs 10 and 11 amend section 6 of the Reservoirs Act 1975 which deals with the construction or enlargement of large raised reservoirs.

275. Subparagraphs (2) to (5) amend section 6 of the Reservoirs Act 1975 so that it also applies to alterations to a large raised reservoir to decrease its capacity. Paragraph 10 makes various consequential amendments to sections 7, 8 and 10 arising from this amendment.

276. Subparagraph (6) adds new subsections 6A and 6B to section 6 of the Reservoirs Act 1975. New subsection 6A provides that section 13 of the Reservoirs Act 1975 applies to alterations or proposed alterations to decrease the capacity of a large raised reservoir so that it is incapable of holding 10,000 cubic metres of water above the natural level of the surrounding land. New subsection 6B allows the Minister by order to substitute a different volume of water for the volume specified in subsection 6A in line with changes to the volume capacity specified in new section A1(3). An order made under new section 6(6B) is subject to the affirmative resolution procedure (see further paragraph 38 of Schedule 4).

277. Paragraph 11(6) amends section 8(3) of the Reservoirs Act 1975 (powers of the enforcement authority in the event of non-compliance with the requirements as to construction or alteration of large raised reservoirs) to require the undertaker to carry out any recommendations an appointed engineer sees fit to make in the interests of safety within the periods specified in the engineer’s report. The engineer’s report must specify the period within which each recommendation contained in the report must be carried out.
High-risk reservoirs: inspections


279. Subparagraph (2) amends section 10(1) of the Reservoirs Act 1975 so that the requirement on undertakers to have any large raised reservoir inspected is amended to apply the requirement to undertakers of high risk reservoirs only. Regulations made under section 10(2) (as amended) are subject to the affirmative resolution procedure.

280. Subparagraph (3) amends section 10(2) of the Reservoirs Act 1975 to allow the Minister to make regulations about the times at which a high-risk reservoir must be inspected.

281. Subparagraph (4) amends section 10(3) of the Reservoirs Act 1975 to allow the inspecting engineer to make any recommendations he sees fit as to (a) the timing of the next inspection (b) the maintenance of the reservoir, and (c) any measures required in the interests of safety and the period in which those measures must be taken. Subparagraph (8) amends section 10(6) of the Reservoirs Act 1975 to require undertakers to carry out any recommendations as to measures required in the interests of safety made by the inspecting engineer within the period specified in the engineer’s report. The engineer’s report must specify the period within which any measure required in the interests of safety must be carried out. Subparagraph (6) amends section 10(5) of the Reservoirs Act 1975 to require the inspecting engineer to include in the certificate he is required to give under section 10(5) any recommendations as to the maintenance of the reservoir included in the engineer’s report. Subparagraph (7) adds a new subsection 10(5A) and requires the undertaker to comply with any recommendation made by an inspecting engineer under section 10(3)(b) of the Reservoirs Act 1975 (as amended) as to the maintenance of the reservoir.

282. Subparagraph (5) inserts a new subsection after section 10(3) of the Reservoirs Act 1975 to require an inspecting engineer to notify the Environment Agency if he has not provided a report before the end of the period of 6 months beginning with the date of completion of the inspection of the reservoir and to provide a written statement of the reasons.

283. Subparagraph (9) inserts into section 10 of the Reservoirs Act 1975 subsection (6A) which requires an inspecting engineer to include in his report a statement as to whether all of the safety measures recommended in the previous inspection report have been taken. Where they have not, the inspecting engineer must either include in the report recommendations to take any safety measure that has not yet been taken or an explanation of why it is no longer required.
284. Paragraphs 13 and 14 contain various consequential amendments to the Reservoirs Act 1975 resulting from the new provision allowing an inspecting engineer to make recommendations as to the maintenance of the reservoir.

285. Paragraph 15 inserts subsections (1AA) and (1AB) after section 22(1A) of the Reservoirs Act 1975 (criminal liability). Under new section 22(1AA), it is an offence to fail to comply with the requirements of section 10(5A) (as amended). The penalty for this offence is set out in new subsection 22(1)(1AB).

**High-risk reservoirs: monitoring and supervision**

286. Paragraphs 16 and 17 amend sections 11 and 12 of the Reservoirs Act 1975 (monitoring and supervision). Sections 11 and 12, as amended, apply to high-risk reservoirs only.

287. Paragraph 17(3) inserts subsections (2A) and (2B) after section 12(2) of the Reservoirs Act 1975. New subsections 12(2A) and (2B) require the supervising engineer to provide the undertaker with a statement of any steps taken to maintain the reservoir in accordance with the recommendations of the inspecting engineer under new section 10(3)(b) at least once every 12 months.

288. Paragraph 17(5) adds subsections (6) to (8) to the end of section 12 of the Reservoirs Act 1975. New section 12(6) gives the supervising engineer the power to direct the undertaker to carry out a visual inspection of the reservoir at specified intervals for the purpose of identifying anything that might affect the safety of the reservoir. These provisions will enable supervising engineers to set out how undertakers can keep a look out for potential problems, such as growing leaks or embankment subsidence which if caught early can avoid worse problems, including emergency situations, developing later on. New section 12(7) requires the undertaker to notify the supervising engineer of each visual inspection that is carried out and anything noticed in the course of it. New section 12(8) allows the Minister to issue guidance to supervising engineers about supervision in accordance with section 12 of the Reservoirs Act 1975 (as amended).

289. Paragraph 19 inserts subsections (1AC) and (1AD) into section 22(1) of the Reservoirs Act 1975 (criminal liability). Under new section 22(1AC), it is an offence, without reasonable excuse, to fail to comply with the requirements of new section 12(6) or 12(7). New section 22(1)(1AD) sets out the penalty for this offence.

**Flood plans**


291. Paragraphs 20(2) and (3) amend the definition of a flood plan in section 12A(1) of the Reservoirs Act 1975 to provide that a flood plan must also give
These explanatory notes refer to the Flood and Water Management Bill as introduced in the House of Commons on 19 November 2009 [Bill 9]

information about the areas that may be flooded in the event of an uncontrolled escape of water and describe the action the undertaker would take in order to prevent an uncontrolled escape of water. Paragraph 21 inserts section 12AA which defines the procedures to be followed where an undertaker is directed to prepare a flood plan, including certification, review, revision, testing and implementation of a flood plan. The undertaker must prepare a flood plan in consultation with the appointed engineer and the engineer must certify that it meets the requirements of section 12A(2)(a) and (b). Paragraph 22 amends section 19 to allow the undertaker to challenge a failure by the appointed engineer to issue a certificate under new section 12AA(3).

292. Paragraph 24 inserts subsection (1AE) into section 22 of the Reservoirs Act 1975 (criminal liability). New section 22(1AE) makes it an offence to fail to comply with the requirements of new section 12AA(4), (5), (6) or (7) and sets out the penalties for these offences.

Discontinuance


294. Paragraph 25(2) amends section 13(1) of the Reservoirs Act 1975 to substitute for “more than 25,000” the figure “10,000” to reflect the new definition of large raised reservoir (see paragraph 2 of Schedule 4).

295. Paragraph 25(3) inserts new subsections (1A) to (1E) after section 13(1) of the Reservoirs Act 1975. These provisions allow a qualified civil engineer to issue an interim certificate if he thinks that the level of water in the reservoir should be reduced before the alteration is completed and requires the undertaker to ensure that the reservoir does not contain water except in accordance with the interim certificate.

296. Paragraph 25(5) adds at the end of section 13 of the Reservoirs Act 1975 new subsections (4) and (5). New section 13(4) allows the Minister by order to substitute a different volume of water for that specified in section 13(1) and 13(3) in line with changes made to the volume capacity specified in new section A1. New section 13(5) allows the Environment Agency to serve a notice requiring the undertaker to appoint a qualified civil engineer where it appears to the Agency that such an engineer has not been employed as required by section 13(1) of the Reservoirs Act 1975. Paragraph 26 makes consequential amendments to sections 15 and 22(1)(b) (criminal liability) of the Reservoirs Act 1975.

297. An order made under new section 13(4) is subject to the affirmative resolution procedure.

Abandonment

299. Paragraph 27(2) amends section 14(2) of the Reservoirs Act 1975 to require the undertakers of a large raised reservoir who are proposing to abandon the use of their reservoir to carry out any recommendations as to measures to be taken in the interests of safety made by the appointed engineer within the period specified in the report.

300. Paragraph 27(3) adds section 14(6), which allows the Ministers to make regulations providing for what is and is not to be treated as abandonment of use and bringing back a large raised reservoir into use as a reservoir for the purpose of the Act.

301. Regulations made under new section 14(6) are subject to the negative resolution procedure.

**Appeals**

302. Paragraph 30 inserts section 19A to the Reservoirs Act 1975. Under sections 8(1), 9(7), 10(7), 12(4), 13(5) and 14(4), the Environment Agency may serve an enforcement notice on the undertakers of a large raised reservoir requiring them to appoint an engineer where it appears to the Agency that the undertakers have not appointed one as required. Under sections 8(3A), 9(7), 10(7) and 14(4), the Agency may also serve an enforcement notice on the undertakers of a large raised reservoir where it appears to the Agency that the undertakers have not carried out any recommendation of an engineer as to measures in the interests of safety. Section 19A requires Ministers to make regulations to provide a right of appeal against the requirements in these enforcement notices. Regulations must define which person or body has jurisdiction and procedural matters.

**Directions of engineers**

303. Paragraph 31 amends section 20(1) of the Reservoirs Act 1975 to include directions made by an engineer under the Act in the list of forms that may be prescribed (see also paragraph 21).

**Assessment of reports and statements**

304. Paragraph 32 inserts section 20A after section 20 of the Reservoirs Act 1975. This will allow Ministers to make regulations for the assessment of the quality of reports and written statements prepared by inspecting and supervising engineers (new section 20A(1)), including for the assessment to be made by a committee of members of the Institution of Civil Engineers (new section 20A(2)). Regulations may set out the criteria and procedures for assessment. The provision will provide a basis on which improvements to, and a greater consistency in, engineers’ reports etc can be achieved and will help to identify where prescribed forms or guidance needs to be revised.
305. Regulations made under new section 20A(1) are subject to the negative resolution procedure.

**Information and reports**


307. New section 21A (power to require information) allows the Environment Agency by notice to require an undertaker to provide specified information for the purposes of carrying out its functions under the Reservoirs Act 1975.

308. New section 21B (reports) allows the Minister to make regulations to require a specified person to report to the Environment Agency on any incident of a specified kind which affected or could have affected the safety of a large raised reservoir. This will enable the Minister to specify the kinds of incident that should be reported to the Environment Agency for collating and dissemination to reservoir undertakers and panel engineers. The intention is that such concerns should be disseminated to undertakers and the profession so that all can learn from individual incidents and if necessary technical guidance issued.

309. Paragraph 34 inserts subsection (4A) to (4C) after section 22(4) of the Reservoirs Act 1975 (criminal liability) to make it an offence to fail to comply with a requirement of a notice under new section 21(A) or to make a report under regulations made under new section 21(B).

310. Regulations made under new section 21B(1) above are subject to the negative resolution procedure.

**Enforcement: supplementary**

311. Paragraph 35 amends section 22(1) of the Reservoirs Act 1975 (criminal liability) by removing the references in that section to “by the wilful default of the undertakers” and “unless there is reasonable excuse for the default or failure” to make the offences strict liability offences.

312. Paragraph 36 inserts new section 22C after section 22B of the Reservoirs Act 1975 (criminal liability). Under new section 22C, the undertaker must pay to the Environment Agency the amount of expenses reasonably incurred by the Agency in connection with the consultation of an engineer when exercising its enforcement powers under sections 8 (construction and enlargement), 9 (re-use of abandoned reservoirs), 10 (inspection) and 14 (abandonment) of the Reservoirs Act 1975.
Arrangements for civil protection: charges

313. Paragraph 37 inserts section 22D to the Reservoirs Act 1975. This provides for Category 1 responders under the Civil Contingencies Act 2004 to charge an undertaker a fee in accordance with a scheme prescribed by regulations made by the Minister. Any scheme would be to enable Category 1 responders to charge fees in respect of costs incurred in carrying out functions under section 2 of the Civil Contingencies Act 2004 in connection with large raised reservoirs. This will enable Ministers to make regulations requiring an undertaker to meet all or part of the costs of emergency planning in connection with an uncontrolled release of water from the large raised reservoir.

Regulations and Orders

314. Paragraph 38 amends section 5 of the Reservoirs Act 1975 (power to prescribe by regulations) to make further provision in relation to regulations and orders made by the Minister under the Reservoirs Act 1975.

Charges


Power to make further provision

316. Paragraph 40(1) provides that the Minister may make such further amendments to the Reservoirs Act 1975 as appear necessary or desirable in consequence of the amendments made by Schedule 4.

317. An Order made under subparagraph 1 is subject to the affirmative resolution procedure.

Ministerial responsibility

318. Paragraph 41 specifies that in the amendments to the Reservoirs Act 1975 made by this schedule, a reference to the Minister is to the Secretary of State in relation to England and the Welsh Ministers in relation to Wales.

Cross-border England-Scotland reservoirs

319. Paragraph 42 makes provision about a large raised reservoir which is partly in Scotland and partly in England. It enables the Secretary of State, with the consent of Scottish Ministers, to provide by order for the English reservoir safety regime (see paragraph 42(1)(c)) or the Scottish reservoir safety regime (see paragraph 42(1)(d)) to apply to any specified large raised reservoir or a class of large raised reservoir.
Clause 34: Special Administration

320. This clause introduces Schedule 5: Special Administration.

321. This Schedule to the Bill amends the special administration regime provisions in the Water Industry Act 1991 to align it with the general insolvency regime as amended by the Enterprise Act 2002. The special administration regime comes into place when water undertakers, sewerage undertakers or certain qualifying licensed water suppliers become insolvent or fail to carry out their statutory functions to such an extent that a transfer to a new owner is seen as the only reasonable way to protect the interests of water and sewerage customers (the “transfer purpose”). The amendments provide the appointed special administrator with an additional purpose (the “rescue purpose”) to instigate a rescue plan. The Schedule also amends provisions related to the transfer purpose, where a failing company is transferred to new owners, and also provides powers to adapt insolvency and company law provisions as they apply to the special administration regime.

Schedule 5: Special Administration

Transfer schemes

322. Paragraph 1 amends Schedule 2 to the Water Industry Act 1991. It removes provisions requiring consent from third party appointees with an interest in the transfer of the property, right or liabilities from an existing water or sewerage undertaker to a new undertaker, before preparing, approving or modifying transfer schemes. An example of such a third party appointee might include a water undertaker that operates in the same area as a sewerage undertaker that is having part or all of its business transferred to a new appointee.

323. Paragraph 2 make a further amendment to provide that a transfer scheme may not impose new liabilities on third party appointees.

Objectives

324. Paragraph 3 amends section 23 of the Water Industry Act 1991 to change the purpose of the special administrator where the water or sewerage company is or is likely to be unable to pay its debts. New section 23(2B) provides that in such a case, its purpose should be to seek to rescue the business as a going concern, instead of seeking to transfer it to a new company. However, the transfer purpose must be pursued instead where the special administrator thinks that a rescue is unlikely to be possible or that the objectives of a special administration order would be better achieved through a transfer.

325. New section 23(2C), as read with the existing subsections (2)(b) and (2A)(b), places a duty on the special administrator to ensure that the company properly
carries out its statutory functions until the transfer purpose or the rescue purpose has been met.

326. New section 23(2D) allows the special administrator to propose a company voluntary arrangement as provided for under Part 1 of the Insolvency Act 1986 or a compromise or arrangement in accordance with Part 26 of the Companies Act 2006 as part of a rescue package to be agreed with creditors.

327. New section 23(2E) to (2G) provides the Secretary of State with a regulation making power to modify provisions outlined in subsection (2D) or apply other provisions related to insolvency or companies in order to adapt them to meet the purposes of the special administration regime. The regulations may in particular confer functions on the Secretary of State, Welsh Ministers or the Authority. The Secretary of State can only make regulations with the consent of the Welsh Ministers and they will be subject to the affirmative resolution procedure.

Financial assistance

328. Paragraph 4 amends sections 153 and 154 of the Water Industry Act 1991 which contain provisions relating to the granting of financial assistance by the Secretary of State or Welsh Ministers where a special administration order has been made.

329. Subparagraphs (2), (3) and (4) expand the power for the Secretary of State and Welsh Ministers to grant indemnities so that they can be granted to the special administrator and the employees and other members of the firm or body corporate associated with the special administrator.

330. Subparagraph (5) provides that arrangements for grants, loans or indemnities made by the Secretary of State or Welsh Ministers may continue after a special administration order ceases to have effect.

331. Subparagraphs (6) and (7) amend the provisions relating to providing information to Parliament or, where the assistance is granted by the Welsh Ministers, the National Assembly for Wales. Subsection (6) replaces a requirement on the Secretary of State and the Welsh Ministers to “immediately” lay details of any guarantees made in connection with a special administration order before Parliament or the National Assembly for Wales, as appropriate, with a requirement to lay “as soon as reasonably practicable”. Subsection (7) makes a similar change to a requirement on a statement of any sums paid by the Secretary of State or Welsh Ministers, for fulfilling a guarantee in connection with a special administration order. This means that in practice that the laying of some documents might be delayed until both Houses of Parliament are sitting rather than during recess or over a weekend, etc.
Hive down

332. Paragraph 5 inserts a new subsection into section 23 of the Water Industry Act 1991 to provide that where the transfer purpose is pursued, the special administrator may “hive down” or transfer the whole or part of a company’s business to a wholly-owned subsidiary of the company in advance of a transfer of the business and securities to one or more new owners.

333. Subparagraphs (2) and (3) provide for the Secretary of State, with the consent of the Welsh Ministers, to make an order amending Schedule 2 to the Water Industry Act to allow the use of transfer schemes to apply to transfers which use a hive down procedure. The order is subject to the affirmative resolution procedure.

334. Subparagraph (4) allows the hive down provisions to be applied to companies which went into special administration before commencement of the new provision.

Application of general administration law

335. Paragraph 6 replaces section 23(3) of, and Schedule 3 to, the Water Industry Act 1991. It applies Schedule B1 to the Insolvency Act 1986 (as inserted by the Enterprise Act 2002) to the special administration regime in place of older insolvency legislation that was generally replaced by Schedule B1, but preserved for the purposes of applying to the special administration regime. It also provides that the Secretary of State, with the consent of the Welsh Ministers, may make regulations to apply, disapply or modify Schedule B1, other Insolvency Act 1986 provisions and other relevant insolvency legislation to special administration.

Strategic supplies

336. Paragraph 7 amends sections 66G(10) and 66H(10) of the Water Industry Act 1991 to provide that the definition of “customer” is to include licensed water suppliers and their respective customers. This is to ensure that all customers of licensed water suppliers are taken into account when the Authority designates certain introductions of water by licensed water suppliers as strategic supplies. These are an introduction of water without which there would be a substantial risk that the undertaker would not be able to maintain supplies to all customers. Currently customers are only defined as those that receive supplies direct from water undertakers, but does not include those that receive supplies through a licensed water supplier.
These explanatory notes refer to the Flood and Water Management Bill as introduced in the House of Commons on 19 November 2009 [Bill 9]

Clause 35: Provision of infrastructure

337. This clause inserts a new Part 2A into the Water Industry Act 1991 ("the Act") under the title of "Regulation of Provision of Infrastructure".

338. New section 36A in the Act allows the "Secretary of State or Welsh Ministers" ("the Minister" (defined in new section 36E)) to introduce regulations to regulate the provision of infrastructure by a third party for the eventual use by water undertakers or sewerage undertakers. The regulations may in particular:

- confer regulatory functions on the Authority (Ofwat) to enable it to regulate the provision of infrastructure;
- apply the same or similar provisions contained in Part 2 of the Act with or without modification. These provisions include such matters as appointment of water and sewerage undertakers, enforcement orders, special administration orders and restrictions on voluntary winding up and insolvency proceedings.

339. The new section also requires that the regulations must specify the activities to which they apply which may include the designing, constructing, owning and operating of infrastructure to be used by undertakers (so for example it could include complex, novel or exceptionally large-scale construction projects that may expose customers to new financial risks) and allows them to define the term "infrastructure".

340. A new section 36B in the Act provides that the regulations under section 36A may allow the Ministers or the Authority (if the role has been delegated to it by the Minister) to specify one or more infrastructure projects which must be put out to tender. The regulations must also prohibit water and sewerage undertakers from carrying out infrastructure projects if they have been identified as the type of projects which have to be put out to competitive tender. However, the regulations may permit or require undertakers to carry out certain preparatory work associated with an infrastructure project and must also include provisions outlining which of the undertakers’ associate companies (e.g. parent or sister companies) may participate in tender processes. In addition the regulations must specify the procedures to be followed in a tender exercise. These provisions may specify factors that need to be taken into account by undertakers when considering bids and must enable an undertaker to determine which bid to accept.

341. This clause also introduces a new section 36C in the Act which requires that the regulations must specify the criteria to be used in determining whether an infrastructure project must be put out to competitive tendering. The regulations may also require the Authority to seek the consent of the relevant Minister before exercising its delegated powers under new section 36B and to publish guidance on how it will determine which infrastructure projects will be subject to tendering.
342. New section 36D provides that the regulations may enable the Authority to designate a successful bidder as an “infrastructure provider”. The regulations may:

- confer full or limited powers and duties consistent with, or similar to, those in the Act upon infrastructure providers, the Authority, the Ministers and other public bodies (e.g. the Drinking Water Inspectorate or Environment Agency);
- relieve water and sewerage undertakers from certain duties in relation to the infrastructure project; and
- vary, revoke or provide conditions of appointment on the designation and provide enforcement provisions.

343. New section 36E in the Act, defines “the Minister”. It provides that the Secretary of State is the Minister in relation to any infrastructure project that is provided or to be provided for the use of any English undertakers and that the Welsh Ministers are the Minister for any infrastructure project that is provided or to be provided for the use of any Welsh undertakers. Where the infrastructure project that is provided or to be provided is for the use of one or more English undertakers and one or more Welsh undertakers the Minister is the Secretary of State and the Welsh Ministers acting jointly.

344. New section 36F provides that in relation to infrastructure in Wales (for the use of undertakers wholly or mainly in England), regulations made by the Secretary of State must require the Secretary of State or Ofwat to consult the Welsh Ministers before specifying projects which must be put out to tender.

345. In relation to infrastructure in England (for the use of undertakers wholly or mainly in Wales), regulations made by the Welsh Ministers must require the Welsh Ministers or Ofwat to consult the Secretary of State before specifying projects which must be put out to tender.

346. New section 36G provides that regulations cannot be made unless a draft has been laid before and approved by resolution of both Houses of Parliament in relation to regulations made by the Secretary of State, the National Assembly for Wales in relation to regulations made by the Welsh Ministers and both Houses of Parliament and the National Assembly for Wales in relation to regulations made by the Secretary of State and the Welsh Ministers acting jointly. Ministers must also consult with persons likely to be affected by the regulations before the draft is laid before Parliament or the Assembly.

**Clause 36: Water Use: Temporary bans**

347. This clause replaces section 76 of the Water Industry Act 1991 with a similar power to allow water companies to temporarily prohibit or restrict specific uses of water, which is supplied by that undertaking. The new section 76(1) allows
water undertakers to ban specified uses of water if there is, or is expected to be, a serious water shortage.

348. They may only ban uses of water which appear in section 76(2). The uses which appear in this list are the watering of private gardens and the cleaning of private motor vehicles using a hosepipe, or using similar apparatus as described in section 76A(5). This continues the water undertakers existing powers to prohibit these activities.

349. New section 76(3) enables the Minister (defined in new section 76A(4) as the Secretary of State and Welsh Ministers), to add other uses of water to the list in section 76(2), thus extending the water undertakers’ powers. Under section 76(3), a water undertaker may only add a non-domestic purpose to the list – that is, a purpose which does not fall within the meaning of domestic purposes in relation to water supply as defined in section 218 of the Water Industry Act 1991. This must be done by order which will be subject to the affirmative resolution procedure in Parliament or the National Assembly for Wales (new section 76C(2)).

350. New section 76A(2) and (3) allow the Secretary of State and Welsh Ministers Minister by order to provide exclusions for any of the listed uses, so that the government could, for example, require the water undertakers to provide an exemption on the grounds of health and safety. It also allows, by order, the definition of some of the terms used and for further clarification to be provided on the uses of water that can be banned.

351. Section 76B requires the water undertaker, in addition to the current requirement to publish a notice of prohibition or restriction in local newspapers, to do so on its website (new section 76B(2)). It requires the water undertaker to serve notices in this way each time the scope of any prohibition or restriction is varied in any way (new section 76B(4). The lifting of any such prohibition or restriction, requires the water undertaker to serve notice in one of these specified ways (new section 76B(5) and (6)). New section 76B(3) requires water undertakers to allow for the receipt of representations to the proposed prohibition.

352. A water undertaking is required to set out in its published notices the terms of the prohibition, as outlined in new section 76B(2). This will include the extent of the uses of water that it will be restricting or prohibiting, and to whom the prohibition or restriction will apply if the water undertaking chooses to only apply the restrictions to specified classes of user. Under new section 76A(1), a water undertaking may exclude groups of customers and/or apparatus in relation to the uses of water, for any purpose which is prohibited or restricted. Under new section 76(4), the notice of the prohibition must specify the date on which the prohibition or restriction will commence and the part of the water undertaking’s area to which the ban will apply.
353. New section 76(5) which outlines offences and new section 76(6) which outlines arrangements for reductions of charges by water undertakers have not been changed from the Water Industry Act 1991, and will continue. It is an offence to contravene a prohibition, punishable, on summary conviction, by a fine not exceeding level 3 on the standard scale. A water undertaker which makes charges in respect of prohibited uses, must make arrangements for a reasonable reduction in the amount that it charges in respect of the use of water which it has prohibited.

354. New section 76C applies section 213 of the Water Industry Act 1991 (powers to make regulations) to orders made by the Minister under section 76(3) or 76A(2) and makes provision in relation to Parliamentary and Assembly procedure.

**Clause 37: Civil sanctions**

355. This clause relates to the existing ability under the Regulatory Enforcement and Sanctions Act 2008 for certain regulators (such as the Environment Agency) to be given (by Order) the ability to impose various kinds of civil sanctions on persons who have committed offences, as an alternative to prosecution.

356. This stems from the “Macrory Report” which was concerned that some regulators were over-reliant on criminal prosecution as a means of enforcement and this can lead to a compliance gap. It recommended introducing a set of administrative penalties that would allow regulators to impose proportionate, flexible and meaningful sanctions. Civil sanctions can include financial penalties and restoration notices.

357. This clause ensures that existing offences in legislation that is amended by the Bill remain eligible for orders granting the ability for civil sanction alternatives to be available. In this respect it aims to preserve the status quo. Hence where an offence is currently not able to be the subject of an order to make civil sanctions available, this situation will continue. It also allows for some offences which are inserted into existing legislation to be the subject of civil sanction orders.

**Clause 38: Incidental flooding or coastal erosion: Environment Agency**

358. This clause allows the Environment Agency to carry out works, under certain conditions, that may or will cause flooding, an increase in the amount of water below the ground, or coastal erosion.

359. The conditions are that the Agency considers that:
   - the works are either in the interest of nature conservation (including conservation of the landscape), the preservation of cultural heritage, the enhancement or conservation of the landscape, or peoples’ enjoyment of the environment or cultural heritage;
• the benefits of the works outweigh the harmful consequences as described in section 2(4)(a) to (d); and
• the Agency has consulted the lead local flood authority for the area in which the work is to be carried out, the district council (if any) for that area and the internal drainage board (if any) whose area the work is in.

360. Subsection (5) requires the Environment Agency to have regard to the national flood and coastal erosion risk management strategies issued under sections 7 and 8 and any relevant guidance, and the local flood risk management strategies issued under section 9 or 10 for the area concerned as well as any relevant guidance issued by the lead local flood risk management authority for that area.

361. Subsection (6) allows the Environment Agency to arrange for works under this section to be done on its behalf by a lead local flood authority, district council or internal drainage board.

362. Subsection (7) allows authorities to carry works under subsection (1) either independently or in combination with any existing powers under other legislation but the conditions on the use of power under subsection (1) do not restrict, limit or relate to what the Agency may do under other enactments.

363. Subsection (8) requires the Secretary of State to make an order applying compulsory purchase, powers of entry and compensation provisions of the Water Resources Act 1991 to this section. Subsection (9), requires that such an order must be laid before and approved by resolution of each House of Parliament.

364. Subsection (10) defines “the Minister” for the purpose of this section as meaning the Secretary of State in England and the Welsh Ministers in Wales.

Clause 39: Incidental flooding or coastal erosion: local authorities

365. This clause allows the lead local flood authorities or internal drainage boards to carry out works, under certain conditions, that may or will cause flooding, an increase in the amount of water below the ground, or coastal erosion.

366. The conditions are that:
• the authority or board considers that the works are either in the interest of nature conservation (including conservation of the landscape), the preservation of cultural heritage, the conservation or enhancement of the landscape or peoples’ enjoyment of the environment or cultural heritage.;
• the authority or board considers that the benefits of the works outweigh the harmful consequences as described in section 2(4)(a) to (d);
• the authority or board has consulted the Environment Agency and, if the works affects a main river, gained its consent;
• the authority or board has consulted any other local authority who may be affected.
Subsection (6) details the authorities which have the powers under this section.

Subsection (7) requires the authorities to have regard to the national flood and coastal erosion risk management strategies issued under section 7 and 8 and any relevant guidance, and the local flood risk management strategy issued under section 9 or 10 for the area concerned as well as any guidance issued by the lead local flood risk management authority for that area.

Subsection (8) allows the authority to arrange for works carried out under this section to be done on its behalf by the Environment Agency, another local authority or internal drainage board.

Subsection (9) establishes that the power in subsection (1) may be used either independently of or in combination with any other powers. However, it does not restrict the use of any other powers.

Subsection (10) allows the Environment Agency to make grants to local authorities in respect of work under this section. Subsection (11) similarly allows Welsh Ministers to make grants for works under this section. No such new power is required in respect of giving grants to the Environment Agency because the appropriate Minister is already empowered under section 47 of the Environment Act 1995 to make grants to the Agency of such amounts, and on such terms, as he thinks fit. This could include grants to carry out works under section 115 of this Bill.

Subsection (12) requires the Secretary of State to make an order applying compulsory purchase, powers of entry and compensation provisions of the Water Resources Act 1991 to this section. Subsection (13) requires that such an order must be laid before and approved by resolution of each House of Parliament.

Subsection (13) defines “the Minister” for the purpose of this section as meaning the Secretary of State in England and the Welsh Ministers in Wales.

Clause 40: Compulsory works orders

This clause provides that the amendments made to section 167 of the Water Industry Act 1991 by the Planning Act 2008 cease to have effect, so that the Welsh Ministers retain their powers to make compulsory works orders. Subsection (2) provides that the Secretary of State will no longer be able to make compulsory works orders in relation to England. Subsection (3) confirms that this amendment does not affect Welsh Ministers’ functions under section 167, which are retained.
These explanatory notes refer to the Flood and Water Management Bill as introduced in the House of Commons on 19 November 2009 [Bill 9]

Clause 41: Agreements on new drainage systems

375. Subsection (1) inserts a new section into the Water Industry Act 1991. It qualifies the right, under section 106 of that Act, for owners of premises and sewers to communicate with the public sewer. It provides that after this new section comes into force, that right to communicate with the public sewer via a lateral drain or private sewer may only be exercised where two conditions are satisfied.

376. The first condition is that the person constructing the sewer or drain has entered into an adoption agreement between the owner of the drain or sewer and the sewerage undertaker for the area under section 104 of the 1991 Act. The second condition is that the agreement must include provision about the standards to which the sewer or drain must be constructed, and about the adoption of the drain or sewer by the undertaker.

377. In order to satisfy the condition about construction standards, the provision in the agreement about construction standards must incorporate or be in accordance with standards which the relevant Minister publishes, or depart from them only with the express agreement of both parties.

378. In order to satisfy the condition about adoption, the provision in the agreement about adoption must require adoption to occur automatically when certain events occur, and must comply with regulations made by the relevant Minister. These regulations will be subject to the negative resolution procedure.

379. Where an agreement which satisfies all of these conditions is in place, the sewerage undertaker may not refuse connection on the basis that the sewer or drain’s mode of construction does not meet the standards that it requires (as is currently allowed by section 106(4) of the 1991 Act) or on grounds that the terms of the agreement have not been complied with.

380. This new limitation on the right to communicate with the public sewer does not apply to drainage systems which require approval under Schedule 3 of this Bill (which is about sustainable drainage systems).

381. The relevant Minister may also make regulations making further exemptions from this new limitation. They will be subject to the negative resolution procedure.

382. Subsection (2) replaces section 105(2) of the 1991 Act, and allows a person who has entered into an agreement under section 104, or wishes to do so, to appeal to Ofwat about anything concerning the agreement.

383. Subsection (3) inserts a new subsection into section 104 of the 1991 Act which provides that undertakers must have regard to any guidance issued by the
Secretary of State or Welsh Ministers concerning adoption agreements under section 104.

384. Subsection (4) makes a consequential amendment to section 112 of the 1991 Act. Section 112 allows the sewerage undertaker to require a drain or sewer to be built in a certain way in certain circumstances. This amendment provides that where that section applies, the undertaker cannot require the drain or sewer to be built in a way which is inconsistent with or more onerous than the standards published by the relevant Minister.

385. For the purpose of this section, the relevant Minister is the Welsh Ministers in relation to sewerage undertakers whose areas are wholly or mainly in Wales, and the Secretary of State in relation to sewerage undertakers whose areas are wholly or mainly in England.

Clause 42: Drainage: concessionary charges for community groups

386. Subsection (1) allows water and sewerage undertakers to operate concessionary schemes for community groups for surface water drainage charges.

387. Subsection (2) allows undertakers to decide whether to bring forward a concessionary scheme, to decide which community groups benefit, to decide what counts as a community group (for example, community amateur sports clubs, places of public religious worship, scout and guide associations and village and community halls) and to decide what reduction in charges to grant (charges must not be reduced to zero). It also allows companies to grant different concessions for different community groups.

388. Subsection (5) enables Ministers to issue guidance to undertakers in respect of concessionary schemes. Undertakers are required to have regard to this guidance. Subsection (6) defines the Minister as the Welsh Ministers where an undertaker’s area is wholly or mainly in Wales and the Secretary of State in other cases.

Clause 43: Abolition of Fisheries Committee (Scotland)

389. Subsection (1) of this clause abolishes the Fisheries Committee as regards Scotland, originally appointed under section 5(2) of the Electricity (Scotland) Act 1979 and now governed by paragraph 5 of Schedule 9 to the Electricity Act 1989 ("the Committee"). There is no equivalent for England or Wales. Abolition is in response to the current functions of the Scottish Environment Protection Agency (SEPA) under the Water Environment (Controlled Activities) (Scotland) Regulations 2005 and the obligation on SEPA to consider the impact on the water environment, including the effect on fisheries and fish stocks, of proposals for, and the ongoing operation of, hydro-electric generation in Scotland, which activity is subject to an authorisation under those Regulations. SEPA’s function
These explanatory notes refer to the Flood and Water Management Bill as introduced in the House of Commons on 19 November 2009 [Bill 9]

in relation to hydro-electric generation is also a responsibility of the Committee, which has led to duplication in regulation.

390. Subsections (2) – (5) make consequential amendments to remove references to the Committee from the Race Relations Act 1976, the Electricity Act 1989, the Public Appointments and Public Bodies etc. (Scotland) Act 2003 and the Freedom of Information (Scotland) Act 2002.

Part 3: General

Clause 44: Pre-consolidation amendments

391. One of the recommendations of the Pitt review was to consolidate the legislation applying to flood and water management. This clause is intended to allow for this consolidation. It enables the Secretary of State to amend the Bill once it becomes an Act, along with the Water Industry Act 1991, the Water Resources Act 1991, the Land Drainage Act 1991, the Reservoirs Act 1975, the Highways Act 1981, the Environment Act 1995 and the Coast Protection Act 1949. These amendments must be for the purposes of standardising provisions, simplifying procedures or correcting errors. Amendments are to be made by order, subject to the affirmative resolution procedure. No order may be made without the consent of the Welsh Ministers.

Clause 45: Subordinate legislation

392. This clause defines what is meant by “subordinate legislation” and sets out the sort of provision which can be contained within a statutory instrument made under the Bill as well as applicable procedures.

Clause 46: Technical provision

393. This clause provides that the resulting Act will bind the Crown, but will contain exemptions for the Queen and Prince of Wales. These exemptions mirror the exemptions in section 221(2) to (8) of the Water Industry Act 1991.

394. Subsection (2) provides for money to be provided by Parliament to pay for expenditure under the Bill or increases in expenditure incurred by virtue of the Bill.

395. Subsection (3) provides for the provisions of the Bill to be brought into force by order of the Secretary of State or the Welsh Ministers, in line with the division of responsibility outlined in this Act. This will allow different parts of the Bill to be brought in at different times, if necessary to allow for transitional matters.

396. Subsection (4) allows for such an order to provide for experimental staged commencement by reference to specified areas or other criteria.
397. Subsection (5) provides that the Bill extends to England and Wales, but not to the rest of the UK, subject to paragraphs (a) and (b).

398. Subsection (6) confirms that an amendment made by this Bill of another Act does not prevent the continued operation of any transfer of functions under the Government of Wales Act 1998 or 2006. This subsection applies irrespective of whether the amendment amends an existing devolved function or confers a new function. New functions which replace or are similar to existing devolved functions are to be treated as having been transferred in the same way as the old function. Provisions made by the Government of Wales Act 1998 or 2006 in respect of functions amended or replaced by this Act continue to apply to the amended or replaced provision.

399. Subsection (7) gives the short title of the Act (as it will become on Royal Assent) as the Flood and Water Management Act 2010.

FINANCIAL EFFECTS AND EFFECTS ON PUBLIC SECTOR MANPOWER

400. Public sector costs for the Bill are estimated at £57 million annually and £18 million for one-off costs from the point of implementation which is expected to start in 2010-11. Costs and new burdens up to and including 2010-11 have already been agreed, as part of the announcement of the Government’s response to Sir Michael Pitt’s review of the summer 2007 floods in December 2008. For example, £16 million being spent by Defra in the current period to build capacity and encourage early action amongst the highest priority local authorities.

401. From 2011-12 the transfer of private sewers to water and sewerage companies, and the savings that local authorities will realise from the changes to local flood risk management will fully offset the additional public expenditure required until around 2018. By that date, the costs involved – steadily growing as a result of the adoption of sustainable drainage systems (see Schedule 3) and maintenance by local authorities for new developments - are likely to begin to exceed the savings anticipated, and alternative means of funding the maintenance of sustainable drainage systems will have to be introduced by this date. Defra will work with Communities and Local Government (“CLG”) and HM Treasury to consider and take forward options.

402. A new burdens assessment for the Bill, summarised above, has been agreed between Defra and CLG colleagues. We are confident that no unfunded net burden will be placed on council tax as a result of provisions within the Bill prior to 2018, and the options referred to will be considered in order to postpone or remove the possibility that unfunded burdens begin to arise. The Government will monitor local authorities’ actual costs and savings in taking forward proposals and take any steps necessary to make sure it remains fully funded.
403. We expect local authorities to recruit between 75 and 225 additional staff to perform the lead flood authority role and a further 75 to 225, to process SUDS Approval and oversee maintenance of SUDS. These are estimates, we have not been able to gain hard evidence for these figures from local authorities or other sources.

404. Equally, when Environment Agency (EA) responsibilities pass to local authorities around 10 EA employees can be expected to have less work. However, the arrangements for ensuring that the EA has a strategic overview of flood and coastal erosion management will mean that there will be a re-balance within the organisation, and it is likely that there will be a slight net gain in the employee resource required.

SUMMARY OF THE IMPACT ASSESSMENT

405. The final Summary Impact Assessment accompanying this Bill can be found online at http://www.defra.gov.uk/environment/flooding/policy/fwmb/index.htm or in hard copy in the Vote Office (House of Commons) or Printed Paper Office (House of Lords).

406. In addition to general benefits, three impact assessments for Bill policies demonstrate a positive net benefit, the remainder have zero costs and unquantifiable benefits. In these cases, there are significant additional non-monetised benefits, such as increased efficiency, accountability and awareness of flood risk, which should also be taken into account. The overall effect is a major net benefit of £4 billion.

407. The Better Regulation Executive within the Department for Business, Innovation and Skills has confirmed that all regulations are appropriate and in line with Better Regulation principles.

408. CLG accepts Defra’s assessment that the benefits of the private sewers transfer to water companies, together with existing expenditure and savings to authority budgets from reduced flood damages, offsets in full the new local authority funding requirement until around 2018/19. Defra is happy to keep key assumptions under review, and commits to fund any shortfalls that may be identified, as well as pursue an agreeable long-term funding solution for the maintenance of SUDS adopted by local authorities. CLG’s other conditions are also acceptable. There are not expected to be any other spending pressures that cannot be accommodated by departmental budgets.

409. All impact assessments have been assessed by Defra economists and have been through a rigorous process of peer review. All impact assessments have been cleared by Defra’s Chief Economist.
410. The impact assessments for the Bill conclude that there would be no significant impact on race, disability, gender or small businesses, through implementation of the legislation. Equally, there would be no tangible impact on carbon levels as a result of this legislation.

411. The main positive economic impacts of the Bill are judged to be:

- delivering resource savings, and in most cases it is assumed that these are invested in flood risk management;
- delivering reduced flood risk and, therefore major savings to the economy;
- developing risk-based approaches to local flood risk management investment, and reservoir regulation which decreases the chance of a reservoir breach; and
- benefits which arise from maintaining water supply for longer in the face of increasing pressures on water resources.

COMPATIBILITY WITH THE EUROPEAN CONVENTION OF HUMAN RIGHTS

412. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act). The statement has to be made before second reading. The Secretary of State for Environment, Food and Rural Affairs, Hilary Benn MP, has made the following statement:

“In my view the provisions of the Flood and Water Management Bill are compatible with the Convention rights.”

413. In this section of the explanatory notes, “Article” refers to an Article of the European Convention on Human Rights 1950.

414. The Bill contains a number of provisions which engage Convention rights, in particular Article 6 (right to a fair trial), Article 8 (right to respect for family and private life etc, here in the context of private life) and Protocol 1, Article 1 (right to property). Most of the provisions in the Bill will be carried out by public authorities in the context of section 6(1) of the Human Rights Act 1998 (“the 1998 Act”), and they are accordingly required to act in ways which are compatible with Convention rights. This section of the Explanatory Notes sets out the provisions of the Bill which are most likely to raise questions about the compatibility with the European Convention on Human Rights, and explains why these provisions do not infringe or authorise the infringement of the Convention rights.
These explanatory notes refer to the Flood and Water Management Bill as introduced in the House of Commons on 19 November 2009 [Bill 9]

Part 1: Flood and Coastal Erosion Risk Management

415. Clauses 1 to 29 and clause 31, which introduces Schedule 2 to the Bill, give the Environment Agency (“EA”) overall responsibility for supervising the management of flood and coastal erosion risks in England, and an enhanced overview for flood and coastal erosion risk management in Wales. It also gives unitary authorities and county councils in England and local authorities in Wales (collectively lead local flood authorities (“LLFAs”)) responsibility for managing local flood risk in their areas. These provisions place duties on, and provides powers for, the Welsh Ministers, the EA, LLFAs, district councils in England and internal drainage boards, collectively “risk management authorities”, to act in such a way so that they can manage risks.

416. In particular risk management authorities are given powers under this Part to undertake works to manage risk from flood and coastal erosion. The assessment of a risk will take into account the potential harmful consequences of the flooding or coastal erosion for human health, social and economic welfare, infrastructure and the environment and the desirability of any risk management work will be assessed in this context. The work must also be desirable having regard to the national flood and coastal erosion risk management strategy. The powers may therefore only be exercised where there is a public interest in doing so.

417. The exercise of the power however could require risk management authorities to enter onto another person’s land in order to access works or to construct works. The Government considers that this might engage Protocol 1, Article 1, in relation to property rights of individuals. However, these provisions add (by way of amendment) to existing powers in the Water Resources Act 1991, the Land Drainage Act 1991 and the Coast Protection Act 1949 and in each case we have applied existing powers of entry, notice requirements, compulsory purchase provisions and compensation provisions, including the associated appeals provisions in each instance.

418. The Government is therefore of the view that a fair balance between public and private interests is achieved and that the works powers are compatible with that right. Furthermore, a person is able to review decisions to use the new powers by way of judicial review in fulfilment of the right under Article 6, and therefore the Government believes that Part 1 of the Bill does not infringe, or authorise any infringement of, Article 1 of Protocol 1.

419. This Part also provides for the EA, Welsh Ministers and an LLFA to have a power to require information from a person where the body considers that the information sought is reasonably required in connection with the body’s flood or coastal erosion risk management functions. Information is most likely to be sought from other public bodies or persons exercising statutory functions but may also include a private individual. It is likely that the information sought in any instance will be information about the location, function and condition of
property (such as a wall) or information about watercourses or structures such as culverts, bridges, sluices, groynes or earth banks, which are owned by an individual. This sort of information is unlikely of itself to be of a personal or private nature although it will be linked to the name and address of the owner.

420. While we note that a person’s name and address, without more, may be regarded as part of the data subject’s private life for the purposes of Article 8, we also note that it is necessary to examine not just the information disclosed but also the anticipated use to which it is put in considering if there is any infringement of this Article.

421. In this case the information which can be requested is limited to that which is reasonably required by the EA, Welsh Ministers or an LLFA in connection with its flood or coastal erosion risk management functions. Those functions are set out in the Bill and in existing legislation and are for the purpose of managing risk from flood and coastal erosion which is in the interests of public safety and the economic wellbeing of the country. The information is most likely to be used in flood and coastal erosion risk management planning, using information about location and condition of assets to determine the integrity of flood defence or coast protection measures, to ascertain vulnerabilities, identify risk and plan for the best value use of resources in future risk management.

422. The EA, Welsh Ministers and LLFAs are also public authorities, and the request for information and the use to which it is put are acts of a public authority for the purposes of the 1998 Act, s. 6(1). It follows that the EA, Welsh Ministers and LLFAs may not act in a way which is incompatible with Convention rights. The power may be exercised compatibly, and it follows that the Bill provision is itself compatible.

423. This Part also requires the LLFA to keep a register of structures and features which an LLFA considers are likely to have significant effect on a flood risk in its area and a record of information about them including details of ownership. The register must be open to public inspection but this requirement does not extend to the record. This provision may raise issues under Article 8 in particular in relation to personal data since a private individual may be responsible for structures and features designated under this provision. We have therefore considered Article 8 in this context since the combined effect of this provision and that in relation to the power to require information is to require people responsible for structures or features caught by this provision to provide information about them including their own name and contact details which will then be recorded in relation to the structure or feature.

424. We consider that the requirement to provide this information is compatible as already noted but in this context we have also considered again the use to which the information will be put.
425. The purpose of the register and record is to assist risk management bodies to carry out their functions and thereby contribute to the protection of the environment and human health. These are legitimate purposes. A register and record are important in ensuring LLFAs can manage local flood risk effectively by knowing what assets in their area impact on risk and who owns them.

426. It is also of legitimate public interest for individuals to know what structures and features in their local area serve a significant purpose in the context of flood risk management and which may impact on them. It will help them understand the importance of such structures and features and contribute to local awareness of flood risk and how it is being managed.

427. For this purpose the keeping of both a register and a record but making only the register open for public inspection are necessary and sufficient to serve the purpose for which both are required and go no further than is necessary to accomplish the objective.

428. We also note that the Secretary of State and Welsh Ministers have power to prescribe by regulations the particulars which are to be included in a register. In making regulations the Secretary of State is acting as a public authority for the purposes of the 1998 Act, s. 6(1) and may not act in a way which is incompatible with Convention rights. Thus this power may be exercised compatibly, and it follows that the Bill provision is itself compatible.

Schedule 1: Risk Management Designation Of Features

429. Clause 30 introduces Schedule 1 to the Bill which allows authorities (the Environment Agency, local councils and internal drainage boards) to designate certain structures or features which affect a flood or coastal erosion risk. Once designated, a person may not alter, remove or replace the feature without consent of the authority. There may be concerns that the designation of property would engage the right to property under Article 1 of Protocol 1 or the right to a fair trial under Article 6.

430. A feature or structure may only be designated if it affects flood or coastal erosion risk. Designations are therefore only allowed where there is a public interest in controlling the use of a feature or structure, which is to allow public authorities to properly plan for and manage flood risk. For example, a factory wall running alongside a river may perform a crucial function in determining the direction in which flood water would flow. There is no outright prohibition on removing or altering property – it may be removed or altered with the authority’s consent.

431. The designating authorities in question are all public authorities for the purpose of section 6 of the Human Rights Act. They will therefore be obliged to ensure that there is a fair balance between the public interest and the rights of the individual when deciding whether to designate a feature, and when deciding
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whether or not to consent to work. There is therefore no infringement of the right to property.

432. Regarding Article 6, it is recognised that it is legitimate for decisions to be taken by administrative rather than judicial bodies where the exercise of specialist judgment is required. In this case, the decisions to designate a feature, or whether to give or withhold consent are decisions which will require expert judgment on the management of flood and coastal erosion risk. There are also a number of procedural safeguards in place to make sure that there is a right to a fair trial. These are:
- a designation cannot be confirmed without giving at least 28 days to make representations;
- there will be a right of appeal against designations and against refusals of consent;
- a person with standing will be able to judicially review a decision to designate a feature or to refuse consent.

433. The combination of these factors mean that there will be no infringement of the right to a fair trial under Article 6, or of the right to property under Article 1 of Protocol 1.

434. Schedule 1 to the Bill also provides powers for a person authorised by the relevant authority to enter land and reinstate a designated structure or feature where a person has altered, removed or replaced it without consent. They also allow entry for the purposes of determining whether to designate a feature, whether a feature has been interfered with, and whether an enforcement notice has been complied with. Article 8 is potentially engaged by these provisions, as the entry to land could potentially affect a person’s home.

435. In this case, the legislative objective pursued (the control of flood and coastal erosion risks) is sufficiently important to justify limiting a fundamental right. There is a rational connection between that objective and the powers of entry, and the powers of entry are only available as a last resort and are therefore no more than is necessary to accomplish the objective. They therefore satisfy the need for such interferences to be proportionate.

436. In any event, before exercising the power in any particular case, the authority will need to satisfy itself that the proportionality test is satisfied in each particular case, and will be obliged to do so by virtue of being a public authority for the purposes of section 6 of the 1998 Act. There is therefore no infringement of Article 8.

437. The Government therefore, believes that Part 1 is compatible with Convention rights.
Part 2: Miscellaneous

Schedule 3: Sustainable Drainage

438. Schedule 3 to the Bill restricts the right of persons to build rainwater drainage systems or to connect to the public sewer. No person may do so without the approval of the local authority, who will make the decision based on national standards for the sustainable drainage of rainwater. It is arguable that this restriction might engage the right to a fair trial under Article 6.

439. The local authority’s discretion will be limited in that it must allow the building work or the connection if the drainage system will be constructed in accordance with the national standards on sustainable drainage, and otherwise must not allow it. The purpose of the national standards is to ensure that in so far as possible rainwater is drained gradually into the ground, for example through soakaways, permeable paving, ditches or into a nearby pond. It should only allow rainwater to drain into a sewer where there are no practical alternatives.

440. Such a decision will require expert judgment, and allowing a body such as a local council to make a decision such as this is consistent with the right to a fair trial. It would also be possible for a person to judicially review the council’s decision, for example, on the grounds that it did not properly judge the decision against the national standards. Schedule 3 to the Bill therefore does not infringe Article 6.

441. There are two elements of this system which might engage the right to property under Article 1 of Protocol 1. The first is the need for approval from the local authority before construction work can begin. This restriction on what a person can do with their property might be regarded as engaging the right to property as it is likely to amount to a “control of use of property”.

442. The second is the power of the local authority, when approving an application to require a bond. The bond means that the developer will not have access to a sum of their own money for a period of time. The local authority may forfeit the bond if it becomes apparent that the developer is not going to complete the drainage works which it agreed to construct in its original application, so as to allow the authority to use the money to complete the work itself. The authority must return any unused element of the bond to the developer once it has completed the work. This might also be regarded as a control of use of the property.

443. In this case, the policy aim is minimising the risk of local flooding by making sure that sites are adequately drained and public sewers do not become overloaded with rainwater, which will cause them to flood. This aim is achieved by (a) preventing development which will not be adequately drained from
beginning; and (b) providing the local authority with the means to complete the drainage works in the event of the developer’s default.

444. Both of these elements will enable the local authority to make sure that proposed new development will be adequately drained in a way which minimises a risk of flooding, which would threaten the property and well being of others in the area. The provisions therefore pursue a legitimate public policy aim and strike a fair balance in doing so as the requirement for prior approval and the power of the local authority to require a bond are proportionate to this aim. Regarding the bond, the local authority will not be allowed to require a bond of a greater value than that which it reasonably considers will be needed to complete the drainage works.

Schedule 4: Reservoirs

445. This Schedule amends the Reservoirs Act 1975. The Reservoirs Act 1975 sets out a regime for regulating the way in which large raised reservoirs are constructed, altered, used and managed in order to ensure their safety. Schedule 4 makes a number of amendments to the existing requirements of the Act and includes some new requirements. It also amends the definition of large raised reservoir.

446. The measures put in place to control the way in which large raised reservoirs are constructed, altered, used and managed could engage the right to property under Article 1 of Protocol 1. Such an interference with property rights is in accordance with the law and the general interest. There is a clear public interest in putting controls in place to manage the risks posed by large raised reservoirs. If a large raised reservoir were to fail it could lead to severe flooding and loss of human life and widespread damage to the surrounding environment and to the property of others. The Government believes that the measures in the Reservoirs Act 1975, as amended, strike a fair balance between the property rights of reservoir undertakers and the public interest and that they do not therefore infringe Article 1 of Protocol 1.

447. Section 2 of the Reservoirs Act requires the EA to maintain a register of all large raised reservoirs in England and Wales giving the prescribed information in relation to each large raised reservoir. The register is open to inspection by the public. Paragraph 4 amends section 2 to require the undertakers of all large raised reservoirs to register their reservoirs with the EA and provide the information prescribed in regulations. As the Minister is a public authority for the purposes of section 6 of the Human Rights Act 1998 and must not exercise his powers to make regulations which are incompatible with Article 8, the Government believes that these provisions are compatible with Article 8.

448. However, the Government has also considered the inclusion of personal data on the register obtained by the new registration requirement in light of Article 8. It is noted that a person’s name and address, without more, may be regarded as
part of the person’s private life for the purposes of Article 8(1). The inclusion of a person’s name and address on the register is therefore potentially an interference with Article 8.

450. The Government believes that it is necessary for public safety and in a democratic society for the protection of the rights and freedoms of others (the public) for the inclusion of the name and address of the undertaker of a large raised reservoir and any engineer appointed by the undertaker for the purposes of the Reservoirs Act 1975 to be included in the register. The information enables members of the public and public bodies to identify assets which may pose a risk to them or their property or to public safety and also enables undertakers (and their engineers) to identify other reservoirs which are upstream from their reservoirs and could therefore pose a risk to their reservoirs.

449. Members of the public, public bodies and undertakers have a clear legitimate interest in readily being able to identify the person operating or owning such an asset. This information is restricted to what is no more than is reasonably necessary to enable a third party to identify the undertakers of a large raised reservoir and any qualified civil engineer appointed by them and is not provided for onward transmission for commercial purposes. The Government therefore believes that the inclusion of personal data on a register is justifiable and compatible with Article 8.

450. Paragraph 7 inserts new provisions into the Reservoirs Act 1975 to allow the Environment Agency to designate a large raised reservoir as a high-risk reservoir if certain criteria are met. The undertaker of a high-risk reservoir must comply with the requirements set out in sections 10, 11 and 12 of the Reservoirs Act 1975 (as amended), whilst the undertaker of a large raised reservoir that is not so designated is not required to. The process of designating a large raised reservoir as a high-risk reservoir is therefore relevant for the purposes of Article 6.

451. A determination as to whether a large raised reservoir is a high-risk reservoir will require specialist expertise, knowledge and judgement. The Government believes that it is therefore appropriate for this determination to be made by the Environment Agency and that judicial review is a sufficient mechanism to review any such designation for the purposes of Article 6(1). In addition, the designation by the Environment Agency will incorporate a number of procedural safeguards and the Minister must in regulations provide a right of appeal against any designation. This requirement to provide a right of appeal is capable of being exercised so as to ensure compliance with Article 6(1). The Government believes that the availability of judicial review, when combined with the procedural safeguards and the right of appeal, ensure that the provisions in relation to the designation of large raised reservoirs as high-risk reservoirs do not infringe Article 6.
Schedule 5: Special Administration

452. These provisions make some amendments to the special administration regime for suppliers of strategic supplies of water and sewerage companies. This regime is contained in sections 23 to 26 of, and Schedules 2 and 3 to, the Water Industry Act 1991 (the 1991 Act).

453. The regime recognises the unique consequences and risks that surround the insolvency of water and sewerage undertakers and water suppliers owing to the vital functions that they perform. It provides for the appointment of special administrators via a special administration regime for water and sewerage undertakers and water suppliers. These provisions take the place of the general regime for administration as set out in the Insolvency Act 1986. It also allows for the appointment of an administrator in circumstances where the company is failing to uphold its statutory duties and certain regulatory failures, for example, where a water or sewerage undertaker is in breach of its main statutory duty under the 1991 Act.

454. In particular these paragraphs provide for the amendment of a transfer scheme under Schedule 2 to the 1991 Act. A transfer scheme under this Schedule operates by transferring property, rights and liabilities from one undertaker (“undertaker A”) to another (“undertaker B”). As both of those undertakers have to give their consent to such a scheme, we consider that there is no infringement of their rights under Article 6.

455. Under the current version of Schedule 2, a transfer scheme may create new rights and liabilities between any of undertaker A, undertaker B or any other undertakers who operate in the same geographical area (“undertaker C”).

456. The Government considers that if a scheme which imposed new liabilities on undertaker C were to be made without the need for the undertaker C to give consent then this could engage undertaker C’s Article 6 rights. We are therefore also amending Schedule 2 so that a scheme may no longer impose new liabilities on anyone other than undertakers A and B. The effect will be that a transfer scheme may only create rights and liabilities as between undertakers A and B, both of whom need to agree to the scheme in order for it to have effect. Article 6 is therefore not engaged.

457. In any event, a transfer scheme also requires the approval of the Secretary of State, Welsh Ministers and Ofwat. As public authorities under section 6 of the Human Rights Act, they will have no power to approve such a scheme if it infringes a person’s rights under Article 6. These provisions are therefore compatible with the Convention rights.
Clause 35: provision of infrastructure

458. These provisions insert a new power to make regulations into the Water Industry Act 1991.

459. The creation of a power, in itself, has no impact on any person’s Convention rights. It is only the exercise of the power that might affect a person’s Convention rights; and in that case, the detail of the regulations will be determinative.

460. The Secretary of State and Welsh Ministers, as public authorities, will be prohibited by section 6 of the 1998 Act from exercising the new power in a way which is incompatible with the Convention rights. Therefore this clause is compatible with the Convention rights. The question as to whether regulations made under the clause are compatible will need to be considered at the time. If the relevant Minister purports to make regulations which infringe the Convention rights, those regulations will be unlawful and are liable to be struck down by the courts.

Clause 36: Water use: Temporary bans

461. These provisions provide a power for water companies to prohibit or restrict certain non-essential uses of water during times where there are shortages of water.

462. The existence of these powers cannot in themselves infringe any of the Convention rights, because they are powers for water companies to take further action in certain circumstances. However, it is arguable that the exercise of this power could engage Article 1 Protocol 1 in a number of ways. It might be argued that when a person turns on a tap, the water which comes out is their property, and a prohibition under this section controls the way in which they may use that water.

463. In addition it might be argued that the exercise of the power could be an interference in the peaceful enjoyment of possessions such as in a case where the inability to use a hosepipe restricted the ability of a person to (for example) carry out a car washing business or maintain a large garden.

464. An interference or control of use will be justified where it is a proportionate means to achieving a legitimate aim. The use of this power is limited in that it can only be used for the purpose of reducing the use of water in cases where there is a serious shortage of water supplies.

465. It is considered that the limited, non-essential uses which may be affected by the power are proportionate to achieving this aim. In addition, where such a prohibition is put in place, the water company will be under an obligation to make
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an appropriate reduction in the charges they impose for the supply of water, which also assists in assessing the proportionality.

Clause 37: Civil sanctions

466. This provision allows for an order making provision in relation to specified Acts for civil sanctions under the Regulatory Enforcement and Sanctions Act 2008 (“the RES Act”) to include provision about offences inserted, amended or affected by the Flood and Water Management Act.

467. The RES Act was considered in relation to the Convention rights prior to its enactment in 2008, and was considered to be compatible. This provision merely ensures its continued applicability to the offences amended and inserted by the Bill. Hence this provision does not itself change the RES Act and nor does it affect the rights of any person. Therefore the Government believes that this provision does not engage the Convention rights.

Clause 38: Incidental flooding or coastal erosion: Environment Agency, Clause 39: Incidental flooding or coastal erosion: local authorities

468. These clauses make various provision in relation to the environment, specifically providing works powers to certain bodies to undertake works which may cause flooding or coastal erosion where certain conditions are met.

469. These powers raise the same Convention rights issues as the works powers in Part 1 and the clauses provide for the same ancillary provisions to be applied to them as for the powers in Part 1. The arguments in relation to them are therefore the same and the Government believes that these provisions are compatible with the Convention rights.

Clause 40: Compulsory works orders

470. This provision amends the Water Industry Act 1991 as amended by the Planning Act 2008 so as to ensure that the Welsh Ministers retain their powers to make compulsory works orders. While a works order itself may engage Convention rights this clause does not impact on the substance of any order or any person affected by such an order. The Government does not believe that this provision engages the Convention rights.

Clause 41: Agreements on new drainage systems

471. This provision limits the right of owners of new private sewers to communicate with the public sewerage system. It does so by providing that in order to be able to connect with the public sewer, the person building a new private sewer must enter into an agreement with the relevant sewerage undertaker, which must contain conditions about the standard to which the new
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sewer must be constructed, and requiring the sewerage undertaker to adopt the new sewer on the fulfilment of certain conditions.

472. A restriction on the right to connect to the public sewer might be regarded as engaging the right to property as it is likely to amount to a “control of use of property”. In the case of a control of use of property, Article 1 of Protocol 1 will not be infringed so long as the policy justification strikes a fair balance between individual rights and the general public interest in pursuing a legitimate aim of public policy.

473. In this case, the policy aim is twofold. First, it is to ensure the robustness of sewers which form part of the public system. A privately built sewer has the potential to affect the integrity of the whole public system which it connects to if it is defective in any way. By requiring the sewerage undertaker to agree to the standard of construction before connection can take place, this reduces the likelihood of this happening.

474. Secondly, by requiring the sewerage undertaker to adopt the new sewer, this will ensure that the sewerage undertaker will become responsible for the ongoing maintenance of the new sewer. This will mean that the person responsible for maintenance will also have an interest in the effect that the sewer has on the system as a whole.

475. The person constructing the new sewer is protected against the undertaker abusing its position by refusing to enter into an agreement, or insisting on unreasonable terms, because it will be possible for such a person to appeal to Ofwat.

476. These provisions pursue a legitimate public policy aim, and the Government considers that they strike a fair balance. The Government believe that this provision is compatible with Convention rights.

Clause 42: Drainage: concessionary charges for community groups

477. This provision allows an undertaker to introduce concessionary charges for community groups in respect of surface water drainage charges. The Government does not believe that this provision engages the Convention rights.

Clause 43: Abolition of Fisheries Committee (Scotland)

478. This provision abolishes the Fisheries Committee appointed under section 5(2) of the Electricity (Scotland) Act 1979 and makes subsequent repeals to remove reference to that Committee from other legislation. The Government does not believe that this provision engages the Convention rights.

479. The Government therefore believes that Part 2 is compatible with Convention rights.
Part 3: General

480. This Part deals with miscellaneous, interpretation and other general matters. The Government does not believe that this Part engages the Convention rights.