

Changes to Drainage for New Development Works Sustainable Drainage and the Draft Flood and Water Management Bill

New provisions proposed by Defra in its draft Flood and Water Management Bill aim to ensure that sustainable drainage is considered in every new development by amending developers' rights to connect into the sewerage system under Section 106 of the Water Industry Act 1991. Developers, land owners, sewerage undertakers and local authorities should be aware of the proposals for new approval requirements, administrative steps and costs involved.

The catastrophic floods of Summer 2007 highlighted the inherent problems with traditional surface water drainage. Traditional drainage systems are designed to transport rainwater from the land on which it falls to a discharge point as quickly as possible. This has the effect of moving a large volume of water to a specific point in a short amount of time, often resulting in flooding downstream, pollution of watercourses and the diversion of rainwater from groundwater supplies. In contrast, sustainable drainage systems, or SUDS, incorporate a range of techniques that endeavour to mimic the natural flow of water, for example permeable paving and filter drains to allow percolation of rainwater into the ground, or retention ponds, infiltration trenches and wetland areas to hold water following heavy rain.

To date, the Government has promoted the use of SUDS through the planning process, as set out in the Planning Policy Guidance Note 25 published in December 2006. The provisions in the draft Flood and Water Management Bill pick up on Defra concerns that incorporation of SUDS into new developments through the planning process has been slow. They also address issues around lack of clarity over who will adopt the SUDS once they are constructed, and who will pay for the ongoing maintenance.

The Bill seeks to address these perceived deficiencies by imposing a new statutory obligation for SUDS to be considered as part of every new development.

The draft Bill proposes to amend the procedure under Section 106 of the Water Industry Act 1991 under which developers currently have the right to demand a connection for their surface water drainage to a sewer. The draft Bill would remove the automatic right to connect into an undertaker's sewerage system by imposing a condition that the request under Section 106 can only be made once the developer has obtained approval for its SUDS under the draft Bill.

Approval would be obtained by a statutory procedure in which the developer applies for approval from the "approving body" (the unitary authority or county council for the area) before constructing any drainage system as part of a development. The decision on whether the proposal is accepted will be made by reference to a set of published national standards, and approval can be refused or granted with or without specific conditions. There are also provisions in the draft Bill for the developer to provide a non-performance bond as part of the approval process. Sewerage undertakers must be consulted on the application and notified of the approval, but there is no right of veto for the sewerage undertaker.

Once the construction of the SUDS has been completed to the satisfaction of the approving body, the approving body would provide the developer with a certificate to that effect, and the approving body will also adopt the drainage system. Upon adoption, the approving body becomes responsible for the ongoing maintenance of the drainage system in accordance with the national standards.

The consultation paper makes it clear that there would be no additional funding for local authorities to assist with the new obligations to administer this system and maintain SUDS. Defra is of the opinion that the local authorities will make substantial savings from both the transfer of private sewers to sewerage undertakers due to take place in April 2011 and the better local flood risk management under the draft Bill, and that these savings will more than cover the additional activities that local authorities will be required to perform. The consultation paper proposes that

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funding on a long term basis should be dealt with as part of future Spending Reviews. Whether Defra's sums add up is, of course, a matter of some debate.

What are the implications for developers?

Developers have already been experiencing problems in recent years connecting into main sewers under Section 106 because some sewerage undertakers are struggling with increasingly overloaded surface water sewerage systems. Sewerage undertakers are not permitted to reject Section 106 applications on the grounds that they have insufficient capacity in the system because that is a consideration to be addressed at the planning stage. However, sewerage undertakers, whilst having a right to be consulted, sometimes consider that their concerns are inadequately addressed in the planning conditions, and are therefore subsequently reluctant to allow the connection under Section 106. This can become a time consuming and costly issue for developers, as demonstrated by the Court of Appeal decision in *Barratt Homes Ltd v Welsh Water* [2008] EWCA Civ 1552 currently on appeal to the House of Lords.

The obligations in the draft Bill add an extra administrative step to the development approval procedure and this is likely to increase the costs of development. However, this additional step may ultimately ensure less resistance from the sewerage undertaker to a connection (if indeed one is needed after the construction of the SUDS) and therefore may result in a smoother Section 106 procedure.

What are the implications for sewerage undertakers?

In general, an increased use of SUDS should alleviate some of the pressures on the overburdened sewerage system infrastructure, and therefore the provisions in the draft Bill are likely to be welcomed by the sector.

However, there are some elements of the draft Bill on which sewerage undertakers may wish to comment, such as the fact that the draft Bill only includes a right for the sewerage undertakers to be consulted on the application for approval for SUDS, and not a right of veto. Therefore, as with consultation within the planning process mentioned above, the sewerage undertaker may find there are occasions when its concerns are not adequately addressed. It is hoped that, in practice, there would be a high level of co-operation between the approving body and the sewerage undertaker when considering the suitability of a SUDS following an application by a developer.

What are the implications for local authorities?

There are concerns over the funding of the maintenance of SUDS once adopted by local authorities, and this will no doubt be an issue that the local authorities will wish to consider carefully. However, providing the financing issues can be resolved, local authorities (who will also have a local leadership role for managing flood risk in their areas under the draft Bill) should be encouraged by the move to further increase the use of SUDS in new developments as it should help to reduce the instance of catastrophic flooding in the future.

The closing date for responses to the consultation is 24 July 2009. If you would like assistance with your response to the consultation, or if you would like further information on the draft Flood and Water Management Bill and how it may impact upon your business, please contact:

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