

# HOUSE OF LORDS

## Delegated Powers and Regulatory Reform Committee

---

6th Report of Session 2009–10

### **Anti-Slavery Day Bill** **Flood and Water Management Bill**

### Government response: **Financial Services Bill**

---

Ordered to be printed 3 March 2010 and published 4 March 2010

---

Published by the Authority of the House of Lords

*London* : The Stationery Office Limited  
£price

HL Paper 77

### *The Delegated Powers and Regulatory Reform Committee*

The Committee is appointed by the House of Lords each session with the terms of reference “to report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny; to report on documents and draft orders laid before Parliament under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006; and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments”.

### *Current membership*

The members of the Delegated Powers and Regulatory Reform Committee are:

Lord Armstrong of Ilminster GCB CVO

Lord Blackwell

Rt Hon. the Lord Boyd of Duncansby PC QC

Rt Hon. the Lord Butler of Brockwell

Viscount Eccles CBE

Lord Goodhart QC (*Chairman*)

Lord Haskel

Rt Hon. the Lord Mayhew of Twysden QC DL

Lord Razzall CBE

Lord Soley

### *Registered Interests*

Members’ registered interests may be examined in the online Register of Lords’ Interests at [www.publications.parliament.uk/pa/ld/ldreg.htm](http://www.publications.parliament.uk/pa/ld/ldreg.htm). The Register may also be inspected in the House of Lords Record Office and is available for purchase from the Stationery Office. Declared interests for this Report are in Appendix 3.

### *Publications*

The Committee’s reports are published by the Stationery Office by Order of the House in hard copy and on the internet at [www.parliament.uk/parliamentary\\_committees/dpr.cfm](http://www.parliament.uk/parliamentary_committees/dpr.cfm).

### *General Information*

General information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at [www.parliament.uk/about\\_lords/about\\_lords.cfm](http://www.parliament.uk/about_lords/about_lords.cfm).

### *Contacts for the Delegated Powers and Regulatory Reform Committee*

Any query about the Committee or its work should be directed to the Clerk of the Delegated Powers and Regulatory Reform Committee, Delegated Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020-7219 3103 and the fax number is 020-7219 2571. The Committee’s email address is [dpr@parliament.uk](mailto:dpr@parliament.uk).

### *Historical Note*

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that “in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion” (Session 1991–92, HL Paper 35–I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, “be well suited to the revising function of the House”. As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006.

# Sixth Report

## ANTI-SLAVERY DAY BILL

---

1. This Private Member's Bill was brought from the Commons on 8 February and will have its Second reading on 5 March. The substantive provision in the Bill is clause 1, which has effect by way of the exercise of a delegated power. Clause 1(1) requires the Secretary of State to specify by order "a date which shall be observed each year as Anti-Slavery Day", the purpose of which is set out in subsections (2) and (3). The order is to be made by statutory instrument, but there is no requirement for it to be laid before Parliament nor, accordingly, for any Parliamentary procedure.
2. Whether it is in principle desirable to observe an Anti-Slavery Day annually is something that will be for the House to determine when it debates the Bill itself: the delegation of power is confined only to the appointment of a date for the purpose. The Committee observes that the choice of date might be of interest to Parliament, and that the power might be considered to be one which some Parliamentary control is desirable. However, in this instance the Committee does not consider the absence of further Parliamentary control to be inappropriate, as the Bill does not impose any binding obligations on anyone.

## FLOOD AND WATER MANAGEMENT BILL

---

### Introduction

3. This Bill is in three Parts. Part 1 confers functions on the Environment Agency and other public bodies in relation to the management of flood and coastal erosion risks and of assets and features designated as affecting such risks. Part 2 contains a variety of provisions, concerned in particular with matters like sustainable drainage, reservoirs and controls on the non-essential uses of water. Part 3 includes a power to amend legislation relating to water for the purpose of facilitating future consolidation of the legislation. The Bill confers a large number of delegated powers. A memorandum on the powers, by the Department for Environment, Food and Rural Affairs ('DEFRA'), is printed at Appendix 1 to this Report.

### Clauses 4 and 5

4. Clause 4 defines "flood risk management functions" for the purposes of Part 1, and clause 5 defines "coastal erosion risk management functions". Clause 4(2)(f) contains a power for the Minister to specify by order subject to negative procedure "any other function" as a "flood risk management function" in addition to those under the provisions listed in subsection (2). There is an equivalent power in clause 5(2)(c). DEFRA explain the choice the negative procedure on the ground that "the order making power could not, by itself, create a new function. It can only add existing functions to the list. The function will have to have been established in law either through primary or secondary legislation" (paragraph 22). But while DEFRA may

have in mind only the addition of existing statutory functions, the powers in clauses 4(2)(f) and 5(2)(c) are not expressly limited to adding only statutory functions. The Committee notes that, where a statutory function is envisaged, the Bill elsewhere makes this explicit (as in clause 11(7) and (9)). **The Committee recommends that either clauses 4(2)(f) and 5(2)(c) should be amended to confine the powers to statutory functions; or that these powers should be subject to the affirmative procedure.**

#### Clause 7

5. Clause 7(1) provides that the Environment Agency must introduce a “national flood and coast erosion risk management strategy” for England. Subsection (5) provides that the Agency may issue guidance about the application of the strategy, which under subsection (9) is required to be laid before Parliament but is subject to no further parliamentary procedure. Clause 11(1) requires relevant authorities to “... act in a manner which is consistent with” the guidance. While the Committee found it surprising to see described as “guidance” provision with which compliance is mandatory, it acknowledges that there is a precedent for this in Part 2A of the Environmental Protection Act 1990. However, that guidance is subject to a negative procedure. **The House may wish to invite the Minister to explain why clause 7 of the Bill does not follow that precedent in relation to procedure as well, and may then wish to consider whether a negative procedure should apply in relation to clause 7.**

#### Clause 15, and Schedules 1, 3 and 4 — Appeals

6. Clause 15 makes provision for a person who fails to provide information to an authority with responsibility for flood and coastal erosion risk management to be given an enforcement notice by the authority. If the person fails to comply with the requirements of the notice, he is liable to a civil penalty. Subsection (8) requires ‘the Minister’ (the Secretary of State or the Welsh Ministers) to provide by negative regulations for a right of appeal against penalties. The appellate jurisdiction must be conferred on the Minister, a court or a tribunal, and the regulations must make provision about procedure. Almost identical requirements as respects negative regulations about appeals are imposed elsewhere in the Bill:
  - in paragraph 15 of Schedule 1 (decisions about designation of structures etc affecting flood or coastal erosion risks);
  - in paragraph 25 of Schedule 3 (decisions on applications for approval of works);
  - in paragraph 7 (new section 2B) of Schedule 4 (decisions about designation of reservoirs as ‘high risk reservoirs’); and
  - in paragraph 30 of Schedule 4 (decisions imposing requirements about reservoir safety).
7. In paragraph 44 of the memorandum, DEFRA explain (as respects the power in clause 15(8)) that the regulations are ‘limited to setting out who the appeal authority is and the procedure to be followed’. But it seems clear that the regulations must do more than that. In particular, provision will need to be made about (for instance) the grounds for appeal and the powers of the prescribed appellate body. Given this, **the Committee recommends that**

**the powers to make provision about appeals in clause 15(8), and Schedules 1 (paragraph 15), 3 (paragraph 25) and 4 (paragraphs 7 and 30) should be subject to the affirmative procedure, at least on the first occasion that each power is exercised.**

#### Clause 15 — Maximum penalty

8. Clause 15(4) provides that a penalty imposed for failure to comply with an enforcement notice must not exceed £1,000. Subsection (9) enables the Minister to substitute some other amount by negative order. It is implicit in what is said in paragraphs 53 and 54 of the memorandum that DEFRA envisage that the power is required so that the maximum penalty can be increased to keep pace with inflation. But subsection (9) contains no such constraint on the exercise of the power. The Committee considers that the exercise of an unlimited power to increase a maximum penalty should be subject to the affirmative procedure. Accordingly, **in relation to clause 15(9) the Committee recommends that either the power itself should be amended to accord with the limited purpose for which DEFRA seem to be saying it is needed; or that the affirmative procedure should be required for any increase which exceeds that necessary to reflect a change in the value of money.**

#### Clause 29 — Restructuring

9. Subsections (1) and (2) of clause 29 enable the Minister to transfer by order functions of certain authorities responsible for flood and coastal erosion risk management to other authorities or bodies, and to amend a relevant definition in clause 6. Subsection (3) provides that an order ‘may amend this Act or another enactment’, in the light of which an order under clause 29 is to attract the affirmative procedure, as the House would expect. But it is unclear whether the power conferred by subsection (3) is intended to enable the amendment of *future* Acts – the conventional limitation to Acts passed before the end of the present Session is certainly not included, and paragraph 87 of the memorandum does not suggest that the power was intended to be so limited. But there is, equally, nothing in paragraphs 86 to 89 which attempts to justify the application of this Henry VIII power of to future Acts, which we would usually expect to see. **The Committee therefore draws the point to the attention of the House, so that it may seek an explanation from the Minister, and then consider whether the power in clause 29(3) should only apply to Acts passed before the end of the present Session.**

#### Clause 47 — Pre-consolidation amendments

10. Clause 47 enables the Secretary of State, by affirmative order, to amend the nine Acts listed in subsection (3) (which include this Bill, once enacted) to eliminate differences, simplify procedure and correct errors or resolve obscurity, if satisfied that this will make it easier to consolidate one or more of the Acts and that the changes are proportionate and do not remove protection. An order would in particular enable the Secretary of State to standardise provisions in the Acts about appeals, compulsory purchase, rights of entry and compensation. So the power would enable changes to be made that go beyond those which might usually be included by way of Law Commission recommendation on the consolidation of statutes.

11. This is not in principle a novel provision. Earlier Acts passed during the last ten years have included power to facilitate consolidation by affirmative order (for instance, the National Health Service Reform and Health Care Professions Act 2002 and the Pensions Act 2004), and the Committee has welcomed the initiative. But both those two powers have made the exercise of the power, or the coming into force of the order, contingent on either the presentation or the passing of a consolidation Bill. In the present case, the power could be exercisable without the order being associated with any current consolidation measure. Paragraphs 299 to 304 do not explain why clause 47 does not contain a similar requirement. **The House may wish to seek an explanation from the Minister why the power in clause 47 is not conditional on the presentation, or passing, of a consolidation Bill, and then to consider whether clause 47 should be amended to introduce such a requirement.**

#### Schedule 4 — Reservoirs

12. This Schedule makes extensive amendments to the Reservoirs Act 1975 to introduce enhanced arrangements for reservoir safety, and to extend the safety regime to a greater number of reservoirs. At present, the 1975 Act contains a number of powers that are exercisable by regulations; but, although there is a requirement that the regulations are to be statutory instruments, they need not be laid before Parliament, and are accordingly not susceptible to Parliamentary scrutiny. Most of the new powers introduced by Schedule 4 are made subject to the negative procedure (though those in the 1975 Act are affirmative). But, as respects paragraphs 4, 22, 31 and 39 of Schedule 4 the powers under amendments continue to attract no Parliamentary procedure, contrary to what is said in the memorandum. The Committee does not consider the absence of a scrutiny procedure to be inappropriate in any of these cases, but draws the point to the attention of the House so that the memorandum does not give rise to any confusion in this respect.

#### FINANCIAL SERVICES BILL — GOVERNMENT RESPONSE

13. We considered this Bill in our 5th Report [HL Paper 60]. The Government have now responded by way of a letter, printed at Appendix 2, from Lord Myners, Financial Services Secretary to the Treasury, HM Treasury.

## APPENDIX 1: FLOOD AND WATER MANAGEMENT BILL

---

### Memorandum by the Department for Environment, Food and Rural Affairs

#### Introduction

1. This Memorandum describes the purpose and content of the Flood and Water Management Bill; identifies the provisions of the Bill which confer powers to make delegated legislation; and explains in each case why the power has been taken and the nature of, and reason for, the procedure selected.
2. The delegated powers are identified in the order in which they appear in the Bill.

#### Background

3. Sir Michael Pitt's Review of the Summer 2007 floods identified clear gaps in the way that flooding is managed, particularly in relation to surface water flooding and on the need for a more risk based approach to reservoir safety. It also highlighted the need to adapt to the increasing pressures as a result of climate change which are predicted to increase the likelihood of extreme weather events such as flood and drought.
4. The Prime Minister announced the Government's intention to introduce legislation on floods and water in the draft legislative programme on 14 May 2008.
5. The draft Flood and Water Management Bill was published on 21 April 2009. Its period of public consultation ended on 24 July 2009. The Environment, Food and Rural Affairs (EFRA) Select Committee published its pre-legislative scrutiny report on the draft Bill on 23 September 2009.
6. The Flood and Water Management Bill was introduced into the House of Commons on 19 November 2009.

#### Overview of the Bill

7. The Bill takes forward some of the proposals in three previous strategy documents published by the UK Government - Future Water<sup>1</sup>, Making Space for Water<sup>2</sup> and the response to Sir Michael Pitt's Review of the Summer 2007 floods<sup>3</sup>. The Bill also takes forward proposals set out in the consultation on the draft Flood and Water Management Bill<sup>4</sup> and takes into account EFRA's pre-legislative scrutiny report.
8. The Bill also gives effect to the Welsh Assembly Government's Environment Strategy for Wales<sup>5</sup>, New Approaches Programme and the Strategic Policy Position Statement on Water<sup>6</sup>.

---

<sup>1</sup> Future Water: the Government's Water Strategy for England, February 2008. <http://www.defra.gov.uk/Environment/quality/water/strategy/pdf/future-water.pdf>

<sup>2</sup> Making space for water: Taking forward a new Government strategy for flood and coastal erosion risk management in England, March 2005. <http://www.defra.gov.uk/environment/flooding/documents/policy/strategy/strategy-response1.pdf>

<sup>3</sup> The Government's Response to Sir Michael Pitt's Review of the Summer 2007 Floods, December 2008. <http://www.defra.gov.uk/environment/flooding/documents/policy/pittreview-response.pdf>

<sup>4</sup> Draft Flood and Water Management Bill, April 2009. <http://www.official-documents.gov.uk/document/cm75/7582/7582.asp>

<sup>5</sup> Environment Strategy for Wales, May 2006. <http://wales.gov.uk/topics/environmentcountryside/epq/envstratforwales/?lang=en>

9. The Bill will improve protection for people, homes and businesses against all sources of flooding, enhance reservoir safety, help safeguard community groups from unaffordable rises in surface water drainage charges and protect water supplies to the consumer. In particular it will:

- give the Environment Agency an overview of all flood and coastal erosion risk management and associated powers, and unitary and county councils the lead in managing the risk of all local causes of floods;
- introduce an improved, risk based approach to reservoir safety, extending the regime to a greater number of reservoirs and providing the Environment Agency with the necessary enforcement powers;
- encourage the uptake of Sustainable Drainage Systems (SUDS) by removing the automatic right to connect to sewers and providing for unitary and county councils to adopt SUDS for new developments;
- extend the scope of Building Regulations so that it is possible to regulate, where it is appropriate to do so, for flood resilience or resistance measures to be required when a building is being repaired;
- enable water and sewerage companies in England and Wales to operate concessionary schemes for community premises on surface water drainage charges;
- update existing law on special administration for water companies, bringing it in line with general insolvency law;
- introduce a new regime to help ensure the delivery of large and unusual infrastructure projects, protecting customers from the risks related to the late delivery or escalating costs associated with such projects; and
- update existing measures to manage droughts to increase the scope and flexibility of water companies to restrict non-essential domestic uses of water during droughts;
- enable water and sewerage companies in England and Wales to address the issue of water affordability by bringing forward charges schemes that include social tariffs designed to reduce charges for customers that would have difficulty in paying water and sewerage bills in full; and
- amend existing legislation to ensure that water companies have full details of tenants and ensure billing dates coincide with tenants moving into and out of properties, discouraging the build up of bad water debt.

10. The remaining elements on which we consulted as part of the draft Bill will be brought forward in future legislation.

11. The Bill is structured as follows:

---

<sup>6</sup> Welsh Assembly Government Strategic Policy Position Statement on Water, March 2009. <http://wales.gov.uk/topics/environmentcountryside/epq/waterflooding/policystatement/?lang=en>

*Part 1 Flood and Coastal Erosion Risk Management*

*Part 2 Miscellaneous*

*Part 3 General*

Part 1 Flood and Coastal Erosion Risk Management

12. 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 the Welsh Ministers. It also, in accordance with the Government's response to Sir Michael Pitt's Review, gives upper tier local authorities in England, and local authorities in Wales, responsibility for preparing and putting in place strategies for managing local flood risk.

13. 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.

14. 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.

15. Regional Flood Defence Committees will have their remit extended to cover coastal erosion and be re-named Regional Flood and Coastal Committees. Each Committee will advise the Environment Agency on the exercise of its functions in their area, and the Agency will also need a Committee's consent to its regional programme for the area before it is implemented. The Committees will retain their decision-making powers in relation to the local levy.

16. This Part also provides additional legal powers for all Operating Authorities in England and Wales 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.

Part 2: Miscellaneous

17. This Part includes clauses on sustainable drainage, reservoirs, special administration, provision of infrastructure, temporary bans on non-essential uses of water, civil sanctions, sustainable development, incidental flooding or coastal erosion of land, flood resistant repairs to property, compulsory works orders, agreements on new drainage systems, concessionary surface water drainage charges for community groups, social tariffs for water charges, water and sewerage charges for non-owner occupiers and the abolition of the Fisheries Committee (Scotland).

Part 3: General

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

## Provisions for delegated legislation

### Part 1 – Flood and Coastal Erosion Risk Management

#### 1. Key concepts and definitions

#### Clauses 4 and 5 – “Flood risk management function” and “Coastal erosion risk management function”

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercised by:* Order

*Parliamentary procedure:* Negative resolution

19. In each case the clause sets out those functions to be regarded as “flood risk management functions” and “coastal erosion risk management functions” respectively for the purposes of this Part. The functions listed are circumscribed by the powers and duties in the Bill and this may limit or otherwise affect the way in which they are exercised in the interests of ensuring that flood and coastal erosion risk management works effectively. Most notably, functions which are flood or coastal erosion risk management functions must be exercised in a way which is consistent with the strategies and guidance developed and issued by the Environment Agency, the Welsh Ministers and lead local flood authorities under clauses 7 to 9. Also, a risk management authority must cooperate with another in its exercise of flood and coastal erosion risk management functions (clause 13).

20. Subsection (2) in each clause specifies the functions which are flood or coastal erosion risk management functions. In addition, both clauses provide a power for the Secretary of State and the Welsh Ministers to specify other functions, by order.

21. The power in each case allows the Secretary of State and the Welsh Ministers to make appropriate adjustments to the list of functions enabling it to be modified to reflect future changes in legislation, or to include additional functions which have not currently been identified as being relevant but become so in the light of experience. For example, it would allow functions arising from new legislation or obligations under European law to be classed as flood and coastal erosion risk management functions for the purposes of this legislation. This would thereby require risk management authorities, for instance, to act in a manner consistent with the strategies and related guidance when exercising those functions.

22. Classifying a function as a flood or coastal erosion management function places requirements on the exercise of those functions. Therefore, some form of scrutiny is needed. The order making power could not, by itself, create a new function. It can only add existing functions to the list. The function will have to have been established in law either through primary or secondary legislation and so will have been through relevant Parliamentary or Assembly procedure. Therefore, the Department considers it would be unduly burdensome to require a debate in each House of Parliament before a flood risk management function could be added to the list. We consider that the negative resolution procedure should provide sufficient scrutiny in these cases.

## 2. Strategies, co-operation and funding

### Clauses 7,8,9,10 – National flood and coastal erosion risk management strategy – Local flood risk management strategy

*Power conferred on:* *the Environment Agency, the Welsh Ministers and lead local flood authorities*

*Power exercisable by:* *Guidance*

*Parliamentary procedure:* *None*

23. These four clauses give the Environment Agency, the Welsh Ministers and the lead local flood authority the power to create a strategy and to issue guidance on it. Clauses 11 and 12 create a duty for a relevant authority to act in a manner consistent with the strategy and guidance. The combination of the effect of these clauses is to give the strategies and guidance force of law, and a delegated power to the Environment Agency, the Welsh Ministers and lead local flood authorities to determine by way of the strategy and guidance, the manner in which a risk management authority must act.

24. Clause 7 gives the Environment Agency a duty to develop, maintain, apply and monitor a national flood and coastal erosion risk strategy for England. Essentially this is a duty to prepare, review, update, and seek to ensure the application of, a long term strategy for flood and coastal erosion risk management which addresses risk from all sources. This will inform local strategies and guide decision-making by risk management authorities. The Environment Agency will have responsibility for assessing flood risks in the country and determining how they need to be dealt with, whilst leaving considerable discretion to local authorities to determine their own strategies.

25. We intend that the guidance to be prepared by the Environment Agency should cover a range of issues such as arrangements for risk management authorities to work together within an area (including at a catchment level) to ensure the partnership working envisaged by the Bill, as well as across boundaries to avoid disputes. We intend that this guidance will set out what will be required in respect of the duty to co-operate and to lay down protocols as to when it is reasonable to require information from other authorities.

26. We intend the guidance to include technical guidance on issues such as methods of risk assessment, on reporting of incidents, best practice in respect of surface water management, as well as the type of assets that need to be included on a register of assets.

27. The Welsh Ministers' national strategy for Wales under clause 8 will give them the duty to develop a long term strategy for flood and coastal erosion risk management which will inform local strategies and decision-making. The Welsh Ministers will have responsibility for assessing flood risks in Wales and determining how this needs to be dealt with, whilst leaving considerable discretion to local authorities to determine their own strategies.

28. We intend that the local authority guidance-making power which is conferred on local authorities in England and Wales by clause 9 and clause 10 will be used to inform the lead authority's partners of the practical arrangements of partnership working. It will also be used to give guidance to potential flood victims.

29. We have decided to provide for flood and coastal erosion risk to be addressed by putting national and local strategies in place because a flexible framework is required for addressing flood risk in the long term. It is not possible to determine binding targets and specific duties at this stage, and these will need to be varied as, for example, climate

change projections develop. For this reason, it is important that there is the flexibility to reflect these changing overarching circumstances as well as local circumstances.

30. The guidance to be given by the Environment Agency is either to assist and facilitate flood and coastal erosion risk management at the local level in the sense of disseminating best practice, or of a technical nature. We anticipate that this guidance for example will help with the sort of information that can reasonably be required by local authorities to fulfil their duties. It will be necessary for these rules to evolve, as protocols and a better understanding of what is required by lead authorities in practice, are developed. In these circumstances, the requirements can be set out more appropriately through guidance rather than through a rigid legal framework. Guidance with significant implications will be consulted upon.

31. The guidance to be given by local authorities will focus on the technical arrangements of partnership working such as attendance at meetings and reporting to local authorities, as well as other matters like the provision of information to potential flood victims on risk management and emergency planning. By providing for binding guidance to be provided at a local level, local authorities will be able to determine their own preferred arrangements and to vary these arrangements as they obtain greater experience of managing flood risk locally.

32. The national strategy for England once approved by the Secretary of State will be laid before Parliament, enabling debate and scrutiny if needed. Prior to approval, the proposed strategy will be subject to consultation and it will be open to the EFRA Committee to scrutinise the proposed strategy.

33. The national strategy for Wales will be laid before the Assembly, enabling debate and scrutiny if required. As in England, the proposed strategy will be consulted on and will be open to scrutiny by committee.

34. The national strategies will be developed on the basis of objective criteria, though in England it may be subject to some direction by Government and will require formal Government approval. In later iterations they will be informed by objective risk assessments and planning under the legislation implementing the European Floods Directive.

35. The local strategies will be developed in consultation with the public and other risk management authorities. Like the national strategy, later iterations of the local strategy will be informed by the process, under the legislation implementing the Floods Directive, which requires objective risk assessments and putting in place of management plans.

36. Both the Environment Agency and the Welsh Ministers' guidance about the national strategies and local authority guidance on local strategies will also be developed in consultation with the public and risk management authorities, as well as Ministers.

37. Both the local and national strategies and guidance will open to local scrutiny by local authority overview and scrutiny committees.

**Clause 11 – Effect of national and local strategies: England****Clause 12 – Effect of national and local strategies: Wales**

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Order

*Parliamentary procedure:* Negative resolution

38. These clauses essentially require English risk management authorities (defined in clause 6(14)) and cross-border internal drainage boards which are mainly in England, to act in a manner consistent with the national flood and coastal erosion risk management strategy, local flood risk management strategies and related guidance, when exercising their flood or coastal erosion risk management functions. Water companies and the Environment Agency (in respect of its clause 7 functions) are exempt from the requirement to act consistently with local strategies and guidance and need only have regard to them. All English risk management authorities must have regard to the strategies and guidance when exercising any other of their functions in a manner which may affect flood or coastal erosion risk. Equivalent provisions apply in Wales.

39. These provisions give the Secretary of State and the Welsh Ministers a power to require further specified people exercising a statutory function which may affect a flood or coastal erosion risk also to have regard to the strategies and guidance (clauses 11(7) and 12(6) respectively). The strategies and guidance are produced by the Environment Agency, the Welsh Ministers and the lead local flood authorities under clauses 7 to 10. The purpose of the provision is to ensure that in taking any decisions which may affect flood or coastal erosion risk (for example, a local authority making a planning decision) specified bodies are giving the right consideration to the strategies and guidance. The power to specify people exercising statutory functions who must also have regard to the strategies and guidance allows for the inclusion of new bodies created in the future, or to include additional bodies or people exercising statutory functions which have not currently been identified as being relevant, but are in the future.

40. The power allows the Secretary of State and the Welsh Ministers to establish and adjust an appropriate list of people who are exercising statutory functions which may affect a flood or coastal erosion risk. The power enables the list to be changed to accommodate the creation of new bodies or to include existing bodies where their roles change or become relevant to include. Parliamentary or Assembly (as relevant) scrutiny of this power is appropriate, since it results in a body becoming subject to an obligation to have regard to the strategies and guidance issued under this legislation.

41. We consider that specifying relevant people exercising statutory functions should be subject to Parliamentary or Assembly (as relevant) scrutiny, given the fact that being such a person carries certain obligations. However this order making power could not, by itself, create a new statutory function or give anybody any functions, and as such we consider it would be unduly burdensome to require a debate in each House of Parliament or the National Assembly for Wales before a person could be specified. Hence we consider that the negative resolution procedure should provide sufficient scrutiny in this case.

## Clause 15 – Civil sanctions (Right of Appeal)

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercised by:* Regulations

*Parliamentary procedure:* Negative resolution

42. This clause provides a civil sanction to enforce compliance with clause 14. In the first instance, 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 don't provide the information. It must also invite representations. 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 advise how to appeal.

43. A right of appeal is to be provided by regulations made under this section. The penalty is recoverable as a debt. The regulations must give the power to consider the appeal and reach decisions, to either the Secretary of State/the Welsh Ministers, or a court or a tribunal. The regulations must also set out how the person might appeal and the procedure for doing so.

44. The matters that the regulations may prescribe are limited to setting out who the appeal authority is and the procedure to be followed. The details of the regulations are not important to the extent that they cannot affect the fundamental right of people to pursue an appeal. The regulation-making power makes it clear that a right of appeal must be available at all times.

45. However, the details of the regulations are important to the extent that they can ensure that the appeal process works for appellants and does not introduce excessive administrative burdens on local authorities and the Environment Agency. The Secretary of State and the Welsh Ministers will aim to ensure an appeal authority is put in place with sufficient technical competence to examine not only procedural but also substantive aspects of appeals. This will make appeals cheaper and easier for appellants, and make it more likely that all aspects of grievances are able to be considered.

46. There are a number of appellate bodies which may be suitable at present. Over time, appellate bodies will evolve and some will become more suitable than others, some will cease to exist and new bodies will arise. Hence it will be desirable and even necessary from time to time to change the appeal authority, and attendant procedures. If an authority were to be specified in the primary legislation then any change to this would need to be made through an amendment to the primary legislation, and the appeals regime would be less responsive, and lag behind what is actually needed.

47. Having flexibility over the appellate body and procedure will make it easier to promote consistency across all flood and coastal erosion matters, which will in turn promote fairness and efficiency. It will also enable the Secretary of State and the Welsh Ministers to evaluate how well the appeal process is performing, and respond to calls for improvement.

48. The regulations are required by the Bill to be in place to ensure a right to challenge an enforcement notice. So, to require a debate even when no-one was calling for one, would delay implementation of the Bill.

49. The changes that can be brought about by regulation are largely procedural, and they are likely to involve technical detail which is unlikely to be of concern to Parliament or the Assembly. Small changes to the procedural details may be needed from time to time to ensure consistency with other areas, and it would be an inefficient use of Parliamentary or Assembly time to require a debate every time this happened.

50. If there are concerns, then either House of Parliament can call a debate and vote to annul the secondary legislation. In the unlikely event that proposed changes to procedural details are causing concern, then the Merits of Statutory Instruments Committee can draw the secondary legislation to the attention of Parliament, to assess whether a debate is needed. The National Assembly for Wales will have the same rights in respect of Wales.

51. As discussed, the regulations cannot remove the right to appeal.

### **Clause 15 – Civil sanctions (Amount of Penalty)**

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercised by:* Order

*Parliamentary procedure:* Negative resolution

52. As described above, this clause provides a civil sanction to encourage compliance with clause 14, in the form of a monetary penalty of up to £1000. The Secretary of State or the Welsh Ministers in relation to Wales may – by order - substitute a different amount.

53. If the penalty is to remain up-to-date with respect to inflation then the maximum amount will need to be increased from time-to-time. The Bill provides an order-making power for this purpose, so that it will not be necessary to use primary legislation.

54. The order-making power is only concerned with the amount of the penalty; it has no other use or purpose. As long as the change is commensurate with recent changes in prices it is unlikely to be of concern to Members of Parliament or the Assembly. It would be an inefficient use of Parliamentary and Assembly time to require a debate every time the penalty was updated.

55. In the unlikely event that the order-making power was used to make a large increase, then the Merits of Statutory Instruments Committee can draw the secondary legislation to the attention of Parliament, to assess whether a debate is needed. If concerns remain, then either House of Parliament can call a debate and vote to annul the secondary legislation. The National Assembly for Wales will have the same rights in respect of Wales.

### **3. Supplemental powers and duties**

#### **Clause 18 – Environment Agency: reports**

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Statutory Instrument - regulations

*Parliamentary procedure:* Negative Resolution

56. This clause requires the Environment Agency to produce a report to the Minister (i.e. the Secretary of State in relation to England, and the Welsh Ministers in relation to Wales) about flood and coastal erosion risk management. This report is designed to allow

the Secretary of State and the Welsh Ministers to see at a glance what the ‘state of the nation’ is in terms of flood and coastal erosion risk, and where the priorities for action are over the coming years. Subsection (3) of this clause allows the Secretary of State and the Welsh Ministers to make regulations setting out the timing and frequency of such reports, and the information that the reports should contain.

57. This clause would enable the Secretary of State or the Welsh Ministers to require regular reports, but also to request reports at specific times, for example, in response to a major flooding event. This would not be possible if the frequency of the reports was expressly provided for. To specify on the face of the Bill the timing, frequency and content of the reports from the Environment Agency would place unnecessary restrictions on the process and would limit its future usefulness.

58. The frequency and content of the reports may need to vary over time to reflect changing needs and priorities. By allowing the Secretary of State and the Welsh Ministers to act flexibly, they could require reports in a way which balances the need for information at any one time, with the cost and other burdens associated with its production. Similarly, the information that the reports contain may need to vary over time and from report to report. For example, some information may only need to be updated every few years while other information is updated more frequently. Setting such requirements in regulations provides the necessary degree of flexibility for them to change over time.

59. We consider that in setting the specifics of timing, frequency and content of the Environment Agency reporting requirements on flood and coastal erosion risk management, the regulations should be subject to scrutiny. We consider that negative resolution procedures would provide Parliament and the Assembly with an opportunity to give due consideration to these issues, but that it would be unduly burdensome to require a debate in each House of Parliament, or the Assembly for the details to be decided.

## Clause 20 – Ministerial directions

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Direction

*Parliamentary procedure:* None

60. This clause allows the Secretary of State in relation to England and the Welsh Ministers in relation to Wales (and both acting jointly in relation to a risk management authority exercising functions in both countries) to direct a risk management authority to exercise a flood or coastal erosion risk management function that would normally be carried out by another relevant authority. The direction in this provision would only be used where the authority normally responsible was not exercising that function, or was doing so in a way that was not in accordance with national or local strategies.

61. Any such directions would, by virtue of subsection (4), have to be sent to the authority concerned and published (except where such publication would be contrary to the interests of national security).

62. This would allow a process whereby work may be undertaken in default of the body which would usually exercise those powers. This action may need to be taken in an emergency, for example to prevent or mitigate the effects of flooding where the “normal” body is unwilling or unable to act, and then, only as an action of last resort.

63. We consider that no formal Parliamentary or Assembly procedure would appear to be necessary to resolve what will essentially be a local issue between one risk management

authority and another. We do consider that a direction-making power is necessary, however, so that inaction or inadequate action does not get ignored. This power will allow the Secretary of State and the Welsh Ministers in effect to adjudicate and determine any local issue on responsibility quickly and effectively.

### **Clause 21 – Lead local authorities: duty to maintain a register**

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Statutory Instrument - Regulation

*Parliamentary procedure:* Negative resolution

64. This clause requires lead local flood authorities to maintain a register of structures and features that may affect flood and coastal erosion risk management in their area, and to record information about those structures and features. Subsections (2) and (4) provide powers for the Secretary of State in relation to authorities in England and the Welsh Ministers in relation to authorities in Wales to make regulations setting out the information to be contained in the register and record and what information should be excluded.

65. The requirement for the lead local flood authorities to maintain a register is to ensure they establish the location and ownership of all drainage and watercourse systems in their area. This will allow for strategic local flood risk management.

66. The clause allows the Secretary of State and the Welsh Ministers to consider what information local authorities will need to undertake this role, and ensure that there is consistency across each country in the detail being recorded.

67. The information that a register or record should contain may vary over time to reflect changing needs and priorities and by allowing the Secretary of State and the Welsh Ministers the ability to act flexibly they will be able to act in a way which balances the need for information at any one time, with the cost and other burdens associated with its production. Setting such requirements in regulations provides the necessary degree of flexibility for requirements to be set and changed over time.

68. We consider that in setting the specific information to be included in the register or record it is placing a burden on the lead local flood authority, and it should be subject to scrutiny to ensure that the requirements are appropriate. We consider that negative resolution procedures provide Parliament and the Assembly with an opportunity to give due consideration to these issues, but that it would be unduly burdensome to require a debate in each House of Parliament or the National Assembly for Wales for the details to be decided.

#### **4. Regional Flood and Coastal Committees**

##### **Clause 22 – Establishment**

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Regulation

*Parliamentary procedure:* Negative resolution

69. This clause requires the Environment Agency to identify regions of England and Wales and establish Regional Flood and Coastal Committees (RFCCs) for each region. These committees will replace existing Regional Flood Defence Committees (RFDCs). The regulation making power in subsection (2) will allow the Secretary of State and the Welsh Ministers to: (a) specify the procedure to be followed by the Environment Agency, such as in respect of consultation, and appeals in deciding on the boundaries of these regions; and (b) make transitional provisions in relation to the switch from one committee regime to the other. This will for instance allow for transitional rules relating to the constitution and membership of RFDCs and provide for arrangements to ensure continuity of functions in the switch to RFCCs.

70. It is appropriate that this be dealt with through secondary legislation as both these sets of regulations would cover matters that are essentially technical. In respect of the procedure that needs to be followed, this will apply to both establishing the boundaries of the committees initially but also to future revisions. The procedure may need to be changed to respond to different circumstances in the future, and the flexibility provided by inclusion in secondary legislation will ensure that changes can be made relatively easily.

71. This reflects existing law which gives powers to the Secretary of State and the Welsh Ministers to alter boundaries and provide for amalgamations of RFDCs, pursuant to schedule 4 to the Water Resources Act 1991, by way of secondary legislation.

72. By using the negative procedure, debate will be allowed for if Parliament or the Assembly considers this necessary. As these are issues of detail, it would be inappropriate to take up Parliamentary or Assembly time where there was no demand for a debate. Transitional arrangements are of lesser importance because of their temporary nature and are therefore unlikely to be particularly contentious.

##### **Clause 24 – Membership**

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Regulation

*Parliamentary procedure:* Negative resolution

73. This clause enables the Secretary of State and the Welsh Ministers to set out the details about the number of members of a Committee, conditions of eligibility, the selection and appointment method (including who is to appoint them), and the proceedings of a Committee including provisions as to the majority needed for certain decisions.

74. This order-making power will provide for administrative efficiency in allowing the means of appointing RFCCs, which can be by election or otherwise, to be amended to reflect any changes in responsibility (clause 29), or other changing circumstances.

75. The provision relating to the majority required for certain decisions will allow rules to be laid down which reflect the membership of the committees when this is decided. We consider that it is appropriate to make such regulations subject to the negative resolution procedure since this provision relates to technical and procedural rules on appointing members of these Committees.

### **Clause 25 – Money**

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Direction

*Parliamentary procedure:* none.

76. This clause allows the Secretary of State and the Welsh Ministers to direct the Environment Agency to make payments to Committee Chairs (or in respect of persons who chair or have chaired committees), subject to the Secretary of State's or the Welsh Ministers' determination, as appropriate, as to the amount, or maximum amount, that may be paid under this section.

77. We consider that no formal Parliamentary or Assembly procedure would appear to be necessary to consider what payments may be made to Chairs of Regional Flood and Coastal Committees, and that no Parliamentary or Assembly scrutiny is required. This provision gives the Secretary of State and the Welsh Ministers a discretionary power to direct the Environment Agency to make payments of amounts determined by the Secretary of State or the Welsh Ministers to specific individuals who are members of, or chair Regional Flood and Coastal Committees. It is however, considered that a direction-making power is appropriate so that the Secretary of State and the Welsh Ministers could require the Environment Agency to make payments of specified amounts which may vary over time and in relation to the specific circumstances of the case.

## **5. General**

### **Clause 27 – Sustainable development**

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercised by:* Order

*Parliamentary procedure:* Negative resolution

78. This clause places a duty on local authorities and internal drainage boards to aim to contribute towards the achievement of sustainable development in exercising their flood or coastal erosion risk management functions. These functions are defined in the clause under subsection (4).

79. Subsection (4)(d) provides a power for the Secretary of State and the Welsh Ministers to specify other functions, by order.

80. The power in each case allows the Secretary of State and the Welsh Ministers to make appropriate adjustments to the list of functions, enabling it to be modified to reflect future changes in legislation or to include additional functions which may become relevant in future. For example, it would allow functions arising from new obligations under European law to be classed as flood and coastal erosion risk management functions for the purposes of this legislation, and thereby require relevant authorities, to act in a manner consistent with the strategies and related guidance when exercising those functions.

81. Classifying a function as a flood or coastal erosion management function places requirements on the exercise of those functions. There is therefore a need for some form of scrutiny. The order making power could not, by itself, create a new function; it can only add existing functions to the list. The function will have had to be established in law either through primary or secondary legislation and will have been through relevant Parliamentary or Assembly procedure. Therefore, we consider it would be unduly burdensome to require a debate in each House of Parliament or the National Assembly for Wales before a flood risk management function could be added to the list. Hence it is considered that the negative resolution procedure should provide sufficient scrutiny in these cases.

### Clause 28 – Power to make further amendments

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Order

*Parliamentary procedure:* Affirmative resolution

82. This clause gives the Secretary of State and the Welsh Ministers a “Henry VIII power” to amend the Coast Protection Act 1949, the Land Drainage Act 1991, the Water Resources Act 1991, and the Environment Act 1995 as they consider appropriate in consequence of Part 1. It also gives the same powers to amend the Public Health Act 1936 and the Highways Act 1980 (so far as they relate to water, which includes flood and coastal erosion risk management as well as other water related matters).

83. This power is necessary because there are a number of provisions in these Acts which may require further consequential amendment as a result of amendments made in this Part and also to enable substantive change to the Acts in preparation for consolidation of the flood and coastal erosion provisions in these Acts. In these circumstances, it would be more effective and efficient to make the appropriate amendment using secondary legislation because it would allow those consequential or substantive changes to be made at the most appropriate time and with suitable transitional arrangements.

84. This power will remove the need to make primary legislation to effect what would be relatively minor or technical changes once the principle changes to the Acts have been made in the Bill. We consider it appropriate to enable the Secretary of State and the Welsh Ministers to make further consequential amendments, as it would be disproportionate to require new primary legislation for this purpose. The power is limited to consequential amendments in connection with Part 1 of the Bill.

85. The Department and the Welsh Assembly Government consider that because this power enables amendment of primary legislation a debate in each House or the National Assembly for Wales on these matters is desirable and proportionate. We therefore consider that it is appropriate for these regulations to be subject to the affirmative resolution procedure.

## Clause 29 – Restructuring

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Order

*Parliamentary procedure:* affirmative resolution

86. This clause gives a power to the Secretary of State and the Welsh Ministers to transfer flood risk and coastal erosion risk management responsibilities by order from those authorities that operate at a local level, i.e. county councils, unitary authorities, district councils and internal drainage boards, to each other or to other bodies. We have provided in the Bill for certain authorities to lead on managing certain sources of risk. A unitary authority and county council have responsibility for the local flood risk strategy in their area and works powers for surface runoff and groundwater. District councils (where there is no unitary authority) and internal drainage boards have works powers to manage flood risk from ordinary watercourses and the sea, and maritime district councils also have works powers to manage coastal erosion risk.

87. These are divisions of responsibility which have been considered and discussed with stakeholders as being appropriate and effective. However, we are concerned that these decisions may need to be altered in the light of experience or in the face of changes to circumstances which alter the bodies best placed to manage flood or coastal erosion risks or what functions are appropriate to manage those risks. This issue was raised by the Environment, Food and Rural Affairs select committee in pre-legislative scrutiny. This provision will allow for such a transfer of functions.

88. This is a Henry VIII power but has limited application to the sort of adjustment of responsibility explained above. It is appropriate to secondary legislation to give the flexibility sought, which would allow the Bill to remain effective and fit for purpose by allowing a timely response to changed circumstances without the need to wait for primary legislation.

89. We consider that it is clearly appropriate to make such regulations subject to the affirmative resolution procedure to give both Houses of Parliament the opportunity to scrutinise, debate and vote on any proposed changes to allocation of responsibility since this will represent a change to a key element of the institutional structure for flood and coastal erosion risk management.

## Clause 30 gives effect to Schedule 1 – Risk Management: Designation of features

### Paragraph 15 – Appeals

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercised by:* Regulations

*Parliamentary procedure:* Negative resolution

90. Paragraph 15 requires regulations to be made providing the mechanism for appeals of certain decisions in Schedule 1 of the Bill.

91. Under Schedule 1, the Environment Agency, internal drainage boards and local authorities may, in respect of their flood risk management responsibilities, designate structures and features in their areas that affect flood risk or coastal erosion risk.

92. The Bill requires a provisional designation to be issued to the owner of the feature in question, followed - after a period of notice - by a designation notice. The designation notice will require the owner to seek consent from the designating authority before altering, removing or replacing the feature. A designation is a local land charge, and will be apparent to anyone searching the title. The owner may apply for consent to cancel the designation.

93. If a person contravenes a designation notice, the designating authority may serve an enforcement notice on the person, requiring remedial action. If a person fails to comply with an enforcement notice, the designating authority may itself carry out the steps identified in the notice, and recover costs from that person. Failure to comply with an enforcement notice is also an offence, which carries a maximum fine of level 5 on the standard scale.

94. The owner of the feature may make representations to the designating authority against a provisional designation notice, and if it is confirmed by means of a designation notice, the owner may appeal against the designation.

95. The provision for appeals requires the Ministers, to provide a mechanism by which an owner may appeal against: a) designations; b) a decision in connection with a consent to alter, remove or replace a designated feature; c) refusal to cancel a designation; and d) enforcement notices.

96. The regulations must give the power to consider the appeal and reach decisions to either the Secretary of State/the Welsh Ministers, or a court or a tribunal. The regulations must also set out how the person might appeal and the procedure for doing so.

97. The matters that the regulations may prescribe are limited to setting out who the appeal authority is and procedure to be followed. The details of the regulations are not important to the extent that they cannot affect the fundamental right of people to pursue an appeal. The regulation-making power makes it clear that a right of appeal must be available at all times, and that the effect of an enforcement notice is suspended while the appeal is pending.

98. However, the details of the regulations are important to the extent that they can optimise the effectiveness of the appeal process to make sure that it works for appellants. Defra will aim to have an appeal authority with sufficient technical competence to examine not only procedural, but also substantive aspects of appeals. This will make appeals cheaper and easier for appellants, and make it more likely that all aspects of grievances can be considered.

99. There are a number of appellate bodies which may be suitable at present. The Planning Inspectorate is the best candidate at present, and the Agricultural Land Tribunal is another candidate. Over time, appellate bodies will evolve and some will become more suitable than others, some will cease to exist and new bodies will arise. Hence it will be desirable and even necessary from time to time to change the appeal authority, and attendant procedures. If an authority were to be specified in the primary legislation then any change to this would need to be made through an amendment to the primary legislation, and the appeals regime would be less responsive, and lag behind what is actually needed.

100. Having flexibility over the appellate body and procedure will make it easier to promote consistency across all flood and coastal erosion matters, which will in turn

promote fairness and efficiency. It will also enable Defra to evaluate how well the appeal process is performing, and respond to calls for improvement.

101. The regulations are required to be in place for the designation notice to be issued, so to require a debate even when no-one was calling for one would delay implementation of the Bill.

102. The changes that can be brought about by regulation are largely procedural, and they are likely to involve technical detail which is unlikely to be of concern to Members of Parliament and Peers. Small changes to the procedural details may be needed from time to time to ensure consistency with other areas, and it would be an inefficient use of Parliamentary time to require a debate every time this happened.

103. If there are concerns, then either House of Parliament can call a debate and vote to annul the secondary legislation. In the unlikely event that proposed changes to procedural details are causing concern, then the Merits of Statutory Instruments Committee can draw the secondary legislation to the attention of Parliament, to assess whether a debate is needed. The National Assembly for Wales will have the same rights in respect of Wales.

104. As discussed, the regulations cannot remove the right to appeal, and the requirement for an enforcement notice to be suspended pending an appeal is set in the primary legislation, and this cannot be changed by regulation.

#### **Paragraph 16 – Notices and applications**

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercised by:* Regulations

*Parliamentary procedure:* Negative resolution

105. Notices may be issued by the Environment Agency, internal drainage boards and local authorities under Schedule 1.

106. This paragraph enables the Secretary of State and the Welsh Ministers to make regulations making provision about the form, content and method of service of a notice, the form and content of an application, and the procedure for determining an application made under Schedule 1.

107. Changes to the specification of notices will be needed from time to time to allow for changing circumstances, and to ensure consistency and efficiency across all flood and coastal erosion matters.

108. These changes would relate to technical and procedural matters, and would be unlikely to be controversial. They will improve the operation of the system for people who own features that are - or are likely to be - designated, and will not affect fundamental rights. To this end, the primary legislation contains a number of safeguards to make sure that the landowner is informed and that the views of the land owner are taken into account. Paragraph 7 provides that designation must always be preceded by a provisional designation. The provisional designation notice must specify:

- the structure or feature to be provisionally designated,
- the date on which the provisional designation takes effect,
- the reasons for the provisional designation,
- how representations to the responsible authority may be made, and

- the period within which representations may be made.

109. Paragraph 7 specifies that the authority must wait at least 28 days after serving the provisional notice in order that representations can be made by the owner and that the authority must have regard to any representations before confirming the designation. If it takes more than 60 days to decide then it cannot confirm the designation. The final designation notice (under paragraph 8) must:

- specify the provisional notice to which it relates,
- specify the structure or feature to be designated,
- specify the reasons for the designation,
- give information about the procedure for bringing an appeal under regulations under paragraph 15, and
- specify the period within which an appeal may be brought.

110. In the event that an authority cancels a designation, paragraph 9 requires that notice must be given to the owner, and must specify the date of the cancellation and give reasons. Paragraph 10 states that the responsible authority must notify any other designating authority which it thinks may have an interest in a designation or cancellation.

111. Paragraph 6 specifies that a responsible authority may only refuse consent to alter, remove, or replace a designated feature if it thinks the change would affect a flood risk or a coastal erosion risk.

112. The provisions that would be made by regulation would be entirely procedural and technical. As discussed above, a lot of the details are already set out in the primary legislation, and what is left are unlikely to be of concern to Members of Parliament or the Assembly.

113. Because the procedural details will need to be updated or improved to respond to changing circumstances, it would be disproportionate - and an inefficient use of Parliamentary or Assembly time - to require a debate every time they need to be amended. If there are concerns then either House of Parliament can call a debate and vote to annul the secondary legislation in England. If it has concerns then the Merits of Statutory Instruments Committee can draw the secondary legislation to the attention of Parliament. The National Assembly for Wales will have the same rights in respect of Wales.

## **Clause 31 gives effect to Schedule 2 – Risk Management: Amendment of Other Acts**

### **Paragraph 54 – Local Government Act 2000**

*Power conferred on:* Secretary of State in relation to England

*Power exercisable by:* regulations

*Parliamentary procedure:* negative resolution

114. This paragraph inserts a new section 21F into the Local Government Act 2000 to provide for overview and scrutiny committees in lead local authorities (county councils and unitaries) to scrutinise the carrying out of flood and coastal erosion risk management functions by the risk management authorities. It places an obligation on the risk management authorities to comply with requests for information and for a response to a report. It also requires these authorities to have regard to the recommendations of the committees.

115. The Secretary of State is given a power to make regulations about detailed matters relating to scrutiny including procedure, the length of notice to be given to the risk management authorities, requirements for them to attend to give information orally, the nature of information and responses that may be required, as well as publication of the information they provide.

116. This paragraph also extends the power under s.123 of the Local Government and Public Involvement in Health Act 2007 to make provision in relation to joint overview and scrutiny committees that cover scrutiny in relation to flood and coastal erosion risk management.

117. This power relates to technical detail which is best dealt with in secondary legislation rather than primary legislation. It does not affect rights of individuals and is concerned only with the detail in respect of compliance by authorities. By providing for these provisions to be made through secondary legislation, it also gives sufficient flexibility for this procedure to be adapted as circumstances develop.

118. The extension of powers to make regulations under s.123 is in line with the procedure laid down in the Local Government and Public Involvement in Health Act 2007. No regulations have been made under this provision as yet.

119. The provisions that would be made by regulation would be entirely procedural and technical. The principle of scrutiny committees is set out in the schedule and well established through Sir Michael Pitt's review and the subsequent Government response. The procedural details will need to be updated or improved to respond to changing circumstances. It would be disproportionate - and an inefficient use of Parliamentary time - to require a debate every time they need to be amended. If there are concerns then either House of Parliament can call a debate and vote to annul the secondary legislation in England. If it has concerns then the Merits of Statutory Instruments Committee can draw the secondary legislation to the attention of Parliament.

## Part 2 – Miscellaneous

### Clause 32 gives effect to Schedule 3 – Sustainable Drainage

#### Paragraph 5 – National Standards

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Publication of Standards

*Parliamentary procedure:* None

120. Paragraph 5 allows the Secretary of State and the Welsh Ministers to publish standards for the implementation of sustainable drainage.

121. These standards do not create any legal obligations in themselves, so it is not necessary for them to be the subject of any form of Parliamentary procedure. The relevant obligations are set in the primary provisions of schedule 3 and include the requirement for drainage systems to be designed, operated, and maintained in accordance with standards.

122. The power in paragraph 5 is to set the technical details of these obligations. The Minister must consult before issuing these standards.

## Paragraph 6 – Approving body

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Order

*Parliamentary procedure:* Negative resolution in some cases, affirmative in others

123. Schedule 3 to the Bill establishes a system whereby a person who is carrying out construction work which has drainage implications must first seek approval from the “approving body”. Paragraph 6 defines who is to be regarded as the approving body. The default position is that the county or unitary council will be the approving body.

124. However, subparagraph (3) provides that the Minister may by order appoint a different body to be the approving body for a specified area.

125. This provision will allow the Minister to adapt this model to cater for individual areas. For example, in some cases it might be appropriate to give this role to the statutory sewerage undertaker who is already responsible for providing sewers for draining rainwater, so as to allow them to integrate the management of sustainable drainage systems with their general drainage role.

126. Subparagraph (4) provides that such an order may confer additional powers on the new approving body of a kind which would normally be exercisable by the unitary or county council.

127. On the first provision (power to appoint a different approval body), the use of secondary legislation for such a provision is necessary to ensure that the Minister retains the flexibility to adapt as understanding of the new approval process develops. This is a very narrow power – it does not enable the Minister to alter the approving body’s role, powers or duties.

128. On the second element (conferring of powers), it is not appropriate to confer all of those powers in primary legislation, because it will be necessary to tailor the powers to the body in question. For example, depending on who the approving body is, it might be desirable to place additional restrictions on the use of some of the powers, perhaps dependent upon how democratically accountable the body in question is.

129. If the order simply appoints a different body to fulfil the role of approving body, and does not confer any additional powers on the body, the order will be subject to the negative resolution procedure. We consider that this is appropriate as it will not make any substantive changes to the system. If Parliament or the National Assembly for Wales wishes to question how the power has been exercised, it may pray against the order and seek to annul it.

130. If the order also confers additional powers on the new approving body, this will be subject to the affirmative resolution procedure. We consider that the conferral of additional powers, such as powers of entry, is something which Parliament or the National Assembly for Wales may wish to supervise more closely.

131. The power is limited to extending powers which are already available to county and unitary local authorities to the new approving body. It cannot be used to create completely new powers.

## Paragraph 7 – Requirement for approval

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Order

*Parliamentary procedure:* Negative resolution

132. Subparagraph (1) requires that any construction work which has drainage implications may not be commenced without prior approval of the approving body. This is to make sure that all new systems for draining rainwater comply with the National Standards on sustainable drainage.

133. Subparagraph (4) allows the Minister to define what is to be or not to be treated as construction work, or to be or not to be treated as having drainage implications and to set exceptions to the general rule. The purpose of this paragraph is to make sure that all new systems for draining rainwater comply with the National Standards on sustainable drainage. There are likely to be some structures which technically fall within the definition of “construction work which has drainage implications” but whose impact is so small that it would be disproportionate to require them to go through the approval process.

134. This provision will offer the Minister the flexibility to adapt the provision as understanding of sustainable drainage systems further develops. The provision thus guards against the creation of a single set of uniform definitions and requirements which might impose undue responsibilities on the approval body.

135. Ensuring that the dividing line is drawn in the right place will involve complex and detailed consideration. Setting such details in secondary legislation will allow the position to be changed over time as knowledge of the behaviour of drainage systems or new methods become available. This approach has parallels with the power to exempt types of development from the need for planning permission by way of development order under the Town and Country Planning Act 1990.

136. The provisions which could be made under this power are likely to be detailed descriptions of what should or should not require approval. We consider that it would be disproportionate to require a debate each time such an order were made or amended. However, of course the Merits of Statutory Instruments Committee will scrutinise it and may draw it to Parliament’s attention if it considers the exercise of the power to be inappropriate. A similar mechanism exists in Wales to facilitate scrutiny by the National Assembly. We therefore consider that the negative resolution procedure provides adequate scrutiny in this case.

## Paragraph 11 – Determination of application for approval

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Regulations

*Parliamentary procedure:* Negative resolution

137. Under subparagraph (1) the approving body must determine applications which are made to it and must refuse approval if it is not satisfied that the drainage, if constructed, will comply with the National Standards. The approving body may grant approval subject

to conditions (subparagraph (2)), and must grant approval if satisfied it will comply with the National Standards.

138. Subparagraph (5) allows the Minister to make regulations to set the timeframe and procedure for approval decisions by the approving body. The regulations may also specify what happens should the approving body fail to comply. Such a power is needed to ensure applications are processed within a reasonable timeframe and to also ensure that, where an applicant has applied for both approval from the approving body and for planning permission, the approving body does not hold up the determination of planning decisions. We envisage setting timeframes which would ensure that the approving body's decision is returned to the planning authority at least one week before they must make a planning determination as specified under the Town and Country Planning (General Development Procedure) Order 1995.

139. It may be deemed appropriate to make modifications or indeed to set different timescale for applications which are made direct to the approving body or to respond to changes to planning timeframes. By setting out the provisions in secondary legislation it will enable the Minister to respond flexibly in the light of experience of how the approval process develops and to made adjustments as necessary.

140. Leaving them to secondary legislation also allows for public consultation about the timeframes and procedure.

141. It is important that there be some scrutiny as an additional check to ensure that the timeframes and procedures are appropriate. But we consider that it would be disproportionate to require a debate each time such an order were made or amended. The Merits of Statutory Instruments Committee will scrutinise it and may draw it to Parliament's attention if it considers the exercise of the power to be inappropriate. A similar mechanism exists in Wales to facilitate scrutiny by the National Assembly. We therefore consider that the negative resolution procedure provides adequate scrutiny in this case.

## Paragraph 12 – Non-performance bonds

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Guidance

*Parliamentary procedure:* None

142. Paragraph 11 enables the approving body to impose a condition on approval requiring a non-performance bond to be deposited. Paragraph 12 provides further details as to how this bond system will operate. The bond may be used by the approving body to undertake work necessary to ensure that the drainage system is completed in such manner as to make it likely to operate in compliance with the national standards provided for in paragraph 5.

143. The value of the bond will be decided by the approving body, but it cannot exceed the best estimate of what it will cost to build the drainage system in line with the approved proposals. This means that up to 100% of the rebuild cost could be specified as the bond.

144. Subparagraph (6) allows the Minister to issue guidance, to which the approving body must have regard, about what amounts may be required for the bond. Some elements of the drainage system might require 100% of the cost to be covered by the bond, but there may be other elements which might not need to be fully covered. Costs of different types of drainage systems and associated risks will vary. A different bond or arrangement may be

needed for phased developments. The provision allows the Minister to respond flexibly in the light of experience and increasing knowledge of sustainable drainage systems. The guidance will be developed with full consultation.

145. We consider that requiring Parliamentary scrutiny is neither necessary nor proportionate given the nature and purpose of the guidance. It is simply guidance to which regard must be had. It is not absolutely necessary to follow the guidance provided that proper regard is given to it and there are good reasons to depart from it. Hence this guidance is not secondary legislation in the normal sense of the word, and it is not necessary to have a Parliamentary procedure associated with it.

### Paragraph 13 – Fees

*Power conferred on:* Secretary of State in respect of England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Regulations

*Parliamentary procedure:* Negative resolution

146. This paragraph enables the Minister to make regulations to set out fees which can be charged for applications for approval. Such fees are necessary to fund the approving body to carry out its approval function. The provision allows the fees to be calculated on the basis of criteria specified in the regulations. This could include for instance the extent or nature of the construction work as well as the cost of work done by the approving body in processing the approval. It provides that in making the regulations the Minister must have regard to the desirability of ensuring that the fee income does not significantly exceed the costs incurred in processing the approval.

147. The fee structure will need to change over time to reflect inflation. Moreover, as the function of approving drainage plans is new, the fee structure will also need to evolve to reflect the true costs of approval, and the way in which fees are best calculated, as understanding and experience of the new approval process develops.

148. The provisions will not place new burdens on local authorities and thus will have little impact on other parts of the legislation. However, the Merits of Statutory Instruments Committee will of course be able to draw the regulation to Parliament's attention if it decides that the provision is inappropriate. We therefore consider that the negative resolution procedure provides adequate scrutiny in this case. A similar mechanism exists in Wales to facilitate scrutiny by the National Assembly.

### Paragraph 14 – Enforcement

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Order

*Parliamentary procedure:* Affirmative resolution

149. The provision enables the Minister to provide for enforcement regarding the requirement for approval in cases where (i) construction starts without approval of its drainage system, (ii) if any of the conditions that the approval was based on are breached or (iii) if construction of the drainage system does not follow the approved proposals. The order may apply (with or without modification) or make provision similar to a provision of

the Town and Country Planning Act 1990. The regulations may cover notices (including enforcement notices, stop notices, temporary notice and breach of condition notices); applications to a court or tribunal; powers (including (i) discretionary powers conferred on the Minister or specified authorities, (ii) powers of entry, (iii) powers of inspection, and (iv) powers to undertake and charge for remedial work); offences of failure to comply with the regulations or notices under them; financial penalties; rights of appeal and compensation.

150. Such enforcement provisions are essential to ensure that sustainable drainage systems are implemented wherever appropriate, and to prevent the construction of drainage systems neither designed nor built to the National Standards for sustainable drainage as is required by paragraph 7 of Schedule 3.

151. Enforcement measures may need to change over time as knowledge and understanding of the approval process develops. In particular we may need to tailor enforcement provisions over time to make sure that they are effective without imposing disproportionate burdens on developers. It is therefore appropriate to leave the precise nature of the provisions to secondary legislation.

152. The powers of enforcement envisaged are similar to those in the 1990 Town and Country Planning Act, which has, of course, already undergone Parliamentary scrutiny. However, it may be deemed appropriate to make modification to the provisions for the application to sustainable drainage systems. Given the provision includes sensitive topics such as powers of entry and prosecution for failure to act, we consider that this is an issue which Parliament and the National Assembly for Wales may wish to supervise more closely. Therefore it is appropriate for such instruments to be subject to the affirmative resolution principle.

#### **Paragraph 17 – Duty to adopt and Paragraph 21: Power to adopt**

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Regulations

*Parliamentary procedure:* Negative resolution

153. Paragraph 17 provides that the approving body has a duty to adopt (that is take on responsibility for maintaining) a sustainable drainage system. This applies either where the sustainable drainage system is constructed in line with an approved drainage plan which conforms to the National Standards, or where the approving body has used its enforcement powers and/or the non-performance bond to complete the drainage systems - so it is likely to operate in compliance with the National Standards. Paragraph 21 provides the approving body with a power to adopt sustainable drainage systems which have not been approved, for example because they were built before this Bill is enacted, or because they were exempt from the need for approval.

154. It is not the policy intention for the approving body to adopt all drainage systems that it approves and two specific exemptions are already on the face of the Bill: single property systems (paragraph 18) and roads (paragraph 19). There may be other instances where it would not be appropriate for the approving body to maintain the system. For example, it may be that in some sites (for example a redevelopment on a brownfield site), the approving body will approve a straightforward connection to a public sewer for the purpose of draining rainwater. If that is the case, this should be maintained by the sewerage undertaker as would currently be the case.

155. We only want the approving body to have to adopt “Sustainable drainage systems”, and subparagraph 5 therefore enables the Minister to define what that means. Sustainable drainage systems take on many forms. Some will be very large-scale and involve a complex network of ditches, swales, ponds, permeable paving etc. In other cases it will be limited to a series of water butts. In some cases, underground plastic pipes will be an integral part of the system (for example to connect two drainage ditches under a pathway), but in the abstract it might be difficult to distinguish that from a traditional drain, which should not be adopted by the approving body.

156. The definition of “sustainable drainage system” is likely to be detailed and to change over time as more innovative sustainable drainage solutions are developed. It is therefore appropriate to leave the precise definition to secondary legislation. If it were too rigidly defined, it may be that (on the one hand) the approving body would become overburdened by a duty to adopt elements of the drainage system which are more appropriate to others, or (on the other hand) bits of the drainage system are left unadopted.

157. These regulations are likely to contain very technical detail as to precisely what is to be regarded as a sustainable drainage system. Such regulations will not have significant implications on the rights of individuals and we consider that it is proportionate for them to be subject to the negative resolution procedure. However, the Merits of Statutory Instruments Committee will of course be able to draw the regulation to Parliament’s attention if it decides that the provision is inappropriate. A similar mechanism exists in Wales to facilitate scrutiny by the National Assembly.

#### **Paragraph 18 – Exception 1: single-property systems**

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales.

*Power exercisable by:* Regulations

*Parliamentary procedure:* Negative resolution

158. Subparagraphs (1) and (2) provide that the approving body’s duty to adopt does not apply to a drainage system, or part of a drainage system, which is designed only to provide drainage for a single property.

159. It would simply be unrealistic to expect the approving body to adopt sustainable drainage systems that only serve one property, although the local authority can voluntarily adopt such a system if it so wishes.

160. Subparagraph (3) provides that the Minister may make regulations to determine when a drainage system, or part of a drainage system, is to be treated as providing drainage for a single property.

161. The provisions which might be made under this power are likely to be complex and detailed to clarify whether or not a building is to be regarded as one or two properties for the purpose of this provision. For example, they will be needed to clarify whether or not a block of flats is to be regarded as one or more properties. Moreover, the provisions may need to be changed over time as knowledge of the behaviour of sustainable drainage systems develops.

162. These regulations are likely to be highly technical in considering how sustainable drainage systems affect their local drainage environment. Such considerations are not of wide significance to other parts of legislation. Thus we believe that it would be disproportionate to require a debate every time such a regulation is made or amended.

However, the Merits of Statutory Instruments Committee will, of course, scrutinise it and may draw it to Parliament's attention if it considers the exercise of the power to be inappropriate. A similar mechanism exists in Wales to facilitate scrutiny by the National Assembly. We therefore consider that the negative resolution procedure provides adequate scrutiny in this case.

### Paragraph 20 – Additional exceptions

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Order

*Parliamentary procedure:* Negative resolution

163. The general rule that the approving body should adopt new sustainable drainage systems is set out in paragraph 17. The Department is already aware of some cases in which it would be inappropriate for this rule to apply, and so exceptions are catered for in paragraphs 18 (single-property systems) and 19 (roads).

164. This paragraph allows the Minister to provide additional exceptions to the approving body's duty to adopt.

165. The provision will enable the Minister to respond flexibly should the need for additional exemptions arise in the light of experience. This will prevent public resources being diverted for the maintenance of drainage systems which could be adequately adopted and maintained by another body or which need not be adopted and maintained at all.

166. As this new policy is implemented, and as the way in which these systems are constructed evolves, it is likely that other examples of situations will emerge in which it is not appropriate for the approving body to adopt the system. Any such exceptions are likely to be complex, detailed rules, and of a nature which might need to be regularly updated in the light of experience to avoid imposing inappropriate burdens on the approving body. It is therefore appropriate that they be contained in secondary legislation.

167. The provisions which could be made under this power are likely to be detailed descriptions of types of drainage system which should not be adopted by the approving body.

168. We consider that it would be disproportionate to require a debate each time such an order were made or amended. However, of course the Merits of Statutory Instruments Committee will scrutinise it and may draw it to Parliament's attention if it considers the exercise of the power to be inappropriate. A similar mechanism exists in Wales to facilitate scrutiny by the National Assembly. We therefore consider that the negative resolution procedure provides adequate scrutiny in this case.

**Paragraph 23 – Process of adoption in pursuance of duty to adopt**

*Power conferred on:* Secretary of State in relation to England the Welsh Ministers in relation to Wales

*Power exercised by:* Order and Regulations

*Parliamentary procedure:* Negative resolution

169. This paragraph details the process of adoption where an approving body is under a duty to adopt the drainage system or where the approving body determines on its own initiative to adopt the drainage system.

170. Subparagraph (4)(a) requires the Minister to prescribe by order the time limit for such determination. This will enable the Minister to respond flexibly in the light of experience of how the adoption process develops and make adjustments to the time limits as necessary.

171. Subparagraph (6) sets out the procedural points the approving body must follow once it has notified the developer of its decision to adopt the drainage system. The approving body must specify the extent of the drainage system being adopted and copy the notice to: (i) the sewerage undertaker in whose areas the drainage system is; (ii) any person who appears to the approving body to own or occupy land on which the drainage system is (including details of any arrangements under the approved plans for access and maintenance); (iii) any other person whom the approving body was obliged to consult on the application for approval for construction; and (iv) any person who appears to the approving body to own or occupy land from which water will be drained by the drainage system. The approving body must also (i) arrange for the inclusion of the drainage system (including any non-adopted part) in the relevant register under section 21 of Part 1 of the Bill; (ii) release any bond provided under paragraph 12; (iii) arrange for the designation under Schedule 1 to the Bill of any part of the drainage system (whether an adopted part or not) which is eligible for designation (and which is not owned by the approving body); and (iv) arrange for the designation under section 63 of the New Roads and Street Works Act 1991 (streets with special engineering difficulties) of any adopted part of the drainage system which is a street as defined by section 48 of that Act.

172. Subparagraph (7) allows the Minister to make regulations about the timing and manner of these procedural points. This is necessary to ensure the smooth functioning of the adoption process and to avoid delays.

173. The adoption process is a new function, and therefore the timeframe and manner for these procedural points may need to be changed over time as understanding of the new process develops. Consequently it would be appropriate to include them in secondary legislation so they can be amended in the light of experience.

174. The procedural points which must be complied with have been clearly set out in the Bill for Parliamentary scrutiny. The provisions which could be made under this power only affect the timeframe and manner of this process.

175. We consider that it would be disproportionate to require a debate each time such an order were made or amended. However, of course, the Merits of Statutory Instruments Committee will scrutinise it and may draw it to Parliament's attention if it considers the exercise of the power to be inappropriate. A similar mechanism exists in Wales to facilitate scrutiny by the National Assembly. We therefore consider that the negative resolution procedure provides adequate scrutiny in this case.

## Paragraph 24 – Process of voluntary adoption

*Power conferred on:* Secretary of State in relation to England the Welsh Ministers in relation to Wales

*Power exercised by:* Regulations

*Parliamentary procedure:* Negative resolution

176. Subparagraphs (2) and (3) set out what needs to happen where an approving body decides to adopt a drainage system to which the duty to adopt does not apply. When doing so it must notify the relevant sewerage undertaker and anyone who owns 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 being adopted. The approving body must also include the drainage system in the local authority register, established under Part 1 of the Bill, and designate any parts which are eligible under Schedule 1 to the Bill.

177. Subparagraph (5) allows the Minister to make regulations about the timing and manner of these notifications, registrations and designations. This power is needed to ensure the smooth functioning of the adoption process and to avoid unnecessary delays.

178. The timeframe and manner of these notifications and arrangements may change as understanding of the process of voluntary adoption develops. Consequently, it would be appropriate to include them in secondary legislation so they can be amended in the light of experience.

179. The process of notification, registration and designation required of the approving body is clearly set out in the Bill for Parliamentary scrutiny. The provisions which could be made under this power only affect the timeframe and manner in which they must be done.

180. We consider that it would be disproportionate to require a debate each time such regulations were made or amended. However, of course, the Merits of Statutory Instruments Committee will scrutinise it and may draw it to Parliament's attention if it considers the exercise of the power to be inappropriate. A similar mechanism exists in Wales to facilitate scrutiny by the National Assembly. We therefore consider that the negative resolution procedure provides adequate scrutiny in this case.

## Paragraph 25 – Appeals

*Power conferred on:* Secretary of State in relation to England the Welsh Ministers in relation to Wales

*Power exercised by:* Regulations

*Parliamentary procedure:* Negative resolution

181. Paragraph 25 requires regulations to be made providing the mechanism for appeals against certain decisions in Schedule 3 of the Bill.

182. The approving body must determine applications which are made to it and must refuse approval if it is not satisfied that the drainage, if constructed, will comply with the National Standards (paragraph 11 (1)). The approving body may grant approval subject to conditions (paragraph 11(2)). Once an approved drainage system has been built and

satisfies certain specified conditions, the approving body must adopt, and take on responsibility for maintaining it (paragraph 17).

183. Paragraph 25 (1) requires the Minister to make regulations, providing a right of appeal against each of the above decisions. Paragraph 25 (2) requires the regulations to specify jurisdiction for appeals on the Minister, a court or tribunal and also to set out procedures for appeal.

184. The matters that the regulations may prescribe are limited to setting out who the appeal authority is and procedure to be followed. The details of the regulations are not crucial to the fairness of the overall scheme, in the sense that they cannot affect the fundamental right of people to pursue an appeal. The regulation-making power makes it clear that a right of appeal must be available at all times.

185. Over time, appellate bodies will evolve and some will become more suitable than others, some will cease to exist and new bodies will arise. Hence it will be desirable and even necessary from time to time to change the appeal body, and attendant procedures. If an authority were specified in the primary legislation, then any change to this would need to be made through an amendment to the primary legislation, and the appeals regime would be less responsive, and lag behind what is actually needed.

186. The changes that can be brought about by regulation are largely procedural, and they are likely to involve technical detail which is unlikely to be of concern to Members of Parliament, Peers and Assembly Members. Small changes to the procedural details may be needed from time to time to ensure consistency with other areas, and it would be an inefficient use of Parliamentary and National Assembly for Wales time to require a debate every time this happened.

187. If there are concerns then either House of Parliament or the National Assembly for Wales can call a debate and vote to annul the secondary legislation. In the unlikely event that proposed changes to procedural details are causing concern, then the Merits of Statutory Instruments Committee can draw the secondary legislation to the attention of Parliament, to assess whether a debate is needed. A similar mechanism exists in Wales to facilitate scrutiny by the National Assembly. We therefore consider that the negative resolution procedure provides adequate scrutiny in this case.

### **Paragraph 28 – Works on public land**

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Regulations

*Parliamentary procedure:* Negative resolution

188. Subparagraph (1) allows the Minister to make regulations to require statutory undertakers to notify the approving body before commencing works on public land which affect, or might affect, the operation of a drainage system on the land. Subparagraph (3) enables the terms “statutory undertaker” and “statutory works” to be defined. Subparagraph (4) allows for the criteria for determining what works are treated as works that will or may affect the operation of a drainage system to be defined. Subparagraph (5) enables the timing and procedure to be specified. Subparagraph (6) enables the consequences of failure to comply with the provisions to be specified. It also allows for provision to be made which would require the statutory undertaker to leave the drainage system in a state approved by the approving body, having regard to the National Standards on sustainable drainage (which, under paragraph 5, the Minister has a duty to

publish) and for the approving body to be given default powers to undertake work and recover its costs. Subparagraph (7) allows for primarily legislation to be amended to include a cross-reference to the regulations.

189. Such powers are essential to protect sustainable drainage systems located on public land owned by a designating authority (as defined under schedule 1, such as the local authority) from damage by a statutory undertaker, such as a utility company, which is exercising its statutory powers to lay or maintain pipes, cables and other apparatus. Such sustainable drainage systems provide drainage for properties and therefore must continue to operate effectively as designed. The provisions which could be made under this power are likely to be detailed descriptions which may, from time to time, require changes to be made.

190. It is also worth noting that sustainable drainage systems on private land, that is on land not owned by a designating authority, will be protected from damage by way of their designation under Schedule 1.

191. We consider that it would be disproportionate to require a debate each time such an order were made or amended. However, of course, the Merits of Statutory Instruments Committee will scrutinise it and may draw it to Parliament's attention if it considers the exercise of the power to be inappropriate. A similar mechanism exists in Wales to facilitate scrutiny by the National Assembly. We therefore consider that the negative resolution procedure provides adequate scrutiny in this case.

## Clause 33 gives effect to Schedule 4 – Reservoirs

### Paragraph 2 – “Large raised reservoir” (Calculation of capacity)

*Duty conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Regulations

*Parliamentary procedure:* Negative resolution

192. The current Reservoirs Act 1975 (“RA75”) applies to “large raised reservoirs” (section 1(1) to (3)). This paragraph replaces the existing definition of “large raised reservoir” with a new definition of “large raised reservoir”. New section A1(1) to (3) contains the new definition of “large raised reservoir” for the purposes of the Act. These provisions provide that a relevant structure or area must be capable of holding 10,000 cubic metres of water or more above the natural level of the surrounding land. New section A1(4) requires the Minister to make regulations about how to calculate the volume capacity of a large raised reservoir for the purposes of the Act. The regulations will enable the Minister to set out in more detail the methodology to be used for determining the capacity of a large raised reservoir and clarify the meaning of “the natural level of any part of the surrounding land”. This is in line with the approach in the RA75.<sup>7</sup>

193. These regulations will be technical in nature and will require the Minister to provide clarification to engineers and reservoir undertakers on how to calculate the volume capacity of a large raised reservoir for the purposes of determining whether a structure or area falls within the definition of “large raised reservoir”. They will enable the Minister to ensure that a consistent approach is taken by all reservoir undertakers and reservoir

---

<sup>7</sup> The current method of calculation of capacity is set out in the Reservoirs Act 1975 (Registers, Reports and Records) Regulations 1985 (SI 1985/177)

engineers. The power will also give Ministers the flexibility to respond to any uncertainties which emerge over the correct method for determining certain factors and to adapt the calculation to reflect any new technical developments which would improve the methodology for calculating the capacity of a large raised reservoir. We do not think that it would be appropriate to take up Parliament's time debating these requirements.

194. The regulations will be subject to the negative resolution procedure as the provisions will be technical in nature and provide clarification. They are not expected to be controversial.

### Paragraph 2 – “Large raised reservoir” (Cascades)

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Regulations

*Parliamentary procedure:* Negative resolution

195. This paragraph also inserts new section A1(5) into the RA75. New section A1(5) allows Ministers to make regulations to provide for a structure or area which is not itself capable of holding 10,000 cubic metres of water above the natural level of any part of the surrounding land to be treated as “large” by reason of its proximity to, or actual or potential communication with, another such structure or area. In making these regulations, Ministers shall aim to ensure that a structure or area is treated as large only if 10,000 cu metres of water might be released as a result of that proximity or communication (see new section A1(6)).

196. This power will enable Ministers to specify those cases in which an area or structure which is not capable of storing 10,000 cubic metres of water is nevertheless to be treated as “large” because it is in a cascade. If an upstream reservoir on a watercourse were to fail, for example, a reservoir downstream of it might as a consequence breach or overtop. In such a case, the regulations would ensure that both structures or areas were treated as large raised reservoirs if more than 10,000 cubic metres were released as a result of both failing.

197. The purpose of this power is therefore to ensure that the revised RA75 applies to structures or areas which are not individually capable of holding 10,000 cubic metres of water above the natural level of the surrounding land but which are connected in such a way that collectively they pose the same danger as a single large raised reservoir (as defined) if they fail. We consider that it would be appropriate to specify these provisions in secondary legislation because determining how these structures are “connected” is a detailed technical matter that will require significant advice from the engineering profession. It would also allow the relevant provisions to be updated in line with technical developments.

198. We consider that it is appropriate for the regulations to be subject to the negative resolution procedure as they will set out the technical criteria for the purposes of ensuring that all appropriate structures and areas are covered by the RA75. We consider that a debate on these matters in each House or in the National Assembly for Wales is not necessary or proportionate, and that negative resolution procedure should provide sufficient scrutiny in this case.

## Paragraph 2 – “Large raised reservoir” (Minimum capacity)

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Regulations

*Parliamentary procedure:* Affirmative resolution

199. Under new section A1 of the RA75, a structure designed or used for collecting and storing water, and any other area capable of storing water which was created or enlarged by artificial means, will be a “large raised reservoir” for the purposes of the RA75 if it is capable of holding 10,000 cubic metres of water or more above the natural level of the surrounding land. The power conferred by new section A1(7) will allow Ministers to alter the definition of “large raised reservoir” by substituting a different volume of water for the volume specified in new section A1(3) and A1(6).

200. The current volume capacity specified in new sections A1(3) and (6) reflects an emerging professional consensus amongst reservoir panel engineers that there are negligible risks to the public from reservoirs below 10,000 cubic metres capacity in any circumstances. However, the profession’s knowledge of smaller reservoirs is necessarily limited as they have not previously been subject to controls.

201. This power would enable relevant structures and other areas with a lower volume capacity to be brought within the controls of the RA75 if in the future it emerges that certain types of structures and other areas that are capable of storing water by artificial means do pose risks to the public. For example, incident reporting may identify matters of a general application to older structures of a specific type that give rise to concerns about the safety of reservoirs of a smaller capacity than 10,000 cubic metres.

202. The power would also allow this figure to be moved upwards, if justified. This might be the case, for example, if the consensus amongst panel engineers shifts over time about the dangers posed by smaller reservoirs in light of further information which becomes available.

203. Paragraphs 10 and 25 enable consequential amendments to be made to the volume capacity specified in new section 6(6A) and section 13(1), as amended by paragraph 25(2).

204. We consider that it would be disproportionate to require new primary legislation for this purpose.

205. Any proposed change would largely reflect the opinion of independent expert reservoir engineers about what the most appropriate volume capacity would be to deliver the policy aims of the reservoir safety regime of the Bill without creating unnecessary burdens for reservoir operators and owners. Ministers would consult interested parties before making the order. We consider that the affirmative resolution procedure will enable Parliament and the National Assembly for Wales to scrutinise any orders sufficiently.

## Paragraph 2 – “Large raised reservoir” (Exclusions)

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Regulations

*Parliamentary procedure:* Affirmative resolution

206. New section A1(8) of the RA75 (to be inserted by this paragraph) will enable Ministers to provide in regulations for specified things not to be treated as large raised reservoirs. The RA75 currently excludes canals and inland navigation and mine or quarry lagoons from the term “reservoir”. It has become apparent to the Department that the current definition of reservoir in the RA75 is not sufficiently clear and has caused some uncertainty amongst practitioners about whether certain structures are caught by the definition. The power will enable Ministers to set out in regulations things that may be caught by the new definition of large raised reservoir, but which it would not be appropriate to be subject to the reservoir safety regime in the revised RA75. It may not be appropriate for some things to be treated as large raised reservoirs because, for example, they are not designed principally to store water or because they only incidentally become reservoirs under certain circumstances. It may also be appropriate to exclude certain things from the definition because their safety is subject to other control regimes (for example, mine and quarries lagoons, which are subject to the Mining Waste Directive 2006/21/EC). The above examples of possible exclusions are intended to be indicative only. By consulting all interested parties on the proposed exclusions before making the regulations, Ministers will be able to ensure that all appropriate exclusions are contained in the regulations.

207. We consider that it is appropriate for the power to be delegated to Ministers so that they can respond to areas of uncertainty which emerge over time and to other statutory controls which may be introduced or removed in the future. The exclusions will involve consideration of technical matters in some cases and provide clarification in areas of uncertainty. We consider that it would be disproportionate to make new primary legislation to deal with these matters.

208. We consider that the affirmative resolution procedure will allow Parliament and the National Assembly for Wales to sufficiently scrutinise any regulations made under this power.

## Paragraph 4 – Registration

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Regulations

*Parliamentary procedure:* Negative resolution

209. Paragraph 4 inserts new sections 2(2B) to 2(2E) into the RA75. New section 2(2B) requires the undertaker of a large raised reservoir to register the reservoir with the relevant authority. New section 2(2C) enables Ministers to make regulations about registration, including details of the information to be registered and the time by which information or changes to information previously provided must be registered.

210. We consider that it is appropriate to allow these matters to be set out in secondary legislation as the provisions would be administrative and procedural in nature.

211. We consider that a debate in each House on these matters is not necessary or proportionate, and that the negative resolution procedure should provide sufficient scrutiny in this case, given that these matters are administrative and procedural in nature.

### **Paragraph 7 – High-risk reservoirs**

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Regulations

*Parliamentary procedure:* Negative resolution

212. This paragraph inserts new sections 2A to 2E into the RA75. These provisions allow the Environment Agency to designate a large raised reservoir as a high-risk reservoir. New section 2A allows the Environment Agency to make a provisional designation of a large raised reservoir as a high-risk reservoir. Such a designation must give the reasons for the provisional designation, how representations may be made, and the period for making representations. New section 2A(4) allows Ministers to specify in regulations the minimum period in which representations may be made.

213. We consider that it is appropriate for this power to be delegated to Ministers because the regulations deal with a procedural matter and would enable Ministers to set the period once it is clear what matters may arise on appeal.

214. The regulations will be subject to the negative resolution procedure as the provisions will be procedural in nature. They are not expected to be controversial.

### **Paragraph 7 – High-risk reservoirs**

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Regulations

*Parliamentary procedure:* Affirmative resolution

215. New section 2C allows the Environment Agency to determine that a reservoir is a high-risk reservoir if the Environment Agency thinks that an uncontrolled release of water from the reservoir could endanger human life; and the reservoir does not satisfy any conditions laid down in regulations. The power in new section 2C(1)(b) will enable Ministers to make such regulations. The regulations will allow Ministers to ensure that large raised reservoirs which satisfy certain conditions are not classified as high-risk reservoirs. Their purpose is to ensure that the Environment Agency does not designate a large raised reservoir which could, in the event of an uncontrolled release of water from the reservoir, endanger human life, if the risk of such endangerment is negligible. Concrete service reservoirs, for example, which supply potable water direct to consumers are often located in built up areas, but their methods of construction and use may render any risk to human life negligible. The factors that make such a risk negligible are largely technical in nature. Detailed advice on these matters will need to be sought from expert reservoir engineers to ensure they properly achieve Ministers' policy aims and any regulations would be consulted on before they were made.

216. We consider that it is appropriate for this power to be delegated to Ministers because the precise conditions to be set out in them will largely be technical in nature and may change over time to reflect engineering developments that reduce the risk of reservoirs failing. Also, the Department will not have a comprehensive picture of the characteristics of all structures and areas that will be subject to the revised RA75, until they are registered under it. The registration process may reveal types of structure that we are not aware of, but which, on closer examination, do not represent a risk to the public, even though they are upstream of human populations.

217. We consider that the affirmative resolution procedure will allow Parliament and the National Assembly for Wales, as appropriate, to sufficiently scrutinise any regulations made under this power.

### **Paragraph 7 – High-risk reservoirs**

*Duty conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Regulations

*Parliamentary procedure:* Negative resolution

218. This paragraph inserts new section 2E into the RA75. New section 2E will require Ministers to provide a right of appeal against designations of large raised reservoirs as high-risk reservoirs under new section 2B. The regulations must confer jurisdiction on a Minister, a court or tribunal, and make provision about procedure.

219. We consider that it is appropriate for this power to be delegated to Ministers because provisions deal with administrative and procedural matters. Paragraph 7 makes it clear that a right of appeal must be available at all times. The matters that the regulations may prescribe are limited to setting out who the appeal authority is and the procedure to apply in relation to appeals. Conferring power on the Ministers to prescribe who the relevant appeal authority is will allow Ministers to ensure that the most appropriate appeal authority is chosen to deal with these appeals, given that most of the matters which may be disputed will be technical in nature. It may also be desirable or necessary from time to time to change the appeal authority and procedures, in light of experience or as some bodies cease to exist and new bodies come into existence. The power therefore allows Ministers the flexibility to respond to these changes in a timely way.

220. The regulations will be subject to the negative resolution procedure as the provisions will be administrative and procedural in nature. They are not expected to be controversial.

### **Paragraphs 12 – High-risk reservoirs: inspections**

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Regulations

*Parliamentary procedure:* Affirmative resolution

221. Section 10 of the RA75 sets out how and when large raised reservoirs must be inspected. Section 10(2) of the RA75 currently sets out the minimum requirements on when large raised reservoirs must be inspected. Paragraph 12(3) amends section 10(2) and enables Ministers to make regulations on the timing of inspections for high-risk

reservoirs. The regulations will allow Ministers to make the duty on reservoir undertakers to appoint a qualified civil engineer to inspect their reservoirs more proportionate, and reflect more closely their technical and other characteristics. Reservoirs with low embankments may, for example, need a lower level of inspection than other types of reservoir.

222. We consider that it is appropriate for this power to be delegated to Ministers because the precise conditions to be set out in them will largely depend on the technical characteristics that affect the likelihood of a reservoir failure. The conditions may change over time to reflect engineering developments that reduce the risk of reservoirs failing. Detailed advice on these matters will need to be sought from expert reservoir engineers to ensure that the inspection regime in section 10 of the RA75 more closely reflects the risk to human life from certain types of reservoir. Also, the Department will not have a comprehensive picture of the characteristics of all structures and areas that will be subject to the revised RA75, until they are registered under it. The registration process may reveal types of structure that we are not aware of, but which, on closer examination represent a sufficiently low level of risk to the public, even though they are upstream of human populations, to merit a lower frequency of inspection.

223. We consider that the affirmative resolution procedure will allow Parliament and the National Assembly for Wales, as appropriate, to sufficiently scrutinise any regulations made under this power.

#### **Paragraphs 14 and 22 – Amendments to section 19 of the RA75**

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Rules

*Parliamentary procedure:* Negative resolution

224. Section 19 allows an undertaker who is aggrieved by certain recommendations by an engineer to refer the matter to a referee. Under section 19(5), Ministers may make rules about the appointment of the referee, the procedure before the referee and the costs of proceedings. Paragraphs 14 and 22 amend section 19 to allow an undertaker to also refer to a referee: any recommendations made by an inspecting engineer under section 10(3) (as amended by paragraph 12(4)), and any failure by an appointed engineer to certify that the undertaker's flood plan meets the requirements of a direction under section 12A(2)(a) and (b).

225. We consider that it is appropriate for the power in section 19(5) to continue to be delegated to Ministers because the matters to be covered (as amended by these provisions) are procedural and administrative in nature.

226. We consider that the negative resolution procedure continues to be appropriate as a debate in both Houses of Parliament or in the National Assembly for Wales on these matters would not be necessary or proportionate

## Paragraphs 27– Abandonment

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Regulations

*Parliamentary procedure:* Negative resolution

227. Section 14 of the RA75 deals with the abandonment of large raised reservoirs and section 9 deals with the re-use of abandoned large raised reservoirs. Paragraph 27(3) inserts new section 14(6) into the RA75. New section 14(6) provides for Ministers to make regulations about what is and is not to be treated as abandonment of the use of a large raised reservoir as a reservoir, and bringing a large raised reservoir back into use as a reservoir, for the purposes of the RA75. The aim will be to provide clarity to reservoir undertakers and the engineering profession about what is meant by abandonment of the use of a large raised reservoir and the re-use of such a reservoir.

228. The detailed requirements will be technical. They should not be controversial.

229. We consider that a debate in each House of Parliament or in the National Assembly for Wales on these matters is not necessary or proportionate. We therefore consider that it is appropriate for these regulations to be subject to the negative resolution procedure, which should provide sufficient scrutiny in this case.

## Paragraph 30 – Appeals

*Duty conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Regulations

*Parliamentary procedure:* Negative resolution

230. The Environment Agency has the power under various sections of the RA75 to serve enforcement notices on undertakers requiring them to appoint a qualified civil engineer for the purposes of the Act or to carry out recommendations as to measures in the interests of safety. These sections are: sections 8(1), 8(3A), 9(7), 10(7), 12(4), 13(5) (to be inserted by paragraph 25(5)) and 14(4). This paragraph inserts new section 19A into the RA75. New section 19A will require Ministers to provide a right of appeal against enforcement notices served by the Environment Agency. The regulations must confer jurisdiction on a Minister or a court or tribunal and make provision about procedure.

231. We consider that it is appropriate for this power to be delegated to Ministers because the provisions will largely deal with administrative and procedural matters. Paragraph 30 makes it clear that a right of appeal must be available at all times. The matters that the regulations may prescribe are limited to setting out who the appeal authority is and the procedure to apply in relation to appeals. Conferring power on the Ministers to prescribe who the relevant appeal authority is will allow Ministers to ensure that the most appropriate appeal authority is chosen to deal with these appeals, given that some of the matters which may be disputed will be technical in nature. It may also be desirable or necessary from time to time to change the appeal authority and procedures in light of experience or as some bodies cease to exist and new bodies come into existence. The power therefore allows Ministers the flexibility to respond to these changes in a timely way.

232. The regulations will be subject to the negative resolution procedure as the provisions will be administrative and procedural in nature. They are not expected to be controversial.

**Paragraph 31 – Amendment of section 20(1) of the RA75 (general provision about documents: prescribed form)**

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Regulations

*Parliamentary procedure:* Negative resolution

233. Section 20(1) enables Ministers to make regulations about the form of reports and certificates by engineers for the purposes of the RA75. The current regulations made under this power are contained in the RA1975 (Certificates, Reports and Prescribed Information) Regulations 1986 (SI 1986/468). Paragraph 31 amends section 20(1) to also allow Ministers to prescribe the form of directions given by engineers for the purposes of the RA75. For example, under section new section 12(6) (to be inserted by paragraph 17(5)).

234. As this is an administrative matter which is not controversial, we consider that it is appropriate to also allow the form of directions given by engineers for the purposes of the RA75 to be set out in secondary legislation.

235. We consider that a debate in both Houses of Parliament or the National Assembly for Wales on these matters is not necessary or proportionate, and that negative resolution procedure should provide sufficient scrutiny in this case.

**Paragraph 32 – Assessment of reports and statements**

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Regulations

*Parliamentary procedure:* Negative resolution

236. Paragraph 32 inserts new section 20A. New section 20A(1) will enable Ministers to make regulations to provide for the assessment of the quality of reports and written statements prepared by inspecting engineers and supervising engineers. The regulations may provide for an assessment to be made by a Committee of members of the Institution of Civil Engineers; and in particular, may specify the criteria for assessment, the documents or categories of documents to be assessed, the assessment procedure and timing.

237. The purpose of this power is to allow Ministers to introduce a formal procedure for the quality checking of certain reports and statements prepared by panel engineers for the purposes of the RA75. Inspecting and supervising engineers have an important role in ensuring the ongoing safety of reservoirs. Concerns have been expressed about the means available for ensuring that their reports and statements are of the requisite standard. The power would allow Ministers to set up a formal system to identify and address these deficiencies if, in the future, it becomes clear that this is warranted. Where the assessment committee concluded that a report was deficient, the assessment committee's report would help the engineer to understand how he or she might be able to avoid doing the

same in future. The assessment procedure could also help the Institution of Civil Engineers to identify areas where further guidance from them would be appropriate. The assessment procedure may also help Ministers to identify whether any engineers may no longer be fit to remain on the relevant panel.

238. The provisions in any regulations made under this power would be procedural in nature. We consider that it would be appropriate for the power to be subject to the negative resolution procedure.

### **Paragraph 33 – Information and reports**

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Regulations

*Parliamentary procedure:* Negative resolution

239. Paragraph 33 inserts new section 21B(1). New section 21B(1) will enable Ministers to make regulations requiring a specified person to make a report about any incident of a specified kind which affected, or could have affected, the safety of a large raised reservoir. In particular the regulations may provide that the duty to report will apply to reservoir undertakers and panel engineers; and provide for the form and timing of reports.

240. This power will allow detailed rules to be specified about the kinds of incident which should be reported to the Environment Agency so that they can collate information and disseminate it to reservoir undertakers and panel engineers. For example, the condition of masonry spillway walls was highlighted by the Ulley incident in summer 2007 and the intention is that such concerns should be disseminated to undertakers and the profession, so that all can learn from individual incidents.

241. The Environment Agency has instigated a voluntary system, but has found that compliance has been limited. It is expected that the kinds of incident featured in reports will vary over time as experience is gained of actual incidents that occur.

242. The provisions would be procedural and technical in nature. The details of the regulations are unlikely to be controversial, and as explained, they are likely to change over time.

243. We consider that a debate in both Houses of Parliament or in the National Assembly for Wales on these matters is not necessary or proportionate. We therefore consider that it is appropriate for these regulations to be subject to the negative resolution procedure, which should provide sufficient scrutiny in this case.

### **Paragraph 37 – Arrangements for civil protection: charges**

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Regulations

*Parliamentary procedure:* Negative resolution

244. This paragraph allows Ministers to make regulations prescribing a scheme whereby Category 1 responders can charge undertakers a fee for costs they incur in carrying out functions under section 2 of the Civil Contingencies Act 2004 in connection with

reservoirs. The functions relate to risk assessment and contingency planning for uncontrolled releases of water from reservoirs. Such planning complements the flood plans required by section 12A of the RA75.

245. Section 12A (as amended by paragraph 20) of the RA75 enables Ministers to direct undertakers of large raised reservoirs to prepare flood plans specifying the action the undertaker would take in order to prevent an uncontrolled escape of water from their reservoirs, and the action they would take to control or mitigate the effects of a flood. Complementary action would be considered by the Category 1 responders under the Civil Contingencies Act 2004 to mitigate the effects of such releases on human welfare and the environment. We consider that it would be more appropriate for these details to be set out in secondary legislation, than in primary legislation. Over time, the costs that Category 1 responders will incur will also change. By conferring this power on Ministers, Ministers will also have the flexibility to amend the fee to reflect these changing costs.

246. We consider that a debate in both Houses of Parliament or in the National Assembly for Wales on these matters is not necessary or proportionate. We therefore consider that it is appropriate for these regulations to be subject to the negative resolution procedure which should provide sufficient scrutiny in this case.

### **Paragraph 39 – Amendment to existing power in section 41(1) of the Environment Act 1995 to make schemes imposing charges**

*Power conferred on:*                      *the Environment Agency*

*Power exercisable by:*                 *Regulations*

*Parliamentary procedure:*            *Negative resolution*

247. Section 41(1) of the Environment Act 1995 enables a relevant Agency in regulations to make a scheme specifying the charges it may require to be paid to it in relation to the carrying out of specified functions. Under section 42, any proposed charging scheme must be submitted to the Secretary of State for approval and prior to this, the relevant Agency must advertise the scheme. The Secretary of State may approve the scheme, subject to any modifications the Secretary of State considers appropriate, and must consider any objections made to the scheme before approving it. We consider that it is appropriate to amend section 41(1) of the Environment Act 1995 to enable the Environment Agency to make a scheme allowing it to charge undertakers in order to recover the costs it incurs in performing its functions under the RA75.

248. We consider that it is more appropriate for the details of these charges to be set out in secondary legislation, than in primary legislation in line with section 41 of the Environment Act 1995. Section 42 of the Environment Act 1995 provides a number of safeguards in relation to the making of any scheme to impose charges under section 41, to ensure that the charges specified are proportionate and reasonable.

249. Regulations made by the relevant Agency for the purposes of section 41 of the Environment Act 1995 are subject to the negative resolution procedure. We consider that it is appropriate for regulations making a scheme allowing the Environment Agency to charge undertakers to recover its costs in carrying out its functions under the RA75, to be also subject to this procedure - which should provide sufficient scrutiny.

### Paragraph 40 – Power to make further provision

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercisable by:* Order

*Parliamentary procedure:* Negative resolution

250. This paragraph gives the Minister a “Henry VIII power” to make further amendments to the RA75 as appear necessary or desirable in consequence of the amendments made by Schedule 4.

251. We consider that it is appropriate to enable Ministers to make further consequential amendments, as it would be disproportionate to require new primary legislation for this purpose. The power is limited to consequential amendments to the RA75 in connection with the amendments made to the RA75 by Schedule 4. This will enable Ministers, for example, to make relatively minor or technical changes to ensure that the existing provisions in the RA75 are consistent with the amendments to the Act made by the Bill. This should not be controversial.

252. We consider that a debate in both Houses of Parliament or in the National Assembly for Wales on these matters is not necessary or proportionate. We therefore consider that it is appropriate for these regulations to be subject to the negative resolution procedure which should provide sufficient scrutiny in this case.

### Paragraph 42 – Cross-border England-Scotland reservoirs

*Power conferred on:* Secretary of State in relation to England and Scotland

*Power exercisable by:* Order

*Parliamentary procedure:* Affirmative resolution

253. Paragraph 42 provides for the Secretary of State, with the consent of the Scottish Ministers, to make orders providing for either the English regime (the Reservoirs Act 1975, as amended by Schedule 4 of Flood and Water Management Bill) or the Scottish regime (the Reservoirs Act 1975, as amended by the Flood Risk Management (Scotland) Act 2009 and regulations made there under) to apply to any large raised reservoir partly in England and partly in Scotland. An order may apply to a specified reservoir or class of reservoir, and provide for any modifications to the English or Scottish regime, as appropriate, that appear to the Secretary of State necessary or desirable.

254. There are currently no known cases of large raised reservoirs that are partly in England and partly in Scotland. However, knowledge of smaller reservoirs is necessarily limited as they have not previously been subject to controls. It is also possible that a large raised reservoir might be constructed on the border in the future. A decision as to which regime (if any) should apply to any such reservoir would need to be taken on the basis of the type and characteristics of the reservoir once known.

255. We consider that the affirmative resolution procedure will enable Parliament to scrutinise sufficiently any orders.

## Clause 34 gives effect to Schedule 5 – Special Administration

### Paragraph 3 – Objectives

*Power conferred on:* Secretary of State in relation to England and Wales, with the consent of the Welsh Ministers

*Power exercisable by:* Regulations

*Parliamentary procedure:* Affirmative resolution

256. Paragraph 3 changes the objectives of special administration for water companies. The existing legislation requires the special administrator to transfer the business of the water company which is in administration, to another company. Paragraph 3 amends this so that in some cases the special administrator will have to try to rescue the company as a going concern instead. This reformed special administration regime will allow the special administrator to work with creditors and water company directors to adopt an appropriate rescue plan to bring the company back into profitability.

257. A rescue will typically take place through a company voluntary arrangement or other arrangements with creditors. These types of arrangement are regulated by Part 1 of the Insolvency Act 1986 and the Companies Act 2006. This power in paragraph 3 allows the Secretary of State to apply, disapply or modify provisions in the Insolvency Act 1986 and Companies Act 2006 that relate to company voluntary arrangements and other arrangements with creditors, to the situation in which a water company is in special administration because it is unable to pay its debts.

258. The regulations will in particular be able to confer functions on the Secretary of State, the Welsh Ministers and Ofwat, the economic regulator for the water sector in England and Wales.

259. It is necessary to allow discretion to the Secretary of State to determine which of the provisions should apply to special administration and to decide whether some modifications might be needed. Some of the provisions adopted for the general insolvency regime may not be appropriate for all water companies, particularly those that have customers that are unable to switch suppliers. The modifications will therefore need to be tailored to fit round the unique regulatory and devolutionary framework for the water industry, to ensure that the interests of customers continue to be protected. These will be technical in nature. They may need to be amended from time to time to reflect changes in the regulatory system (e.g. where new types of water company enter the market), and to keep pace with changes to the Insolvency Act and the Companies Act. The power will be limited in that the regulations will not be able to depart completely from the model as set out in the Insolvency and Companies Acts.

260. The affirmative resolution procedure will give both Houses an opportunity to scrutinise and vote on the regulations.

## Paragraph 5 – Hive down

*Power conferred on:* Secretary of State in relation to England and Wales, with the consent of the Welsh Ministers

*Power exercisable by:* Order

*Parliamentary procedure:* Affirmative resolution

261. Paragraph 5 allows the transfer of a water business from a company in special administration to another by way of “hive down”. This means transferring the business into a subsidiary of the original water company, and then transferring the shares in that subsidiary to the successor water company.

262. Schedule 2 to the Water Industry Act 1991 allows for transfer schemes, which are a mechanism for transferring the assets, rights and liabilities from the first company to the second. Some technical consequential amendments will be needed to Schedule 2 to allow the use of transfer schemes when the hive down mechanism is employed to transfer the property, rights and liabilities to a subsidiary of a water company in special administration before transferring to a new owner.

263. Transfer schemes are used for a number of reasons – such as for water company mergers and when water company boundaries are changed – as well as for water companies in special administration. We will need to make technical changes to Schedule 2 of the Water Industry Act 1991 to adapt the provisions to fit the transfer to a subsidiary and the subsequent transfer of the subsidiary to the new owner.

264. This is a narrow power, limited to making the technical amendments to Schedule 2 of the Water Industry Act 1991 to allow transfer schemes to apply where the “hive down” route is used.

265. The affirmative resolution procedure will give both Houses an opportunity to scrutinise and vote on the regulations.

## Paragraph 6 – Application of general administration law

*Power conferred on:* Secretary of State in relation to England and Wales, with the consent of the Welsh Ministers

*Power exercisable by:* Regulations

*Parliamentary procedure:* Affirmative resolution

266. At present, the old general administration rules under Part 2 of the Insolvency Act 1986 apply to water company special administration, with some modifications to cater for the special status of water companies. Paragraph 6(1) disapplies these old rules and provides that Schedule B1 to the Insolvency Act should apply instead. Schedule B1 was inserted by the Enterprise Act 2002 and has generally replaced Part 2. These are the rules which now apply generally to companies in administration.

267. However, some departures from the general rules will still be needed to cater for the fact that water companies provide a crucial public function. The Secretary of State will therefore have powers to apply, disapply and modify Schedule B1 provisions of the Insolvency Act 1986 (as inserted by the Enterprise Act 2002) to the special administration regime. It also permits the Secretary of State to apply any future changes to the Insolvency Act and related legislation to the special administration regime.

268. Some of the provisions adopted for the general insolvency regime may not be appropriate for all water companies, particularly those that have customers that are not able to switch suppliers. The modifications will therefore need to be tailored to fit round the unique regulatory and devolutionary framework for the water industry to ensure that the interests of customers continue to be protected. We note that similar provisions have been included in the energy administration regime (paragraph 46 of Schedule 21 of the Energy Act 2004) and the bank insolvency regime (section 122 of the Banking Act 2009). The power will be limited in that the regulations will not be able to depart completely from the model as set out in the Schedule B1 to the Insolvency Act.

269. The affirmative resolution procedure will give both Houses an opportunity to scrutinise and vote upon the order.

### Clause 35 – Provision of infrastructure

*Power conferred on:* *the Secretary of State with respect to water and sewerage undertakers wholly or mainly in England; The Welsh Ministers with respect to the areas of water and sewerage undertakers wholly or mainly in Wales; and both ministers in relation to cross-border projects.*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *Affirmative resolution*

270. Ministers will have a regulation making power for ministers to introduce a regime to regulate the delivery of large infrastructure projects for the water industry. The regulations would introduce provisions that will:

- delegate and confer functions on Ofwat;
- require water companies to go out to tender on certain projects;
- designate infrastructure providers (IPs); and
- apply, disapply or modify Water Industry Act 1991 powers and duties on IPs

271. The new regime will provide the framework for identifying projects that are likely to represent new risks to water and sewerage customers, placing water companies under new duties associated with tendering and regulating a new type of water company that owns and manages infrastructure on behalf of statutory water companies. This will have to be a fully flexible framework to protect the interests of customers from risks around complex or novel projects. The duties and functions of the new regulated entity would be subsets of the existing duties/functions of water and sewerage undertakers, but these would require precise definition depending on the specific characteristics of the project. It will be a similar situation with tendering exercises when different criteria may apply to specific infrastructure projects. Both these will contain more detail than would normally be appropriate for primary legislation. It is also likely that there may be times when the circumstances around tendering will need to be changed to reflect wider Government policy or evolving EU requirements. A similar regulation-making power relating to tendering for offshore transmission licences is provided for by section 6C of the Electricity Act 1989 (as inserted by the Energy Act 2004).

272. The affirmative resolution procedure will give both Houses of Parliament and the National Assembly for Wales an opportunity to scrutinise, debate and vote on the regulations.

**Clause 36 – Water use: temporary bans (Inserting new section 76(3))**

*Power conferred on:* Secretary of State in relation to prohibitions which may be issued by undertakers whose areas are wholly or mainly in England; The Welsh Ministers in relation to prohibitions which may be issued by undertakers whose areas are wholly or mainly in Wales

*Power exercisable by:* Order

*Parliamentary procedure:* Affirmative resolution

273. New section 76 of the Water Industry Act 1991 will allow a water undertaker to prohibit specific uses of water at times of water shortages. They may prohibit one or more of any of the uses of water listed in section 76(2). Section 76(3) will allow the Secretary of State and the Welsh Ministers, by order, and with the approval of Parliament or the National Assembly for Wales to add to, or to remove a category of use from, the list of uses which water companies may prohibit.

274. The list of uses of water that it would be appropriate to allow water undertakers to prohibit in times of shortage may change over time. The detail of the most effective mix of options to constrain customer's demand for water in times of shortage depends on a number of criteria – costs and benefits, changing patterns of water use (for example, as a consequence of climate change), impacts on business etc. As these criteria change over time, and evidence suggests it is appropriate to do so, the list of uses that may be restricted under section 76(2) may be expanded or narrowed using the power in section 76(3).

275. This power will allow Ministers to update their assessment of the types of uses of water which it is most appropriate to allow water companies to restrict. In particular, it will allow them to update the list of uses of water in section 76(2) and change the water companies' powers by secondary legislation if that is needed in order to allow them in times of drought to target a reduced use of water in the most cost-effective way.

276. The Department acknowledges that extending the ability of water companies to restrict the use of water is a matter which would be of a significant amount of public interest, and therefore considers it appropriate that this should be subject to a debate and vote in both Houses of Parliament, or the National Assembly for Wales as appropriate. We therefore propose that the affirmative resolution procedure should be used in these circumstances.

**Clause 36 – Water use: temporary bans (76A(2))**

*Power conferred on:* Secretary of State in relation to prohibitions which may be issued by undertakers whose areas are wholly or mainly in England; The Welsh Ministers in relation to prohibitions which may be issued by undertakers whose areas are wholly or mainly in Wales

*Power exercisable by:* Order

*Parliamentary procedure:* negative resolution

277. The provision in new section 76A(2) provides for the Secretary of State/ the Welsh Ministers to provide exceptions to the categories of water uses that can be restricted by water companies; exclude specified activities in specified circumstances from the restrictions or define words or phrases to clarify the extent of the power.

278. This order making power allows the Secretary of State/ the Welsh Ministers to provide further detail as to the extent of the power to restrict the use of water on a temporary basis, either by defining a word, constraining the extent of the power or providing for exceptions to the restrictions. The categories of use that could be restricted will have been determined either by primary legislation or by order through the affirmative resolution process. For example they could be used to define what is to be regarded as a “private garden” or a “hosepipe”. It may make exceptions, for example by preventing water companies from restricting certain businesses from using water if the negative impact on their business would outweigh the benefits of conserving the water. This allows Ministers to keep under review how water companies are exercising these powers and, taking account of the public interest, adjust the powers if they consider that is appropriate.

279. This power is much more limited than that in new section 76(3) in that it only allows clarification of the power, and so will not allow it to be changed radically. We consider that it would be disproportionate to require every such amendment to be subject to a debate in Parliament or the National Assembly for Wales, and so we have opted for the negative resolution procedure. This ensures that the use of this power will be subject to parliamentary control, and if a particular order causes concern then MPs or peers can pray against it to ensure that it is debated and voted on.

**Clause 38 – Incidental flooding or coastal erosion: Environment Agency and clause 39 – Incidental flooding or coastal erosion: Local Authorities**

*Power conferred on:* Secretary of State in relation to England and the Welsh Ministers in relation to Wales

*Power exercised by:* Order

*Parliamentary procedure:* Affirmative resolution

280. These clauses allow the Environment Agency and local authorities 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.

281. Subsection (8) of clause 38 and subsection (12) of clause 39 allow the Minister to ensure that the appropriate and related powers and protections relating to compulsory purchase, powers of entry and compensation are applicable to these powers.

282. The power in each case allows the Secretary of State to apply specific provisions as contained in the Water Industry Act 1991 relating to compulsory purchase, powers of entry and compensation. These provisions will be subject to pre-consolidation amendments in preparation for consolidation of all the related legislation in this area to provide for a single unifying act as recommended by Sir Michael Pitt's Review. The flexibility that an order provides is thus desirable to co-ordinate with the consolidation process.

283. Applying provisions relating to compulsory purchase, powers of entry and compensation will affect people's rights and duties, and there is therefore a need for the level of scrutiny that an affirmative order provides.

#### Clause 42 – Agreements on new drainage systems

*Powers conferred on:* Secretary of State in relation to sewerage undertakers whose areas are wholly or mainly in England and the Welsh Ministers in relation to sewerage undertakers whose areas are wholly or mainly in Wales

*Powers exercisable by:* Regulations and issuing of standards

*Parliamentary procedure:* Negative resolution

284. The clause requires anyone wanting to exercise their right to connect a private sewer or lateral drain to the public sewerage system under section 106 of the Water Industry Act 199, to first enter into an agreement with the relevant statutory sewerage undertaker. The agreement must utilise the procedure in section 104 of the same act, and must contain undertakings about the design and construction of what is to be connected and when the sewerage undertaker must adopt it as part of the public system it is responsible for – currently such an agreement is voluntary and adoption is discretionary. We are seeking to make adoption mandatory for all lateral drains and sewers which connect into the public network, and for such adoption to occur automatically when either: (i) the terms of the agreement are fulfilled; or (ii) default mechanisms such as bonds or guarantees are activated to ensure proper construction.

285. There is provision allowing Secretary of State and The Welsh Ministers to:

- a) Set out in regulations exemptions to the requirement to enter into the agreement before exercising the right to connect into the public sewerage system;
- b) Set out in regulations key requirements that the agreement must contain. For example, the agreements will need to include mechanisms such as bonds and other guarantees to ensure that the sewer is built properly, without the cost of remedying design and construction faults unfairly falling to the undertaker. It will also need to contain a requirement for the undertaker to adopt once the sewer is built properly.
- c) Publish standards about the construction of sewers that adoption agreements must incorporate or accord with, unless the parties agree to depart from those standards.

286. The intention is to allow the content of the agreement to be left to the parties as far as possible, so as not to stifle site flexibility or innovative approaches - hence it is not proposed to set out in primary legislation requirements that may have the unforeseen consequences of doing this. The Secretary of State and the Welsh Ministers will have power to specify requirements within the agreements, to ensure that adoption takes place.



*relation to services provided by an undertaker whose area is wholly or mainly in Wales.*

*Power exercisable by: Regulations*

*Parliamentary procedure: Negative resolution*

292. Clause 44 amends the Water Industry Act and inserts new section 144C so that occupiers of properties are liable for payment of bills unless the landlord of a property fails to arrange for the provision of tenant's details to the water company within a set timescale.

293. This clause allows Ministers to make regulations regarding:

- the information that water companies may request;
- the timescale and procedure for the provision of details; and
- the circumstances under which an owner may be exempted from liability for passing on false information which was provided to them by a tenant.

294. We note that new section 144C also provides that when the section is commenced by an order under clause 48(3), that order may contain a transitional measure that the owner's duty to provide information is not activated until the undertaker serves a notice on the owner. This is to ensure that owners are aware of the new duty and do not end up in breach of the law through ignorance.

295. We believe it is appropriate to specify these details about what information can be required, timescale, procedure, and liability in secondary legislation to allow for sufficient public consultation and in order to allow for flexibility to amend these details in the future if necessary, without having to revise primary legislation. In addition to this, it will provide flexibility to keep pace with any future changes in data protection law.

296. The most important thing the regulations will do will be to set out what information needs to be provided to the water company by the landlord. In order to keep the burden of the duty to a minimum, it will be important to ensure that no more information is required than is absolutely necessary for the undertaker to identify the tenant. Hence the regulations should be subject to scrutiny to ensure that the requirements are appropriate.

297. The department considers that negative resolution procedures would provide Parliament and the National Assembly for Wales with an opportunity to give due consideration to these issues, but that it would be unduly burdensome to require a debate in each House of Parliament, or the Assembly for the detailed specifics to be decided.

298. Furthermore, as the new system is implemented and as technology improves it may become apparent that less information is needed to identify the tenant. The negative resolution procedures will ensure that the information requirements can be cut down to size without delay, and ensure that any unnecessary burden on the owner is not kept in place any longer than is necessary. It also means that the liability requirements can be quickly adjusted if necessary to make sure that owners who pass information on in good faith are not held to have breached the duty if it turns out that they were given incorrect information by their tenant.

## Part 3 – General

### Clause 47 – Pre-consolidation amendments

*Power conferred on:* Secretary of State, with the consent of the Welsh Ministers

*Power exercisable by:* Order

*Parliamentary procedure:* Affirmative resolution

299. Sir Michael Pitt's review into the summer 2007 floods made a number of recommendations. One such recommendation was that there should be a single unifying Act that addressed all sources of flooding, clarified responsibilities and facilitated flood risk management. The Government still retains the ambition for unified legislation on floods. Due to timing constraints in the coming session, the Government has concentrated on those areas where action is needed most urgently. We will bring forward the remaining legislation at the earliest Parliamentary opportunity and consolidate the results accordingly. This pre-consolidation clause will be a step along the way to effective consolidation of legislation. Once in place, we plan to use these powers at the earliest opportunity to amend existing legislation and allow for greater consistency. We will continue to work towards a single unifying act with a view to producing further legislation at an early opportunity.

300. This Henry VIII power enables the Secretary of State to make amendments to this Act and to 8 previous Acts for the purpose of standardising provisions, simplifying procedures or correcting errors.

301. The changes made would be largely procedural in nature. They would aim to ensure greater consistency across existing legislation related to flood and water management in order to facilitate the consolidation of this Bill and the 8 Acts mentioned.

302. As is stated on the face of the Bill, this power may only be used for the purpose of making consolidation easier and if the change is proportionate to the advantage which would be gained by making it. It is made clear that this power will not authorise any amendments which would remove any protections.

303. Because of the limitations on this power, it is very likely that it will only be used for making relatively minor and technical amendments to the legislation and we consider that it would therefore be suitable for inclusion in secondary legislation.

304. However, we acknowledge that the use of this power will be of particular interest to Parliament which is why we propose that it may be subject to the affirmative resolution procedure. This would provide an opportunity for both Houses to scrutinise, debate and vote on the use of this power. The Welsh Ministers are not able to make orders under this section, but there is a requirement to consult the Welsh Ministers before using the power.

**Clause 48 – Subordinate Legislation**

*Power conferred on:* Secretary of State and the Welsh Ministers

*Power exercisable by:* Regulations or Order

*Parliamentary procedure:* Affirmative or negative resolution

305. Clause 47 does not contain a power as such, but it provides that other order and regulation making powers in the Bill include the ability for the resulting subordinate legislation to: (i) apply generally or only for specified purposes; (ii) make different provision for different purposes; and (iii) include incidental, consequential, or transitional provision.

306. It is appropriate for such matters to be in secondary legislation in order to provide the customary flexibility around commencement and to allow for incidental, consequential, or transitional matters.

307. The power does not allow for the amending of other enactments, and so - unless the particular power is one that has been singled out for the affirmative resolution procedure – it is appropriate to have the reduced level of scrutiny provided by the negative resolution procedure.

Department for Environment, Food and Rural Affairs

February 2010

## APPENDIX 2: FINANCIAL SERVICES BILL — GOVERNMENT RESPONSE

---

### Letter to the Chairman from Lord Myners, Financial Services Secretary to the Treasury, HM Treasury

1. The 5th Report of the Delegated Powers and Regulatory Reform Committee, published on 11 February, included the Committee's views on delegated powers contained within the Financial Services Bill. I am writing to you to set out the Government's response to the Committee's detailed comments on the Bill.

#### Clause 7(4) – FSA general rules

2. We agree that clause 7(4) represents an extension to the FSA's current rule-making power in section 138 of FSMA, but we do not consider that it is a major change from the current position. It has always been the case that rules could be made under section 138 for the purpose of protecting consumers, which also pursued other of the FSA's objectives, even without the amendment in clause 7. For example, a sudden loss of confidence in the market would be likely to damage consumers' interests. So rules designed to maintain confidence would be for the purpose of protecting the interests of consumers. In a similar way, the FSA could make rules that pursue financial stability without the amendment made by clause 7(4), as instability is so clearly against the interests of consumers. But the Government considers that it is better to provide legal certainty with clause 7(4). This is partly because it is not possible to know at this time every eventuality where the rule-making power might be required, and partly because the financial stability objective in new section 3A includes matters to which the FSA should have regard, which will only be expressly engaged in rule-making if clause 7(4) is included. For the reasons set out above, however, the Government does not consider that clause 7(4) represents a significant extension to the FSA's rule-making power in section 138 of FSMA.

#### Clause 11 – rules about remuneration

3. The Government believes that it is necessary to disapply section 151(2) of FSMA in this case. One of the powers given to the FSA in clause 11 is power to prohibit specified forms of remuneration. If a contractual provision that contravened such a prohibition were nevertheless valid and enforceable, the prohibition would not have achieved its purpose. This would weaken the FSA's ability to ensure remuneration is consistent with effective risk management. To prevent this, the FSA need to have the power to provide that contractual provisions that breach such prohibitions are void and unenforceable.

#### Clause 22 – collective proceedings: regulations

4. The Committee has concluded that Regulations under clause 22(2)(e) or (f) should be subject to affirmative procedure. The Government accepts the Committee's conclusion and has tabled an amendment to this effect.

5. The Committee commented that the relationship between the Regulations and court rules is not entirely clear from paragraph 64 of the memorandum, and the powers conferred on the Treasury seem in some respects to be ones which could have been exercisable instead by rules of court. We note that there are separate powers to make court rules and Treasury regulations which in both cases enable provision to be made, for example, in respect of the authorisation of collective proceedings. The explanation is that there will be court rules that are generic in nature, and are intended to apply to collective

proceedings that may be introduced in other sectors. The kind of court rules that are to be made using this power are exemplified by the draft rules for collective proceedings to be found on the Civil Justice Council website. In contrast, regulations may, subject to the final shape of the rules, set out requirements that may be specific to financial services, for example having regard to the roles of the regulators and the relationship between collective proceedings and regulatory intervention. This is consistent with the Government policy expressed in its response to the Civil Justice Council report on collective redress. It ensures that our policy, which is described there, of taking due account of regulatory solutions, and of proceeding in a way responsive to the needs of the individual sector, can be embodied in appropriate provision.

6. The purpose of the Treasury's power is therefore generally to provide for Government policy that originates in the financial services domain rather than in the area of court practice and procedure. It is closer to the example of section 47B of the Competition Act 1998, which confers a power on the Secretary of State to make certain provision in relation to collective proceedings in that Act. However, the Government recognises that it must seek relevant advice and approval in respect of any Treasury regulations, insofar as they affect court procedure, from the expert rule-making bodies.

### **Clause 26 – consumer redress schemes**

7. The Committee rightly points out that the FSA is not limited to remedies which may be awarded in legal proceedings, when specifying the kinds of redress that firms are to make to consumers. The Government wants to ensure that the redress offered to consumers is the most appropriate for them. A payment of compensation, or other remedy available in court, is not always the best outcome. To take the example of personal pensions, there may be tax benefits to consumers in requiring redress to be in the form of a top-up to a personal pension rather than as a cash payment. During the pensions mis-selling of the 1990s many consumers were wrongly advised to transfer out of an employer's occupational pension scheme into a personal pension. The pensions review went beyond the legal redress that would have been available to consumers. It required firms to negotiate with the employer's occupational pension scheme trustees to reinstate the consumer into that scheme. This would put the consumer back into the position they would have been in without the mis-selling. If that was not possible, the firm was required to top up the personal pension rather than pay compensation, so preserving tax benefits. Or it could provide a guarantee to do so in future if the customer's pension experienced a shortfall on retirement. Cash compensation was the last option. While we anticipate that the FSA will be largely guided by the type of relief that a court would grant, this example shows why it is important for the FSA to be able to depart from this where appropriate. Clause 26 provides that the FSA can do so where it is just, having regard to the nature and extent of the loss or damage. This is intended to secure the best outcome for consumers and firms.

8. Sections 404A(1)(k) and (7) provide for the FSA itself, in certain cases, to determine whether a failure has caused loss to the consumer, and to determine what the redress should be. This is to ensure that customers of firms which fail to operate consumer redress schemes as required by section 404 rules will not lose out. When the FSA, or a competent person acting on its behalf, steps in to carry out the scheme, instead of the firm, the normal due process for enforcement action under FSMA will apply – namely the issue of warning notices (which give rise to a right to make representations to the FSA) and decision notices, and the right to refer any determination of liability or redress to the Tribunal.

9. The Government has responded to concerns about the adequacy of safeguards for firms against the use of the proposed power. We have put forward an amendment giving firms

the right to apply to the Tribunal to quash rules made under section 404. The general rule is that the Tribunal is to apply the principles applicable on an application for judicial review. Thus a firm would be able to challenge the kind of redress specified by the FSA on the basis that it is unreasonable. In addition, the new s404AC clarifies the powers that the Tribunal will have in two respects:

- I. subsection 6 provides that, in respect of the examples the FSA gives of things which firms are to regard as constituting a failure, under section 404A(1)(b), the Tribunal can come to its own view as to whether the example given does in fact constitute a failure to comply with the requirements;
- II. subsection (7) provides that, in respect of matters the FSA can require firms to take into account for the purpose of assessing evidence or determining causation, under s404A(1)(c), the Tribunal may determine whether in its view these are matters that firms should be required to take into account.

### **Clause 30 – financial stability information**

10. We have provided in clause 30, new section 165C that an Order made by the Treasury prescribing a person (or class of person) as someone from whom the FSA can seek financial stability information may not be treated as a hybrid instrument. As you will be aware, a hybrid instrument is an instrument that affects “a particular private interest in a manner different from the private interests of other persons or bodies of the same category or class”. If, for example, it was necessary to enable the FSA to seek information from a single institution, or just a few institutions within a class, so that the Order did not prescribe all institutions in that class, the Order would be liable to be treated as a hybrid instrument.

11. There are a number of relevant precedents in this area. For example, section 13(4) of the Banking (Special Provisions) Act 2008 provided that statutory instruments made under the Act were not to be treated as “hybrid instruments”, as did s.259 of the Banking Act 2009. Similar provision is made in the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007, in relation to orders under section 3 of that Act which modify transfer provisions in other legislation, and in section 958 of the Companies Act 2006 (in relation to regulations providing for a levy to be paid to meet expenses of the panel to Takeovers and Mergers (s.958)).

### **Clause 36 – consequential provision**

12. The Government accepts that each piece of legislation needs to be considered in its own context. In this case, however, the Government does not consider that the power in section 36(3) to amend primary legislation should be subject to the affirmative procedure. Regardless of the wide degree of autonomy given to the FSA within its statutory framework and the importance of the integrity of that framework, the power in section 36(3) is a narrow one to make consequential amendments. As the Committee recognises, it does not extend to “incidental or supplementary provision” or to the consequences of subordinate legislation under the Bill. The Government has sought to identify all the changes to primary legislation consequent on the provisions in the Bill. In view of that and the fact that the power is narrowly circumscribed by reference to amendments that are consequent on provisions that will have been enacted in the Bill, the Government does not consider that the affirmative resolution procedure is necessary or proportionate in this case. While accepting the importance of context, the Government notes that (in addition to the Postal Services Bill) both the Welfare Reform Act 2007 (sections 26 and 28) and the Welfare Reform Act 2009 (sections 9(4), (5) and (10)) also contain powers to make consequential amendments that are subject to the negative resolution procedure. The latter includes power to amend future Acts of Parliament and therefore is more extensive

than the power in clause 36(3). This underlines the Government's view of the appropriateness of the negative resolution procedure in this case.

13. I hope this letter has helped clarify the Government's position on these matters. I am placing a copy in the Library of the House.

Lord Myners

HM Treasury