

# FLOOD AND WATER MANAGEMENT ACT 2010

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## EXPLANATORY NOTES

### COMMENTARY

#### **Part 2: Miscellaneous**

##### *Section 32: Sustainable drainage*

205. [Section 32](#) introduces Schedule 3: Sustainable Drainage.

##### *Schedule 3: Sustainable drainage*

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

##### **“Drainage system”**

207. [Paragraph 1](#) defines “drainage system” for Schedule 3 as a structure designed to receive rainwater, other than a public sewer or a natural watercourse.

##### **“Sustainable drainage”**

208. [Paragraph 2](#) defines the term “sustainable drainage” for the purposes of this Schedule.

##### **Cross-border systems**

209. [Paragraph 3](#) states that in situations where part of a drainage system is in Wales and part in England then the parts will be treated as separate systems for the purposes of this Schedule. However, decisions on one part should be taken with regard for the other part.

##### **“The Minister”**

210. [Paragraph 4](#) defines the Minister as the Welsh Ministers for drainage systems in Wales, and the Secretary of State for drainage systems in England.

##### **National Standards**

211. [Paragraph 5](#) imposes a duty on the relevant Minister to publish national standards about how drainage systems should be designed, constructed, maintained and operated for the purpose of implementing sustainable drainage. These national standards are referred to in other paragraphs in this Schedule.

212. Sub-paragraph (3) provides that the standards may permit or require approving bodies to form judgments on drainage systems using specific criteria. Approving bodies must also take account of any guidance which is issued by the Minister.
213. The Ministers must consult before publishing the standards.

### **Approving body**

214. [Paragraph 6](#) sets out who is to act as the “Approving Body” for drainage systems for an area. In the first instance, the Approving Body is to be the unitary or county council for the area.
215. The relevant Minister may appoint by order another body to be the Approving Body, instead of the unitary or county council. The order may apply to all areas, or to one or more specified areas.
216. Sub-paragraph (4) allows the Minister to appoint the alternative Approving Body for a specified purpose only, and for different bodies to be appointed for different purposes. For example the approval and adoption functions could be split, and transferred to two different bodies.
217. Sub-paragraph (5) states, that when appointing a different body to act as the Approving Body for a particular area, the order may also confer additional powers on that body that would assist them in acting as the Approving Body. It may only confer powers which are already available to a unitary or county council. For example, this might be used to give local authority powers of entry to the new Approving Body for maintenance purposes so as to put them in the same position as the unitary or county council would have been. Where additional powers are conferred on the Approving Body, the order will be subject to the affirmative resolution procedure either in Parliament or the National Assembly for Wales.
218. An order appointing another body as Approving Body will be subject to the negative resolution procedure. Where the order includes provision to split approving body functions under sub-paragraph (4) or to confer additional powers under sub-paragraph (5), the affirmative resolution procedure will apply.

### **Requirement for approval**

219. [Paragraph 7](#) provides that approval by the Approving Body is required before commencement of any construction work which has drainage implications. This paragraph defines construction work as anything done by way of, or in connection with, or in preparation for, the creation of a building, including any structure that covers land (such as a patio). Construction work has drainage implications if the building or structure will affect the ability of the land to absorb rainwater. Approval for construction work is not required if that construction work is a nationally significant infrastructure project, as defined in section 31 of the Planning Act 2008. These projects will require approval from the Infrastructure Planning Commission.
220. Sub-paragraph (4) allows Ministers to define what is to be treated as construction work, or as having drainage implications, and therefore what requires approval. It also enables the Minister to set exemptions to the requirement for approval. This power is exercisable by order and will be subject to the negative resolution procedure.

### **Applications for approval**

221. [Paragraph 8](#) provides for two approaches for applying for approval from the Approving Body. Where planning permission under the Town and Country Planning Act is not required, then the application is to be made as a “free-standing” application, directly to the Approving Body. Where planning permission is required then the applicant can choose to make a combined application with planning permission, by lodging both applications to the planning authority at the same time.

### **Free-standing application for approval**

222. [Paragraph 9](#) provides the procedure for free-standing applications. The Approving Body may require applications to be made in a particular form, and applications must contain any information that the Approving Body requires in order to determine the application. If a fee is payable then it must also be accompanied by that fee.

### **Combined applications**

223. [Paragraph 10](#) provides the procedure where an applicant chooses to have their application for approval combined with planning permission. In a case like this, the applicant must give the planning application and the application for approval required by this Schedule to the planning authority. The application for approval of the drainage will need to contain the same information, be in the same form, and be accompanied by a fee in the same way as if a free standing application were made.
224. The planning authority will be obliged to consult with the Approving Body (if it is a different body than the planning authority), so that the Approving Body can determine the drainage application. The planning authority must inform the Approving Body of its final decision on the planning application. The planning authority must also inform the applicant of the final decision of the Approving Body on the drainage system at the same time as it informs the applicant of its final decision on planning permission.

### **Determination of application for approval**

225. [Paragraph 11](#) provides the process for determining an application for approval. An Approving Body must grant an application if it is satisfied that the drainage system complies with the national standards for sustainable drainage. If it is not satisfied then it must refuse the application. Approval may be granted subject to conditions on the construction, or modifications to the original proposals. The Approving Body may grant approval on the condition that the applicant provides a non-performance bond. In such a case, the approval only takes effect once the applicant has provided the non-performance bond. Grant of approval may relate to inspection of the drainage system or there may be a condition which requires payment of fees payable for the processing of the application for approval of a drainage system.
226. Before determining an application the Approving Body must consult a number of relevant bodies. If a connection to the sewer is proposed, it must consult the relevant sewerage undertaker; if the drainage system will discharge to a watercourse, it must consult the Environment Agency; if the drainage system is likely to affect a road, it must consult the relevant highway authority; if the drainage system is to discharge under, or directly or indirectly into a waterway managed by British Waterways, it must consult British Waterways; and finally it must consult the appropriate internal drainage board if the Approving Body thinks that the drainage system may directly or indirectly involve the discharge of water into an ordinary watercourse within that board's district.
227. Once the Approving Body has made a decision, it must notify the applicant (or, in the case of a combined application, the planning authority), and any relevant consultees, of its decision as soon as it reasonably can.
228. The Secretary of State or Welsh Ministers may make regulations about the timing and procedure for determination of applications for approval and the consequences of the failure to comply with these regulations. These regulations are subject to the negative resolution procedure.

### **Non-performance bonds**

229. [Paragraph 12](#) explains what a non-performance bond is. When approving an application, the Approving Body may require the applicant to deposit a non-performance bond as a condition of granting approval. The value of the bond will be

decided by the Approving Body, but it cannot exceed the best estimate of the most that it will cost to build the drainage system in line with the approved proposals. Sub-paragraph (6) provides for the Minister to issue guidance, to which approving bodies must have regard, about what amounts may be required for the bond.

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

## **Fees**

231. [Paragraph 13](#) provides for the Minister to make regulations on fees for applications for drainage approval. The provisions allow for the regulations to provide for fees to be determined by reference to criteria specified in the regulations, for instance the extent or nature of the construction works. The regulations can also provide for fees to be paid by reference to the costs of work done by the authority to process the approval. In making the regulations, the Minister must have regard to the desirability that the income from fees does not significantly exceed the costs incurred in processing an approval.

## **Enforcement**

232. [Paragraph 14](#) requires the Minister to make an order to make provision about enforcement of the requirement for approval under this Schedule. The order can be used to make provision for taking enforcement action in cases where construction starts without approval of its drainage system, where any of the conditions that the approval was based on are breached or where construction of the drainage system does not follow the approved proposals.
233. The order can include provisions about notices including enforcement notices, stop notices, temporary notices and breach of condition notices; allowing for applications to be made to a court or tribunal; confer powers including discretionary powers on the Minister or other authorities, powers of entry, powers of inspection and powers to undertake and charge for remedial work; and provisions about the consequences of failure to comply with the order itself or notices produced under it. If the Minister wishes, the order can apply or make provisions similar to provision in the Town and Country Planning Act 1990.
234. The order under this paragraph will be subject to the affirmative resolution procedure.

## **Guidance**

235. [Paragraph 15](#) provides for the Minister to issue guidance, to which approving bodies must have regard, on the process of seeking and obtaining approval.

## **Sewers and roads**

236. [Paragraph 16](#) amends section 106A of the Water Industry Act 1991 and inserts a new section 106A. The effect of this amendment is to limit the existing right to connect to the public sewer in certain cases. Where the connection to the sewer is part of a drainage system which requires approval under this Schedule, connection will only be allowed where the application for approval of the drainage plans proposes a connection to the public sewer, and that application is approved by the Approving Body.
237. At present, under section 106(4) of the Water Industry Act, a sewerage company may refuse to allow a connection to the public sewer if it thinks that the mode of construction or condition of associated drains and sewers would be prejudicial to its sewerage

system. This paragraph provides that the sewerage company will no longer be able to refuse a connection in respect of surface water on these grounds in a case where the sewer connection is part of the approved drainage system. It also provides that a connection to the sewer may not be refused on the grounds that drainage system drains more than one property or sewer, or absorbs water from other land as well as from premises and sewers.

238. Sub-paragraph (3) inserts a new subsection into section 115 of the Water Industry Act to require a sewerage undertaker to accept any drainage from a highway drain which is in accordance with a drainage system approved under this Schedule.

### **Duty to adopt**

239. [Paragraph 17](#) imposes a duty on the Approving Body to adopt any new drainage system which meets these conditions:
- a. Condition 1 is satisfied where the drainage system has been constructed in line with an approved drainage plan which conforms to the national standards.
  - b. Condition 2 is satisfied where the Approving Body is satisfied that the drainage system has been built and functions in accordance with the approved plan (and complies with any conditions or approval) or alternatively where the Approving Body can, or has, issued a certificate that the non-performance bond will be used to complete the drainage system, for the reasons described under non-performance bonds. The Approving Body must also have regard to any guidance issued by the Minister on this condition.
  - c. Condition 3 is satisfied if the system is a “sustainable drainage system”, as defined by regulations made by the Minister.
240. Where part of a drainage system is exempt from adoption, this duty to adopt continues to apply to the rest of the system as if it were a whole drainage system in its own right.

### **Exception 1: single property systems**

241. [Paragraph 18](#) provides that the Approving Body is not under a duty to adopt any drainage system, or part of a drainage system, which only provides drainage for single properties. The Minister can make regulations to define when a drainage system or part of a drainage system provides drainage for a single property.

### **Exception 2: Roads**

242. [Paragraph 19](#) provides that the Approving Body is not under a duty to adopt drainage systems, or parts of a drainage system which are also a publicly maintained road. This paragraph defines the term “publicly-maintained road” and provides that a reference to a “road” could refer to a road in its entirety or just a part of a road.
243. Where part of an adopted drainage system is a publicly maintained road, or where a drainage system is entirely contained within a publicly-maintained road, the road maintaining authority (the highway authority), must exercise its functions in accordance with the approved plan for the drainage system, including any conditions of approval, and in accordance with national standards. The functions affected would include the highway authority’s functions of maintaining a road, and arranging for it to be properly drained under the Highways Act 1980. The maintaining authority must also designate the road as a “street with special engineering difficulties” under section 63 of the New Roads and Street Works Act 1991.
244. If a road is part of a drainage system (for example, by being constructed of permeable paving) but is privately maintained, then that part of the drainage system will need to be adopted by the Approving Body in the same way as the rest of the system. If a private road which is part of a drainage system subsequently becomes adopted by the highway

authority (and therefore becomes a publicly maintained road) the Approving Body's adoption of that part of the drainage system will lapse.

### **Additional exceptions**

245. [Paragraph 20](#) allows the Minister to provide additional exceptions to the duty to adopt a drainage system. This power must be exercised by order and would be subject to the negative resolution procedure.

### **Power to Adopt**

246. [Paragraph 21](#) enables the Approving Body to voluntarily adopt a sustainable drainage system, where it is not under a duty to do so. The relevant Minister may make regulations defining the types of sustainable drainage systems which may be voluntarily adopted.

### **Effect of adoption**

247. [Paragraph 22](#) provides that where an Approving Body adopts a drainage system, it must maintain the drainage system in line with the National Standards.

### **Process of adoption in pursuance of duty to adopt**

248. [Paragraph 23](#) details the process of adoption where the Approving Body is under a duty to adopt the drainage system. The person who applied for approval, referred to as "the developer", can formally request the Approving Body to adopt a drainage system (for example, when it considers that it has completed the system in line with the approved plans). But the Approving Body does not need to wait for a formal request to be made if it considers on its own initiative that it is under a duty to adopt the drainage system.
249. The Approving Body may prescribe the form required for the developer to make formal requests for adoption. Where an Approving Body receives a formal request for adoption, it must determine the request within any time limit imposed by the Minister by order. The Approving Body must notify the developer of its decision, and of its right to appeal as soon as is reasonably practicable.
250. Where an Approving Body give notice of adoption it must ensure that the notice specifies the extent of the drainage system being adopted. The notice must be copied to the relevant sewerage undertaker. The notice (together with details of the arrangements for access and maintenance in the approved plans) must be copied to anyone appears to own land on which the drainage system is located, and anyone whose property appears to be drained by the system. The notice must also be copied to the developer and any other statutory consultees to the approval process.
251. The Approving Body must also include the drainage system in the local authority register which is established under Part 1 of the Act, and designate any parts of the drainage systems which are eligible for designation and not owned by the Approving Body. It must also release any unused non-performance bond which was paid as a condition of approval back to the developer.
252. Finally, the Approving Body must designate any adopted part of the drainage system that is a street as a "street with special engineering difficulties", as under section 63 of the New Roads and Street Works Act 1991. The definition of "street" in this context is set out in section 48 of the New Roads and Street Works Act 1991.
253. The Minister can make regulations about timing, and manner of compliance with these obligations. These regulations are subject to the negative resolution procedure.



### **Process of Voluntary adoption**

254. [Paragraph 24](#) sets out what happens where the duty of adoption does not apply to a drainage system, but the Approving Body nonetheless decides to adopt it. When doing so it must notify the relevant sewerage 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 which is being adopted.
255. The Approving Body must also include the drainage system in the local authority register which is established under Part 1 of the Act, and designate any parts of the drainage systems which are on third party land and which are eligible to be designated under Schedule 1 of the Act.
256. The Minister can make regulations about the timing and manner in which notification, registration and designation are carried out. Any such regulations will be subject to the negative resolution procedure.

### **Appeals**

257. [Paragraph 25](#) requires the Minister to make regulations providing a right of appeal against decisions about applications for approval (including decisions about conditions), and decisions about the duty to adopt. The regulations must specify jurisdiction for appeals on the Minister, a court or tribunal, and make provision for the procedures and circumstances for appeal.
258. The first set of regulations made under this paragraph will be subject to the affirmative resolution procedure.

### **Building Act 1984**

259. [Paragraph 26](#) provides for changes to the Building Act 1984.
260. Section 21 of the Building Act 1984 provides that when a developer deposits plans of a building or extension in accordance with Building Regulations, the local authority can direct that the building be connected to a sewer. This paragraph amends section 21 so as to provide that where the construction work requires approval under this Schedule, the power in section 21 will no longer apply.
261. Section 59(1)(c) of the Building Act 1984 provides that where a cesspool, private sewer, drain or other specified types of drainage work which are provided for a building are in such a condition so as to be prejudicial to health or a nuisance, the local authority may require the owner of the building to carry out work. This paragraph extends the power in this section so that it also applies to sustainable drainage systems (whether or not they are adopted) in the same way as it applies to cesspools, sewers, drains etc. Insofar as it relates to sustainable drainage systems, the power may be exercised by the Approving Body – under the Building Act 1984 the powers are only available to district councils, whereas Approving Bodies will generally be county councils. The Building Act 1984 is amended to include a reference to these provisions.
262. This paragraph amends section 84(1) of the Building Act 1984 to ensure that sustainable drainage systems are appropriately dealt with in the relevant Building Act provisions relating to courts, yards and passages.

### **New Roads and Street Works Act 1991**

263. [Paragraph 27](#) provides for changes to the New Roads and Street Works Act 1991 to “sign-post” the fact that this Act contains duties to designate sustainable drainage systems under section 63 of the New Roads and Street Works Act 1991 and extends the criteria for designation to reflect this.

## **Works on public land**

264. [Paragraph 28](#) concerns statutory works conducted by a statutory undertaker on public land which affects (or may affect) that land's drainage system. The Minister may make regulations requiring a statutory undertaker to notify the approving body before starting such works.
265. Sub-paragraphs (2) and (3) make provision about the definitions of the terms "public land", "statutory undertaker" and "statutory work."
266. The regulations may specify criteria for determining whether works affect a land's drainage system, and may include provision on timing and procedure. The regulations may also specify the consequences of a failure to comply with the regulation's provisions.
267. The regulations may also require, or enable, the approving body to require a statutory undertaker carrying out such works to carry out further work on the system. This may include a requirement to leave the system in a state approved by the approving body, having regard to national standards for sustainable drainage.
268. The regulations could also give powers to the approving body to undertake work and recover their costs.
269. Finally, the regulations may amend existing primary legislation to include a cross-reference to the new regulations.

## ***Section 33: Reservoirs***

270. This section introduces Schedule 4: Reservoirs. This Schedule to the Act makes various amendments to the Reservoirs Act 1975, including amendments to introduce a risk-based approach to reservoir safety in England and Wales reflecting the danger that reservoir failures might pose to human life.

## ***Schedule 4: Reservoirs***

### **Introduction**

271. [Paragraph 1](#) introduces the specific amendments to the Reservoirs Act 1975 as it applies in England and Wales. References below to the Minister are to the Secretary of State in relation to England and the Welsh Ministers in relation to Wales.

### **“Large raised reservoir”**

272. [Paragraph 2](#) amends the definition of “large raised reservoir” for the purposes of the Reservoirs Act 1975. The new definition of large raised reservoir replaces the existing definitions of “reservoir”, “raised reservoir” and “large raised reservoir” in section 1(1) to (3) of the Reservoirs Act 1975.
273. New section A1(1) provides that a large raised reservoir is (a) a large, raised structure designed or used for collecting and storing water; and (b) a large, raised lake or other area capable of storing water which was created or enlarged by artificial means. New section A1(1)(a) includes non-impounding, banded reservoirs (reservoirs with a continuous embankment around their perimeter which are filled with water from, for example, river or groundwater sources and rain). New section A1(1)(b) includes impounding reservoirs (formed by the construction of an embankment across a watercourse or lake).
274. The terms “raised” and “large” are further defined in subsection (2) and (3) of new section A1. A “raised” structure or area will be “large” if it is capable of holding 10,000 cubic metres of water or more above the natural level of any part of the surrounding



land. The volume specified in subsection (3) may be amended by order by the Minister under subsection (7) of new section A1.

275. Subsection (4) of new section A1 allows the Minister to make regulations specifying in more detail how the capacity of a large raised reservoir is to be calculated for the purposes of the Reservoirs Act 1975. This power enables the Minister to provide clarification to engineers and reservoir undertakers on how the volume capacity of a reservoir must be calculated for the purposes of determining whether a structure or area falls within the new definition of large raised reservoir.
276. Subsection (5) of new section A1 enables the Minister to provide in regulations for a structure which is designed or used for collecting and storing water, or a lake or other area capable of storing water which was created or enlarged by artificial means, to be treated as “large” by reason of its proximity to, or actual, or potential communication with another such structure or area. Where two or more reservoirs lie on the same watercourse, the uncontrolled release of water from an upstream reservoir may cause a reservoir downstream to also fail. The power will enable the Minister to extend the definition of large raised reservoir to include, for example an area or structure which is not capable of holding 10,000 cubic metres of water, but which, if it failed, could cause a connected reservoir which is also not capable of holding 10,000 cubic metres of water to release 10,000 cubic metres of water or more downstream.
277. Subsection (6) of new section A1 requires the Minister to aim to ensure, when making these regulations, that such a structure or area is treated as “large” only if 10,000 cubic metres of water or more might be released as a result of this proximity or communication.
278. Subsection (8) allows the Minister to make regulations providing for specified things not to be treated as large raised reservoirs for the purposes of the Reservoirs Act 1975.
279. Subsection (9) of new section A1 defines a large raised reservoir further to include anything used or designed to contain the water or its flow.
280. Orders made under subsection (7) and regulations made under subsection (8) of new section A1 are subject to the affirmative resolution procedure. Regulations made under subsections (4) and (5) are subject to the negative resolution procedure. See further paragraph 38 of Schedule 4.
281. [Paragraph 3](#) makes consequential amendments to the Reservoirs Act 1975.

## **Registration**

282. [Paragraph 4](#) inserts additional provisions after section 2(2A) of the Reservoirs Act 1975 about the registration of large reservoirs.
283. The Reservoirs Act 1975 already requires the Environment Agency to establish and maintain a register of large raised reservoirs in England and Wales and a record of information about each of them (see section 2(2)). New section 2(2B) makes it a requirement for the undertaker of a large raised reservoir to register the reservoir with the Environment Agency in accordance with regulations made under new section 2(2C) so as to ensure that the Environment Agency is able to keep its register complete and up-to-date.
284. [Paragraph 5](#) makes consequential amendments to the Reservoirs Act 1975.
285. [Paragraph 6](#) inserts section 22(A1) before section 22(1) of the Reservoirs Act 1975. Under new section 22(A1), it is an offence to fail to comply with the requirements of new section 2(2B) or a requirement specified in regulations made under new section 2(2C). New section 22(A2) sets out the penalty for the offence under section 22(A1).

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

### **High-risk reservoirs**

287. [Paragraphs 7 and 8](#) insert new sections 2A to 2E after section 2 of the Reservoirs Act 1975 and make consequential amendments to the Act.
288. New section 2A(1) requires the Environment Agency, as soon as reasonably practicable after a large raised reservoir has been registered under new section 2(2B), to consider whether it is to be designated as a “high-risk reservoir”. Where the Environment Agency proposes to designate a large raised reservoir as a high-risk reservoir, it must notify the undertaker of its provisional designation, including the reasons for this designation, and how and within what period representations to the Environment Agency can be made (section 2A(2) and (3)).
289. New section 2B(1) empowers the Environment Agency to designate a large raised reservoir as a high risk one by giving notice confirming a provisional designation.
290. New section 2C sets out the criteria by reference to which the Environment Agency may determine that a large raised reservoir is a high-risk reservoir. Under subsection (1) of new section 2C the Environment Agency may determine that a large raised reservoir is a high-risk reservoir if the Environment Agency thinks that, in the event of an uncontrolled release of water from the reservoir, human life could be endangered unless the reservoir satisfies any conditions specified in regulations that may be made by the Minister. Subsection (2) of new section 2C gives an indication of the conditions that may be specified in regulations made under new section 2C(1)(b).
291. The undertaker of a high-risk reservoir will be required to comply with sections 10, 11 and 12 of the Reservoirs Act 1975 (as amended), whereas the undertaker of a large reservoir that is not so designated will not.
292. New section 2D requires the Environment Agency to carry out a review in relation to a large raised reservoir that has not been designated as a high-risk reservoir following its registration if it later thinks that it may be appropriate to designate the reservoir as a high-risk reservoir. Such a review may be appropriate where development has taken place downstream or alterations to the reservoir have affected the reservoir’s inundation zone. The Environment Agency must also carry out a review if it thinks that the designation of a large raised reservoir as a high-risk reservoir may have ceased to be appropriate. The procedure that applies in relation to the designation of a large raised reservoir as a high-risk reservoir following a review is the same as the procedure that applies following its registration.
293. New section 2E requires the Minister to make regulations providing a right of appeal against designations made under new section 2B. The regulations must define which person or body has jurisdiction in relation to the appeal and set out the appeal procedure. Under subsection (3) of new section 2E a designation is suspended pending the outcome of the appeal. The first set of regulations made under section 2E is subject to the affirmative resolution procedure; otherwise regulations made under this section are subject to the negative resolution procedure (see paragraph 38 of Schedule 4).

### **Panels of Engineers**

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

## **Construction and alteration**

295. [Paragraph 10](#) amends section 6 of the Reservoirs Act 1975 which relates to construction and alteration of large raised reservoirs.
296. Sub-paragraphs (2) to (5) amend section 6 of the Reservoirs Act 1975 so that the Act also applies to alterations to a large raised reservoir to decrease its capacity.
297. Sub-paragraph (6) adds new subsections (6A) and (6B) to section 6 of the Reservoirs Act 1975. New subsection (6A) provides that section 13 of the Reservoirs Act 1975 applies to alterations or proposed alterations to decrease the capacity of a large raised reservoir so that it is incapable of holding 10,000 cubic metres of water above the natural level of the surrounding land. New subsection (6B) allows the Minister, by order, to substitute a different volume of water for the volume specified in subsection (6A) in line with changes to the volume capacity specified in new section A1(3). An order made under new section 6(6B) is subject to the affirmative resolution procedure (see further paragraph 38 of Schedule 4).
298. [Paragraph 11](#) makes consequential amendments to the Reservoirs Act 1975. Paragraph 11(6) also amends section 8(3) of the Reservoirs Act 1975 (powers of the enforcement authority in the event of non-compliance with the requirements as to construction or alteration of large raised reservoirs) to require the undertaker to carry out any recommendations an appointed engineer sees fit to make in the interests of safety within the periods specified in the engineer's report. The engineer's report must specify the period within which each recommendation contained in the report must be carried out.

## **High-risk reservoirs: inspections**

299. [Paragraph 12](#) amends section 10 of the Reservoirs Act 1975 (inspections).
300. Sub-paragraph (2) amends section 10(1) of the Reservoirs Act 1975 so as to only require the undertakers of high-risk reservoirs to have their reservoirs periodically inspected.
301. Sub-paragraph (3) amends section 10(2) of the Reservoirs Act 1975 to enable the Minister to make regulations about the times at which a high-risk reservoir must be inspected. Regulations made under section 10(2) (as amended) are subject to the affirmative resolution procedure.
302. Sub-paragraph (4) amends section 10(3) of the Reservoirs Act 1975 to allow the inspecting engineer to make any recommendations he sees fit as to: (a) the timing of the next inspection; (b) the maintenance of the reservoir; and (c) any measures required in the interests of safety and the period in which those measures must be taken. Sub-paragraph (8) amends section 10(6) of the Reservoirs Act 1975 to require undertakers to carry out any recommendations as to measures required in the interests of safety made by the inspecting engineer within the period specified in the engineer's report. Sub-paragraph (6) amends section 10(5) of the Reservoirs Act 1975 to require the inspecting engineer to include in the certificate he is required to give under section 10(5) any recommendations as to the maintenance of the reservoir included in the engineer's report. Sub-paragraph (7) adds a new subsection 10(5A) and requires the undertaker to comply with any recommendation made by an inspecting engineer under section 10(3) (b) of the Reservoirs Act 1975 (as amended) as to the maintenance of the reservoir.
303. Sub-paragraph (5) inserts a new subsection after section 10(3) of the Reservoirs Act 1975 to require an inspecting engineer to notify the Environment Agency if he or she has not provided a report before the end of the period of 6 months, beginning with the date of completion of the inspection of the reservoir and to provide a written statement of the reasons for this.
304. Sub-paragraph (9) inserts into section 10 of the Reservoirs Act 1975 subsection (6A). This subsection requires an inspecting engineer to include in his or her report, a statement as to whether all of the safety measures recommended in the previous

inspection report have been taken. Where they have not, the inspecting engineer must either include in the report recommendations to take any safety measure that has not yet been taken or an explanation of why it is no longer required.

- 305. [Paragraphs 13 and 14](#) contain various consequential amendments to the Reservoirs Act 1975 resulting from the new provision allowing an inspecting engineer to make recommendations as to the maintenance of the reservoir.
- 306. [Paragraph 15](#) inserts subsections (1AA) and (1AB) after section 22(1) of the Reservoirs Act 1975 (criminal liability). Under new section 22(1AA), it is an offence to fail to comply with the requirements of section 10(5A). The penalty for this offence is set out in new subsection 22(1AB).

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

- 307. [Paragraphs 16 and 17](#) amend sections 11 and 12 of the Reservoirs Act 1975 (monitoring and supervision). Sections 11 and 12, as amended, apply to high-risk reservoirs only.
- 308. [Paragraph 17\(3\)](#) inserts subsections (2A) and (2B) after section 12(2) of the Reservoirs Act 1975. New subsections 12(2A) and (2B) require the supervising engineer to provide the undertaker with a statement of any steps taken to maintain the reservoir in accordance with the recommendations of the inspecting engineer under new section 10(3)(b) at least once every 12 months.
- 309. [Paragraph 17\(5\)](#) adds subsections (6) to (8) to the end of section 12 of the Reservoirs Act 1975. New section 12(6) gives the supervising engineer the power to direct the undertaker to carry out a visual inspection of the reservoir at specified intervals for the purpose of identifying anything that might affect the safety of the reservoir. These provisions will enable supervising engineers to set out how undertakers can keep a look out for potential problems, such as growing leaks or embankment subsidence which if caught early can avoid worse problems, including emergency situations, developing later on. New section 12(7) requires the undertaker to notify the supervising engineer of each visual inspection that is carried out and anything noticed in the course of it. New section 12(8) allows the Minister to issue guidance to supervising engineers about supervision in accordance with section 12 of the Reservoirs Act 1975 (as amended).
- 310. [Paragraph 19](#) inserts subsections (1AC) and (1AD) into section 22 of the Reservoirs Act 1975 (criminal liability). Under new section 22(1AC), it is an offence, without reasonable excuse, to fail to comply with the requirements of new section 12(6) or 12(7). New section 22(1AD) sets out the penalty for this offence.

### **Flood plans**

- 311. [Paragraphs 20 and 21](#) amend section 12A of the Reservoirs Act 1975 (flood plans).
- 312. [Paragraphs 20\(2\) and \(3\)](#) amend the definition of a flood plan in section 12A(1) of the Reservoirs Act 1975 to provide that a flood plan must also give information about the areas that may be flooded in the event of an uncontrolled escape of water, and describe the action the undertaker would take in order to prevent an uncontrolled escape of water. [Paragraph 21](#) inserts new section 12AA, which sets out the procedure to be followed and other requirements that apply where an undertaker is directed to prepare a flood plan. The undertaker must prepare a flood plan in consultation with the appointed engineer and may not provide a copy of it or publish it, as directed, unless the engineer has certified that it meets the requirements of section 12A(2)(a) and (b). [Paragraph 22](#) amends section 19 to allow the undertaker to challenge a failure by the appointed engineer to issue a certificate under new section 12AA(3).
- 313. [Paragraph 24](#) inserts subsection (1AE) into section 22 of the Reservoirs Act 1975 (criminal liability). New section 22(1AE) makes it an offence to fail to comply with the requirements of new section 12AA(4), (5), (6)(a) or (7) and sets out the penalties for these offences.

## **Discontinuance**

314. Paragraph 25 amends section 13 of the Reservoirs Act 1975 (discontinuance of large raised reservoirs).
315. Sub-paragraphs (2) and (4) amend section 13(1) and 13(3) of the Reservoirs Act 1975 to substitute for “more than 25,000” the figure “10,000” to reflect the new definition of large raised reservoir (see paragraph 2 of Schedule 4).
316. Paragraph 25(3) inserts new subsections (1A) to (1E) after section 13(1) of the Reservoirs Act 1975. These provisions allow a qualified civil engineer to issue an interim certificate if he thinks that the level of water in the reservoir should be reduced before the alteration is completed, and requires the undertaker to ensure that the reservoir does not contain water except in accordance with the interim certificate.
317. Paragraph 25(5) adds at the end of section 13 of the Reservoirs Act 1975 new subsections (4) and (5). New section 13(4) enables the Minister by order to substitute a different volume of water for that specified in section 13(1) and 13(3) in line with changes made to the volume capacity specified in new section A1. New section 13(5) allows the Environment Agency to serve a notice requiring the undertaker to appoint a qualified civil engineer where it appears to the Environment Agency that such an engineer has not been employed as required by section 13(1) of the Reservoirs Act 1975. Paragraph 26 makes consequential amendments to sections 15 (reserve powers) and 22(1)(b) (criminal liability) of the Reservoirs Act 1975.
318. An order made under new section 13(4) is subject to the affirmative resolution procedure.

## **Abandonment**

319. Paragraphs 27 and 28 amend section 14 of the Reservoirs Act 1975 (abandonment of large raised reservoirs).
320. Paragraph 27(2) amends section 14(2) of the Reservoirs Act 1975 to require the undertakers of a large raised reservoir who are proposing to abandon the use of their reservoir, to carry out any recommendations as to measures to be taken in the interests of safety made by the appointed engineer within the period specified in the report.
321. Paragraph 27(3) adds section 14(6) to the Reservoirs Act 1975, which enables the Minister to make regulations providing for what is and is not to be treated as abandonment of use of a large raised reservoir and bringing back a large raised reservoir into use as a reservoir for the purpose of the Act.
322. Regulations made under new section 14(6) are subject to the negative resolution procedure.

## **Appeals**

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



the affirmative resolution procedure; otherwise regulations made under this section are subject to the negative resolution procedure (see paragraph 38 of Schedule 4).

### **Directions of engineers**

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

### **Assessment of reports and statements**

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

### **Information and reports**

327. [Paragraph 33](#) inserts sections 21A and 21B after section 21 of the Reservoirs Act 1975.
328. New section 21A (power to require information) allows the Environment Agency by notice to require an undertaker to provide specified information where the information is required by the Environment Agency for the purposes of carrying out its functions under the Reservoirs Act 1975.
329. New section 21B (reports) allows the Minister to make regulations to require a specified person to report to the Environment Agency on any incident of a specified kind which affected or could have affected the safety of a large raised reservoir. This will enable the Minister to specify the kinds of incident that should be reported to the Environment Agency for collating and dissemination to reservoir undertakers and panel engineers. The intention is that issues of safety arising from individual incidents should be disseminated to undertakers and the profession so that all can learn from individual incidents and if necessary technical guidance can be issued.
330. [Paragraph 34](#) inserts subsection (4A) to (4C) after section 22(4) of the Reservoirs Act 1975 (criminal liability) to make it an offence to fail to comply with a requirement of a notice under new section 21A or to make a report under regulations made under new section 21B.
331. Regulations made under new section 21B(1) are subject to the negative resolution procedure.

### **Enforcement: supplementary**

332. [Paragraph 35](#) amends section 22(1) of the Reservoirs Act 1975 (criminal liability) by removing the references in that section to "by the wilful default of the undertakers" and "unless there is reasonable excuse for the default or failure" to make the offences strict liability offences.
333. [Paragraph 36](#) inserts new section 22C after section 22B of the Reservoirs Act 1975 (criminal liability). Under new section 22C, the undertaker must pay to the Environment Agency the amount of expenses reasonably incurred by the Environment Agency in connection with the consultation of an engineer when exercising its enforcement powers



under sections 8 (construction and alteration), 9 (re-use of abandoned reservoirs), 10 (inspection) or 14 (abandonment) of the Reservoirs Act 1975.

### **Arrangements for civil protection: charges**

334. [Paragraph 37](#) inserts section 22D in the Reservoirs Act 1975. This section allows Category 1 responders (as listed in Part 1 of Schedule 1 to the Civil Contingencies Act 2004) to charge an undertaker a fee in accordance with a scheme prescribed by regulations made by the Minister. The purpose of such a scheme is to enable Category 1 responders to charge fees in respect of the costs they incur in carrying out functions under section 2 of the Civil Contingencies Act 2004 in connection with large raised reservoirs.

### **Regulations and Orders**

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

### **Charges**

336. [Paragraph 39](#) provides for the introduction by the Environment Agency of a charging scheme for the recovery of the Environment Agency's costs incurred in performing its functions under the Reservoirs Act 1975. The procedure that applies to the introduction of a charging scheme is set out in section 42 of the Environment Act 1995.

### **Power to make further provision**

337. Paragraph 40(1) provides that the Minister may make such further amendments to the Reservoirs Act 1975 as appear necessary, or desirable in consequence of the amendments made by Schedule 4.
338. An order made under sub-paragraph (1) is subject to the affirmative resolution procedure.

### **Regulatory impact assessment**

339. [Paragraph 41](#) will require the Secretary of State in relation to reservoirs in England and the Welsh Ministers in relation to reservoirs in Wales, to review, prepare and publish a report, on the burdens on undertakers of large raised reservoirs of complying with the Reservoirs Act 1975, as amended by Schedule 4.
340. The review must be carried out at the end of the period of 12 months beginning with the date on which all of the following are first brought into force in relation to all large raised reservoirs (as defined in new section A1): new section A1 ("large raised reservoir": England and Wales); the regulations under new section 2(2C) (registration); the regulations under new section 2C(1)(b) (conditions (if any) which a large raised reservoir must satisfy in order for it not to be designated as a high-risk reservoir where section 2C(1)(a) applies); and the regulations under section 10(2), as amended (the times at which a high-risk reservoir must be inspected).

### **Ministerial responsibility**

341. [Paragraph 42](#) provides that in the amendments to the Reservoirs Act 1975 made by this Schedule, a reference to the Minister is to the Secretary of State in relation to England and the Welsh Ministers in relation to Wales.

### **Cross-border England-Scotland reservoirs**

342. [Paragraph 43](#) makes provision about a large raised reservoir which is partly in Scotland and partly in England. It enables the Secretary of State, with the consent of Scottish

Ministers, to provide by order for the English reservoir safety regime (see paragraph 43(1)(c)) or the Scottish reservoir safety regime (see paragraph 43(1)(d)) to apply to any specified large raised reservoir or a class of large raised reservoir.

### ***Section 34: Special Administration***

343. This section introduces Schedule 5: Special Administration.
344. This Schedule to the Act amends the special administration regime provisions in the Water Industry Act 1991 to align it more closely with the general administration regime, as amended by the Enterprise Act 2002. The special administration regime comes into play when a water company (a water undertaker, sewerage undertaker or qualifying licensed water supplier) becomes insolvent or fails to carry out its statutory functions or licensed activities to such an extent that a transfer to a new owner is seen as the only reasonable way to protect the interests of water and sewerage customers. The amendments provide the appointed special administrator with an additional purpose to the pursuit of the “transfer purpose” to instigate a rescue plan. The Schedule also amends provisions and includes new provisions related to the transfer purpose, and provides powers to adapt general insolvency and company law provisions for the purpose of the special administration regime.

### ***Schedule 5: Special Administration***

#### **Transfer schemes**

345. [Paragraph 1](#) amends Schedule 2 to the Water Industry Act 1991, which in certain circumstances allow a water or sewerage undertaker or qualified licensed water supplier to transfer its business (or part of its business) to a new appointee by way of a transfer scheme. A transfer scheme may be used to facilitate the smooth transfer of the business of a water company in special administration to the new appointee. Paragraph 1 removes the provisions requiring the consent of third party undertakers with an interest in the transfer before the transfer scheme is prepared, approved or modified.
346. [Paragraph 2](#) makes a further amendment to provide that a transfer scheme may not impose new liabilities on third party undertakers.

#### **Objectives**

347. [Paragraph 3](#) amends section 23 of the Water Industry Act 1991 to change the purposes of a special administration order where the water company is placed in special administration on the grounds that it is, or is likely to be, unable to pay its debts. The effect of new section 23(2B) is to require the special administrator to seek to rescue the water company as a going concern (the “rescue purpose”), rather than to transfer its business in accordance with the transfer purpose set out in section 23(2)(a) or (2A) (a). However, the special administrator must pursue the transfer purpose instead of the rescue purpose where the special administrator thinks that a rescue is unlikely to be possible or that the objectives of a special administration order would be better achieved through a transfer.
348. New section 23(2C), as read with the existing subsections (2)(b) and (2A)(b), places a duty on the special administrator to ensure that the water company properly carries out its statutory functions or licensed activities until the transfer purpose or the rescue purpose has been met.
349. New section 23(2D) allows the special administrator to propose a company voluntary arrangement under Part 1 of the Insolvency Act 1986 or a compromise, or arrangement in accordance with Part 26 of the Companies Act 2006 as part of a rescue package to be agreed with creditors.

350. New section 23(2E) to (2G) provides the Secretary of State with a regulation making power to modify the provisions in the Insolvency Act 1986 and the Companies Act 2006, in relation to these types of arrangements and compromises, and to make other additional provision about these types of arrangements and compromises in order to adapt them to water companies in special administration and meet the objectives of the special administration regime. The regulations may in particular confer functions on the Secretary of State, the Welsh Ministers or the Water Services Regulation Authority. The Secretary of State can only make regulations with the consent of the Welsh Ministers and they are subject to the affirmative resolution procedure.

### **Financial assistance**

351. [Paragraph 4](#) amends sections 153 and 154 of the Water Industry Act 1991, which contain provisions relating to the granting of financial assistance by the Secretary of State or the Welsh Ministers where a special administration order has been made.
352. Sub-paragraphs (2), (3) and (4) expand the power which enables the Secretary of State and the Welsh Ministers to offer indemnities to a special administrator, the employees and other members of the firm or body corporate in respect of liabilities or loss incurred or sustained under the order.
353. Sub-paragraph (5) provides that arrangements for grants, loans or indemnities made by the Secretary of State or the Welsh Ministers may continue after a special administration order ceases to have effect.
354. Sub-paragraphs (6) and (7) amend the provisions which require the Secretary of State and the Welsh Ministers to respectively inform Parliament and the National Assembly for Wales where a guarantee is given under section 154. Subsection (6) replaces a requirement on the Secretary of State and the Welsh Ministers to “immediately” lay details of any guarantees made in connection with a special administration order before Parliament or the National Assembly for Wales, as appropriate, with a requirement to lay the details “as soon as reasonably practicable”. Subsection (7) makes a similar change to the requirement to lay a statement of any sums paid by the Secretary of State or the Welsh Ministers, under a guarantee in connection with a special administration order. This means that in practice the laying of documents might be delayed until both Houses of Parliament or the National Assembly for Wales are sitting rather than during recess or some other time when they are not sitting.

### **Hive down**

355. [Paragraph 5](#) inserts a new subsection into section 23 of the Water Industry Act 1991 to provide that where the transfer purpose is pursued, the special administrator may “hive down” or transfer the whole or part of the company’s business to a wholly-owned subsidiary of the company in advance of a transfer of the securities in that subsidiary to one or more new owners.
356. Sub-paragraphs (2) and (3) provide for the Secretary of State, with the consent of the Welsh Ministers, to make an order amending Schedule 2 to the Water Industry Act 1991 to allow the use of transfer schemes to transfer the whole or part of the business of a company in special administration by way of hive down. The order is subject to the affirmative resolution procedure.
357. Sub-paragraph (4) allows the hive down provisions to be applied to companies which went into special administration before commencement of these new provisions.

### **Application of general administration law**

358. [Paragraph 6](#) replaces section 23(3) of, and Schedule 3 to, the Water Industry Act 1991. It applies Schedule B1 to the Insolvency Act 1986 (as inserted by the Enterprise Act 2002) to the special administration regime in place of older insolvency legislation that

was generally replaced by Schedule B1, but preserved by the Enterprise Act 2002 for the purposes of the special administration regime. It also provides that the Secretary of State, with the consent of the Welsh Ministers, may make regulations to apply, disapply or modify Schedule B1, other Insolvency Act 1986 provisions and other relevant insolvency legislation for the purposes of the special administration regime.

## **Strategic supplies**

359. **Paragraph 7** amends sections 66G(10) and 66H(10) of the Water Industry Act 1991. These sections allow the Water Services Regulatory Authority (Ofwat) to designate an introduction of water by a licensed water supplier as a strategic supply where, without the introduction or introductions, there would be a substantial risk that the undertaker would not be able to maintain supplies to all customers. The current definition of “customer” does not currently include licensed water suppliers who receive wholesale water supplies from the undertaker in order to supply their customers. The amendment in paragraph 7 ensures that the Authority can take wholesale supplies by the water undertaker to licensed water suppliers (and thereby their customers) into account when determining whether to designate one or more introductions of water by another licensed water supplier as a strategic supply.

## **Section 35: Provision of infrastructure**

360. This section inserts a new Part 2A into the Water Industry Act 1991 (“the Act”) under the title of “Regulation of Provision of Infrastructure”.
361. New section 36A in the Act allows the “Secretary of State or Welsh Ministers” (“the Minister” (defined in new section 36E)) to introduce regulations to regulate the provision of infrastructure by a third party for the eventual use by water undertakers or sewerage undertakers. The regulations may in particular:
- confer regulatory functions on the Authority (Ofwat) to enable it to regulate the provision of infrastructure;
  - apply the same or similar provisions contained in Part 2 of the Act with or without modification. These provisions include such matters as appointment of water and sewerage undertakers, enforcement orders, special administration orders and restrictions on voluntary winding up and insolvency proceedings.
362. The new section also provides that the regulations must specify the activities to which they apply which may include the designing, constructing, owning and operating of infrastructure to be used by undertakers (for example, it could include complex, novel or exceptionally large-scale construction projects that may expose customers to new financial risks) and allows them to define the term “infrastructure”, which may include parts of a project or a project in its entirety. However, the regulations must only make provision or confer functions in relation to projects or works that are of a size or complexity that threatens an undertaker’s ability to provide services for its customers (e.g. if there is a possibility that customers could be exposed to risks connected with the delivery of the projects that may result in the undertaker not being able to carry out its statutory functions or meet other obligations).
363. A new section 36B in the Act provides that the regulations under section 36A may allow the Ministers or the Authority (if the role has been delegated to it by the Minister) to specify one or more infrastructure projects which must be put out to tender. The regulations must also prohibit water and sewerage undertakers from carrying out infrastructure projects if they have been identified as the type of projects which have to be put out to competitive tender. However, the regulations may permit or require undertakers to carry out certain preparatory work associated with an infrastructure project and must also include provisions outlining which of the undertakers’ associate companies (e.g. parent or sister companies) may participate in tender processes. In addition the regulations must specify the procedures to be followed in a tender exercise.

These provisions may specify factors that need to be taken into account by undertakers when considering bids (if any) and must enable an undertaker to determine which bid to accept.

364. This section also introduces a new section 36C in the Act which requires that the regulations must specify the criteria to be used in determining whether an infrastructure project must be put out to competitive tendering. The regulations may also require the Authority to seek the consent of the relevant Minister before exercising its delegated powers under new section 36B and to publish guidance on how it will determine which infrastructure projects will be subject to tendering.
365. New section 36D provides that the regulations may enable the Authority to designate a successful bidder as an “infrastructure provider”. The regulations may:
- confer full or limited powers and duties consistent with, or similar to, those in the Act upon infrastructure providers, the Authority, the Ministers and other public bodies (e.g. the Drinking Water Inspectorate or the Environment Agency);
  - relieve water and sewerage undertakers from certain duties in relation to the infrastructure project; and
  - vary, revoke or provide conditions of appointment on the designation and provide enforcement provisions.
366. New section 36E in the Act, defines “the Minister”. It provides that the Secretary of State is the Minister in relation to any infrastructure project that is provided or to be provided for the use of any English undertakers and that the Welsh Ministers are the Minister for any infrastructure project that is provided or to be provided for the use of any Welsh undertakers. Where the infrastructure project that is provided or to be provided is for the use of one or more English undertakers and one or more Welsh undertakers the Minister is the Secretary of State and the Welsh Ministers acting jointly.
367. New section 36F provides that in relation to infrastructure in Wales (for the use of undertakers wholly or mainly in England), regulations made by the Secretary of State must require the Secretary of State or Ofwat to consult the Welsh Ministers before specifying projects which must be put out to tender.
368. In relation to infrastructure in England (for the use of undertakers wholly or mainly in Wales), regulations made by the Welsh Ministers must require the Welsh Ministers or Ofwat to consult the Secretary of State before specifying projects which must be put out to tender.
369. New section 36G provides that regulations cannot be made unless a draft has been laid before, and approved by resolution of both Houses of Parliament in relation to regulations made by the Secretary of State, the National Assembly for Wales in relation to regulations made by the Welsh Ministers, and both Houses of Parliament and the National Assembly for Wales in relation to regulations made by the Secretary of State and the Welsh Ministers acting jointly. Ministers must also consult with persons likely to be affected by the regulations before the draft is laid before Parliament or the Assembly.

### ***Section 36: Water use: temporary bans***

370. This section replaces section 76 of the Water Industry Act 1991 with a similar power to allow a water undertaker, in relation to water which it supplies, to temporarily prohibit or restrict specific uses of water. New section 76(1) allows a water undertaker to ban specified uses of water if the undertaker thinks that it is experiencing, or it may experience, a serious shortage of water for distribution.
371. A water undertaker may only ban one or more of the uses of water which appear in section 76(2). Most of the uses which appear in this list only apply to the use of water



which is drawn through a hosepipe or similar apparatus (see further section 76A(5)). However, in the case of filling or maintaining a domestic swimming pool or paddling pool, or filling or maintaining an ornamental fountain, the use of water which may be prohibited extends to all means of filling and would also cover filling by means of fixed or permanent plumbing. A water undertaker need not ban a specified use of water entirely (new section 76A(1)). It may limit the scope of a ban by, for example, excluding specified groups of customers and apparatus and restricting the use of water at specified times only.

372. New section 76(3) enables the Minister (defined in new section 76A(4) as the Secretary of State in relation to prohibitions which may be issued by undertakers whose areas are wholly or mainly in England, and the Welsh Ministers in relation to prohibitions which may be issued by undertakers whose areas are wholly or mainly in Wales) to add other uses of water to the list in section 76(2) and to remove a purpose from the list. Under section 76(3), a use of water may only be added to the list if it is for a non-domestic purpose – that is a purpose which does not fall within the meaning of “domestic purposes” in section 218 of the Water Industry Act 1991. An order adding another use of water to, or removing a use of water from, the list in section 76(2) will be subject to the affirmative resolution procedure in Parliament or the National Assembly for Wales (new section 76C(2)).
373. New section 76A(2) and (3) allows the Minister, by order, to narrow the scope of any of the listed uses. This power would allow the Minister, for example, to exempt from the listed uses, the use of water on the grounds of health and safety. It also allows for the terms used in section 76(2), such as “private motor vehicle”, to be defined further.
374. Before a prohibition can take effect, the water undertaker must publish a notice of the prohibition in local newspapers and also on its website (new section 76B(2)). New section 76B(4) requires the water undertaker to give notice this way each time the scope of a prohibition is varied in any way. The lifting of any such prohibition may take effect as soon as one form of notice has been given (new section 76B(5) and (6)). New section 76B(3) requires a notice of a prohibition to explain how representations about a proposed prohibition may be made.
375. The notice of the prohibition must set out clearly the terms and extent of the prohibition. In particular, it must specify the date on which the prohibition will commence and the part of the water undertaker’s area to which the ban will apply (new section 76(4)).
376. New section 76(5), which replaces existing section 76(3), makes it an offence to contravene a prohibition. A person guilty of the offence is liable, on summary conviction, to a fine not exceeding level 3 on the standard scale. New section 76(6) requires a water undertaker that has made a specific charge in its tariff for a use that is subsequently banned, such as the use of a hosepipe or sprinkler, to make arrangements for a reasonable reduction or refund in respect of the charge for the use it has prohibited. These provisions replace existing section 76(4) and reflect the uses of water listed in new section 76(2), which are not all limited to the use of water drawn through a hosepipe or similar apparatus.
377. New section 76C applies section 213 of the Water Industry Act 1991 (powers to make regulations) to orders made by the Minister under section 76(3) or 76A(2) and makes provision in relation to Parliamentary and Assembly procedure.

### **Section 37: Civil sanctions**

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



379. This stems from the “Macrory Report” which was concerned that some regulators were over-reliant on criminal prosecution as a means of enforcement and this can lead to a compliance gap. It recommended introducing a set of administrative penalties that would allow regulators to impose proportionate, flexible and meaningful sanctions. Civil sanctions can include financial penalties and restoration notices.
380. This section ensures that existing offences in legislation that is amended by the Act remain eligible for orders granting the ability for civil sanction alternatives to be available. In this respect it aims to preserve the status quo. Hence where an offence is currently not able to be the subject of an order to make civil sanctions available, this situation will continue. It also allows for some offences which are inserted into existing legislation to be the subject of civil sanction orders.

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

381. This section allows the Environment Agency to carry out works, under certain conditions, that may or will cause flooding, an increase in the amount of water below the ground, or coastal erosion.
382. The conditions are that the Environment Agency:
- considers that the works are either in the interest of nature conservation, the enhancement or conservation of the landscape, the preservation of cultural heritage, or peoples’ enjoyment of the environment or cultural heritage;
  - considers that the benefits of the works outweigh the harmful consequences as described in section 2(4)(a) to (d);
  - has consulted the lead local flood authority, the district council (if any) and the internal drainage board (if any) for the area in which the work is to be carried out in; and any persons who own or occupy land that, in the opinion of the Environment Agency, is likely to be directly affected by the work.
383. Subsection (5) requires the Environment Agency to have regard to the national flood and coastal erosion risk management strategies issued under sections 7 and 8 and any relevant guidance, and the local flood risk management strategies issued under section 9 or 10 for the area concerned, as well as any relevant guidance issued by the lead local flood authority for that area.
384. Subsection (6) allows the Environment Agency to arrange for works under this section to be done on its behalf by a lead local flood authority, district council or internal drainage board.
385. Subsection (7) states that the power in subsection (1) may be relied upon in combination with any existing powers under other legislation, but the conditions on the use of power under subsection (1) do not restrict, limit or relate to what the Environment Agency may do under other enactments.
386. Subsection (8) requires the Minister to make an order applying compulsory purchase, powers of entry and compensation provisions of the Water Resources Act 1991 to this section. Subsection (9) requires that such an order must be made subject to the affirmative resolution procedure
387. Subsection (10) defines “the Minister” for the purpose of this section as meaning the Secretary of State in England and the Welsh Ministers in Wales.

***Section 39: Incidental flooding or coastal erosion: local authorities***

388. This section allows a lead local flood authority, district council or internal drainage board 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. These bodies are

collectively defined as “local authorities” for the purpose of this section (subsection (6)) and that terminology is used in describing this section.

389. The conditions are that the local authority:
- considers that the works are either in the interest of nature conservation, the conservation or enhancement of the landscape, the preservation of cultural heritage or peoples’ enjoyment of the environment or cultural heritage;
  - considers that the benefits of the works outweigh the harmful consequences as described in section 2(4)(a) to (d);
  - has consulted the Environment Agency and, if the works affects a main river, gained its consent;
  - has consulted any other local authority who may be affected and any other persons who own or occupy land that, in the opinion of the authority, is likely to be directly affected by the work.
390. Subsection (7) requires the local authority to have regard to the national flood and coastal erosion risk management strategies issued under sections 7 and 8 and any relevant guidance, and the local flood risk management strategy issued under section 9 or 10 for the area concerned as well as any guidance issued by the lead local flood authority for that area.
391. Subsection (8) allows the local authority to arrange for works carried out under this section to be done on its behalf by the Environment Agency or another local authority.
392. Subsection (9) states that the power in subsection (1) may be relied upon in combination with any existing powers under other legislation but the conditions on the use of power under subsection (1) do not restrict, limit or relate to what a local authority may do under other enactments.
393. Subsection (10) allows the Environment Agency to make grants to local authorities in England in respect of work under this section. Subsection (11) similarly allows Welsh Ministers to make grants to local authorities in Wales for works under this section. No such power is required in respect of giving grants to the Environment Agency in respect of works which it might undertake section 38 because the Secretary of State and the Welsh Ministers are already empowered under section 47 of the Environment Act 1995 to make grants to the Environment Agency of such amounts, and on such terms, as they think fit.
394. Subsection (12) requires the Minister to make an order applying compulsory purchase, powers of entry and compensation provisions of the Water Resources Act 1991 to this section. Subsection (13) requires that such an order must be made subject to the affirmative resolution procedure.
395. Subsection (14) defines “the Minister” for the purpose of this section as meaning the Secretary of State in relation to England and the Welsh Ministers in relation to Wales.

#### ***Section 40: Building regulations: flood resistance***

396. This section amends Schedule 1 to the Building Act 1984. Schedule 1 supplements section 1 of that Act, which contains the power to make building regulations, by setting out in detail matters in relation to which such regulations may be made.
397. Subsection (1) inserts into Schedule 1 new paragraph 8(5A), which provides that building regulations can be made for any type of work to a building, or with respect to any service, fitting or equipment provided in connection with a building, in relation to flood resilience and resistance.

398. Subsection (2) makes a consequential amendment to paragraph 8(6) of Schedule 1 to the Building Act 1984.

***Section 41: Compulsory works orders***

399. This section provides that the amendments made to section 167 of the Water Industry Act 1991 by the Planning Act 2008 cease to have effect, so that the Welsh Ministers retain their powers to make compulsory works orders. Subsection (2) provides that the Secretary of State will no longer be able to make compulsory works orders in relation to England. Subsection (3) confirms that this amendment does not affect Welsh Ministers' functions under section 167, which are retained.

***Section 42: Agreements on new drainage systems***

400. Subsection (1) inserts a new section into the Water Industry Act 1991. It qualifies the right, under section 106 of that Act, for owners of premises and sewers to communicate with the public sewer. It provides that after this new section comes into force, that right to communicate with the public sewer via a lateral drain or private sewer may only be exercised where two conditions are satisfied.
401. The first condition is that the person constructing the sewer or drain has entered into an adoption agreement between the owner of the drain or sewer and the sewerage undertaker for the area under section 104 of the 1991 Act. The second condition is that the agreement must include provision about the standards to which the sewer or drain must be constructed, and about the adoption of the drain or sewer by the undertaker.
402. In order to satisfy the condition about construction standards, the provision in the agreement about construction standards must incorporate, or be in accordance with standards which the relevant Minister publishes, or depart from them only with the express agreement of both parties.
403. In order to satisfy the condition about adoption, the provision in the agreement about adoption must require adoption to occur automatically when certain events occur, and must comply with regulations made by the relevant Minister. These regulations will be subject to the negative resolution procedure.
404. Where an agreement which satisfies all of these conditions is in place, the sewerage undertaker may not refuse connection on the basis that the sewer or drain's mode of construction does not meet the standards that it requires (as is currently allowed by section 106(4) of the 1991 Act) or on grounds that the terms of the agreement have not been complied with.
405. This new limitation on the right to communicate with the public sewer does not apply to drainage systems which require approval under Schedule 3 of this Act (which is about sustainable drainage systems).
406. The relevant Minister may also make regulations making further exemptions from this new limitation. They will be subject to the negative resolution procedure.
407. Subsection (2) replaces section 105(2) of the 1991 Act, and allows a person who has entered into an agreement under section 104, or wishes to do so, to appeal to the Water Services Regulation Authority (Ofwat) about anything concerning the agreement.
408. Subsection (3) inserts a new subsection into section 104 of the 1991 Act which provides that undertakers must have regard to any guidance issued by the Secretary of State or Welsh Ministers concerning adoption agreements under section 104.
409. Subsection (4) makes a consequential amendment to section 112 of the 1991 Act. Section 112 allows the sewerage undertaker to require a drain or sewer to be built in a certain way in certain circumstances. This amendment provides that where that section

applies, the undertaker cannot require the drain or sewer to be built in a way which is inconsistent with or more onerous than the standards published by the relevant Minister.

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

***Section 43: Drainage: concessionary charges for community groups***

411. Subsection (1) allows water and sewerage undertakers to operate concessionary schemes for community groups for surface water drainage charges. Subsection (2) allows undertakers to decide whether to bring forward a concessionary scheme, to decide which community groups to include and what constitutes a community group, what reduction in charges to allow, and for different reductions to be granted to different classes of community group.
412. Subsection (3) prohibits charges under a concessionary scheme from being reduced to nothing. Subsection (4) provides a non-exhaustive list of what can count as a community group in terms of benefitting the local community. Subsection (5) requires the Water Services Regulation Authority (Ofwat) and undertakers to have regard to any guidance issued by the Minister around the need for concessionary schemes, which community groups should benefit and what reductions in charges to allow. Subsection (6) defines “the Minister” for the purposes of this section as being the Secretary of State for an undertaker whose area is wholly or mainly in England and the Welsh Ministers for an undertaker whose area is wholly or mainly in Wales.

***Section 44: Social tariffs***

413. Water and sewerage undertakers have the power to make charges schemes under section 143 of the Water Industry Act 1991. Such a scheme must be approved by the Water Services Regulation Authority (Ofwat) before it can take effect. This section allows for a water or sewerage undertaker to include in its charges scheme provision for a social tariff which is designed to reduce charges for individuals who would otherwise have difficulty paying in full (subsection (1)). Such a scheme may have the effect of introducing a subsidy to such individuals by other persons (subsection (2)). “Persons” includes any legal person.
414. Subsection (3) states that Ofwat’s powers in connection with the approval of a charges scheme (including any powers under the Water Industry Act 1991 which may be used to that effect) are subject to subsections (1) and (2). A charges scheme cannot be rejected on the grounds that it contains a social tariff, whether or not this includes a cross subsidy.
415. Subsection (4) requires the Minister to issue guidance in respect of subsections (1) and (2). The guidance must in particular include factors to be taken into account in deciding whether one group of customers should subsidise another. In formulating this particular aspect of the guidance the Minister must have regard to the need to balance the desirability of helping individuals who would have difficulty paying in full with the interests of other customers.
416. Both undertakers and Ofwat must have regard to the guidance issued by the Minister (subsection (5)). Subsection (6) defines “the Minister” for the purposes of this section as being the Secretary of State for an undertaker whose area is wholly or mainly in England and the Welsh Ministers for an undertaker whose area is wholly or mainly in Wales.

***Section 45: Water and sewerage charges: non owner occupiers***

417. This section inserts a new section 144C into the Water Industry Act 1991 regarding liability of payment for water and sewerage charges.

*These notes refer to the Flood and Water Management Act  
2010 (c.29) which received Royal Assent on 8 April 2010*

418. Subsection (1) of new section 144C provides that the new section applies to residential premises which are occupied by someone other than the owner of the property, i.e. tenants of a property, but also people who live in the property without paying rent.
419. Subsection (2) provides that the owner of such properties must arrange for water and sewerage companies to be given information about the occupiers of their property.
420. Under subsection (3) the occupiers' liability for payment of water and sewerage charges becomes shared (jointly and severally) with the owner if the required information is not provided to the water and sewerage company. In this case the company may choose to pursue either the occupier or owner of the property or both.
421. Subsection (4) enables Ministers to make regulations about: (a) the information that the water and sewerage company may ask for (such as name or address); and (b) the timescale within which the information must be provided, and the procedure. Subsection (8) defines the Minister as the Welsh Ministers in relation to services provided by an undertaker whose area is wholly or mainly in Wales and the Secretary of State in relation to services provided by an undertaker whose area is wholly or mainly in England.
422. Subsection (5) allows for the Minister to make further regulations exempting owners from assuming liability for water and sewerage charges, where the owner has provided information that is either inaccurate or incomplete but the owner has taken necessary steps identified in regulations to ensure that those details are accurate and complete.
423. Subsection (6) provides that within this section, "residential premises" means premises that are: (a) occupied by one or more people as a home but not necessarily as their only or main home (for example, a second home); and (b) a "dwelling", a "house in multiple occupation" or "accommodation for the elderly" in Schedule 4A to the Water Industry Act 1991.
424. Subsection (7) provides that a person who is "the "owner" of a premises by virtue of being an agent or a trustee in terms of section 219(1) of the Water Industry Act 1991 (for example someone to whom the management of a property has been assigned, such as a lettings agent) is not the owner for the purposes of this section and cannot be liable for an occupier's water bills.

***Section 46: Abolition of Fisheries Committee (Scotland)***

425. Subsection (1) of this section abolishes the Fisheries Committee as regards Scotland, originally appointed under section 5(2) of the Electricity (Scotland) Act 1979 and now governed by paragraph 5 of Schedule 9 to the Electricity Act 1989 ("the Committee"). There is no equivalent for England or Wales. Abolition is in response to the current functions of the Scottish Environment Protection Agency (SEPA) under the Water Environment (Controlled Activities) (Scotland) Regulations 2005 and the obligation on SEPA to consider the impact on the water environment, including the effect on fisheries and fish stocks, of proposals for, and the ongoing operation of, hydro-electric generation in Scotland, which activity is subject to an authorisation under those Regulations. SEPA's function in relation to hydro-electric generation is also a responsibility of the Committee, which has led to duplication in regulation.
426. Subsections (2) to (5) make consequential amendments to remove references to the Committee from the Race Relations Act 1976, the Electricity Act 1989, the Public Appointments and Public Bodies etc. (Scotland) Act 2003 and the Freedom of Information (Scotland) Act 2002.