

**EXPLANATORY MEMORANDUM TO**  
**THE FLOOD RISK MANAGEMENT FUNCTIONS ORDER 2010**

**2010 No. 2232**

**1.** This explanatory memorandum has been prepared by the Department of the Environment Food and Rural Affairs (Defra) and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

2.1 This order will make certain functions of the Environment Agency, local authorities and water and sewerage undertakers (water companies) subject to the national flood and coastal erosion risk management strategy and other provisions within the recently enacted Flood and Water Management Act 2010 (the Act). These functions relate to: (i) the preparation of flood risk assessments, maps and plans that the Agency and local authorities are required to prepare under the Flood Risk Regulations 2009, which implement the EU Directive on floods; and (ii) the statutory duty of water companies in respect of surface water, under s94 of the Water Industry Act. This is in order to ensure that these functions are exercised consistently with the broader strategic framework and subject to the powers and duties within the Act.

**3. Matters of special interest**

3.1 None

**4. Legislative Context**

4.1 Section 4(2) of the Flood and Water Management Act 2010 defines all new functions within Part 1 of the Act together with a list of functions under other existing legislation which relate to highway drainage, flood defence and land drainage, as flood risk management functions for the purposes of the Act. Section 4(2) (f) allows the Minister by order to include new functions as flood risk management functions under the Act. This is the first time that this order-making power has been used.

4.2 The order under S4 (2) will define certain functions set out in other legislation, as flood risk management functions for the purposes of the Act.

4.3 The new functions are:

- (i) the preparation of flood risk assessments, maps and plans that the Agency and local authorities are required to prepare under the Flood Risk Regulations 2009, which implement the EU Directive on Floods and;
- (ii) the statutory duty of sewerage undertakers in respect of providing sewers for surface water drainage.

4.4 The reason why the functions are being included shortly after the FWMA has been enacted are :

- The Flood and Water Management Bill was published before the Flood Risk Regulations were finalized and made, which meant that it was not practicable for the functions under those Regulations to be included under s.4(2) of the Flood and Water Management Act 2010.
- It was important to have the agreement of relevant stakeholders such as OFWAT to the precise functions of Water and Sewerage companies that were to be included and although this agreement was obtained it was too late to be included in the Bill.

4.5 Paragraph 27 of The Explanatory Notes for the Flood and Water Management Bill as brought before the House of Commons on 3rd Feb 2010 [HL Bill 28] explained Clause 4 of the Bill and indicated that the functions of water companies may be included by order.

4.6 The relevance of a function being a flood and coastal erosion risk management function under the Act is important in several legal contexts. Examples below are for England and similar provisions apply to Wales.

4.7 The main consequence of the order is to bring the new functions within the scope of strategies which will set out how flood risk will be managed at the national and local scale.

4.8 Pursuant to section 11 of the Act, these risk management functions will have to be exercised consistently with the national flood and coastal erosion risk management strategy for England. In the case of risk management functions of the risk management authorities, other than those of the water companies, such as under the Flood Risk Regulations, these will also need to be exercised consistently with local strategies drawn up by the lead local flood authority. Water companies will have to exercise their functions (under section 94 WI Act) having regard to the local strategies, as they are in a different position from other authorities, also being under the supervision of OFWAT. These additional risk management functions will also be subject to certain other provisions, such as the section 20 power to give Ministerial Directions and the duty of the Environment Agency to consult Regional Flood and Coastal Committees on the exercise of their flood and coastal erosion risk management functions.

## **5. Territorial Extent and Application**

5.1 This instrument applies to England and Wales.

## **6. European Convention on Human Rights**

6.1 As the order is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy background - What is being done and why.**

7.1 Two new flood risk management functions are being added to a list which defines flood risk management functions in the Flood and Water Management Act (the Act).

The Act was enacted in April 2010 and Part 1 of the Act provides a new framework for the management of all types of flood risk across England and Wales.

- 7.2 The Act incorporates many of the key recommendations of Sir Michael Pitt's review of the summer floods of 2007. The Pitt Review identified a lack of co-ordination across different organisations and authorities with responsibility for flood risk management and gaps in responsibility for some forms of flood risk, particularly local sources of flood risk including surface runoff, groundwater and minor watercourses. The Pitt review also identified that in 2007 existing voluntary arrangements for co-ordination and co-operation between flood risk management authorities were not working and that legislation was required to establish a formal framework for co-ordination and assign responsibility for flood risk where there were gaps.
- 7.3 The Act establishes a new national strategic role for the Environment Agency to have an overview of all types of flood and coastal erosion risk at the national level in addition to their existing responsibilities for main rivers and the coast. The Act also establishes a new leadership role for upper tier local authorities (county councils or where there is no county council the unitary) to co-ordinate the management of local flood risk including activities of other risk management authorities such as District Councils, internal drainage boards, water companies and highway authorities.
- 7.4 The Act defines the "risk management authorities" and what "flood risk management functions" are and then makes reference to these terms in sections where duties and powers apply to them. The reason why the new functions should be added is because they are important flood risk management activities which should be considered at national and local level with the other flood risk management activities to ensure that all the activities are properly co-ordinated. This was a key recommendation of the Pitt review. More specifically, inclusion of these functions will ensure that:
- *It is clear to the Environment Agency and Lead Local Flood Authorities and other risk management authorities which flood risk management functions should be included in national and local strategies.*
  - *Water companies act consistently with the national strategic frameworks and with the local framework, unless they have good reason to depart from it, in exercising their duty to provide effective surface water sewers (section 94 function).*
  - *It is clear that the EA needs to take into account the views of the Regional Flood and Coastal Committees on the Flood Risk Regulation's assessments, maps and plans*
  - *Government has the power to ensure action is taken by the authorities under the Flood Risk Regulations 2009, where this is required, without which the UK would be vulnerable to infraction proceedings.*
  - *Enable all risk management authorities to use the same powers and duties provided for within the Act whilst undertaking joint or co-ordinated actions for flood risk management.*
- 7.5 The reason why the functions were not originally included in the list of functions has already been explained in section 4.4 above.

7.6 Government has considered self regulation and voluntary codes of practice to achieve the desired objectives and has concluded that there is a need to legislate for the following reasons:

- The Pitt review identified that a voluntary arrangements for co-ordinated working between flood risk management organisations were not working.
- S20 of the Act can enforce the implementation of the Flood Risk Regulations and removes the risk of infraction by the EU. A voluntary code would not be sufficient to deal with this risk.
- The Act will ensure that water companies who have duties towards shareholders and duties towards consumers regulated by OFWAT will have to carry out these duties in a way which is also consistent with the national flood risk management strategy and have regard to local strategies. Without a legal requirement it is likely that flood risk objectives and considerations will be given insufficient consideration as has happened in the past.

### **Consolidation**

7.7 It is likely that at some point in the future the legislation will be consolidated with the Flood and Water Management Act and other Floods related legislation, in line with the Pitt Review recommendations on a single unifying Act, although currently there is no timetable for this. A specific power has been included in the Act to allow for pre-consolidation amendment to be made. The Government plans to publish a White Paper on Water in the future and this may contain proposals for consolidation.

## **8. Consultation outcome**

8.1 A full public consultation was held for the Flood and Water Management Act during the period April-July 2009. Over 600 responses were received and are compiled in the “Summary of Responses to the consultation on the draft Flood and Water management Bill from April 2009 – July 2009”. The consultation included a question (Q17) as to whether any other organisations should be added to the list of authorities required to act consistently with the national strategy. Water companies were one of the three most popular suggestions received in responses. The other two organisations were in fact already included. Many respondents felt that the sewerage industry at present was not taking an appropriate amount of responsibility and suggested that the regulations needed to be tightened.

8.2 Further formal consultation for the making of this Order was considered disproportionate, and is not required under the empowering provision. Views of key stakeholder representatives on the Local Flood Risk Roles and Responsibilities Steering Group were however sought on the proposed Order including:

- The Environment Agency
- Local Authorities and the Local Government Association
- Internal Drainage Boards
- Ofwat
- Water UK – representing Water Companies.
- Dept for Transport and Dept for Communities and Local Government.

8.3 Comments received were supportive of the order which was regarded as helpful. As a result of engagement with Ofwat and Water UK it was agreed that the enforcement powers of S18 of the Water Industry Act should apply to the functions of the Water Companies not S20 of the FWMA of the Act as this should help ensure no duplication of legislation over the water company functions.

## **9. Guidance**

9.1 No special guidance will be produced as a result of this order. The effect of the order is similar in nature to the effect of other existing functions under the Act. Any future guidance for the commencement of the Act such as Environment Agency guidance relating to the National Strategy or advice to local authorities will include information on the new functions along with information on existing functions.

## **10. Impact**

10.1 No impact on charities or voluntary bodies is foreseen. Impacts on business, principally on Water Companies are as already set out in the Impact Assessment for Local Flood Risk Management and the increased use of Sustainable Drainage systems prepared for the Flood and Water Management Bill. The IA contained assumptions that the surface water drainage functions of water companies would be functions under the Act and co-ordinated with the flood risk management functions of other authorities and part of strategies for how flood risk will be managed at a national and local level.  
([Link to the Impact Assessment](#))

10.2 The principal impacts on the public sector are as already set out in the Impact Assessment for Local Flood Risk Management and the increased use of Sustainable Drainage systems and the IA for transposing the Floods Directive in England ([Link to Impact Assessment](#)). There are potential small additional non monetised benefits to the public sector resulting from improved efficiency of local authorities because the inclusion of the new functions will help implementation by clarifying what functions are within the scope of the Act and removing uncertainty.

10.3 A new Impact Assessment has not been prepared for this instrument.

## **11. Regulating small business**

11.1 The order does not apply to small business.

## **12. Monitoring & review**

12.1 Monitoring and review of this new order will be fully incorporated into monitoring and review of the main Act which is planned within 10 years of commencement.

## **13. Contact**

13.1 Linda Aucott at the Department for the Environment, Food and Rural Affairs Tel: 01823 348403 or email: [linda.aucott@defra.gsi.gov.uk](mailto:linda.aucott@defra.gsi.gov.uk) can answer any queries regarding the instrument.