

The Flood and Water Management Act 2010

21st April 2010

Introduction

The Flood and Water Management Act (FWMA) came into effect on Monday 12th April 2010. The Act takes forward a number of recommendations from the Pitt Review into the 2007 floods and places new responsibilities on the Environment Agency, local authorities and property developers (among others) to manage the risk of flooding.

This briefing note will draw out some of the key requirements in the Act from the standpoint of a property owner or developer. To keep it to a reasonable length, it will only set out the implications of the Act in England. The full version of the Act can be accessed here:

http://www.opsi.gov.uk/acts/acts2010/ukpga_20100029_en_1.

Summary of key issues

- The Environment Agency is responsible for developing and applying a flood risk management strategy for England and Wales. Every other agency with a flood risk management function across England and Wales must take account of this strategy.
- Local authorities across England and Wales are required to develop, maintain, apply and monitor a strategy for local flood risk management in their areas. These local strategies must include the risk of flooding from surface water, watercourse and groundwater flooding.
- Lead local authorities must establish and maintain a register of structures which have an effect on flood risk management in their areas.
- The Act introduces a requirement to improve the flood resistance of existing buildings by amending the Building Act 1984.
- The Act introduces the provision for residential landlords to be charged the cost of their tenant's unpaid water bills should the landlord fail to pass on the tenants details to the respective water company for the local area.
- The Act introduces the requirements for developers of property to construct Sustainable Drainage Systems (SUDS).
- Local authorities have a duty to adopt these SUDS once completed. By adoption, the Act means become responsible for maintaining the systems.

New responsibilities placed on the Environment Agency (EA) for flood risk management (s.7)

Under the Act, the Environment Agency must develop, maintain, apply and monitor a strategy for flood and coastal erosion risk management in England (a “national flood and coastal erosion risk management strategy”).

The strategy must specify among other things:

- The English risk management authorities and the flood and coastal erosion risk management functions that may be exercised by those authorities in England;
- The objectives for managing flood and coastal erosion risk and the measures proposed to achieve those objectives;
- The costs and benefits of those measures, and how they are to be paid for;
- How the Strategy is to be reviewed.

The Environment Agency’s strategy is intended to be the overarching strategy for managing flood risk across England. Every other agency involved in flood and coastal erosion risk management functions – such as local authorities (see below), internal drainage boards, water companies and highway authorities – must take account of this strategy.

In working up the strategy, the Environment Agency must consult a number of stakeholders (including the public) and must publish a draft of the strategy and any guidance accompanying it.

New responsibilities placed on local authorities for managing the risk of flooding (s.9)

The Bill also places responsibilities for managing the risk of flooding on ‘lead local authorities’. These authorities are defined in the Bill (7 a) as the unitary authority for the area, a unitary authority meaning:

- the council of a county for which there are no district councils;
- the council of a district in an area for which there is no county council;
- the council of a London borough;
- the Common Council of the City of London;
- the Council of the Isles of Scilly.

These lead local authorities must develop, maintain, apply and monitor a strategy for local flood risk management in their areas (a “local flood risk management strategy”). Importantly, the Act specifies that the risk of flooding from surface water as well as ordinary watercourses and groundwater flows must be included in these local flood risk strategies.

The local flood risk strategies must also specify the authorities responsible for flood risk management in their areas; the flood risk management functions that may be exercised by those authorities and how the risk of flooding is to be assessed, managed and put into practice (including how the measures will be paid for).

In the spirit of the Act, local authorities’ flood risk management strategies must be consistent with the Environment Agency’s national flood and coastal erosion risk management strategy and as per the requirements for the Environment Agency, the Act states that any local strategy for local flood risk management must be consulted on.

The Act places a duty on agencies involved in flood and coastal risk management to cooperate (s.13)

The lack of co-operation between agencies involved in flood and coastal risk management was highlighted as an area of concern by the Pitt Review. The Act takes steps to rectify this by placing a duty on a relevant authority to co-operate with other relevant authorities in the exercise of their flood and coastal erosion risk management functions.

The funding issue (s. 16)

The Act does not make any commitments for funding into flood defences. However the Environment Agency is specified as the lead funding body for flood risk management and is able to make grants in respect of expenditure incurred or expected to be incurred with flood and coastal erosion risk management in England. The Act provides for any grant to be subject to conditions.

Lead local authorities must maintain a register of structures with a flood risk function (s. 21)

The Act requires lead local flood authorities to establish and maintain a register of structures or features which, in the opinion of the authority, are likely to have a significant effect on flood risk in its area. They must also include a record of information about each of these structures or features, including ownership and state of repair.

The vast majority of these structures will not touch BPF members. However, the Act does provide for the Minister to make regulations as to which structures are to be contained in the register, and Schedule 1 of the Act sets out the implications of the register on those assets and the owners of those assets whom are caught by it.

The flood resistance of existing buildings (s. 40)

Improving the flood resistance of existing buildings is a key issue of flood risk management. Unsurprisingly therefore, the Act contains an amendment to be inserted into the Building Act to improve the flood resistance of existing buildings. The full wording of the relevant clause is below:

“After paragraph 8(5) of Schedule 1 to the Building Act 1984 (building regulations: application to buildings erected before the regulations come into force) insert—

“(5A) The provision that may be made by building regulations includes provision imposing on a person carrying out work of any type in relation to a building (whenever erected), or in relation to any service, fitting or equipment provided in or in connection with a building (whenever erected), a requirement to do things for the purpose mentioned in section 1(1)(a) of this Act in so far as it relates to the resistance or resilience of buildings in respect of flooding.”

(2) In paragraph 8(6) of that Schedule after “sub-paragraph (5)” insert “or (5A)”.

Water charging on non-owner occupiers of residential property (S.45)

The Act provides for landlords of residential property to be held liable for any unpaid water bills of their new tenants, should the landlord fail to pass on the tenants details to the respective water company. More information on this can be found on a separate BPF briefing paper which can be found on the BPF website.

Sustainable drainage systems (SUDS): Schedule 3

One of the most significant implications of the Floods and Water Management Act concerns sustainable drainage and specifically sustainable drainage systems or SUDS. The Act draws a broad definition of construction work, with the result that anything that looks like the creation of a building, or the result of the construction is that the land has a reduced ability to drain rainwater, will require the developer to construct SUDS as part of the construction.

The standards for SUDS

The Act states that DEFRA shall publish national standards for the implications of sustainable drainage. These are being worked up currently by Government, and are likely to be released later this year. The standards will address the way in which drainage systems are to be designed, constructed and maintained and which developers must comply. The Act states that the Government must consult on these standards before bringing them into effect.

The application process for getting approval for SUDS

The method of approving SUDS is theoretically quite simple. The most pressing issue is whether the public authorities involved in approving an application do so in an efficient manner.

The requirement for approving SUDS is laid out in section 7 of Schedule 3. In it, the Schedule states that construction work which has drainage implications may not be commenced unless a drainage system for the work has been approved by the approving body: an approving body being a 'unitary authority' as set out in the Act i.e. the local authority or London Borough.

The Act sets out two ways in which a developer can apply to the approving body for approval of its SUDS. These are as follows:

1. If the construction work does not require planning permission, then it can be made directly to the approving body (in the correct form, with the right level of information and with the specified fee);
2. If the construction work does require planning permission then it can either be submitted on its own right or combined with an application for planning permission. Should a combined application be submitted, the planning authority must inform the applicant of the result of the planning permission and approval for SUDS at the same time.

On receiving the application, the approving body may either grant the application if "it is satisfied that the drainage system if constructed as proposed will comply with national standards for sustainable drainage" or it may act to refuse it. The Act requires approving bodies to consult the necessary stakeholders before approving a SUDS proposal.

There is no specification in the Act as to the timeliness with which the approving body must determine applications made to it. However that is not to say that the Minister will not make them in the future, for the Act contains powers for him to do so, including the ability to specify the implications of a failure to comply.

Conditions

The Act provides for conditions to be attached to the approval in specified instances, a range of conditions specified in the Act:

- (a) Relating to the construction of the drainage system;
- (b) Provided that approval takes effect only if and when the applicant provides a non-performance bond;
- (c) Relating to the inspection of the SUDS;
- (d) Requiring the payment of fees should work have to be undertaken in connection with the approval.

The payment of non-performance bonds is included as a condition of a granting of an application for approval. The bond will be payable to the approving body in two circumstances:

- (i) if the drainage system has not been constructed in accordance with the approved proposals and:
- (ii) the drainage system work is unlikely to be completed.

Should an approving body require this money it must notify the developer firstly, put the work right to the standard specified in the National Standards and should there be any excess, return it to the developer.

When calculating the value of this bond, the Act states that approving body must specify a value which does not exceed the best estimate of the maximum cost of works that is likely to be needed to ensure the drainage systems are in line with the approved proposals.

Fees

The Act provides the Minister with scope to introduce fees for applications for approval. To ensure that the fees are not disproportionate, the Act provides the caveat that the fee income must not 'significantly exceed' the costs that approving bodies incur in connection with the approval.

Enforcement

The Act contains provisions for an Order to be introduced setting out the mechanisms by which the enforcement of SUDS will be put into play. An indication of how this may be done is provided in S 14. There is a requirement in the Act for Ministers to provide a right of appeal (s 25)

Duty to adopt

The adoption of SUDS following their completion was an issue of contention as the Act proceeded through the House. The Act does contain the requirement, however, for an approving body to adopt a drainage system which is constructed to the required standard and which functions in accordance with that standard. For simplicity, drainage systems which are designed to drain a single property are not required to be adopted.

Adoption means that the approving body becomes responsible for maintaining the system and in doing so must adhere to the National Standards for SUDS.

Where next?

The Floods and Water Management Act was pushed through the House of Parliament quickly on account of a shortage of Parliamentary time ahead of the May general election. There is therefore a lot of the working detail to come; some of which may be taken forward in secondary legislation and others in regulations.

The last statements on the Bill before it was enacted into an Act provide a hint on the shape of this future work. Statements by Ann McIntosh MP – the Conservative MP – expressed the desire to undertake a white paper on flooding should the Conservatives come into power.

The Minister in charge of the Bill – Huw Irranca-Davies – provided greater certainty by making it clear that further legislation on flooding is in the pipeline:

*“On future legislation, we are in agreement. We see the need for additional engagement. Beyond Pitt's recommendations, we have the Cave report and Anna Walker's report and so much besides. **We will have to have some consolidating legislation and I am pleased to say that we are already working up some proposals internally to try to bring forward something at the earliest opportunity.** As always, this will be subject to parliamentary time but we would share the hon. Lady's aspiration to have another water Bill before the House as soon as possible.”*

The National Standards for SUDS are being worked on currently and will likely be out for public consultation later in the year.

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