



# Flood and Water Management Act 2010

## A Trojan Horse?

### What is it about?

Following the devastating floods in England during the Summer of 2007, the independent review, conducted by Sir Michael Pitt, concluded that, "*the current lack of clarity and transparency [on responsibility for flood defence] has the potential to put not only peoples homes, but lives in jeopardy*".

The Government response to the Pitt report was announced in the Queens speech in November 2009, which introduced the Flood and Water Management bill, to "*protect communities from flooding and to improve the management of water supplies*".

The bill was one of the pieces of legislation considered to be sufficiently important for the Government to ensure that it became an Act during the flurry of activity leading up to the dissolution of parliament in preparation for the forthcoming general election and it duly received Royal Assent on 8 April 2010.

While the principal aim of providing better protection from flooding and better management of water supplies is to be supported, the additional provisions included in the Act may well have unexpected and unanticipated impacts on present and future land use, development and construction.

### Designation of "features"

Under the Act, "**lead local flood authorities**" (Unitary Authorities or County Councils) are under a **duty** to implement a **local flood risk management strategy**. In discharge of that duty, they must keep a **register** of "features" which are likely to have a **significant effect on flood risk** in their area. The register will include information about ownership and state of repair.

These "features" are either structures or natural or man made features of the environment, the existence or location of which affects flood or coastal erosion risk, which will encompass, for example, walls, channels, culverts, sluices, raised ground and embankments.

Upon designation, a person may not alter, remove or replace a designated structure or feature **without the consent** of the responsible authority (normally the Environment Agency or the lead local flood authority). Since floods are, by their nature, relatively extreme events, it is therefore entirely possible that seemingly innocuous structures or landscape features may attain **considerable significance**, and now protection, in the context of flood risk management.

Depending upon the approach of the responsible authorities, the designation of features on sites may well introduce difficulties and layers of complication for present and future land use, development and construction proposals.

It is possible to appeal against designation, to apply for cancellation and to appeal against a decision on application for consent to alter, remove or replace a designated structure or feature.

There is no current provision by which a responsible authority can compel maintenance of a designated feature but the registering of information on ownership and state of repair may lead to the creation of an **indirect duty** to at least maintain the feature in its current condition.

## Sustainable Drainage

The Act imposes a duty on specified authorities to carry out their functions so as to contribute towards the achievement of sustainable development. Part of the fulfilment of this function by Unitary Authorities and County Councils lies in the issuing of consents for sustainable drainage systems. Under the Act, a new permitting requirement is introduced which **prohibits the commencement** of any construction work which has drainage implications until a drainage system for the work has been approved. This is a requirement whether or not planning permission is required.

Approval can only be granted if the approving body is satisfied that the drainage system will **comply with national standards**, to be published, addressing the design, construction, maintenance and operation of sustainable drainage systems. Approval may be made subject, amongst other things, to the provision of a **non-performance bond**, to provide financial security to ensure completion to the appropriate standards. It is possible in certain circumstances, and subject to ministerial guidance also yet to be published, for approving bodies to be under a **duty to adopt** an approved drainage system, although they may adopt voluntarily should they choose to do so. Additionally, the power under the Building Act 1984 enabling local authorities to **require an owner to carry out works** to address the unsatisfactory condition of drains is extended to approving bodies in relation to sustainable drainage systems under the Act. It is not clear yet whether this power will be used to compel the maintenance, or even the improvement, of drainage systems that have already been installed but the wording is sufficiently widely drafted to allow this to be a possibility.

## What should I do?

Bearing in mind the **potential limitations and restrictions** on present and future land use, development and construction, it is increasingly important to **monitor liaison** with the Environment Agency and other local authorities in relation to potential flood risk issues, especially if there is any indication that a designation may apply to a feature on some, or even all, of your sites. Designations, consents, approvals and refusals **can all be appealed** against but this process is likely to require specialist flood risk assessment, advice and assistance. These issues need to be taken into account not only in relation to development proposals but also in relation to the way they may affect the way in which your land is currently used.

## How can we help?

Our specialist environment team can assist with advice on the law and any associated proceedings, dealings with relevant bodies and the appointment of, and interaction with, relevant specialists as necessary.

**For more information please contact Alistair Watson or Noel Doran.**



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