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Royal Assent Granted for Flood and Water Management Act

In one of the final acts of the parliamentary session, the Flood and Water Management Act has received Royal Assent.

The final document has been slimmed down from the original and concentrates on a number of key areas as expected. The provisions of the Act are subject to the enactment of secondary legislation in the form of Statutory Instruments. These are likely to emerge between now and the end of 2012.

Surface Water Management

The section of the Act that has the greatest impact for developers remains largely unchanged from the Bill. It requires that any works that affect drainage or the ability of the ground to absorb water are approved by the SuDS Approval Body (SAB). The SAB will be the Unitary Authority or County Council in most cases. The approval will be granted subject to compliance with a National Standard on which the Minister is required to consult prior to issue.

Please see the article on page 4 for a detailed assessment of this aspect of the Act.

Reservoir Safety

As predicted, the Act has reduced the threshold volume of a large raised reservoir to 10,000 cubic metres, which will be of concern to those developers who maintain and supervise bodies of water. The definition of how to calculate this volume is to be clarified through further regulations, but it appears largely unchanged from the existing Reservoirs Act.

The reservoirs which are registered will fall into two classifications, high risk and not high risk. Our initial reading is that the provisions of the Reservoirs Act, in respect of inspection and supervision, will only apply to those in the high risk classification, these being defined as those where an uncontrolled discharge of water could endanger human life. Future regulations may also add reservoirs to the high risk category based on their construction, maintenance and use.

Where required by the Environment Agency, undertakers must prepare a Flood Plan (i.e. an emergency plan covering required actions in the event of an impending or actual dam breach, introduced in the Water Act 2003) in consultation with the Supervising Engineer.

Flood and Coastal Erosion Risk Management

The emphasis here is on production of national and local strategies in accordance with the Flood Risk Regulations 2009. This places a duty on the Environment Agency and Local Authorities to produce these strategies and supporting information within a prescribed timescale.

There is a new ability to designate features which affect flood and coastal erosion risk, this may be of concern to landowners in flood risk areas. The circumstances under which this designation can be made have now been clarified. Now, there are to be specific provisions for appeal against the designation itself and also applications for consent to modify a designated feature.

The key message is that the roles are now clarified and all sources of flooding are

now catered for. It is also reasonably clear that all local strategies will be subservient to the national strategy produced by the Environment Agency. The Environment Agency will also provide guidance to local authorities, to which they must adhere.

Water Resources

Little has changed in regard to water resources that would be of interest to the development community.

Overall, we will continue to monitor the Act as it is implemented and consultation on new legislation is announced. The Act itself may be slimmer, but we expect to see the other

elements from the original Draft Bill emerge over the coming months.

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To keep up to date on the latest developments in Flood Management, visit Paul's blog at www.peterbrett.com/blogs, or follow him on [www.twitter.com/paulcjenkin](https://twitter.com/paulcjenkin).

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Flood and Water Management Act 2010 Removes Ambiguities for SuDS

The proposed changes for the implementation of sustainable surface water drainage systems remain largely unchanged from those originally made in the Draft Bill, although the ambiguity surrounding many issues is now resolved.

The Secretary of State will publish National Standards covering the design, construction, operation and maintenance of Sustainable Drainage Systems (SuDS), following a consultation exercise later this year. With sustainable drainage essentially now a mandatory requirement, we eagerly await the National Standards consultation to assess the implications on land development density and cost.

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Arguably the biggest change is the creation of new Approval Bodies for surface water drainage design and consent, which is separate from the planning process. Without the Approving Body's consent, no construction work can commence on a project.

There will be two types of SuDS approval, firstly a free standing application for work where no planning consent is required, and secondly, a combined planning and SuDS application process.

Although there is a combined approval mechanism, this remains in effect a twin approval process, where planning consent could be obtained but SuDS approval potentially refused.

Where the Approving Body is also the planning authority in the case of a unitary authority we would expect the SuDS approval process to be integrated into the planning system. However, it remains to be seen whether in practice the new approval process will become an onerous constraint where the responsibilities are shared between first and second tier authorities.

Any approval given by the Approving Body may be subject to conditions including: the requirement for providing a non-performance bond, payment of fees and inspection requirements.

The automatic 'right of connection' to a public sewer has been removed by the Act and connection can only be obtained where the drainage system has been approved by the SuDS Approving Body.

The good news is that any proposed connection to a public sewer which has associated Approving Body consent cannot be refused by the sewerage undertaker on the grounds that it will convey land drainage, which has been a problem in the past.

Another benefit for developers is that the Approving Body now has a duty to adopt SuDS, which have been approved and constructed in accordance with the National Standards. The Approving Body can adopt a drainage system on its own initiative or upon the request of a developer. Therefore, the option to retain systems within private ownership will remain for developers wishing to hold and maintain assets.

The duty to adopt does not apply to systems or parts of systems that drain single properties. Publicly maintained roads are also excluded.

More guidance, policy and subordinate legislation will follow, bringing into force the various sections of the Act, throughout the course of this year.

Visit Dan's blog at www.peterbrett.com/blogs to share your views on the latest SuDS developments.

Daniel Hayes
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“With sustainable drainage essentially now a mandatory requirement, we eagerly await the National Standards consultation to assess the implications on land development density and cost.”

Energy Act 2010

It is clear in the Energy Act 2010, which recently received Royal Assent, that the Government is serious about following its Low Carbon Transition Plan to achieve reductions in carbon dioxide emissions of 34% by 2020 and 80% by 2050.

This Act forms part of the first wave of instruments to take the UK into a low carbon and resource efficient economy.

The main focus of the Act is to apply British Carbon Capture and Storage (CCS) theoretical capabilities into deliverable and demonstrated projects. To pay for this, the Act has introduced the potential for the Government to apply an electrical levy to electricity suppliers, the levy will be managed by Ofgem.

How this electrical levy will be enacted is yet to be decided, but the resulting funds raised are intended to support CCS projects. It is understood that the sum which will need to be raised is in the region of £9 billion over the next 10 years. Inevitably, the electricity suppliers will pass this cost onto consumers, adding what could be in excess of 3% to electricity bills.

If the Government decides to increase the capital sums and shorten the time scales, the impact on our electricity bills will be greater still.

From the Energy Act 2010, Ofgem obtains great regulatory powers to tackle market exploitation and drive the low carbon transition. In addition, the Act provides a mandatory social price support mechanism to help alleviate social fuel poverty.

We support the position the Government is taking to drive a low carbon economy and expect to see further legislation that will drive companies and individuals to become resource efficient. However, rather than considering our future as “carbon constrained”, we favour a more positive outlook: being resource efficient will enhance and benefit the way we do business.

There is no escaping the reality that to make national low carbon infrastructure such as CCS more economically viable, the price of carbon will need to rise. This will impact all businesses that consume resources.

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“Rather than considering our future as “carbon constrained”, we favour a more positive outlook: being resource efficient will enhance and benefit the way we do business.

IPC Opens for Business

The Infrastructure Planning Commission (IPC) is a new independent body established by the government to consider planning applications in England and Wales for nationally significant infrastructure projects, such as power stations, large wind farms, major roads, railways, airports and harbours.

The body has been set up to provide a more streamlined development consent process for large infrastructure projects some of which, in the past, have been beset by delays in the process of obtaining consent. On 1st March 2010 the IPC formally opened its doors to receive applications from the energy and transport sectors – other sectors will be ‘switched on’, in a phased manner.

National Policy Statements (NPSs) setting out the government’s policy on infrastructure will be used as the basis for the IPC to make a decision. Twelve NPSs are planned at present and are being rolled out over the next two years. The following draft NPSs have been through a period of consultation and will be finalised later this year:

- Overarching National Policy Statement for Energy
- Renewable Energy Generation – including wind farms, energy from waste and biomass plants
- Fossil Fuel Electricity Generating Infrastructure – gas, oil and coal fired power stations
- Gas Supply Infrastructure and Pipelines
- Oil Pipelines
- Electricity Networks Infrastructure – power lines and substations
- Nuclear Power Generation Plants.

The government’s programme for issuing the remaining NPSs is:

- National Networks – road and rail networks (draft early 2010, finalised during 2010)
- Waste Water - (draft early 2010, finalised during 2011)
- Hazardous Waste (draft mid 2010, finalised during 2011)
- Water Supply (draft late 2010, finalised early 2012)
- Airports (draft early 2011, finalised during 2011).

The IPC does not have the power to decide an application until a NPS is formally designated by the government. Until then the IPC will make a recommendation to the relevant Secretary of State who is required to make a decision within three months of the IPC recommendation.

PBA is currently involved in several projects which are likely to follow the IPC consent route, the first of these projects is due to be submitted next month and we are working with clients and associated professionals to ensure that the requirements of the new consent regime are adequately addressed.

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The Marmot Review on Health Inequalities

The Marmot Review “Fair Society, Healthy Lives” was published in February 2010. It was commissioned to review inequalities in health in England and advise on policy measures that would contribute to a strategy to address health inequalities beyond 2010.

Even in the 21st century there are dramatic health inequalities across all regions in England. The difference in average life expectancy of people living in the richest and poorest areas of England is seven years, while a male living in Kensington and Chelsea can expect to live for 17 years longer than a male in Tottenham Green. There is also a difference in the quality of life between rich and poor areas - the average difference in disability free life expectancy is 17 years. Therefore people who live in poorer areas not only die sooner, but will also spend more of their shorter lives with a disability.

The review concluded that these differences do not arise by chance and cannot be attributed simply to genetic make up, behaviour or access to medical services; the relationship between social circumstances and health is a graded one. It found that differences in health status reflect and are caused by social and economic inequalities in society. These “social determinants of health” are at the core of the Health Impact Assessments (HIA).

The review identifies six key policy objectives. Delivery will require collaborative working across the public, private and third sectors. The report recommends that “all national and local policies and strategies should be routinely scrutinised through a health equity impact assessment”.

Policy Objective E, in particular, focuses on the creation and development of healthy and sustainable places and communities. This should go hand in hand with climate change mitigation – an ethos which underpins our work. Policies and interventions that both reduce health inequalities and mitigate climate change should be prioritised. These include improving: active travel, the availability of good quality open and green spaces, the food environment in local areas and the energy efficiency of housing across the social gradient.

Increasingly Local Authorities are requiring completion of a HIA to accompany major planning applications. HIAs seek to identify potential positive and negative impacts on health arising from urban regeneration and other land development. As the main determinants of health are socio-economic, HIA takes a broad view, looking at potential impacts on the health and wellbeing of the communities potentially affected.

In many ways, the Marmot Review does not tell us anything new. However, it does provide opportunities for professionals in transport planning, placemaking, behaviour change, sustainability, environment and health to work together under a single agenda, encouraging us all to think holistically for greater health equity.

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Asbestos: The Survey Guide

At the start of 2010, the Health and Safety Executive (HSE) published the New Guide to Asbestos Surveys. It updates and replaces MDHS100: Surveying, sampling and assessment of asbestos-containing materials.

Survey types are now changed from the former Types 1, 2 and 3 Surveys to more logically classed Management Surveys (to facilitate production of a Management Plan) and Refurbishment or Demolition Surveys to provide adequate information to safely carry out this type of work on buildings.

The overall approach and principles have not changed significantly; however, the guide is far more user friendly, giving advice both to the surveyor and the client/dutyholder, including what data should be provided, gathered and presented.

Regulation 4 of the Control of Asbestos Regulations (2006) places a duty on the owners and occupiers of non-domestic premises, who have maintenance and repair responsibilities, to assess and manage the risks from the presence of asbestos. However, vast numbers of such duty holders have no management plans and those that do often have very poor quality and out of date records.

“the guide is far more user friendly, giving advice both to the surveyor and the client/dutyholder”

The HSE does not currently appear to be dragging these huge numbers of non-compliant duty holders through the courts, without some prior incident, such as an uncontrolled exposure. But, when they do, it can have a substantial financial impact.

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Code of Practice on the Definition of Waste

It has been reported in a previous Environews that a Code of Practice (CoP) was issued in late 2008 on the Definition of Waste. The CoP gives guidance on how to demonstrate that material is not waste or ceases to be waste.

Connected with this, the Environment Agency (EA) has taken a tough stance on soil arisings from construction sites. It recently confirmed its position that it will accept transfer of natural soils (whether they are derived from greenfield or previously used sites) using the CoP and they can be reused without the need for an Environmental Permit (formerly a Waste Management Licence). This means they are not waste.

However, the EA is not yet prepared to accept transfer of contaminated soil or made ground even though it may be suitable for use on the receiving site. Such materials are deemed to be wastes and are likely to require an Environmental Permit or Mobile Treatment Licence before they can be transferred from one site to another.

“The Environment Agency is not yet prepared to accept transfer of contaminated soil or made ground even though it may be suitable for use on the receiving site.”

Under the CoP, a Materials Management Plan (MMP) is required on most development sites and the EA has stated that it plans to scrutinise developments of companies who are not submitting MMPs. This ties in with new regulations on Environmental Permit exemptions that came into force on 6 April 2010. Anyone wanting to carry out a new waste-related activity after this date will need to register one of the new exemptions or apply for an Environmental Permit.

There are often hurdles to be cleared when planning to move construction arisings from one site to another or indeed handling any construction wastes. Please get in touch if you wish to discuss specific circumstances.

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Feed-In-Tariff: Make Money Through Your Building

The UK Government recently announced the introduction of Feed-In Tariffs (FIT), commencing in April 2010, which are paid to individuals, communities or businesses using technologies that generate up to 5MW of renewable energy. The supplier and installer need to register with the Microgeneration Certification Scheme (MCS).

The intention is to encourage all levels of microgeneration in the UK by producing a return of between 5% and 8% on the investment required. The tariffs will be payable for a set period, generally 20 or 25 years, with the tariff increasing annually with inflation. So if you or your client have a suitable building you can earn some money. Typically costing £4–6000/kW, photovoltaics (PVs) will earn 30 to 40p/kWh generated.

There is a small wrinkle in the tariff rates in that the starting rate will reduce in future years through a mechanism called “digression”. This is all part of a carefully calculated approach to encourage the maximum investment in microgeneration to kick-start the industry whilst introducing a rebalancing of returns as the costs reduce with volume over future years.

The FIT pays a rate to generators of <5MW simply for generating the electricity. The electricity consumed, up to the quantity generated, is free of charge and any excess supplied to the grid is rewarded at a further premium, currently set at 3p/kWh. The tariff varies with the technology. For example, a typical retrofitted PV installation would pay

41.3p/kWh. Add the saving for existing electricity consumption at 11p/kWh and it looks attractive but advice is needed to ensure the quoted generation will be achieved. The position and orientation of the PVs is critical to performance.

“a typical retrofitted PV installation would pay 41.3p/kWh”

There are concerns about the real performance of PVs and therefore the actual returns that might be achieved. Also the FIT for Anaerobic Digestion makes it less attractive than using the Renewables Obligation Certificate (ROC) where a certificate is issued per MW hour of eligible renewable output generated. Whilst the number of opportunities for Anaerobic Digestion installations will be small in overall terms, there is a real need to consider the economic drivers for diverting putrescible waste from landfill.

In contrast, the performance of PVs may not be as good as suggested, but the sun is a permanent energy source which will mean some return on the investment. Renewable Heat Incentives are being considered by Department of Energy and Climate Change at present.

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Government Review on Definition of Contaminated Land

SPOSH? Although you may think it's a great sound effect, in the contaminated land world it represents the concept of Significant Possibility of Significant Harm. Precisely what constitutes significant in terms of harm is something with which the contaminated land industry continues to grapple.

At present there is no clarity as to what level of contamination is unacceptable to current or proposed land use or a water body. This uncertainty stems from Government Statutory Guidance lacking clear definition of a contamination level that results in Significant Possibility of Significant Harm and hence, the land being 'contaminated'. This deficiency is leading to regulators and practitioners being overcautious, resulting in unnecessary remediation or exposure to inappropriate risk.

To address this situation, Defra has been asked by Ministers to review the Statutory Guidance. This is not a review of Part IIA of the Environmental Protection Act but is targeted at key issues in the Statutory Guidance such as:

- Retaining the focus on risk-based assessment.
- Better definition of SPOSH.
- Definition of significant water pollution.
- Update to reflect Environmental Damage Regulations.

Our industry has severe reservations about the models used in calculating generic assessment values. Currently, Defra will not produce any assessment values on the basis that these could be open to challenge. In our

view, this seems at odds with the government already prescribing levels of contaminants in drinking water, air quality and pesticides in food, for example.

We have an opportunity to influence Defra both in drafting the consultation paper (due in the summer) and during the consultation itself. At PBA, we are taking this opportunity seriously and have met with Defra and industry leaders to engage in the review to the benefit of our clients.

As we work within the industry to define SPOSH, we welcome your views and comments.

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Updates in Regulation of Controlled Waters

The Water Act 2003 adds to and modifies (but does not replace) the Water Resources Act 1991. Key areas that are due to come into force shortly are the change to the abstraction licensing regime and discharge permits which could affect anyone involved in land development.

Abstraction

Licences are now required for dewatering activities in connection with civil engineering, quarrying and mining which were formally exempt from requiring abstraction licences under the Water Resources Act (1991).

The types of abstraction licence required for surface water and groundwater are: 'temporary' (under 28 days), 'full' and 'transfer'. Licences are required where more than 20m³ per day is to be extracted. This is a small quantity that could easily be exceeded in many foundation dewatering exercises.

Transfer licences are appropriate where water is transferred to another source of supply, e.g. from an underground aquifer to a canal, or where water is transferred to the same source of supply at a different location without intervening use, e.g. construction dewatering.

Note that if the abstracted water is used prior to returning it to its source, as in gravel washing or wheel washing, a transfer licence is not appropriate and a full licence is required.

Implementation of the new licence system was originally due to come in during October 2009. This date has been revised and implementation is expected during 2010.

Discharge Permits

Liquid discharges to controlled waters are now regulated under the Groundwater (England & Wales) Regulations 2009. The Environment Agency (EA) should be able to grant, on request, permits for the following activities:

- Construction and civil engineering (these processes will effectively be policed under abstraction licensing);
- Injections required for exploration for petroleum or mining (drilling);
- Reinjection of water abstracted for mining or quarrying (processes policed under abstraction licensing);
- Reinjection of water used for geothermal purposes;
- Augmentation/artificial recharge for groundwater resource management.

All other activities will need a more detailed application which should include: a summary of the hydrogeological conditions of the area concerned, an estimate of the purifying potential of the soil and subsoil and an assessment of the risk that the proposed discharge may alter the quality of the water being discharged into.

The EA, in granting the Permit, must ensure that all necessary measures are taken to prevent the discharge of hazardous substances into groundwater, and to limit the introduction of non-hazardous pollutants into groundwater to ensure that pollution is not caused. Permit holders will need to ensure they meet ongoing conditions of their Permits thereafter.

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Knotweed Update: An Invasive Pest to Control an Invasive Weed

Huw Irranca-Davies, Wildlife Minister, has given the go-ahead for the release of Japanese psyllids (insects) to manage and control the growth of Japanese Knotweed.

This decision comes after CABI research into a possible biological control, Japanese psyllids, for Japanese Knotweed. There has been a three month consultation period, supported by the findings of the CABI research. The psyllid, called *Aphalara itadori*, will weaken the plant by sucking sap out of it. The research suggests that the survival of the psyllid on any other plant is unlikely.

We responded to the consultation, supporting the use of psyllids in controlling Japanese Knotweed while highlighting the importance of having strict controls on the release of these non-native insects.

It is expected that the psyllid will be released to a few areas and closely monitored before nationwide release. The psyllids will reduce the dominance of the Japanese Knotweed so there is a natural balance of the plant. This will protect drainage, concrete and foundations while preventing natural flora and fauna from being displaced. It will also reduce the costs of control of the invasive weed by conventional methods.

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“It is expected that the psyllid will be released to a few areas and closely monitored before nationwide release.”

Insert: Transport Assessments

A fundamental part of transport assessments for new developments is to ensure sustainable modes are available. As the transport sector contributes 21% of total UK domestic greenhouse gas emissions and has a detrimental impact on air quality, an increase in sustainable travel can have a positive effect on the environment. Knowing which type of assessment is needed for the scale of a proposed development minimises its impact on the environment.

We've created a handy guide (enclosed) that demonstrates the type of assessment required by Department for Transport guidelines for different developments.

While Peter Brett Associates LLP has prepared this briefing document with care and diligence to inform its clients, the information provided reflects the views of the individual authors and does not constitute advice. Please contact us if you wish to discuss further how industry developments and legislation could impact your particular development or business.

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