

Consultation on implementation of the Sustainable Drainage Systems (SuDS) provisions in Schedule 3 of the Flood and Water Management Act 2010

Summary of Consultation Responses

August 2012

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Any enquiries regarding this document/publication should be sent to us at:

SuDS Team, Defra, Area 2A, Ergon House, London SW1P 2AL

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Consultation information and coverage

The consultation on the implementation of provisions on Sustainable Drainage Systems began (and was published) on 20 December 2011 and ended on 13 March 2012.

This consultation presented our proposals to implement the requirements for sustainable drainage systems (SuDS) in new and redeveloped sites in England, which are provided for in Schedule 3 of the Flood and Water Management Act (2010).

In the consultation we asked specifically for views on the:

- a. Impact Assessment;
- b. Draft National Standards; and
- c. Draft Statutory Instruments, including proposals for approval and adoption.

To support implementation, we also proposed developing guidance to support the National Standards for Sustainable Drainage in collaboration with interested parties (paragraphs 1.30 to 1.32 of the consultation document refer). We invited expressions of interest from participants who would like to contribute to work to further develop the guidance.

Introduction to the policy

Surface water flooding is a serious problem. Of the 55,000 properties damaged in the summer of 2007, two-thirds were flooded by surface runoff overloading drainage systems. More recently, surface water flooding has had a significant impact on homes and businesses during the wet start to the 2012 summer.

Despite significant improvements in the quality of our rivers and groundwater in recent years, the damaging effects of diffuse pollution are of increasing concern.

Conventional piped drainage has a limited capacity and is usually designed to convey surface runoff rapidly from a development; it also provides no facility to control diffuse pollution. Significant investment is required to increase the capacity of our sewerage system, which struggles to cope with the high volumes of surface runoff and the increasing costs of improving water quality.

The SuDS approach makes use of different techniques, such as infiltration and retention, which mimic runoff from the site in its natural state. Rainwater should be managed close to its source and on the surface where possible. As a result the water is stored and released slowly, reducing flood risk and improving water quality. Less surface runoff frees up capacity in our sewers, whilst more natural materials improve biodiversity and amenity. Examples of SuDS techniques include permeable paving, soakaways, green roofs, swales and ponds.

SuDS can be used effectively in both rural and urban areas and help support new development without adding to the risk of flooding or pollution.

Government policy already encourages developers to build SuDS. However, we estimate that as few as 40% of new developments and redevelopments are drained by SuDS of some sort; and uptake has been slow.

Sir Michael Pitt's review of the 2007 floods identified a number of factors that contribute to the slow uptake of SuDS. His recommendations to resolve these issues included:

- A call for Government to resolve the issue of which organisations are responsible for the ownership and maintenance of SuDS.
- The removal of the automatic right to connect surface runoff from new developments to the sewerage system.

Government supports these recommendations and therefore developed the proposals to increase the use of SuDS in new developments and redevelopments wherever possible by establishing National Standards that maximise the benefits this approach offers. In order to do this The Act includes Schedule 3 for SuDS.

Schedule 3 to the Act requires construction work with drainage implications to have its drainage systems for managing surface runoff (including rainwater, snow and other precipitation) approved before construction may begin. A SuDS Approving Body (SAB) will be established in unitary or county local authorities to approve and, where appropriate, adopt SuDS.

The Act requires the Minister to publish National Standards on the design, construction, operation and maintenance of SuDS. In order for drainage applications to be approved, the SAB must ensure that the applicant has designed the SuDS in accordance with the National Standards. Once approved, the SAB must adopt and maintain those SuDS that are functioning properly and serve more than one property.

The Act amends the Water Industry Act 1991, making the right to connect surface runoff to public sewers conditional upon the drainage system being approved by the SAB.

The draft National Standards we proposed, when read with the four draft statutory instruments, were intended to provide sufficient underpinning detail to support the policy.

The four draft statutory instruments deal with:

- Approval and adoption;
- Enforcement of the requirement for SAB approval;
- Procedural matters relating to approval and adoption; and
- Appeals against SAB decisions.

It is our intention that the measures that we are proposing will not delay development or the planning application and determination process. We are also mindful of current planning reforms, including Government's work on simplifying the planning system. We also therefore sought views on aspects of the SAB approval process that could be simplified.

Responses received: a summary

We received a total of 302 responses to the consultation. We wrote to key stakeholders advising them of the date of consultation launch and the detail on how to respond, but the consultation was open to anyone to submit a response.

We published the full draft proposals, including the Statutory Instruments, Standards and policy implementation proposals, along with a series of 29 specific questions. These questions were asked with open text boxes but also by way of a "box tick" survey to enable and support fast responses from those who did not have additional text to insert. For those who wanted to supply additional information, an alternative method of responding was provided.

A significant number of respondents provided additional comments not related to the consultation questions. The detail of this additional information has been captured and will be used throughout the development of implementation plans.

In addition to the formal consultation activity we also ran informal consultation workshops where we gathered views from stakeholders. These were attended by upwards of 80 stakeholders each time, ranging from Local Authorities to Internal Drainage Boards and consultants, and took place from 2pm – 5pm each day over a period of three weeks in early 2012 as follows:

- 7th Feb – Ambassadors Bloomsbury Hotel, London,
- 8th Feb - Ambassadors Bloomsbury Hotel, London
- 9th Feb - Holiday Inn, Southampton,
- 21st Feb - Armada House Conference Centre, Bristol
- 22nd Feb - Aston Business Conference Centre, Birmingham
- 23rd Feb - Great Northern Hotel, Peterborough
- 28th Feb - Millennium Galleries, Sheffield
- 29th Feb - Gateway Centre, Warrington
- 1st March - Newcastle Civic Centre, Newcastle Upon Tyne

The comments and input received at these workshops was collated and has also been fed into the consultation analysis.

Our stakeholders groups for this consultation are varied but comprise mainly of Local Authorities, Consultants, Developers, Drainage Boards and Water Companies. Although we have quantitative data on the number of respondents to consultation questions and issues (and this is sometimes highlighted in the summaries below) we have taken into account that there are more respondents in some stakeholders groups than others. Therefore our responses and summaries have drawn on informal evidence and discussion to enable us to get a richer picture of the situation and preferences, and take decisions on the weight and balance of evidence wherever possible rather than solely on the number of responses.

We received a large number of additional comments and views relating to the wider policy proposals for Sustainable Drainage Systems. We have registered these views and will take them into account at the appropriate points in the policy development process.

Summary of responses for each question

Question 1

We have based our proposals on the evidence, outlined in our Impact Assessment, of the impact of surface runoff on future development and the benefits of SuDS. Do you have any additional evidence that may alter the recommendations of the Impact Assessment?

97% of respondents to the survey and consultation questions replied to this question. However, because of the detailed nature of responses, the analysis for this question has largely been qualitative rather than quantitative.

A significant number of respondents provided comments and additional evidence and this information has been provided to our economists for consideration. Amongst the additional points raised were:

- That the FTE equivalent calculations for staffing of a SAB and getting the right skills underestimated the resource implications (particularly in two-tier authorities);
- That water quality and biodiversity benefits should be included/better monetised;
- That land-take should be calculated and taken into account;

- That the benefits calculated assumed large-scale uptake of SuDS, which may not be the case;
- That the assumptions made should be revised given changes in the economic climate;
- That whole-life costs and benefits of SuDS should be better taken into account.

We will consider these and the other points raised.

Question 2

We propose that SAB approval will not be required for the first 12 months:

- **for developments that already granted planning permission before commencement; or**
- **for developments with one or more reserve matters where an application for approval of the reserve matter(s) is made; or**
- **for which a valid planning application has been submitted before commencement**

Do you agree with this approach for transitional arrangements, if not please explain why?

The majority of respondents agreed with this proposal. Of the 29% who disagreed, the majority of those disagreed only with the final bullet point.

Question 3

We propose implementing on the common commencement date of 1 October 2012, do you agree this is reasonable? If not would you prefer an implementation date of April 2013, October 2013 or after 2013?

70% of respondents favoured an implementation date later than October 2012. For this reason, and because information received during our informal consultation work suggested that October 2012 would not be possible, we decided to announce early that implementation would not take place in October 2012.

We acknowledge the point made by many respondents that adequate time to prepare, leading up to any implementation date, is preferred.

We will consider the responses to this question.

Question 4

We understand that there may be capacity issues for SABs to meet their new duty to approve drainage. We are therefore considering whether to phase implementation of the requirement for approval. Do you think a phased approach is necessary?

62% of respondents agreed that a phased approach was necessary. Some of the specific comments were:

- Phasing allows skills and resources to be built up (though an opposite view was expressed that phasing adds to resourcing uncertainty)
- Phasing allows experience to be shared and learned from, starting smaller and learning as we progress

Despite the majority view, amongst the concerns were expressed by some parties were that:

- Phasing could result in “orphaned” SuDS
- Starting with fewer developments could result in little or no work for some SABs
- The resultant lack of capacity would lead to approval delays.

We will consider the responses to this question.

Question 5

Do you agree that development under a Neighbourhood Development Order should be exempt from the requirement of SAB approval?

We will consider the responses received to this question.

Question 6

Drainage for surface runoff should be sustainable and affordable to build and maintain. Do the National Standards deliver this, if not please explain why?

98% of respondents answered this question. Of those, most thought that the standards did not deliver this. In the main, the concerns raised were:

- That the definitions should be clarified;
- That good underpinning guidance should be produced to aid interpretation;
- That the technical detail was not yet right in places.

We will consider the responses to this question.

Question 7

Affordable sustainable drainage systems for surface runoff are comparable in costs with conventional alternatives. Do you agree?

82% of respondents answered this question. 52% of those respondents disagreed. There were polarised views. Some of the points raised were:

- That the answer to this depended heavily on site-specific circumstances;
- That unquantified amenity and biodiversity benefits meant that SuDS could be cheaper;
- That land-take implications meant that SuDS could be more expensive;
- That whole-life costs and benefits should be taken into account;
- That the definitions (e.g. of conventional, affordable) need more explanation.

We will consider the responses to this question.

Question 8

We propose that the SuDS Approving Body must determine an application for approval within 12 weeks where it relates to major development or a county matter and 7 weeks where it relates to other development. But could applications be determined in less time? If yes, please specify reduced time to consider applications:

- **1 week less**
- **3 weeks less**
- **5 weeks less**

52% of respondents to this question agreed with this timescale. Of those that disagreed, the majority thought that a shorter timescale was more appropriate. A few thought that timescales should be longer.

We will consider the responses to this question.

Question 9

Do you think guidance for calculating the amount required for a non-performance bond is necessary?

92% of respondents to this question consider that guidance is necessary. Of the small number disagreeing, comments mainly related to a desire for locally determined calculations.

Question 10

Do you agree with our proposals to set approval fees for three years? If you disagree, please explain why and provide any supporting evidence.

A small number (just over 10%) of respondents to this question disagreed with the proposal to set fees for three years. The main reason was that it was felt that it should be possible to evaluate the fees after an operating period of between 12 and 18 months. There were requests that increases to fees after this time should only occur in line with inflation.

We will consider the responses to this question.

Question 11

We propose that the fee for each inspection of the drainage system should be set on a cost recovery basis rather than to a fixed fee. Do you agree with this proposal?

17% of respondents to this question disagreed with this proposal.

We will consider the responses to this question.

Question 12

We propose to make arrangements for fees for applications to vary an approval, re-submitted applications, discounted fees, fees for cross area approvals as well as the refunds of application fees. Do you agree that this covers all the scenarios for which fees are likely to be needed? If not, please explain what is missing and provide further explanation if required.

60% of respondents to this question agreed that the proposal covers all likely scenarios. Most positive responses were short and unqualified. Of those that disagreed, the main points raised were:

- Fees for other processes (e.g. enforcement, monitoring and final adoption) should be covered
- Fees for re-submitted or withdrawn applications should be considered
- A refund mechanism and pro-rata model should be covered

We will consider the responses to this question.

Question 13

We propose setting a time limit of 21 days for statutory consultees to respond to the SAB. Do you agree with the timeframe proposed?

90% of respondents agreed with this timeframe. The small number of opponents were divided in their reasoning – some examples given were:

- The 21 day period would be a significant part of the SABs 7-12 week response time
- Knowledge gaps might mean that this timescale could not be met.

We will consider the responses to this question.

Question 14

We propose to give enforcement powers to the SuDS Approving Body and the local planning authority. Do you agree?

81% of respondents agreed with this proposal. Of those disagreeing, reasons cited were:

- That problems could arise within two-tier authorities - who leads on enforcement, for example;
- That enforcement action should be taken against owners, not developers
- That it could be difficult to obtain the right enforcement officer resource/training.

We will consider the responses to this question.

Question 15

Do you agree that the proposed powers of entry are reasonable and proportionate, if not please explain why?

79% of respondents agreed that the proposed powers of entry were reasonable. Of those disagreeing, reasons cited were:

- That the measures seem excessive when compared with other regulatory instruments (e.g. Building Regulations);
- That with non-performance bonds in place, these measures seemed unnecessary;
- That the powers of entry cease once a drainage systems is adopted – there was some suggestion that the powers should continue to apply.

We will consider the responses to this question.

Question 16

We propose that claims for compensation related to powers of entry and temporary stop notices must be submitted within 12 months of the powers being exercised or the notice being withdrawn/ ceasing to have effect. Do you agree, if not please explain why?

76% of respondents agreed with this proposal. Of those comments against, examples were:

- That there should be no time limit for compensation
- That the circumstances surrounding powers of entry should be more clearly defined
- That there was no need for the ability to claim compensation unless a stop notice is/was found to be unlawful.

We will consider the responses to this question.

Question 17

We propose that, as in planning, a time limit of four years is set for when the SuDS Approving Body is able to give an enforcement notice? Do you agree, if not please explain why.

74% of respondents agreed with this proposal. Common themes against were:

- It may take many years for the right storm conditions to test un-consented works
- If a drainage systems has been constructed without approval there should be no time limit on discovery of the breach

We will consider the responses to this question.

Question 18

Are the criminal offences proposed in the draft statutory instrument appropriate and proportionate?

91% of respondents agreed that the criminal offences were appropriate and proportionate. There were a small number of fairly polarised objections. Amongst these were that:

- Failure to comply ought to be a criminal offence determinable in the magistrates courts
- The suggested fine levels are inadequate and should represent a deterrent as well as covering the impact on public finance
- The suggested fine levels were excessive and unfair.

We will consider the responses to this question.

Question 19

We propose to provide similar procedures for appeals against SuDS enforcement notices to those which currently apply to planning enforcement appeals (written representation, hearing or inquiry). Do you agree, if not please explain why?

90% of respondents agreed with this proposal. Of the small number disagreeing, some of the points made were:

- That the appeals process is too lengthy
- That an inquiry should only be held in extremis
- Once the SuDS infrastructure has been adopted, no enforcement notice should be issued
- The notices are too complex

We will consider the responses to this question.

Question 20

We propose a register of SuDS enforcement notices which mirrors the register for planning enforcement notices. Do you agree?

94% of respondents agreed with this proposal. The concerns expressed by those who disagreed related mainly to the enforcement process as a whole rather than the proposal to keep a register, and reiterated earlier points made by those respondents:

- “If enforcement notices are to be part of the process then they should only apply until such time as the SuDS infrastructure becomes adopted.”

We will consider the responses to this question.

Question 21

For the purpose of the SuDS Approving Body's duty to adopt, "sustainable drainage system" means those parts of a drainage system that are not vested in a sewerage undertaker. Do you agree this provides certainty and clarity on what is adoptable by the SuDS Approving Body? If not please provide an alternative definition.

67% of respondents disagreed that the definition on what is adoptable is clear. The main areas of concern were:

- It does not exclude parts of the drainage systems serving more than one property;
- It does not deal with Highways drainage
- It does not cover situations where there is no connection to the sewer
- It does not explain what does or does not constitute a SuDS component or what water companies will accept under a section 104 agreement.

We will consider the responses to this question.

Question 22

The SuDS Approving Body's duty to adopt does not apply to a single property drainage system. We propose that "a drainage system or any part of a drainage system is to be treated as designed only to provide drainage for a single property if it is designed to provide drainage for any buildings or other structures that, following completion of the construction work, will be owned, managed or controlled by a single person or two or more persons together". Is our definition clear on what will or will not be adopted? if not please provide an alternative definition.

Because of the detailed nature of responses, the analysis for this question has largely been qualitative rather than quantitative. The majority of respondents thought that the

definition was insufficiently clear or not right. We will consider the responses to this question.

Question 23

We propose that the SuDS Approving Body should determine a request for adoption within 8 weeks of receiving the request. Do you agree with this timeframe?

42% of respondents disagreed with this timeframe.

There were polarised views. Some thought that the period was too short. Some thought that 8 weeks was too long.

We will consider the responses to this question.

Question 24

We propose for the SuDS Approving Body to have a 28 day time limit for administrative processes (for example return of bonds, the process of registration or designations). This time limit applies throughout the SuDS process. Do you agree with this timeframe, if not please explain why?

76% of respondents agreed with this timeframe. Of those disagreeing, the points raised were varied:

- That 28 days could prove to be too short a period if a number of submissions were received at once;
- That the time limit was too long and should only be 14 days;

We will consider the responses to this question.

Question 25

We propose that all Statutory Undertakers must notify the SuDS Approving Body at least four weeks in advance of works that may affect the SuDS' operation. Do you agree with this timeframe?

89% of respondents agreed with this timeframe although many suggested that there should be a 3-month notification period for major works. We will consider the responses to this question.

Question 26

We propose upon completion of the works, the SuDS Approving Body must decide within 12 months if it is satisfied that the SuDS functions in accordance with the National Standards. Do you agree, if not please explain why?

There were polarised views amongst respondents to this question, and a lot of narrative detail was provided in responses. The opposing views were that 12 months was either too short, or too long. We will consider the responses to this question.

Question 27

We propose that an appeal must be made within six months of the SuDS Approving Body's decision or within six months of when the decision was due. Do you agree?

94% of respondents agreed with this proposal. The positive responses were mainly short and unqualified. However, varied points of concern were raised amongst the small number of those disagreeing:

- There should be a mechanism for awarding appeal costs to developers where the SAB has delayed things due to “frivolous or vexatious” action, and an appeal is upheld
- Six months may not be long enough if complicated reports and investigation is needed – 12 months may be more appropriate
- Six months is too long – 3 months should suffice

We will consider the responses to this question.

Question 28

We propose to adopt similar procedures for SuDS appeals to those which currently apply to planning appeals (written representation, hearing or inquiry). Do you agree, if not please explain why?

89% of respondents agreed with this proposal. The positive responses were mainly short and unqualified. However, varied points of concern were raised amongst the small number of those disagreeing:

- Hearings and inquiries could prove costly and bureaucratic – written representation is preferable
- Combined applications need to be dealt with jointly on appeal
- The approach should mirror Building Regulations appeals and not planning as it is a technical approval.

We will consider the responses to this question.

Question 29

Should we take action to avoid the increase of un-adopted SuDS? If your answer is no, please explain why?

90% of respondents thought that government should act to avoid the increase of un-adopted SuDS.