

December 2011

Consultation on Sustainable Drainage Systems (SUDS) – Frequently Asked Questions (As at 20 December 2011)

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Flood and Water Management Act 2010

Q1. What are the main provisions on SuDS in Schedule 3 of the Flood and Water Management Act 2010?

In summary, Schedule 3:

- Establishes a SuDS Approving Body (SAB) in unitary or county councils;
- Provides that drainage systems for managing rainwater (including snow and other precipitation) for new developments and redevelopments must be approved by the SAB, before construction begins;
- Requires the Secretary of State to publish National Standards for the design, construction, operation and maintenance of SuDS. In order to be approved by the SAB, the proposed drainage system must meet the National Standards;
- Places a duty on the SAB to adopt and maintain approved SuDS that serve more than one property; where the SuDS is constructed and functions as approved in accordance with the National Standards;
- Amends the Water Industry Act 1991 to make the right to connect surface water to public sewers conditional on the drainage system being approved by the SAB as meeting the National Standards;
- Sets out Sewerage Undertakers, Environment Agency, Internal Drainage Boards, British Waterways and Highway Authorities as statutory consultees to the SAB.

Q2. Do the provisions in Schedule 3 apply to foul drainage?

No. The provisions in Schedule 3 of the Act only apply to surface water drainage. The draft National Standards for the design, construction, maintenance and operation of SuDS prohibit surface runoff to be connected to a foul drain. For foul drainage, section 42 of the Act requires developers who want to connect to a public sewer to enter into a binding agreement for the adoption of new connecting sewers by the undertaker (under section 104 of the Water Industry Act 1991). The agreement must specify that new sewers will be built to a standard published by the Minister or any other such standard as may be agreed.

Q3. When will the public consultation on proposals for implementing Schedule 3 of the Act take place?

The SuDS consultation launched on 20 December 2011 and will run for 12 weeks. The closing date is 13 March 2012.

Approval and Adoption Role

Q4. How does the SAB approval role fit with planning approval?

The processes in the Act were developed to align wherever possible with the existing planning regime at that time. Given the close links between SAB approval and obtaining planning permission we have, where practical, used the existing planning system as a model to develop the approval proposals.

In view of the Government's planning reforms, and that some development will now take place under a Neighbourhood Plan and Neighbourhood Development Order, we have developed an additional consultation option which would align the SAB approval process with proposed planning reforms. The consultation period will provide further opportunity to better understand how best SuDS approval and planning reforms should coexist

Q5. Should water and sewerage companies approve, adopt and maintain SuDS rather than local authorities?

The Act places SuDS approval and adoption responsibilities with county and unitary local authorities. This fits well alongside their existing responsibilities for highways and surface water management planning as well as their other new lead local flood authority responsibilities under the Act. SuDS in the public realm have a dual function as parks and roads, both tackling surface water run-off and improving public amenity. Local authorities already maintain these spaces. The Act makes sewerage undertakers statutory consultees to the SuDS Approval process. This is vital to feed in knowledge about the capacity within their sewers, plans for future provision, and particular hot spots for surface water flood and pollution incidents.

Q6. Why does the SuDS Approving Body (SAB) function sit at the upper-tier when planning is at district level?

The Act places SuDS approval and adoption responsibilities with county and unitary local authorities. This fits well alongside their existing responsibilities for highways and for surface water management planning, as well as their new 'lead local flood authority' role set out in the Act. They have a strategic overview of surface water and flooding issues which will be critical in ensuring well designed, effective and sustainable drainage responding to the catchment rather than an 'end of pipe' approach.

Q7. Will other bodies (e.g. Internal Drainage Boards or Sewerage Undertakers) be able to maintain adopted SuDS?

The Act places the SuDS approval and adoption duties on the SuDS Approving Body (SAB), which will be within unitary or county local authorities. The Act does not prevent the SAB from transferring maintenance of adopted SuDS to other bodies including IDBs or sewerage undertakers, by agreement. Indeed we anticipate such transfers will be fairly common. However, the SAB will retain responsibility and liability for the adopted SuDS.

National Standards

Q8. How will the most appropriate and suitable drainage system for a site be approved?

The SuDS Approving Body will need to decide whether the proposed drainage system will comply with the National Standards for SuDS. The draft Standards which are part of this consultation, take a hierarchical approach for where runoff can be discharged and set criteria for the rate and volume of runoff which will allow flexibility for site specific circumstances so the most practicable and cost effective drainage solution for a site is built.

Q9. Will the National Standards for SuDS prohibit connection to a foul or combined sewer?

The draft Standards recognise the need to avoid foul flooding and they propose that connection of a SuDS to a foul sewer will be prohibited. The discharge to a combined sewer, if proposed as part of the drainage plans, would be the choice of last resort. For example, where opportunities for infiltration or discharge to a watercourse are not available or in redeveloped areas where there are no separate surface water sewers. The incorporation of SuDS should in most cases reduce the flow of runoff to the sewer.

Approval Process

Q10. How will SuDS approval be funded?

The SAB will be able to charge fees, on a cost recovery basis, for approving applications and for inspections. The consultation document contains proposals on fees, including the proposal to fix approval fees for the first three years of implementation.

Q11. What pre-application liaison will be needed between the SuDS Approving Body (SAB) and Local Planning Authority?

The effective implementation of the new system for SuDS approval will rely on close co-operation between local planning authority (LPA) and the SAB. LPAs should ensure that suitable SuDS are incorporated in developments and the SAB should take account of any local requirements which may be required in addition to the National Standards for SuDS. Pre-application discussions between the LPA, SAB, developers and others e.g. statutory consultees will minimise delay in both planning and SuDS approval processes and ensure that developers fully understand what is expected of them.

Q12. Can construction commence without SuDS Approving Body (SAB) approval?

Under paragraph 7 of Schedule 3 to the Act, construction which has drainage implications requires SAB approval **before** construction can commence. Where planning permission is required the SAB will be a statutory consultee to the local planning authority during the planning approval process. The consultation document seeks views on what requires SAB approval, including:

- a phased implementation approach; and
- an exemption for development covered by a Neighbourhood Development Order.

It also proposed time limits for SAB approval of drainage applications.

Q13. Will local authority roads required SAB approval?

The consultation document sets out proposals for what will and will not require approval. It is proposed that the construction of new local authority roads will require SAB approval (the consultation document is inviting views on whether development under a Neighbourhood Development Order, or development below the large major/major threshold in the first three years, should be exempt). Road maintenance, such as filling in potholes will not require SAB approval.

Q14. Do all surface water drainage applications which require approval by the SuDS Approving Body (SAB) also require planning permission?

No. Applications for construction with drainage implications which require approval by the SAB may not require planning permission from the Local Planning Authority e.g. because it does not constitute development or it is “permitted development”. In some circumstances a developer may wish to agree drainage provisions for a development in advance of the submission for planning approval. Therefore there are two application routes to the SAB, either a “freestanding” application or a “combined” application (where the surface water drainage application is combined with the planning application).

Q15. What is the application route for SuDS approval?

There are two routes for approval:

- i. A **“freestanding” application** direct to the SAB. Developers are able to seek approval direct from the SAB. This route can be used when planning approval is not required or when the developer wants SAB approval before submitting the full planning permission application.
- ii. A **“combined” application** via the Local Planning Authority (LPA). Where planning permission is required, the developer may lodge both a planning application and a surface water drainage application with the LPA. This will streamline the process by ensuring a single application point for the developer. The LPA would then forward the SuDS application and the fee onto the SAB for a decision on the drainage application. The SAB’s decision on the drainage application would be notified to the developer by the LPA.

Q16. What does the SuDS Approving Body (SAB) have to do when considering a SuDS application?

When the SAB receives a valid SuDS application it must determine whether the drainage proposals meet the National Standards for SuDS. The SAB must also consult relevant statutory consultees, for example where a connection to a public sewer is proposed the sewerage undertaker should be consulted. The SAB would then notify the applicant of its decision, in the case of a freestanding decision, or the Local Planning Authority in the case of a combined application. The SAB must also notify any statutory consultees who it consulted of the decision.

Q17. What is the role of the local planning authority in a combined SuDS application?

In a combined application the developer would submit both surface water drainage application and planning applications to the Local Planning Authority (LPA). The LPA must forward the drainage application and associated fee to the SAB. The SAB would then consider whether or not the drainage proposals met the National Standards for SuDS and consult its statutory consultees as necessary. The SAB would return its decision to the LPA. This decision would be independent of the planning decision.

The LPA must inform the SAB of its determination of the application for planning permission. It must also inform the applicant of its determination of their planning application and where the SAB determination is available, the LPA must, at the same time, inform the applicant of the SAB decision.

It should be noted that the LPA and SAB would be the same authority in unitary local authorities.

Q18. What would happen to a combined application if the SuDS Approving Body (SAB) refused the drainage application or was unable to determine the application within the set timeframe?

Where the SAB refuses a drainage application, the planning authority could still grant planning permission and inform the applicant of its own decision within the allocated timeframe for

planning. However, without SAB approval construction could not commence and connection to the sewer, where proposed, would not be possible.

The planning authority should therefore still inform the applicant of its own decision on the planning application thereby meeting its own deadline for response. Any appeal resulting from the non-determination of the SuDS application would be against the SAB and not the planning authority.

Q19. Will the SuDS be inspected before being adopted by the SuDS Approving Body (SAB)?

The SAB may wish to set conditions of approval related to inspection. For example the SAB may wish to inspect the SuDS during construction to ensure it is being built as approved. It may also wish to inspect post construction and prior to adopting, to ensure the SuDS is functioning as approved.

Statutory consultees to the SuDS Approving Body (SAB)

Q20. Who are the Statutory Consultees to the SAB?

Paragraph 11(3) of Schedule 3 to the Act requires the SAB to consult with specified statutory consultees. The requirement to consult with one or more of the following consultees is triggered if an application for approval specifically impacts on that consultee, as follows:

- i. **Sewerage undertakers** where the sustainable drainage system is proposed to communicate with their public sewer;
- ii. **Highways authorities** for a road and associated drainage system which may be affected by the sustainable drainage system;
- iii. **Environment Agency** where the sustainable drainage system involves, either directly or indirectly, the discharge of water into a watercourse or groundwater;
- iv. **Internal Drainage Board** where the sustainable drainage system may discharge, directly or indirectly, into an ordinary¹ watercourse within the board's district.
- v. **British Waterways** where the sustainable drainage system may involve the discharge, directly or indirectly, of water into or under a waterway managed by them.

The SAB will not have to consult a consultee if they are not affected by the drainage proposals, hence reducing bureaucracy and costs.

Q21. At what stage in the approvals process would statutory consultees be aware that there has been an application for approval of a sustainable drainage system?

Statutory consultees are encouraged to participate in pre-application discussions with the SuDS Approving Body (SAB) and developer. The SAB is required to consult relevant statutory consultees where an application for approval specifically impacts on them. The consultation document proposes a time limit for statutory consultees to respond to the SAB. Once the SAB

¹ As set out in section 72 of the Land Drainage Act 1991.

has determined the application for approval it must notify any statutory consultees who it consulted of the decision.

Q22. Can the SuDS Approving Body (SAB) ignore advice from a statutory consultee?

It is an established principle that consultation must be carried out properly in order to satisfy the common law principles of procedural fairness. If a statutory consultee raises an objection to a proposal we would expect the SuDS Approving Body (SAB), the consultee and the developer to find a workable solution. If the SAB decided to ignore the advice of a statutory consultee it would be expected to explain why. The process for consulting statutory consultees proposed in the consultation document has been designed to avoid delay to the approval process.

Q23. Will the SuDS Approving Body (SAB) reimburse statutory consultees for any costs they incur in responding to an application for approval?

No, statutory consultees will have to meet their own costs.

Q24. What influence will the statutory consultees have on the SuDS National Standards?

The National Standards are a mandatory requirement that the SuDS Approving Body (SAB) is under a duty to comply with when approving, adopting or maintaining SuDS. Statutory consultees should take account of its principles when providing their advice.

Adoption and Maintenance

Q25. Does the Act allow retrospective adoption of SuDS?

Paragraph 21 of Schedule 3 to the Act allows the SAB to voluntarily adopt SuDS where the duty to adopt does not apply. This means the SAB would be able to adopt and maintain existing SuDS if it chooses to do so, funding would need to be agreed separately.

Q26. How will the SAB be able to maintain a soakaway serving two properties when it has no easy access or control over its management?

The Act deals with SuDS in new developments and re-developments so such things as access for maintenance is able to be agreed at the approval stage. If a SAB is having difficulty accessing a site then the powers in section 14A of the Land Drainage Act 1991 are available.

Q27. Who will be accountable where an adopted SuDS, with a residual connection to the public sewer, causes flooding?

The SuDS Approving Body (SAB) will be responsible for the adopted SuDS, including its maintenance. One of the reasons the SuDS approval and adoption functions are located with local authorities is because local authorities are democratically responsible and accountable. This is especially true if the SuDS fall into a state of disrepair, fail and cause local flooding. As lead local flood authorities they also have wider responsibilities for effectively managing surface

water. In any case sewerage undertaker and the Environment Agency would be likely to identify areas where maintenance was not being carried out, where it has a knock on effect on sewers or watercourses. Should the SAB fail to carry out its statutory functions in relation to SuDS, the local authority would be subject to judicial review in the same way it would if it failed to carry out other statutory functions.

Q28. How will the maintenance of adopted SuDS be funded?

In the short-term, maintenance of SuDS adopted by the SuDS Approving Body will be funded by Defra. Funding has been set aside as part of the Spending Review and will be provided as grants. This will pay in full for the added costs of SuDS maintenance in the first few years of implementation. Officials are working with Treasury and other departments to develop options for long term funding that are viable and value for money.

Q29. Highway authorities do not currently adopt parts of a road where 3rd party drainage occurs. How will the provisions in the Flood and Water Management Act alter this arrangement?

Section 115 of the Water Industry Act 1991 currently permits the sewerage undertaker and highways authority to enter into an agreement to utilise one another's sewers for the purpose of draining surface water from highways (but not where 3rd party connections occur).

Paragraph 16(3) of Schedule 3 to the Act, when commenced (the consultation document proposes this would be in October 2012), will amend Section 115 so that a sewerage undertaker must accept any surface water from a publicly maintained road which is in accordance with drainage approved by the SuDS Approving Body (SAB) as meeting National Standards for SuDS. This will mean that where SuDS approval is given for a drainage system, which drains via a highway drain into the public sewer, the sewerage undertaker will be obliged to accept any connection from the road or highway drain which is part of the drainage plan which has been approved.

Q30. Will Highways Authorities be responsible for maintaining SuDS which are in or beside a publicly maintained road?

Yes. Highways Authorities are already responsible for the drainage and maintenance of publicly maintained roads. Under paragraph 19 of Schedule 3 of the Act the SuDS Approving Body (SAB) is exempt from adopting any part of a SuDS which is a publicly maintained road. The maintaining authority (i.e. the Highways Authority) is required to act in accordance with the drainage plan as approved by the SAB and in accordance with the National Standards for SUDS.

Q31. Who would be responsible for maintaining a SuDS in a private road?

The SuDS Approving Body (SAB) will be required to adopt approved SuDS in or alongside private roads that serve more than one property. Once adopted the SAB would be responsible for maintaining the SuDS. If in the future the road becomes a publicly maintained road then the Highways Authority would be responsible for maintenance.

In either scenario, we understand in practice, it is likely that the Highways Authority would carry out the maintenance duties. They would therefore be acting on behalf of the SAB where SuDS are in or alongside a private road.

Miscellaneous

Q32. Are steps being taken to help build Local Authority capacity prior to implementation of the SuDS provisions in the Act?

Officials are working with key groups including local authorities, Environment Agency and other professional bodies on increasing local authority capacity to implement the Act, this includes the SuDS measures. More specifically 32 workshops for Lead Local Flood Authorities were held between January and April 2011 under the Skills and Capacity Strategy. 9 of the workshops specifically focussed on SuDS.

Q33. How does the Act change the automatic right to connect surface water to the public sewer network?

The automatic right to connect surface water to the public network has been amended to make it conditional on receiving approval from the SuDS Approving Body (SAB) that the proposed drainage system meets the National Standards for sustainable drainage. The WaSC may not refuse connection on the grounds that the drainage system absorbs water from more than one set of premises or sewer or from land that is neither premises nor a sewer (section 106A(3) of the Water Industry Act 1991 refers).

Q34. Does the Act provide the SuDS Approving Body (SAB) with powers to compulsorily purchase land?

No such powers are provided in the Act that are specifically designed with SuDS in mind. However the SAB may, if it chose to do so, use powers inserted by the Act into the Land Drainage Act (as section 14A) to enable pipes which are part of the drainage system to be built, and compulsorily acquire easements etc. However, we would not expect these powers to be used very often and the SAB would only be able to use them if the conditions of section 14A were satisfied.

Q35. Does the Act provide developers with powers to access third party land?

No such powers are provided in the Act that are specifically designed with SuDS in mind. However, as is the case now developers who need access over third party land in order to connect their run-off to public sewers or nearby water bodies would be wise to approach those third parties to obtain the necessary property rights. If they are unable to reach agreement with third parties then the same kinds of options that currently exist will remain available to them. These options include: (i) asking the SuDS Approving Body to consider using its works powers under the Land Drainage Act 1991 (section 14A) to build the necessary infrastructure and acquire the necessary property rights; or (ii) requisitioning a sewer from the undertaker under section 98 of the Water 1991.

Q36. How will London Borough's and Transport for London (TfL) link up with the new SuDS provisions set out in the Flood and Water Management Act 2010?

Where a London Borough Council proposes significant changes/additions to an existing TfL road to incorporate SuDS, i.e. retrofit, this will need to be considered within the current norm of everyday discussions and procedures between the two authorities and as part of the local flood risk management strategy.

Q37. Has consideration been given to retrofitting SuDS? What is being done about increasing retrofitting of SuDS?

The Act seeks to increase the uptake of SuDS in new developments and re-developments. Government recognises that there are also benefits to be gained from retrofitting SuDS in existing developments. The Water White Paper sets out the Government's intentions on retrofitting.

**Defra, SuDS Policy Team
20 December 2011**

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