

## **Terms of Reference-Review of the arrangements for determining responsibility for surface water and drainage assets**

### **BACKGROUND**

1. Effective surface water management requires coordinated action by all of those with responsibilities for managing land, rivers and drainage systems. Lead Local Flood Authorities (LLFAs) (county and unitary authorities) have the leadership role on surface water management, including maintaining a register of surface water assets with information about their ownership and state of repair.
2. In practice, many people are not aware that LLFAs have the leadership role on surface water flooding and the responsibilities between the different parties can become blurred, particularly when the source of flooding is unclear. LLFA's have taken very different approaches to developing their asset registers, and disputes between partners over the responsibility for surface water assets are quite common.
3. The government's Surface Water Management Action Plan includes a commitment for Defra to commission a review of the arrangements for determining responsibility for surface water and drainage assets (including the legal mechanisms, guidance and dispute resolution arrangements as set out in box 7 of the plan) to identify recommendations for how to make this more straightforward for property owners and others.

The government published a written ministerial statement on 8 July 2019 which referenced the planned review.

“We published the Surface Water Management Action Plan, which included a commitment to review effectiveness and compliance with local requirements. It will also consider how responsibility for surface water and drainage assets is determined locally, including dispute resolution. I have appointed David Jenkins, Chair of the Wessex Regional Flood and Coastal Committee, to undertake this independent review. He will provide an interim report by December 2019. David will draw on his past experience as CEO of a Lead Local Flood Authority (“LLFA”), solicitor and member of an Ombudsman Office.”

Thérèse Coffey (Parliamentary Under Secretary of State at the Department for Environment, Food and Rural Affairs 17 July 2016 to 25 July 2019)

## PURPOSE

4. To examine how effectively the risk management requirements and mechanisms are being used - individually and in combination - and make evidence-based recommendations about actions LLFAs, other parties (such as other Risk Management Authorities) and where necessary, government, could take to strengthen their efficiency and effectiveness.

## Arrangements for Identifying Local Responsibilities

Defra will commission a review of the arrangements for determining responsibility for surface water and drainage assets (including the legal mechanisms, guidance and dispute resolution arrangements in box 7) to identify recommendations for how to make this more straightforward for property owners and others.

### BOX 7

#### Arrangements for Identifying Local Responsibilities

There are a number of formal mechanisms that can help with determining ownership and responsibility for surface water and drainage assets:

- **Asset registers** - Lead Local Flood Authorities (LLFAs) are required to maintain a record of structures and features (drains, ditches, pipes, gullies etc.), which are likely to have a significant effect on flood risk in their area, including who owns the asset and the responsibility for maintenance.
- **“Section 19” reports** - When a flood occurs, Lead Local Flood Authorities investigate which Risk Management Authorities have relevant flood risk management functions and whether they have exercised those functions.
- **Designation** - Where surface water assets are in private ownership, the LLFA, the Environment Agency, district council or Internal Drainage Board may “designate” them so that the owners must inform the authority before altering them

There is a range of guidance for local parties whose activities could have an impact on flood risk. This includes:

- guidance for developers who are building new sewerage infrastructure to serve new homes and businesses;
- a protocol to help determine whether a structure should be treated as a sewer or a “culverted watercourse”, which comes with additional legal responsibilities;
- guidance about flood risk responsibilities for landowners who have watercourses on or under their land (“riparian landowners”); and
- guidance for highway authorities on the most cost effective approach to managing and maintaining drainage assets.

Finally, there are mechanisms for resolving disputes over responsibility for surface water flooding:

- **the First-tier Tribunal (Property Chamber) Agricultural Land and Drainage** can deal with issues being caused by blocked drainage channels or inadequate drainage on all types of land, not just agricultural land;
- the government provides a list of registered **mediation providers** who offer fixed fee services.
- **arbitration** can also be a useful process for resolving disputes if both parties agree to appoint an independent arbitrator and to abide by the arbitrator's decision.

## SCOPE

5. The review should:
  - Gather and consider any relevant evidence about how effectively the requirements and mechanisms are being utilised individually and collectively (e.g. through examining available existing information and reports, interviewing a sample of representatives from relevant parties, requesting further information from relevant parties that is necessary).
  - Assess where arrangements are working well or where they are not and provide clear analysis of this
  - Provide evidence of good practice of the mechanisms
  - Prioritise the issues that are identified through the completion of the review
  - On the basis of the evidence, value for money (time and resource implications) and deliverability considerations - make recommendations on the key actions that could be pursued by each or any party:
    - How these existing mechanisms might individually be strengthened, streamlined or otherwise improved – including in ways that make things more straightforward for the property owner or public
    - How the relationships between these mechanisms could be improved so that they work effectively together, and
    - New or different mechanisms which might usefully add to or replace the existing ones.
6. It should also cover the following existing mechanisms (and further background information will be supplied regarding these mechanisms):
  - Asset registers – According to the Flood and Water Management Act 2010, LLFAs must establish and maintain a register of structures or features which, in the opinion of the authority, are likely to have a significant effect on a flood risk in its area. They must keep

a record of information about each of those structures or features, including information about ownership and state of repair and must arrange for the register to be available for inspection at all reasonable times.

- “Section 19” reports - When a flood occurs, Lead Local Flood Authorities investigate which Risk Management Authorities have relevant flood risk management functions and whether they have exercised those functions.
- Designation - Where surface water assets are in private ownership, the LLFA, the Environment Agency, district council or Internal Drainage Board may “designate” them so that the owners must inform the authority before altering them<sup>1</sup>.
- The range of existing guidance for local parties whose activities could have an impact on flood risk.
- The existing mechanisms for resolving disputes over responsibility for surface water flooding.