Sustainability Committee

SC(3)-03-10 (p4, Paper to Note): 21 January 2010

Short Inquiry into the Flood and Water Management Bill

Evidence from Dwr Cymru

Dear Mr Bates,

Thank you for your letter of 9 December 2009 inviting Dŵr Cymru Welsh Water to submit written evidence to inform the Committee's short inquiry into the Flood and Water Management Bill ("the Bill"), following its inclusion in November's Queen's Speech to Parliament. We note that you will be focusing on the alterations made to the Bill since its publication in draft in April.

As the Committee is aware, Dŵr Cymru is a statutory water and sewerage undertaker that supplies over three million people living and working in Wales and some adjoining areas of England. We are owned by Glas Cymru, a single purpose company with no shareholders, so any financial surpluses are reinvested in the business for the benefit of our customers.

When the Sustainability Committee carried out its previous inquiry into this Bill it took great interest in our concerns about the potential impact on Dŵr Cymru's customers under our unique business model of some of the recommendations that Professor Cave made in his ""Independent Review of Competition and Innovation in Water Markets"". I am pleased to report that the Welsh Assembly Government subsequently confirmed in September (in a joint WAG/DEFRA consultation about implementing the Cave Review) that it has no plans to apply many of Professor Cave's more far reaching proposals (such as splitting off water companies' retail functions) to water companies in its jurisdiction. We welcome the more cautious approach adopted by the Welsh Assembly Government to competition in the water industry, and I would like to thank the Committee for its support in this matter.

There are significant differences between the Bill that Defra and the Welsh Assembly Government published in April for public consultation and the version presented to Parliament in November. The Bill is now significantly shorter and some of the proposals that caused us concern have been dropped. For example, Dŵr Cymru is pleased that provisions enabling the Water Services Regulation Authority ("Ofwat") to insist on changes to our terms of appointment have been removed. Plans to use the Bill as a vehicle to implement Professor Cave's and Anna Walker's respective reviews have also been dropped, although we understand that Defra and the Welsh Assembly Government still intend to take forward many of these policies at the next legislative opportunity.

The focus of the shortened Bill is now flood risk management. Dŵr Cymru believes that the Bill's revised sewerage provisions could seriously undermine this objective as they may lead to more overloading of sewers, which will inevitably cause more sewage flooding.

One example of this is the revised package of provisions relating to sustainable drainage systems (SUDS). Dŵr Cymru has, up to now, been very supportive of the SUDS approach, so we are particularly disappointed that the Bill's SUDS provisions (in Schedule 3 of the Bill) seem seriously flawed.

As we explained in our previous evidence, we think that an integrated SUDS strategy is the most sustainable way forward. The impact of removing significant volumes of surface water from our sewers would be to reduce the risk of sewer flooding and storm overflow spills, while at the same time helping us to cut our energy use and improving the preparedness of our sewerage infrastructure to cope with climate change. This would bring direct benefits to customers and the environment in our region and, to the extent that it improves our operational efficiency, it would also benefit customers under our business model.

We have also said that we would be very willing to support local authorities with the carrying out of their new SUDS functions, and would like to work closely with all the SUDS Approving Bodies (SABs).

However, as currently drafted, the Bill will allow developers to install SUDS that drain to the public sewer, but will give sewerage undertakers such as Dŵr Cymru no control over the quantity or quality of those flows. Because of this, the risk of sewerage-related flooding of people's homes may in fact be increased rather than reduced by some SUDS schemes.

We are concerned that under paragraph 11(3)(a) of Schedule 3, the SAB (which in Wales will be the unitary authority for the area) will be required only to ""consult"" the relevant sewerage undertaker, so will not be obliged to accept the undertaker's advice. However, paragraph 15 of Schedule 3 will mean that the sewerage undertaker must allow the connection of approved SUDS schemes to its public sewers, whether or not those sewers have the capacity to cope.

Part H of the Building Regulations 2000 requires a hierarchical approach to the design of SUDS. Ideally, the SUDS should return the surface water to the ground; failing that, the water should drain to a watercourse. Only if neither of these two options is practical should the surface water be discharged into a sewer. However, some local authorities may be reluctant to adopt SUDS structures and developers may find it comparatively expensive and complex to provide drainage to (what may well be remote) watercourses. We therefore fear that connection to sewer will all too often continue to be the preferred choice, particularly as the "right to connect" means that the sewerage undertaker will be powerless to refuse, no matter what harm the connection may cause. This is one reason why we believe that the "automatic right to connect" to sewer must be removed.

Another serious concern is that Paragraph 15(2) of Schedule 3 of the draft Bill inserts a new sub-clause that says that the sewerage undertaker is not allowed to refuse the connection of SUDS, "on 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". This wording implies that a sewerage undertaker must accept flows from both highway run-off and land drainage. It will therefore continue the uncontrolled right of local/highway authorities to discharge highway run-off, at no cost to them, to the public sewer. To make matters worse, it will also add unknown flows from land drainage and other surface run-off: sewerage undertakers currently have no responsibility to provide facilities or capacity for land drainage. This provision seems to be adding a significant new burden on our sewerage infrastructure which will represent a major new unfunded obligation on sewerage undertakers and thus our customers.

If SUDS are to be connected to public sewers, we believe that the Bill should specify that this can only be to surface water sewers: connection of SUDS to foul sewers or to combined (surface and foul) sewers should be prohibited because of the almost inevitable probability of downstream foul flooding (the Bill currently fails to make this distinction, relying instead on the very broad definition of ""public sewers"" in section 219(1) of the Water Industry Act 1991).

Dŵr Cymru believes that the Bill must be amended to give sewerage undertakers a veto if they have reason to believe and can demonstrate that SUDS (or indeed any other proposed connections) could overload their sewers: if needs be, our veto could be subject to a right of appeal to Ofwat. At the very least, there should be no right to connect to public sewer without completion of an integrated impact assessment, which should address the environmental, sewerage customer service and financial impact (for the SAB, Dŵr Cymru and others) of a SAB decision to connect to public sewer. In this way, consideration of Dŵr Cymru's consultation view is embedded and the SAB is able to satisfy the Welsh Assembly Government, local authority ratepayers and Dŵr Cymru's customers that the best sustainable solution has been adopted.

We are also concerned that the Bill provides no assurance that the sewerage industry will be closely involved in the development of the national standards for SUDS to be set by Ministers (paragraph 5 of Schedule 3 of the Bill). These standards could go some way toward mitigating the potential risks described above.

The provisions setting mandatory build standards for sewers in the April version of the Bill have been replaced by clauses that we consider will weaken still further sewerage undertakers' control over their own infrastructure.

Of particular concern is clause 41 which will amend the Water Industry Act 1991. In summary, the new section 106B to be inserted into the 1991 Act would provide that a person may only connect new sewers and lateral drains to a public sewer if he first enters into an agreement (under section 104) with the sewerage undertaker: that agreement must normally include provisions that the pipes will be constructed in accordance with the universal build standards to be prescribed by Ministers. However, sub-section 106B(7) would mean that a sewerage undertaker cannot subsequently refuse connection on the grounds that the sewer or drain does not satisfy standards reasonably required by the sewerage undertaker; or because the making of the connection would be prejudicial to the public sewerage system; or even if the person has not complied with the section 104 agreement.

This is totally unreasonable. If developers can ignore the section 104 agreement, we cannot see the point of entering into them in the first place. Dŵr Cymru therefore believes that the proposed sub-section 106B(7) of the Water Industry Act 1991 (to be introduced by clause 41 of the Bill) must be deleted, and that sewerage undertakers should, under certain circumstances, be allowed to refuse permission to connect to our sewers.

The April version of the Bill included a provision to enhance the powers of sewerage undertakers to tackle misconnections. Although Defra and the Welsh Assembly Government have confirmed that the proposal received widespread support from respondents to the consultation paper, it has disappointingly been dropped from the Bill.

To sum up our views on the Bill's sewerage provisions, Dŵr Cymru is repeatedly having to cope with problems which stem from our lack of effective control over our own sewerage assets. Overloaded sewers can cause flooding and/or pollution, the latter leaving us open to criminal prosecution (which at Crown Court can involve unlimited fines and/or potential imprisonment of our Directors). Despite this, the revised Bill will largely protect developers' automatic right to connect, even though the Pitt Review was unequivocal in recommending that, "The automatic right to connect surface water drainage of new developments to the sewerage system should be removed" (recommendation 10).

We therefore find it very frustrating that the sewerage provisions of the Bill, which had seemed quite promising in the April draft, may worsen an already very difficult position.

The pressing need for the automatic right to connect to public sewerage to be reviewed has been demonstrated by a recent Supreme Court judgement. The Committee may recall that Dŵr Cymru was embroiled in a landmark legal case (Barratt Homes Ltd v Dŵr Cymru Cyf) in which we sought to establish that we should have a greater say about the way in which developers connect to our sewers. Unfortunately, having examined the relevant statute, the majority finding of the Supreme Court was in the developers' favour, so reinforcing the developer's right to connect (under section 106 of the Water Industry Act 1991) at a point to be determined by the developer rather than the sewerage undertaker; this is regardless of any adverse impact or consequences to existing customers or the environment. The Court held that control over a sewerage undertaker's assets effectively rests with the local Planning Authority. (The judgement also included a minority view which set out a very different - and we would argue more sensible - interpretation of the legal position, suggesting the existing legislation does allow sewerage undertakers to impose conditions on the way in which developers propose to connect to the public sewer, including the place). We would be happy to provide the Committee with a copy of the Supreme Court judgement. To put matters into perspective, we estimate that the impact of this judgement over the coming five year investment period will cost Dŵr Cymru, and therefore our customers, an additional £12 million. This estimate does not account for any of the changes currently proposed in the draft Bill, which could allow land drainage and additional highway drainage to connect to the public sewerage system.

As the Committee will also remember, we are not even a statutory consultee under town and country planning legislation. In recommendation 3 of your previous report on the draft Bill you urged the Welsh Assembly Government to address this issue. In the light of the Minister's evidence to the Committee, and the recent Supreme Court judgement, we have raised this with the Welsh Assembly Government's Chief Planner - a copy of our letter is enclosed. We hope that the Committee will continue to endorse our view that we should be given statutory consultee status under planning legislation.

Turning to another issue raised by the Bill, we continue to have concerns about the future regulation of major new water-related infrastructure projects in Wales (see clause 35 of the revised Bill). Climate change is likely to mean that, when all other options are exhausted, there will be increasing demands for new sources of large volumes of water so that supplies can be maintained to those parts of the UK suffering water resource deficits. We therefore envisage calls for new or extended reservoirs to be built in Wales to supply those parts of England where water resources become depleted. However, the territorial responsibilities remain essentially the same in the revised Bill - under (what will become) section 36E of the Water Industry Act 1991, the Welsh Ministers will be responsible only for infrastructure provided by or for Welsh undertakers.

We note that the Bill does now contain provisions (in what will become section 36F of the 1991 Act) enabling the Secretary of State to make regulations to confer some (as yet unspecified) powers on the Welsh Ministers in relation to infrastructure in Wales provided solely for the use of English undertakers. However, the Secretary of State is under absolutely no obligation to make those regulations.

Dŵr Cymru remains firmly of the view that there must be some safeguard on the face of the Bill to ensure that the Welsh Ministers and National Assembly for Wales have some meaningful control over all major water-related projects if they are to be located anywhere in Wales, whether or not they are provided by or for Welsh undertakers. We also believe that the ownership of such assets should remain in Wales.

I hope this evidence will be useful when you are considering the implications of this Bill for Wales. Please let me know if you would like a representative of Dŵr Cymru to appear before the Committee to expand on any of these points.

Nigel Annett

Managing Director