



www.defra.gov.uk

Department
for Environment
Food & Rural Affairs

Consultation on a Proposal to use a Legislative Reform Order to make changes to the Land Drainage Act 1991

A Consultation Paper issued by

**Defra on behalf of the Parliamentary Under Secretary for Natural
Environment, Water and Rural Affairs**

January 2013

© Crown copyright 2013

You may re-use this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit www.nationalarchives.gov.uk/doc/open-government-licence/ or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or e-mail: psi@nationalarchives.gsi.gov.uk

This document/publication is also available on our website at:

<http://www.defra.gov.uk/consult/open/>

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

Email: floodreports@defra.gsi.gov.uk

Or alternatively please contact:-

Kilie Mpopo
Flood Risk Management
Department for Environment, Food and Rural Affairs
Area 2D, Ergon House
Horseferry Road
London
SW1P 2AL
Telephone: 0207 238 5624
Email: kilie.mpopo@defra.gsi.gov.uk

Contents

Chapter 1: Introduction	4
Purpose of the consultation.....	4
Who will the proposals affect?.....	4
Why Changes are needed?.....	4
Defra's Policy Intention.....	5
How these proposals will be taken forward	5
Chapter 2: What can be delivered by a Legislative Reform Order?	6
Section 1	6
Section 2	6
Section 20 Orders	6
Preconditions	6
Devolution	8
Consultation	8
Disclosure	8
Confidentiality and Freedom of Information.....	9
Responding to the consultation document	9
Chapter 3: Background to the Policy and Legislation and Proposed Changes	10
Background	10
Current Process for Approving IDB Structural Changes.....	10
Proposed Changes to the IDB Structural Reform Process.....	12
Current requirements on dissemination of information under the 1991 Act.....	13
Proposed changes to requirements on dissemination of information	14
Impact Assessment.....	15
Chapter 4: Legal analysis against requirements of the Legislative and Regulatory Reform Act 2006.....	16
Annex A: List of consultees.....	18
Annex B: Response Form.....	19
Annex C: Legislative Reform Orders – Parliamentary Consideration	22
Annex D: Consultation criteria	26
Annex E: Land Drainage (Election of Drainage Boards) Regulations 1938	27

Summary of Proposals

A consultation paper issued by the Department of Environment, Food and Rural Affairs on behalf of the Parliamentary Under Secretary for Natural Environment, Water and Rural Affairs

Scope of the consultation

Topic of this consultation	<p>This consultation sets out proposals to amend sections in the Land Drainage Act 1991 that relate to the Order making process for Internal Drainage Board (IDB) structural reforms under section 3 and Schedule 3 of the 1991 Act. The amendments would streamline the advertising process with the aim of removing unnecessary delays and reducing the burden on IDBs. For information on the sections of the Land Drainage Act 1991, please see at:-</p> <p>http://www.legislation.gov.uk/ukpga/1991/59/contents</p> <p>The changes to the Order making process in Schedule 3 would not affect Orders made under sections 4,5,32 and 35 of the Land Drainage Act 1991.</p> <p>The consultation also sets out proposals to amend specific sections of the 1991 Act relating to advertisement of notices in newspapers by IDBs and the Environment Agency under 2(2)(b) and 3(4)(b); 38(5)(b); 39(4)(b); 48(3)(b); 58(3); and Schedule 5(1)(1) of the Land Drainage Act 1991. The changes would allow more flexibility in the way notices are advertised so they may be advertised electronically and more locally in parishes/districts. This is intended to reduce the cost of advertising for IDBs while maintaining transparency and inclusiveness.</p>	See Chapter 3
Scope of this consultation	<p>The purpose of the consultation is to set out the full proposals and seek your views on amendments to the Land Drainage Act 1991 as described above. The outcome of the consultation will assist in formulating the final proposal that we will then be put before Parliament.</p> <p>We intend that the proposed changes to the legislation are made through a Legislative Reform Order (LRO) under the Legislative and Regulatory Reform Act 2006.</p> <p>Subject to the outcome of the consultation, we propose that the draft Order is laid before Parliament in Spring 2013 and that the changes are implemented thereafter.</p>	See Chapter 2 for details of LROs

Geographical scope	The changes will only apply to Internal Drainage Boards wholly or mostly in England	
Impact Assessment	An impact assessment (IA) has been prepared for these proposals and accompanies this consultation document	See separate IA

Basic information

To	This consultation is open to everyone, but will be of particular interest to internal drainage boards.	
Body/Bodies responsible for the consultation	This consultation is being carried out by the Department for Environment, Food and Rural Affairs.	
Duration	Consultation starts: 21 January 2013 Consultation closes: 18 March 2013	
Enquiries	<p>During the consultation, if you have any enquiries, or wish to receive hard copies of the consultation documents, please contact:</p> <p>Kilie Mpopo Flood Risk Management Department for Environment, Food and Rural Affairs Area 2D, Ergon House Horseferry Road London SW1P 2AL</p> <p>Telephone: 0207 238 5624</p> <p>Email: floodreports@defra.gsi.gov.uk</p>	
How to respond	<p>Any comments on the proposals in this consultation document should be sent by 18 March 2013 to:- floodreports@defra.gsi.gov.uk</p> <p>you may alternatively send your comments by post to:</p> <p>Kilie Mpopo Flood Risk Management Department for Environment, Food and Rural Affairs Area 2D, Ergon House Horseferry Road London SW1P 2AL</p> <p>Please also send any comments you may have on the Impact Assessment to the same email and postal address as well.</p>	
After the consultation	When this consultation ends, we intend to put a copy of the responses in the Defra library at Ergon House, London. This is	

	<p>so that the public can see them. Members of the public may also ask to see a copy of responses under freedom of information legislation.</p> <p>If you do not want your response - including your name, contact details and any other personal information – to be publicly available, please say so clearly in writing when you send your response to the consultation. Please note, if your computer automatically includes a confidentiality disclaimer that will not count as a confidentiality request. Please explain why you need to keep details confidential. We will take your reasons into account if someone asks for this information under freedom of information legislation. But, because of the law, we cannot promise that we will always be able to keep those details confidential.</p> <p>We will also summarise the responses and place this summary on our website at www.defra.gov.uk/consult. This summary will include a list of names of organisations that responded but not individual contact details.</p> <p>To see consultation responses and summaries, please contact the library at:</p> <p>Defra Information Resource Centre Lower Ground Floor Ergon House 17 Smith Square London SW1P 3JR</p> <p>Telephone: 020-7238-6575 Email: defra.library@defra.gsi.gov.uk</p> <p>Please give the library 24 hours' notice. There is a charge for photocopying and postage</p>	
Compliance with the Consultation Principles	<p>This consultation is being conducted in accordance with the requirements of the Legislative and Regulatory Reform Act 2006 and the terms of the Government's Consultation Principles – see at:-</p> <p>http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf</p>	See Annex D

Chapter 1: Introduction

Purpose of the consultation

1.1 This consultation paper sets out the Government's proposals for reforming sections of the Land Drainage Act 1991 (<http://www.legislation.gov.uk/ukpga/1991/59/contents>); specifically those parts relating to:-

- Simplification of the Internal Drainage Board structural reform process under section 3 and Schedule 3; and
- Making the advertising arrangements for public notices more flexible under:
 - section 2(2)(b) – review of boundaries of internal drainage districts;
 - section 3(4)(b) – schemes advertised by the Environment Agency for reorganisation of internal drainage districts;
 - section 38(5)(b) – division of drainage districts for the purposes of raising expenses;
 - section 39(4)(b) - petition for sub-division of internal drainage district ;
 - section 48 (3)(b) – procedure for making a drainage rate;
 - section 58 (3) – allocation of EA revenue for its functions as an IDB; and
 - Schedule 5 (1)(1)(a) – publicity for IDB byelaws

1.2 The legislative changes being proposed would only apply to those IDBs wholly or mainly in England.

Who will the proposals affect?

Internal Drainage Boards

1.3 Internal Drainage Boards (IDBs) are semi-independent statutory bodies responsible for drainage in areas of special drainage need.

Environment Agency

1.4 Under the Land Drainage Act 1991, the Environment Agency (EA) have the responsibility under section 3 of the Act to prepare and submit proposals to Defra Ministers for a scheme which takes forward IDB structural reforms.

Why Changes are needed?

Process for making structural changes to IDBs

1.5 IDBs may choose to change their size and structure, for example, by amalgamating with other drainage boards in order to benefit from economies of scale and improved efficiency.

1.6 Previous consultation discussions in the context of the 2009 Flood and Water Management Bill identified that processes set out in the Land Drainage Act 1991 for making structural changes to IDBs can give rise to unnecessary delay and costs.

Advertising notices in newspapers

1.7 The requirement to advertise a range of notices, procedures and orders only in newspapers is inflexible and out of date. Many IDBs consider that the cost of advertising in local newspapers is often disproportionate to the benefit and have suggested that Defra should look for a more cost effective way of advertising which allows the IDBs to determine how they target the people affected by any changes, to achieve the most effective dissemination of information. This could, for example, include advertising new byelaws or new drainage rates.

Defra's Policy Intention

1.8 The policy objectives for undertaking these changes are to:-

- reduce administrative burdens for IDBs and relevant external stakeholders affected by the changes by speeding up the structural reform process;
- reduce costs for IDBs and the EA;
- remove barriers to enable IDBs to make changes more quickly and benefit from efficiency savings and operational improvements;
- ensure transparency and inclusiveness so that the views of other affected parties are effectively taken into account; and
- modernise and introduce flexibility into the way schemes/orders are advertised to improve dissemination of information.

1.9 Previous consultations and discussions indicate that there is broad agreement amongst stakeholders that the number of advertising periods and stages before making an order should be reduced and that the current requirements for notices to be publicised should be updated and made more flexible.

How these proposals will be taken forward

1.10 We propose to introduce the changes to the Land Drainage Act 1991 by means of a Legislative Reform Order (LRO) under sections 1 and 2 of the Legislative and Regulatory Reform Act 2006 (LRRA). This consultation is being conducted in accordance with the provisions of section 13 of the LRRA. Views are invited on all aspects of the consultation paper, and a number of specific questions are set out in Chapter 4, and in the Response Form at Annex B. Views are also sought on the accompanying Impact Assessment. Annex E asks an additional question about advertising notices of registers and notices of elections. This will not form part of the Legislative Reform Order.

Chapter 2: What can be delivered by a Legislative Reform Order?

Section 1

2.1 Under section 1 of the Legislative and Regulatory Reform Act 2006 (LRRA) a Minister can make a Legislative Reform Order (LRO) for the purpose of ‘removing or reducing any burden, or overall burdens, resulting directly or indirectly for any person from any legislation’.

2.2 Section 1(3) of the LRRA defines a ‘burden’ as:

- a financial cost;
- an administrative inconvenience;
- an obstacle to efficiency, productivity or profitability; or
- a sanction, criminal or otherwise, which affects the carrying on of any lawful activity.

Section 2

2.3 Under section 2 of the LRRA a Minister can make a LRO for the purpose of securing that regulatory activities are exercised in a way that is transparent, accountable, proportionate, consistent, and targeted only at cases in which action is needed.

2.4 ‘Regulatory function’ is defined in section 32 as:

- a function under any enactment of imposing requirements, restrictions or conditions, or setting standards or giving guidance, in relation to any activity; or
- a function which relates to the securing of compliance with, or the enforcement of, requirements, restrictions, conditions, standards or guidance which under or by virtue of any enactment relate to any activity.

Section 20 Orders

2.5 Section 20 of the LRRA enables a Minister to exercise the order-making powers under sections 1 and 2 together with the power to make an order under section 2(2) of the European Communities Act 1972 in a single instrument. This enables a single order to implement Community law under section 2(2) of the 1972 Act and, for example, to remove or reduce burdens resulting from pre-existing statutory provisions.

Preconditions

2.6 Each proposal for a LRO must satisfy the preconditions set out in section 3 of the LRRA. The questions in the rest of this document are designed to elicit the information that the Minister will need in order to satisfy the Parliamentary Scrutiny Committees that, among other things, the proposal satisfies these preconditions.

2.7 For this reason, we would particularly welcome your views on whether and how each aspect of the proposed changes in this consultation document meets the following preconditions:-

(i) **Non-Legislative Solutions** – A LRO may not be made if there are non-legislative solutions which will satisfactorily remedy the difficulty which the LRO is intended to address. An example of a non-legislative solution might be issuing guidance about a particular legislative regime.

(ii) **Proportionality** – The effect of a provision made by a LRO must be proportionate to its policy objective. A policy objective might be achieved in a number of different ways, one of which may be more onerous than others and may be considered to be a disproportionate means of securing the desired outcome. Before making a LRO the Minister must consider that this is not the case and that there is an appropriate relationship between the policy aim and the means chosen to achieve it.

(iii) **Fair Balance** – Before making a LRO, the Minister must be of the opinion that a fair balance is being struck between the public interest and the interests of any person adversely affected by the LRO. It is possible to make a LRO which will have an adverse effect on the interests of one or more persons only if the Minister is satisfied that there will be beneficial effects which are in the public interest.

(iv) **Necessary protection** - A Minister may not make a LRO if he considers that the proposals would remove any necessary protection. The notion of necessary protection can extend to economic protection, health and safety protection, and the protection of civil liberties, the environment and national heritage.

(v) **Rights and freedoms** - A LRO cannot be made unless the Minister is satisfied that it will not prevent any person from continuing to exercise any right or freedom which they might reasonably expect to continue to exercise. This condition recognises that there are certain rights that it would not be fair to take away from people using a LRO.

(vi) **Constitutional Significance**– A Minister may not make a LRO if he considers that the provision made by the LRO is of constitutional significance.

2.8 It should be noted that even where the preconditions of section 3 of the LRRA are met, a LRO cannot:

- Deliver ‘highly controversial proposals’;
- Remove burdens which fall solely on Ministers or Government departments, except where the burden affects the Minister or Government department in the exercise of regulatory functions;
- Confer or transfer any function of legislating on anyone other than a Minister; persons or bodies that have statutory functions conferred on or transferred to them by an enactment; a body or office which has been created by the LRO itself;
- Impose, abolish or vary taxation;
- Create a new criminal offence or increase the penalty for an existing offence so that it is punishable above certain limits;
- Provide authorisation for forcible entry, search or seizure, or compel the giving of evidence
- Amend or repeal any provision of Part 1 of the LRRA;
- Amend or repeal any provision of the Human Rights Act 1998;

- Remove burdens arising solely from common law.

Devolution

2.9 The LRRA imposes certain restrictions regarding LROs and the devolution agreements:

- **Scotland** – A Minister cannot make a LRO under Part 1 of the LRRA which would be within the legislative competence of the Scottish Parliament. This does not affect the powers to make consequential, supplementary, incidental or transitional provisions.
- **Northern Ireland** – A Minister cannot make a LRO under Part 1 of the LRRA that amends or repeals any Northern Ireland legislation, unless it is to make consequential, supplementary, incidental or transitional provisions.
- **Wales** – The agreement of the Welsh Ministers is required for any provision in a LRO which confers a function upon the Welsh Ministers, modifies or removes a function of the Welsh Ministers, or restates a provision conferring a function upon the Welsh Ministers. The agreement of the National Assembly for Wales is required for any provision in a LRO which is within the legislative competence of the Assembly.

Consultation

2.10 The LRRA requires Departments to consult widely on all LRO proposals. The list of consultees, including the devolved administrations, to which this document has been sent, is at Annex A. It is also available on the internet at: www.defra.gov.uk/consult

Comments are invited from all interested parties, and not just from those to whom the document has been sent. A response form is at Annex B and it is also attached separately to make it easier for completion.

2.11 A note explaining the Parliamentary process for LROs to be made under the LRRA can be found at Annex C. This will help consultees understand when and to whom they are able to put their views should they wish to do so.

2.12 This consultation document follows the format recommended by Better Regulation Executive for such proposals. The criteria applicable to all UK public consultations under the Consultation Principles are set out in Annex D.

Disclosure

2.13 Normal practice will be for details of representations received in response to this consultation document to be disclosed, and for respondents to be identified. While the LRRA provides for non-disclosure of representations, the Minister will include the names of all respondents in the list submitted to Parliament alongside the draft LRO. The Minister is also obliged to disclose any representations that are requested by, or made to, the relevant Parliamentary Scrutiny Committees. This is a safeguard against attempts to bring improper influence to bear on the Minister. We envisage that, in the normal course of events, this provision will be used rarely and only in exceptional circumstances.

2.14 You should note that:

- If you request that your representation is not disclosed, the Minister will not be able to disclose the contents of your representation without your express consent and, if the representation concerns a third party, their consent too. Alternatively, the Minister may disclose the content of your representation but only in such a way as to anonymise it.
- In all cases where your representation concerns information on a third party, the Minister is not obliged to pass it on to Parliament if he considers that disclosure could adversely affect the interests of that third party and he is unable to obtain the consent of the third party.

2.15 Please identify any information which you or any other person involved do not wish to be disclosed. You should note that many facsimile and e-mail messages carry, as a matter of course, a statement that the contents are for the eyes only of the intended recipient. In the context of this consultation such appended statements will not be construed as being requests for non-inclusion in the post consultation review unless accompanied by an additional specific request for confidentiality, such as an indication in the tick-box provided for that purpose in the response form of Annex B.

Confidentiality and Freedom of Information

2.16 It is possible that requests for information contained in consultation responses may be made in accordance with access to information regimes (these are primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004). If you do not want your response to be disclosed in response to such requests for information, you should identify the information you wish to be withheld and explain why confidentiality is necessary. Your request will only be acceded to if it is appropriate in all the circumstances. An automatic confidentiality disclaimer generated by your IT system will not of itself be regarded as binding on the Department.

Responding to the consultation document

2.17 Any comments on the proposals in this consultation document should be sent by 18 March 2013 to: floodreports@defra.gsi.gov.uk. We should also be grateful for any comments on the Impact Assessment which accompanies the consultation document.

You may alternatively send your comments, or any requests for further copies of this document, to:

Kilie Mpopo
Flood Risk Management
Department for Environment, Food and Rural Affairs
Area 2D, Ergon House
Horseferry Road
London SW1P 2AL Tel: 0207 238 5624

Chapter 3: Background to the Policy and Legislation and Proposed Changes

Background

3.1 IDBs are semi-independent statutory bodies responsible for drainage in areas of special drainage need. They were set up under a series of private Acts from the 17th century onwards. Their main focus historically was drainage of agricultural land (IDBs are currently responsible for drainage of approximately 11% of our agricultural land covering 1.2million hectares). However they have evolved to play a much wider role, contributing to flood risk management in both urban and rural areas, including protection of infrastructure such as major power stations. Much of their work involves the improvement and maintenance of rivers, drainage channels and pumping stations; managing water levels; and protecting and enhancing wildlife and biodiversity.

3.2 There are currently 126 IDBs wholly or mainly in England; these vary in size (the largest covers 52,498 hectares and the smallest 181 hectares in England). They are concentrated mainly in East Anglia, Yorkshire, Somerset, Lincolnshire, Sussex and Kent.

3.3 The 8 IDBs in Sussex and Kent are operated by the Environment Agency (EA). Under the Land Drainage Act 1991, there are powers to make the EA an IDB.

3.4. The Land Drainage Act 1991 consolidated the existing legislation relating to internal drainage boards. The 1991 Act applies to England and Wales only; however the proposed changes which will be taken forward via the Legislative Reform Order would only apply to those IDBs wholly or mainly in England. The 1991 Act was amended by the Flood and Water Management Act 2010, but a series of constituting Acts remain in relation to IDB functions.

3.5 For information on the Land Drainage Act 1991, please see:-
<http://www.legislation.gov.uk/ukpga/1991/59/contents>

Current Process for Approving IDB Structural Changes

3.6 Under the 1991 Act, IDBs may undertake structural changes to deliver operational or efficiency benefits, such as:- making changes to their boundary, or to the structure of the Board; taking forward amalgamation of a number of Boards into one IDB; abolishing an IDB, or creating a new IDB. Section 3 of the Land Drainage Act 1991 includes powers for the EA to prepare schemes of reorganisation for IDBs, which they are required to submit to Ministers for approval.

3.7 Where a scheme is submitted to Ministers under section 3 and Ministers agree to proceed with the proposed changes, the Minister makes an order confirming the scheme following the statutory procedures set out under Schedule 3 of the 1991 Act.

3.8 The process under section 3 and Schedule 3 for taking forward IDB structural changes can take at least 9-12 months and includes a series of four advertising periods. The reform process and advertising periods are as follows:-

1. **Under section 3(4):** As soon as the EA has submitted a scheme to the Minister the EA must publish it in newspapers, and allow for inspection and representations to the Minister within one month after publication of the notice.
2. **Schedule 3, paragraph 2:** Before making an order (i.e. draft Order stage), the Minister must give notice of his intention to make it, allowing for inspection of the draft Order and a period of time for objections (the notice must be published in the London Gazette). Defra has historically allowed one month as a fair period of time for objections.
3. **Schedule 3, paragraph 4:** After the Order has been made, the Minister must publish it (together with a notice) “in such manner as he thinks best adapted for informing the persons affected”. The notice must provide for at least 30 days for objectors to lay a memorial praying (i.e. an objection) against the Order, before the Order comes into effect. If a memorial praying has been presented in respect of such an Order and has not been withdrawn, then the Order is subject to Special Parliamentary Procedure (as set out under Schedule 3, paragraph 5(2) – please see below for further details on the Special Parliamentary Procedure).
4. **Schedule 3, paragraph 6:** As soon as an unconfirmed Order has effect, the Minister must publish a notice in the London Gazette, and “in such other manner as he thinks best adapted for informing persons affected”, stating that the order has come into force and including details of where copies of it can be inspected. If a person is aggrieved by an Order having been made and confirmed, they may make an application to the High Court within six weeks after publication of the notice (see below for further information on application to the High Court).

Special Parliamentary Procedure

3.9 As explained above, under Schedule 3, paragraph 5 (2), if a memorial praying (i.e. an objection) has been presented in respect of an Order and has not been withdrawn, then the Order is subject to Special Parliamentary Procedure.

3.10 The Special Parliamentary Procedure enables parties who are directly and specially affected by the Order to petition against it to the House of Commons and/or the House of Lords. It is open to any individual, group of individuals or organisation “*directly and specially affected*” by the provisions of an order to petition against that order. The petition should explain what action the petitioners would like to see. They should either outline the changes they would wish to see made to the order (in a Petition for Amendment) or briefly give their reasons as to why the order should be rejected altogether (in a Petition of General Objection).

Application to the High Court

3.11 The process of applying to the High Court, although similar to Judicial Review, allows for a shorter time period in which to apply to the Court for a review of whether the decision by Ministers to make and confirm the Order should be upheld.

Proposed Changes to the IDB Structural Reform Process

3.12 Having analysed the existing process for IDB structural changes, we consider that streamlining can best be achieved through simplifying the process into the following three steps:-

- 1) Advertisement of the Scheme by the EA calling for objections and representations (1 month)
- 2) Advertisement of the Draft Order by Defra in the London Gazette calling for objections and representations, as well as ensuring the Order is advertised locally by other means (1 month)
- 3) Once the Order has been made and come into effect, Defra to advertise this fact in the London Gazette allowing 6-weeks for challenge to the High Court.

3.13 Under this proposed approach, the Order would be made after **two** advertising periods have taken place (as opposed to three periods under the present arrangement). This would simplify and shorten the process through which the Order would come into effect, thereby reducing the burden and costs on IDBs, and making their business planning more straightforward. Reduction in costs is explained in more detail within the Impact Assessment (attached separately).

3.14 In order to achieve this, we propose to remove the 30 day advertising period as currently set out under Schedule 3, paragraph 4, for raising objections once the Order has been made. Since we are removing the opportunity to raise objections at this stage, this would also mean that the Order would no longer be subject to Special Parliamentary Procedure. The 30 day advertising period after the Order has been made is inextricably linked to the Special Parliamentary Procedure, so we cannot remove one without the other.

3.15 We do not consider that removal of this 30 day objection period and the Special Parliamentary Procedure from the process would have the effect of removing a necessary protection. The EA's initial advertising of the scheme followed by the publication of the draft order in the London Gazette supported by wider local publication would still ensure that people have two opportunities to voice their opinions and make representations if they wished to do so. Experience indicates that people who wish to raise objections have normally made representations when the EA advertises the scheme. Objections are then addressed before the EA submits the scheme to Ministers to be made into a draft Order. Objections have, to date, rarely, if ever, been received after the draft Order stage. We do not consider that the third advertising period and associated Special Parliamentary Procedure (which has not previously been invoked so far as we are aware) provide additional value and transparency which would justify the additional delay they currently give rise to. We estimate that the removal of this advertising period would shorten the process for introducing an Order by at least three months.

Do you support the removal of the 30 day objection period after the Order has been made, which would mean that the Order making would no longer be subject to the Special Parliamentary Procedure? If not, please explain why.

3.16 We have also considered the pros and cons of removing the fourth advertising period (which highlights that an Order has come into force and the opportunity for any aggrieved person to apply to the High Court). On balance, we do not consider that it would be beneficial to remove this advertising period since it does not prolong the overall length of the Order-making process (the Order already having been confirmed) and serves a useful purpose in highlighting the opportunity for legal challenge. The prescribed six week time limit for challenging a made Order is also more focussed and constrained than if the normal Judicial Review rules were to apply which allow 3 months for objection.

Do you agree that the made Order should continue to be advertised by Defra allowing six weeks for challenge to the High Court? If not, please explain why.

Current requirements on dissemination of information under the 1991 Act

3.17 The requirements in the 1991 Act with regard to dissemination of information about Structural Reform Orders, Differential Rating Orders, Drainage Rates and Byelaws currently focus exclusively on publication in newspapers, in some cases specifically the London Gazette.

3.18 The sections of the Land Drainage Act 1991 that specify advertising of notices in newspapers are as follows:-

- **Section 2(2)(b):** Where the EA receives a petition for the alteration of IDB boundaries, the EA have an obligation to publish a notice of the petition in one or more newspapers in order to allow a period of 30 days for any representations.
- **Section 38(5)(b):** Where an IDB is applying for a Differential Rating Order¹ (DRO), they have a duty under this section to publish the notice in one or more newspapers in the district in order to allow for representations within one month.
- **Section 39(4)(b):** Where an IDB or the EA receives a petition for the making, variation or revocation of a DRO, there is a duty on the IDB/EA to publish a notice in one or more newspapers in order to allow for representations within a 30 day period.
- **Section 48(3)(b):** Where an IDB is making drainage rates², the IDB has a duty to publish a notice in one or more newspapers.

¹ A Differential Rating Order (DRO) is used to subdivide the Internal Drainage District of an IDB into sub-districts for the purposes of issuing differential drainage rates or differential special levies.

² Drainage Rates set out the amount of the board's expenses raised by rates paid by farmers/landowners and special levies paid by unitary and district local authorities

- **Section 58(3):** Where the EA is the drainage board, they may by resolution specify their expenses for its functions as an internal drainage board and they have a duty to publish any resolution in one or more newspapers.
- **Schedule 5(1)(1):** Where an IDB wishes to apply to the Minister for confirmation of any byelaws, they have a duty to publish their notice of intention in the London Gazette and in other ways they see fit one month prior to applying for confirmation.

Proposed changes to requirements on dissemination of information

3.19 With regard to the specific advertising requirements relating to IDB structural changes or publication of notices for byelaws, differential rating orders, and drainage rates, our intention is to remove the requirement to publish in one or more newspapers and to provide for more flexible arrangements.

3.20 Defra understands that advertising in some local newspapers can be costly and is mindful that this method of advertising alone may not represent best value for money in reaching out to communities. Defra also understands that many local newspapers are not necessarily widely distributed in rural communities or in some cases may no longer be published. We recognise that IDBs often have a great deal of local experience and expertise about what methods work best in disseminating information to their communities and that some IDBs may still see local newspapers as an important mechanism for reaching their key target audience. We consider that IDBs and the EA should therefore be allowed the scope to choose whether to use local newspapers or any other appropriate mechanisms, such as websites, local parish boards, to ensure the notices are publicised in the most effective way.

3.21 With regard to the publication of byelaws under Schedule 5 of the 1991 Act, our intention is to remove the requirement for IDBs to have to publish their byelaws in the London Gazette, particularly given our understanding that local authorities are not subject to a similar duty (they are only required to publish their byelaws in local newspapers). It would therefore seem unreasonable and disproportionate for IDBs to have to pay to use the Gazette, and not in line with the principles of better regulation.

3.22 Our intention is therefore to amend all relevant sections of the Act (as highlighted in paragraph 3.18 above) to allow for a wider, more targeted distribution of notices (e.g. use of electronic means, parish notice boards, etc), whilst retaining a fair, open and inclusive process, taking full advantage of the knowledge and experience of IDBs and the Environment Agency in ensuring that the advertising reaches the appropriate people.

Do you agree that the requirements with regard to advertisement of notices of byelaws, drainage rate orders, schemes, etc should be made more flexible giving IDBs and the EA more scope to choose how they reach their target audience? If not, please explain why.

Impact Assessment

3.23 Defra has undertaken an Impact Assessment (IA) of the proposed changes, which sets out potential costs and benefits associated with the amendments. The IA is included with this consultation document.

If you have any comments on the IA or consider that we have overlooked any other costs, benefits or issues that should be taken into account, please provide details as part of your consultation response.

Chapter 4: Legal analysis against requirements of the Legislative and Regulatory Reform Act 2006

4.1 As explained in Chapter 2, paragraph 2.7, these proposals must satisfy the preconditions set out in section 3 of the Legislative and Regulatory Reform Act 2006. We therefore welcome your views on our analysis of how the proposals to amend the Land Drainage Act 1991 meet these preconditions.

(i) Non Legislative solutions

The Land Drainage Act 1991 sets out the statutory procedures for taking forward IDB structural changes under section 3 and schedule 3, and for the advertisement of notices and Orders related to those reforms. Changes in the legislation are necessary if we are to streamline and improve the way in which structural reforms and the advertisement of notices and Orders are implemented. We do not consider that there is any practicable alternative to making legislative changes.

Do you agree with our assessment?

(ii) Proportionality

We consider that the proposed reforms would reduce costs and burdens for IDBs and others and help to expedite important reforms, without sacrificing transparency and inclusiveness. They would also ensure that appropriate safeguards for communities affected by any changes are maintained.

There would be no direct financial impact on the public.

Do you agree with our assessment?

(iii) Fair Balance

We consider that these proposals strike a fair balance between the legitimate desire of IDBs and others to implement structural reforms without unnecessary delay, and ensuring that those affected by the proposed changes are fully consulted and have the opportunity to comment or object.

Do you agree with our assessment?

(iv) Necessary protection

We do not consider that these proposals would remove any necessary protections. With regard to the IDB structural reform process, there would still be the opportunity for people to object to the reforms through the two remaining advertising periods, and to challenge an Order after it is made. The notices of Orders, and byelaws would still

need to be advertised and IDBs would still have a duty to ensure that the people affected by the reforms and notices are made aware of any changes

Do you agree with our assessment?

(v) Rights and freedoms

We are not aware of any right or freedom which would be affected by this proposal.

Do you agree with our assessment?

(vi) Constitutional significance

The provisions are limited to the structural reform process of IDBs and advertising of notices (Orders, byelaws, etc) relating to IDBs. We do not believe these changes to be of constitutional significance.

Do you agree with our assessment?

Annex A: List of consultees

Association of Drainage Authorities

Chartered Institution of Water and Environmental Management (CIWEM)

Countryside, Land and Business Association

Internal Drainage Boards

Local Authorities (unitary and those authorities who pay special levies to IDBs)

Local Government Association

National Farmers Union

Regional Flood and Coastal Committees

Royal Society for the Protection of Birds

Rural and Farming Network

Welsh Assembly Government

Wildlife and Countryside Link

Annex B: Response Form

Response form for consultation paper issued by Department for Environment, Food and Rural Affairs regarding proposals for a Legislative Reform Order to amend the Land Drainage Act 1991

Respondent Details	Please return by 18 March 2013 to:-
Name:	floodreports@defra.gsi.gov.uk
Organisation:	or by post to Kilie Mpopo Flood Risk Management
Address:	Department for Environment, Food and Rural Affairs
Town/City:	Area 2D, Ergon House Horseferry Road
County/Postcode:	London SW1P 2AL
Email:	

Tick this box if you are requesting non-disclosure of your response.

a) Do you think our proposals to simplify the IDB structural reform process and make requirements for dissemination of information more flexible will remove or reduce burdens as explained in Chapter 3 above?
Comments:

b) Do you have views regarding the expected benefits of the proposals as identified in Chapter 3 of this consultation document and addressed in the Impact Assessment attached separately to this Consultation Document?
Comments:

c) If there is any empirical evidence that you are aware of that supports the need for these reforms? Please provide details here.
Comments:

d) Do you support the removal of the 30 day objection period after the Order has been made, which would mean that the Order making would no longer be subject to the Special Parliamentary Procedure? (see Chapter 3) If not, please explain why.

Comments:

e) Do you agree that the made Order should continue to be advertised by Defra allowing six weeks for challenge to the High Court? (see Chapter 3) If not, please explain why

Comments:

f) Do you agree that the requirements with regard to advertisement of notices of byelaws, drainage rate orders, schemes, etc should be made more flexible giving IDBs and the EA, more scope to choose how they reach their target audience? (see Chapter 3). If not, please explain why.

Comments:

g) Do you have any comments on the Impact Assessment? Please send us details of any costs, benefits or other issues that we may have overlooked. (see Chapter 3 and separate IA)

Comments:

h) Are there any non-legislative means that would satisfactorily remedy the difficulty which the proposals intend to address? (see Chapter 4)

Comments:

i) Are the proposals put forward in this consultation document proportionate to the policy objective? (see Chapter 4)

Comments:

j) Do the proposals put forward in this consultation document taken as a whole strike a fair balance between the public interest and any person adversely affected by it? (see Chapter 4)

Comments:

k) Do the proposals put forward in this consultation document remove any necessary protection? (see Chapter 4)

Comments:

l) Do the proposals put forward in this consultation prevent any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise? If so, please provide details. (see Chapter 4)

Comments:

m) Do you consider the provisions of the proposal to be constitutionally significant? (see Chapter 4)

Comments:

n) Do you agree that IDBs should be able to choose the most appropriate cost effective methods to advertise notices of registers and notices of elections? (see Annex E)

Comments:

Annex C: Legislative Reform Orders – Parliamentary Consideration

Introduction

1 These reform proposals to the Land Drainage Act 1991 will require changes to primary legislation in order to give effect to them. The Minister could achieve these changes by making a Legislative Reform Order (LRO) under the Legislative and Regulatory Reform Act 2006 (LRRA). LROs are subject to preliminary consultation and to rigorous Parliamentary scrutiny by Committees in each House of Parliament. On that basis, the Minister invites comments on these reform proposals in relation to the Land Drainage Act 1991 that might be carried forward by a LRO.

Legislative Reform Proposals

2 This consultation document on proposals to amend the Land Drainage Act 1991 has been produced because the starting point for LRO proposals is thorough and effective consultation with interested parties. In undertaking this preliminary consultation, the Minister is expected to seek out actively the views of those concerned, including those who may be adversely affected, and then to demonstrate to the Scrutiny Committees that he or she has addressed those concerns.

3 Following the consultation exercise, when the Minister lays proposals before Parliament under the section 14 Legislative and Regulatory Reform Act 2006, he or she must lay before Parliament an Explanatory Document which must:

- i) Explain under which power or powers in the LRRA the provisions contained in the order are being made;
- ii) Introduce and give reasons for the provisions in the Order;
- iii) Explain why the Minister considers that:
 - There is no non-legislative solutions which will satisfactorily remedy the difficulty which the provisions of the LRO are intended to address;
 - The effect of the provisions are proportionate to the policy objective;
 - The provisions made in the order strikes a fair balance between the public interest and the interests of any person adversely affected by it;
 - The provisions do not remove any necessary protection;
 - The provisions do not prevent anyone from continuing to exercise any right or freedom which they might reasonably expect to continue to exercise;
 - The provisions in the proposal are not constitutionally significant; and
 - Where the proposals will restate an enactment, it makes the law more accessible or more easily understood.

- iv) Include, so far as appropriate, an assessment of the extent to which the provision made by the order would remove or reduce any burden or burdens;
- v) Identify and give reasons for any functions of legislating conferred by the order and the procedural requirements attaching to the exercise of those functions; and
- vi) Give details of any consultation undertaken, any representations received as a result of the consultation and the changes (if any) made as a result of those representations.

4 On the day the Minister lays the proposals and explanatory document, the period for Parliamentary consideration begins. This lasts 40 days under negative and affirmative resolution procedure and 60 days under super-affirmative resolution procedure. If you want a copy of the proposals and the Minister's explanatory document laid before Parliament, you will be able to get them from the Department of Environment, Food and Rural Affairs by emailing:- floodreports@defra.gsi.gov.uk or writing to Flood Risk Management Team, Department for Environment, Food and Rural Affairs, Area 2D, Ergon House, Horseferry Road, London SW1P 2AL

Parliamentary Scrutiny

5 Both Houses of Parliament scrutinise legislative reform proposals and draft LROs. This is done by the Regulatory Reform Committee in the House of Commons and the Delegated Powers and Regulatory Reform Committee in the House of Lords.

6 Standing Orders for the Regulatory Reform Committee in the Commons stipulate that the Committee considers whether proposals:

- (a) appear to make an inappropriate use of delegated legislation;
- (b) serve the purpose of removing or reducing a burden, or the overall burdens, resulting directly or indirectly for any person from any legislation (in respect of a draft Order under section 1 of the Act)
- (c) serve the purpose of securing that regulatory functions are exercised so as to comply with the regulatory principles, as set out in section 2(3) of the Act (in respect of a draft Order under section 2 of the Act);
- (d) secure a policy objective which could not be satisfactorily secured by non-legislative means;
- (e) have an effect which is proportionate to the policy objective;
- (f) strike a fair balance between the public interest and the interests of any person adversely affected by it;
- (g) do not remove any necessary protection;
- (h) do not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise;
- (i) are not of constitutional significance;

- (j) make the law more accessible or more easily understood (in the case of provisions restating enactments);
- (k) have been the subject of, and takes appropriate account of, adequate consultation;
- (l) give rise to an issue under such criteria for consideration of statutory instruments laid down in paragraph (1) of Standing Order No 151 (Statutory Instruments (Joint Committee)) as are relevant, such as defective drafting or failure of the department to provide information where it was required for elucidation; and
- (m) appear to be incompatible with any obligation resulting from membership of the European Union.

7 The Committee in the House of Lords will consider each proposal in terms of similar criteria, although these are not laid down in Standing Orders.

8 Each Committee might take oral or written evidence to help it decide these matters, and each Committee would then be expected to report.

9 Copies of Committee Reports, as Parliamentary papers, can be obtained through HMSO. They are also made available on the Parliament website³.

10 Under negative resolution procedure, each of the Scrutiny Committees is given 40 days to scrutinise a LRO, after which the Minister can make the order if neither House of Parliament has resolved during that period that the order should not be made or to veto the LRO.

11 Under affirmative resolution procedure, each of the Scrutiny Committees is given 40 days to scrutinise a LRO, after which the Minister can make the order if it is not vetoed by either or both of the Committees and it is approved by a resolution of each House of Parliament.

12 Under super-affirmative procedure each of the Scrutiny Committees is given 60 days to scrutinise the LRO. If, after the 60 day period, the Minister wishes to make the order with no changes, he may do so only after he has laid a statement in Parliament giving details of any representations made and the LRO is approved by a resolution of each House of Parliament. If the Minister wishes to make changes to the draft LRO he must lay the revised LRO and as well as a statement giving details of any representations made during the scrutiny period and of the proposed revisions to the order, before Parliament. The Minister may only make the order if it is approved by a resolution of each House of Parliament and has not been vetoed by either or both relevant Committees.

³ <http://www.parliament.uk/business/committees/committees-archive/regulatory-reform-committee/> (Regulatory Reform Committee in the Commons) or <http://www.parliament.uk/business/committees/committees-archive/dprr/> (Delegated Powers and Regulatory Reform Committee in the Lords)

How to Make Your Views Known

13 Responding to this consultation document is your first and main opportunity to make your views known to us as part of the consultation process. You should send your views to the person named in paragraph 2.17 and Annex B of this consultation document. When the Minister lays proposals before Parliament you are welcome to put your views before either or both of the Scrutiny Committees.

14 In the first instance, this should be in writing. The Committees will normally decide on the basis of written submissions whether to take oral evidence.

15 Your submission should be as concise as possible, and should focus on one or more of the criteria listed in paragraph 6 above.

16. The Scrutiny Committees appointed to scrutinise Legislative Reform Orders can be contacted at:

Delegated Powers and Regulatory Reform Committee House of Lords London SW1A 0PW Tel: 0207 219 3103 Fax: 0207 219 2571 mailto: DPRR@parliament.uk	Regulatory Reform Committee House of Commons 7 Millbank London SW1P 3JA Tel: 020 7219 2830/4404/2837 Fax: 020 7219 2509 mailto: regrefcom@parliament.uk
---	--

Non-disclosure of responses

17. Section 14(3) of the LRRA provides what should happen when someone responding to the consultation exercise on a proposed LRO requests that their response should not be disclosed.

18. The name of the person who has made representations will always be disclosed to Parliament. If you ask for your representation not to be disclosed, the Minister should not disclose the content of that representation without your express consent and, if the representation relates to a third party, their consent too. Alternatively, the Minister may disclose the content of the representation in such a way as to preserve your anonymity and that of any third party involved.

Information about Third Parties

19. If you give information about a third party which the Minister believes may be damaging to the interests of that third party, the Minister does not have to pass on such information to Parliament if he does not believe it is true or he is unable to obtain the consent of the third party to disclose. This applies whether or not you ask for your representation not to be disclosed.

20. The Scrutiny Committees may, however, be given access on request to all representations as originally submitted, as a safeguard against improper influence being brought to bear on Ministers in their formulation of legislative reform orders.

Annex D: Consultation criteria

The criteria in the "**Consultation Principles**" (<http://www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance>) apply to all UK national public consultations on the basis of a document in electronic or printed form.

Though they have no legal force, and cannot prevail over statutory or other mandatory or external requirements (eg under European Community law) they should otherwise generally be regarded as binding on UK Departments and their agencies unless Ministers conclude that exceptional circumstances require a departure.

The key Consultation Principles are:

- departments will follow a range of timescales rather than defaulting to a 12-week period, particularly where extensive engagement has occurred before;
- departments will need to give more thought to how they engage with and consult with those who are affected;
- consultation should be 'digital by default', but other forms should be used where these are needed to reach the groups affected by a policy; and
- the principles of the Compact between government and the voluntary and community sector will continue to be respected.

Defra believes that in relation to this particular consultation that we have followed the criteria. If you have any comments in relation to Defra's approach to consultation then they may be contacted at consultation.coordinator@defra.gsi.gov.uk.

Please do not send specific responses to this consultation to the consultation co-ordinator. We will be happy to receive those at:

floodreports@defra.gsi.gov.uk

Annex E: Land Drainage (Election of Drainage Boards) Regulations 1938

Within the Land Drainage (Election of Drainage Boards) Regulations 1938, paragraph 3 states that the Clerk shall publish a notice of the proposed register in the manner prescribed in Rule 28. Similarly, paragraph 6 of the Regulations states that, the Returning Officer shall publish notices of elections in the manner prescribed in Rule 28.

Rule 28 states that, “any notice, certificate, or declaration required by these Rules shall be given by inserting the same in one or more newspapers circulating in the Drainage District or otherwise in such manner as the Minister considers sufficient and so directs”.

In line with our intention to make the Land Drainage Act 1991 requirements for the publication of notices more flexible, we propose to enable IDBs to have more scope to choose how they publish notices of registers and elections in future.

Do you agree that IDBs should be able to choose the most appropriate cost effective methods to advertise notices of registers and notices of elections?