

POW OF INCHAFFRAY DRAINAGE COMMISSION (SCOTLAND) BILL

Written submission by Peter Symon

1. I reside in Perth and Kinross but not in the Pow of Inchaffray area. My interest in the Pow of Inchaffray Drainage Commission Bill stems partly from student summer jobs working in the land drainage industry, then a flourishing sector, in the Perth area. My academic training was originally in geography and I have worked in university teaching and research in housing and public policy. I welcome the opportunity to make this submission, on a non-professional basis. To save space I have left out certain sources, especially those obtained from telephone calls or emails, but further details can be provided on request if they would be of assistance. The views expressed in the submission are mine alone and I take full responsibility for any errors or omissions in it.

2. I am cautiously supportive of the general purposes of this Private Bill insofar as they would improve the protection of properties through more effective water level and flood risk management. A strategic approach should, as the Association of Drainage Authorities (ADA) outline, be on a local catchment basis.¹ Pow Water² is a sub-basin of the River Earn catchment, and both are extensively engineered fluvial systems with subsoil, arterial and pumped land drainage, reservoirs, and public and private wastewater drainage. The upper Earn has hydro too.

3. A limitation for policymaking is that, unlike England and Wales, where there are Internal Drainage Boards (IDBs), and unlike other European countries, there is no statutory basis in Scotland for local public land drainage and water level management bodies. In 1930, when permitting them to be made in England and Wales, parliament declined to permit public IDBs to be made in Scotland. Agricultural land was excluded from flood protection schemes until 2009. Flood risk from the watercourses such as Pow tends to be given a low priority by local flood risk management authorities (**Promoters' Memorandum, paras 45-50**).

4. The Pow Commission may have quasi-public water level management functions. As Lord Aitchison, introducing the second reading of the Land Drainage (Scotland) Bill, noted in 1930, the Pow Commission is the only ad hoc, local private drainage authority in Scotland.³ It also may resemble, in budget and area drained, some of the smaller of the roughly 110 IDBs, certain of them being consortia including pre-1930 local drainage commissions.

5. Other local private drainage bodies exist in Scotland, including a Pow Commission in the area in which I live, the Carse of Gowrie, which lies on the north bank of the inner estuary of the River Tay and is an area resembling the topography of the flattest and most low lying 10 per cent of the land area of England that is covered by areas of special drainage need managed by IDBs. A Pow Commission in the Carse was founded by Decreet Arbitral in 1848, not by statute.⁴ Like Inchaffray, much of the Carse had already been drained by proprietors under an earlier Decreet

Arbital (in the Carse, for 18th century reclamation of lands, including commonty; in Inchaffray, probably also for land reclamation, pre-dating the 1696 Act).

6. Both the Pows of Inchaffray and of the Carse of Gowrie are described as "public" drains: in sheriff court papers relating to those in the Carse; and **s40 1846 Act** for the Inchaffray Pow. The conception of these watercourses as public may result from their function as a supply of water power for driving corn mills.

7. Another similarity between the Commissioners in the Carse of Gowrie (founded 1848) and the Pow Commissioners of Inchaffray (1846) is that they were both interested in facilitating the construction of a railway across the proprietors' lands.⁵ The same surveyor, Alexander Drummond, was employed to survey both areas around the same time. At Inchaffray a railway company was going to pay for the passage through Parliament of the necessary Railway Bill but eventually the proprietors paid for their own Drainage Bill.

8. That the future railway was uppermost in the minds of the 1846 Bill promoters is evident in **s42 1846 Act**, restricting the gradient of ascent to bridges over the Pow to "not steeper than is prescribed by the Railway Bridges Consolidation (Scotland) Act, 1845". Work did not begin on the Crieff and Methven Junction Railway until 1864 and it opened to the public on 21 May 1866.⁶ One of the stations was at Balgowan, where three parish boundaries met. The railway closed to passenger traffic in 1951 and finally in 1967. Its dismantled track follows the banks of the Pow for much of the length between Methven Moss SSSI and Madderty Station.

9. The railway origins of the 1846 Act may explain some of the circularity in the definition of the lands required to be surveyed and valued by **s23 1846 Act** as those which may be affected by the intended drainage. I discuss below some issues arising for the extent of the benefited land in **s3** of the Bill. Probably the lands were drained to suit the route of the railway. Some fields which the track passed through may have been included in their entirety even though only partially at risk of flooding.

10. Under **s41 1846 Act** the occupiers (farm tenants) of lands intended to be drained as part of the scheme were obliged to clean (annually, under **s40 1846 Act**; and manually, until the 1970s) the "Ditches and open Drains adjoining and belonging to" their lands, as traditionally is the case in private law, to the satisfaction of the Commission, which was empowered to penalise occupiers who refused or neglected to do so and to carry out works at occupiers' expense (**s41 1846 Act**).

11. It is not clear to me if occupiers were entitled, if they so wished, to maintain the Pow itself, rather than just the ditches draining into it, all to the satisfaction of the Commission. But if it was so, then the Bill may be removing that entitlement to "opt out" of the collective arrangements. It may be putting on a statutory basis the *de facto* arrangement for sharing the expense of maintaining the Pow, but removal of the occupier's right could potentially be one of the "new and more extensive powers" the promoters seek (**Explanatory Note, para 5**).

12. It is also unclear what the effects of repealing the 1846 Act would be for real rights in land titles that are derived from the statute, or earlier statutes.

13. The 1846 Act⁷ set out detailed powers. New and more extensive powers are sought but the Bill mixes a broad-brush approach to proposed functions and general powers of the Commission (**s1(2) and sch 1, paras 1-2**), and also the saving provisions of **s1(3)**, with some detailed Sections and Schedules. There is much detail that, had it been a Public or Hybrid Bill, may have been more appropriately provided for by secondary legislation, e.g. Regulations, Ministerial Order (e.g. those made under the Transport and Works (Scotland) Act 2007) or Commission Byelaws.

Part 1 The Commission

14. The type of (presumably not-for-profit) company to be formed is not stated: e.g. private unlimited company, private company limited by shares or guarantee, community interest company, or charity (relevant heads under the Charities Act 2011 may include the advancement of environmental protection or improvement, provision of public works, public amenities or promotion of agriculture). **Sch 1, paras 10 & 11** implies that financial statements would not be published by Companies House.

15. The Balgowan section seems underrepresented with one out of the seven Commissioners (**s2(2)**). According to the Scottish Government, residential heritors' share of total contributions to the Commission's budget could be 35.3 per cent.

16. Some details of the outer and sectional boundaries of benefited land as shown on the Land Plans appear to need attention, e.g. at Woodend and Nethermains of Gorthy, where such boundaries deviate from parcel boundaries.

17. **Section 3 (Extent of the Pow and the benefited land)** presents some intractable difficulties, consideration of which is beyond the scope of my submission.

18. Missing are details of the surveys carried out before and after the works under the 1846 Act, to determine the extent to which the land had benefited. Also missing is a plan of the 1846 Act benefited land.

19. The flood risk maps prepared by SEPA (whose remit is not flood management) diverge from benefited land marked on Land Plans in the flatter upper and middle sections. The most problematic discrepancy is at the Balgowan housing development, which SEPA mostly excludes from high flood risk. It is the former site of a timber merchant's yard and sawmill adjacent to the former railway station.

20. Flood risk maps should only be a starting point for considering whether land should be included within the boundary of benefited land on a case-by-case basis, including by detailed local flood risk assessment where necessary. Any such evidence supporting the inclusion of the site, in whole or part, would be helpful, including any documents relating to the planning application, in order to establish the extent of flood risk for houses at Balgowan. It is noted that flood damage to private

drainage, such as soakaways, is the most common type of flood insurance claim in the UK, according to the Law Society guidance on Flood Re.

21. Research on the relationship between land drainage and flooding suggests that arterial drainage (i.e. ditches) may raise the risk of flashy floods from increased runoff associated with climate change, especially in dry catchments.⁸ Changes in land drainage techniques have led to an increase in arterial drainage compared with subsurface drainage. It may therefore be proportionate to have the power to vary those ditches that are or are not included in associated works **(s3(2)(b))**.

22. The 1,930 acres (roughly 781 ha) of benefited land is around 9.3 per cent of the 84km² total catchment area of the Pow (roughly 20,756 acres). The Commission cannot do anything about the water it is required to accept from the higher 90.7 per cent of land in the catchment and gets no money to manage it. In contrast, IDBs receive Higher Land Water Contributions from the Environment Agency for water received within Internal Water Districts from outside the district.

23. More information about incidence and impacts of flood events on the Pow, especially the more flood-prone middle and upper sections, would be helpful. Land in the vicinity of the former Balgowan station was flooded in August 1877 when heavy rain cause the Pow to overflow. The recently constructed railway embankment was washed away in several places and the railway line between Balgowan and Madderty stations was covered in eight to twelve inches of water in places.⁹

24. The Pow sub-basin accounts for 9.7 per cent of the River Earn catchment which has a total area of 869.14km² (about 214,735 acres). The Earn downstream of the Pow has a history of flood events, the largest recent one being in January 1993 which led to the construction of the Bridge of Earn Flood Protection Scheme.

25. The Pow averages 4.7 per cent of the flow rate of the River Earn at Kinkell Bridge, just downstream of the confluence.¹⁰ The Pow's share of the Earn flow is in the range from 1.1 to 12.8 per cent. Flow rates, measured in cubic metres per second (cumecs), on the lower stretch of the Pow at Millhills, are in the range from 0.10 cumecs to 7.93 cumecs. While probably an underestimate of the highest flow rates, due to limitations of field measurements, they indicate the extent to which the levels in the Pow can rise and fall. Peak flows downstream in the Pow can be impeded by bridges, silt, collapsed banks, vegetation and rubbish, leading to increased flood risk upstream.

26. Water from the Pow is unlikely to change the level of the Earn by more than a few millimetres. IDBs in England pay a precept to the Environment Agency as a contribution for water passing from the Internal Drainage District into a main river.

27. SEPA advise that any flood risk to downstream receptors from activities on or near a watercourse should be considered, including land raising in a floodplain, which may require provision of compensatory storage. Also, cleaning the Pow would

increase the conveyance capacity of the watercourse and increase the flood peaks downstream, particularly if flood peaks of the Pow and the Earn coincide. Flow rates at Millhills and Kinkell Bridge are highly correlated (Pearsons $r = 0.79$), suggesting a potentially fairly close coincidence of flood peaks.

28. It is not clear if the term "**other structures**" **s(3)(2)(d)** includes **bridges** over the Pow, including footbridges. The 1846 Act empowers Commissioners to make bridges (**s34 1846 Act**) thereafter vested in them "for the time being" (**s36 1846 Act**). Commissioners have a duty to make bridges either where the Pow works cross roads or where bridges are necessary for owners' or occupiers' enjoyment of the land, failing which owners and occupiers may make such bridges as they consider necessary (**s39 1846 Act**). Their significance for Victorian drainage is shown by the penalty of up to £20 which could be imposed for damaging bridges (**s76 1846 Act**).

29. The status of **Woodend Bridge** (NN 937 222), a footbridge over the Pow between Drumphin and the former Woodend mansion, now Woodend farm, requires clarification. It may be a Commission bridge. A bridge at that location is marked on the 25 inch OS map surveyed in 1864 (published 1867) and also in the 1901 edition. It is the only bridge permitting the Pow or associated works to be crossed by a non-vehicular Right of Way or Core Path (Right of Way 22/24/11; Core Path ESTN11).

30. Woodend Bridge superstructure was removed a few years ago. Raising the matter with an MSP in late 2016, I was advised that owners of the properties on either side of the relevant section of the Pow (including the said MSP) had had conversations with certain specified organisations about the replacement bridge and works were required to make the banking safe. It seems to me that there has been little or no progress. When I visited a few weeks ago the bridge superstructure had still not been replaced and the north abutment had collapsed since my previous visit.

31. Experience, insider knowledge and recruitment of Commissioners, who give their time voluntarily, are crucial but a ten year tenure in office (**sch 2 para 9**) seems long. Consideration might be given to overlapping terms for Commissioners, with rotating membership unless reappointed. Conduct matters in **Sch 3 paras 6-8** could be covered by a Commissioner's Code of Conduct and Register of Interests.¹¹ **Sch 1, para 4** makes no provision for a quorum for Commission committees.

32. The quorum of 3 for heritor's meetings (**s7(6)**), the same as for meetings of 7 Commissioners (**Sch 3, para 4**), is low. It would be met if a heritors' meeting was attended by 3 Commissioners and no others. The number of heritors is set to rise from 14 in 1846¹² to apparently some 102 if the Bill is passed. **Sch 2, paras 4 and 5** also give cause for concern about the consequences of low attendance at heritors' meetings. Neither are Committee standing orders etc outlined. **Section 9** does not specify how the "75 per cent" rule by land value would operate in practice.

Part 2 Annual assessments etc

33. The Statement of Account for 2015/16 suggests the Commission's annual budget is under £25,000. Following the Scottish Government's methodology for calculating notional assessments, and assuming a budget of £25,000 (not taking account of VAT), the annual assessment per house could be £126.09. The difference in the annual assessment per house could fall from £150.00 in 2015/16 to £126.09, a drop of £23.91 (15.9 per cent), both figures excluding VAT.

34. By way of comparison, Perth and Kinross Council Tax and Scottish Water water charge for houses in Band G were £2,257.00 in 2016/17 and £2,644.89 in 2017/18, an increase of £387.89 (17.19 per cent). Band E increased from £1,655.13 to £1,795.24, an increase of £140.11 (8.47 per cent).

35. More than two thirds of the Manor Kingdom houses in Balgowan are Band G (Earn Square, Millglen Drive and Munro Drive, detached) and the rest are Band E (Eden Square, terraced). Most houses are presumed to be owner-occupied and therefore most occupiers would be liable for annual assessment by the Commission although in some cases liability may be with landlords (wherever resident).

36. Wastewater treatment charges are not collected with Council Tax at Balgowan as there is no Scottish Water wastewater treatment works. The private wastewater treatment works serving the Manor Kingdom houses and situated next to the Pow is still in the hands of the developer. Scottish Water have declined to adopt the treatment works until it is brought up to Scottish Water's standards.

37. Based on the above, an annual budget of £25,000 would be unlikely to raise affordability issues for households. However, an annual budget of £100,000 could add another £504.34 on top of the £1,795.24 Council Tax and water charges in 2017/18 of those Band E occupiers liable for assessment, i.e. a total of £2,299.58 (an increase of 28.1 per cent). Particularly when levied as a single annual payment (**s10(8)**), assessment could present a problem for household budgets.

38. It is not known whether the current budget is sufficient to maintain the Pow to the satisfaction of Commissioners or whether there is a backlog of maintenance work required. Judging by the condition of the Pow and adjoining land in the middle and upper sections in particular, the latter appears to be the most likely.

39. Capital works for improvement schemes could cost considerably more than £100,000. Unlike in the past, agricultural grants are unlikely to be available. Flood prevention scheme funding, concentrated in Potentially Vulnerable Areas (population centres) in terms of the Flood Risk Management (Scotland) Act 2009, may also not be available. The Commission's budget, and consequently assessments, could be increased considerably by improvement works compared with recent years. Potentially highly variable assessments year-on-year would be inadvisable.

40. Revaluation for assessment may not be consistent with valuation for purposes of non-domestic rates, from which agricultural land and buildings, gas pipelines (e.g. at Williamston) and certain other rural uses are exempt. Revaluation of houses may also be inconsistent with 1991 values used for Council Tax purposes.
41. If residential land is valued, not by the market-value-based methodology set out in **s10 and Schedule 4**, but based on Council Tax bands, it may also avoid issues arising from **Sch 4, para 6** (equal parcel sizes within a housing development).
42. The absence of a right of appeal under **Sections 10-12** compares unfavourably with the right of appeal under **s48 1846 Act.** Judicial review (JR) may not be available as the Commission is not a public body, although the Commission may be deemed to discharge quasi-public functions (e.g. flood management). Claims based on natural justice and human rights law may arise. JR is not practical for most.
43. It is unclear if agricultural land used for a renewable energy project (e.g. a solar farm) would continue to be "agricultural" land or would become "commercial" land (**Sch 4**), and therefore subject to the higher rate contribution.
44. A Commissioner, heritor or occupier of benefited land is apparently not barred by **s13** from appointment as surveyor under sections 11 and 12.
45. Extending right of inspection of **Land plans (s15) and Register of Heritors (s16)** from heritors-only to public access, as per the submission by Professor Gretton, is supported, provided data protection Regulations can be complied with.
46. Sight of (anonymised) Title Sheets of houses subject to the assessment may be helpful, to see if the Pow obligation is within the four corners of the title, or not.
47. I phoned two estate agents currently selling houses in Manor Kingdom estate and both confirmed that they were aware of no property details mentioning any obligations in respect of the Pow Commission, which they had not heard of.
48. Relieving residential heritors or occupiers from direct assessment altogether, as is now the case with IDBs, may only be a theoretical option in Scotland, because statutory provision for public aid for the Commission is absent.
49. The Association of Drainage Authorities (representing IDBs and drainage commissions) has nevertheless kindly supplied information I requested, and which I have summarised as follows, about the financing of the work of IDBs in England by Special Levy and Local Levy payments and contributions.
50. Occupiers of agricultural land pay a drainage rate based on the full annual rental value of the property protected by the work of the Board. This is known as the Local Levy and is charged directly. The drainage rate that would otherwise have been paid by occupiers of "other land", including residential, commercial and shops, is collected as part of Council Tax, Business Rates and Local Services Support

Grant across the local authority (LA) area rather than just the properties within the Internal Drainage District. IDBs make a Special Levy on LAs to collect the payments.

51. The power to conclude voluntary payment agreements dates back to the Land Drainage Act 1930, by s25 of which LAs were given the ability to appoint members to the Board as a result. This continues under the Land Drainage Act 1991, as amended by the Land Drainage Act 1994. The Special Levy is not part of the council's budget and councils neither gain nor lose any money in their budgets as a result of the transactions. It is also noted that the 1930 Act originally charged non-agricultural occupiers on only one third of the annual rateable value of the property.

Part 3 Miscellaneous and General

52. Seven days' notice of non-urgent access (**s(17(2))**) may not be long enough for landlords to notify tenants of works affecting them (there is no provision for a register of occupiers). Prior consent for access to residential gardens seems not to be required (**s17(3)**) whereas **s37 1846 Act** requires prior written consent for works on gardens, driveways, inter alia.

53. Amendment of primary legislation is implied by **s18 (notice of planning applications)**, in order to allow enforcement, address effects on permitted development rights and ensure applicants know of the obligation to notify.

54. Protecting "affected land" from obstruction by housing developments, trees and fences (a frequent issue in the past) is crucially important, in order to allow access to the Pow by mechanical excavators. Access may have been obstructed to parts of Pows in the Carse of Gowrie. For avoidance of doubt the words "or obstruct access to the affected land" could be added to the end of **s19(1)(b)(i)**.

55. Affected land (**s.27**) is land within 6 metres of the top of a bank or within any part of the Pow and reflects the current standard for payments under agri-environment schemes. By comparison, Model IDB Byelaw 10 prohibits any obstruction within 9 metres of the landward toe of a watercourse.¹³ Margin width may need to allow for flood measures (e.g. "scrapes and hollows"). The small population of beavers SNH say are already present on the Pow may also have an influence.

56. **Section 19(1)(b)** interacts with SEPA Regulations ("CAR"). It is noted that no Savings for Other Bodies or Limitation of the effects of the Bill on statutory provisions are included.

57. In **Schedule 5 (Consent procedure)** there is nothing about an application form or a published schedule of fees, revised from time to time, both of which may be relevant to what is deemed "reasonable" (**para 1**), or about giving reasons for decisions (**para 3(b)**). There is also no appeal procedure (see above).

¹ Association of Drainage Authorities and Environment Agency, *Establishing New Internal Drainage Boards - Guidance* (Bristol: Environment Agency; http://www.ada.org.uk/downloads/other/downloads_page/Establishing%20New%20Internal%20Drainage%20Boards%20National%20Guidance.pdf), p.2; See also: *An introduction to Internal Drainage Boards (IDBs)* (ADA: Stoneleigh Park, Warwickshire; <http://www.ada.org.uk/downloads/publications/IDBs-An-Introduction-web.pdf>); and National Audit Office, *Internal Drainage Boards*, Report to DEFRA, March 2017 (<https://www.nao.org.uk/wp-content/uploads/2017/03/Internal-Drainage-Boards.pdf>).

² As the Pow of Inchaffray is named on O.S. maps.

³ Land Drainage (Scotland) Bill, 2nd reading, per Lord Avocate, Mr Craigie Aitchison, MP for Pollok, House of Commons Debate, 23 January 1930, vol 234, cc431-474, at c437 : <http://hansard.millbanksystems.com/commons/1930/jan/23/land-drainage-scotland-bill>

⁴ *The legal liability of the proprietors to uphold and maintain the Pows*, Report by Messrs. Condie Mackenzie & Co., W.S., Perth to the Commissioners of the Pows of Horn, Myres and Charleston (Perth, 1931).

⁵ On Inchaffray, see: Norman Watson, *History of the Pow of Inchaffray*, Linda McGill, 1997, pp 25-31.

⁶ *Dundee Courier and Argus*, 24 May 1866.

⁷ For the purposes of judicial notice, the 1846 Act is a Public Act (s91).

⁸ See for example the recent comprehensive literature review by the Centre of Expertise for Waters (CREW) at Heriot-Watt University: http://www.crew.ac.uk/sites/default/files/sites/default/files/publication/CREW_NFMPProject_Land_Drainage-FINAL.pdf

⁹ 'The Storm', *Dundee Courier and Argus*, Wednesday 22 August 1877. A train from Perth carrying livestock to the agricultural show in Crieff was prevented from reaching its destination.

¹⁰ The figure is based on my own unpublished research, using flow rate data in cubic metres per second (cumecs) supplied by SEPA (and subject to standard SEPA terms of use agreement) for 57 readings between 1969 and 1989 at reading stations at Millhills, about 1.5km upstream of the confluence of the Pow with the River Earn, and at Kinkell Bridge, 4km downstream of the confluence on the Earn, for the same dates.

¹¹ See, for example, such documents prepared by South Holland Internal Drainage Board as possible templates: https://www.wlma.org.uk/uploads/SHIDB_Register_of_Members_Interests_Form.pdf ; https://www.wlma.org.uk/uploads/SHIDB_Members_Code_of_Conduct.pdf . Fifty per cent plus one member of an Internal Drainage Board are made up of local authority appointed members.

¹² 35 farm tenants were also deemed to benefit from the drainage in 1846 (Watson, *History*, p.36).

¹³ This is a maximum, depending on technical data such as soil stability, and many boards have found a lesser distance adequate (ADA, *Model Drainage Byelaws, Internal Drainage Boards*, 2012) ; available at <http://www.ada.org.uk/wp-content/uploads/2017/01/Model-IDB-Drainage-Bylaws.pdf>