

Advice Note

Ordinary Watercourse Regulation - Consenting

February 2012

This advice note aims to assist the transfer of ordinary watercourse consenting Powers from the Environment Agency to Local Authorities as required in the Flood and Water Management Act (FWMA) 2010 in England only.

Introduction

Local Authorities will lead on ordinary watercourse consenting and enforcement unless it is in an Internal Drainage District where Internal Drainage Boards (IDBs) will retain their existing powers. The Land Drainage Act 1991 will underpin ordinary watercourse regulation undertaken by Local Authorities. This will occur following commencement of paragraphs 32-34 of Schedule 2 of the Flood and Water Management Act 2010.

- Changes to ordinary watercourse management have been made by the Flood and Water Management Act 2010 [FWMA]. In particular paragraph 32 (principally) of Schedule 2 of the FWMA amends section 23 of the Land Drainage Act 1991 (LDA1991).
- This note covers the transfer of regulatory powers (consenting and enforcement) on Ordinary Watercourses from the Environment Agency to Lead Local Flood Authorities (LLFAs). Together ordinary watercourse consenting and enforcement are referred to as regulation.
- The purpose of ordinary watercourse regulation is to control certain activities that might have an adverse flooding impact.
- Defra and Welsh Government may choose, separately or jointly, to produce further documentation on the transfer of ordinary watercourse consenting.
- Currently ordinary watercourse consenting and enforcement, other than in an “internal drainage district” is undertaken by the Environment Agency, however Local Authorities already have enforcement powers under s25 of the Land Drainage Act 1991.
- This note is to assist Environment Agency Area Development and Flood Risk and Asset System Management Teams in consistently sharing their expertise in these two roles (consenting and enforcement, together described as regulation) with Lead Local Flood Authorities, and for ongoing reference by LLFAs.
- Ordinary watercourse regulation within internal drainage districts is undertaken by internal drainage boards (IDBs). IDBs can operate as either:
 - “stand alone”;
 - more than one internal drainage board working together as a “consortium”;
 - internal drainage boards operated by the Environment Agency.

- The responsibilities for ordinary watercourse regulation in internal drainage districts are not affected by the FWMA. Internal drainage districts only cover approximately 10% of England and Wales by area.
- In some areas the Environment Agency has assumed delegated responsibility for the IDBs. Where this is the case, the Environment Agency, acting as an internal drainage board, will continue to undertake ordinary watercourse regulation. All other ordinary watercourse regulation undertaken by the Environment Agency is intended to transfer to LLFAs.
- These changes result from recommendations contained in Sir Michael Pitt's independent review of the 2007 summer floods.

Geographical Coverage

The advice covers the whole of England.

Existing Environment Agency Consenting Approach

- The Environment Agency takes a risk based and proportionate approach in undertaking these activities. Information on the numbers of ordinary watercourse consents we currently determine is shown in Appendix 1.
- The Environment Agency uses certain procedures, including internal guidance notes, in determining ordinary watercourse consents and considering enforcement action. Appendix 2 is presented as a series of simple cross sections which represent those activities the Environment Agency considers to require consent and those which do not.
- The Environment Agency has always encouraged early discussions in advance of consent application and always seeks first to resolve enforcement issues by negotiation. Pre-application discussions may be able to identify an alternative approach that does not require consent because it will present no risk to flood risk management.
- A Consent application requires the payment of a fee. Consent application fees are fixed in Statute and to change them requires a Ministerial Order.
- Appendix 3 includes an example template for a consent application form and associated notes. A LLFA does not have to use this template but it provides guidance on the information that the Environment Agency has found to be necessary.
- To avoid confusion, it is suggested that if an application form is used for consenting on ordinary watercourses that it should be clearly distinguishable from Main River consents.
- Appendix 3 also includes standard letters and a consent document for granting ordinary watercourse consent. Following the transfer it will be possible to attach reasonable conditions to a Consent such as relating to timing and manner of the works.

- Appendix 4 includes a non-exhaustive list of issues that could support conditions and informatives based upon the Environment Agency's experience on main river permits.
- In determining applications it is necessary to consider other Legislation including, but not exclusively: The Environment Act; the Habitats Regulations; the Water Framework Directive (WFD); the Countryside and Rights of Way Act; the Salmon and Freshwater Fisheries Act; the Eel Regulations.
- In undertaking other activities LLFAs will need to have regard to their general obligations and these regulations in particular. Information on these is provided in [Appendix 6](#). From the Environment Agency other permits that may be required by the applicant include environmental permits (previously abstraction, impoundment and discharge consents) and consents may also be required from Natural England and the Countryside Council for Wales. If the application has the potential to affect a main river or sea defences the LLFA must consult the Environment Agency to ensure a partnership approach. The Environment Agency anticipates that the two bodies would discuss issues and work together.
- Permissions may be required for works in relation to designated sites (SSSIs, SACs, SPAs) and/or protected species. Currently, where a third party seeks consent for works, the Environment Agency undertakes to consult with Natural England or CCW on potential impacts on designated sites. The third party is not required to apply directly to Natural England or CCW for consent under the designated sites legislation. However, where protected species may be affected by works, the third party must contact Natural England or CCW directly in case works need to be licensed under the protected species legislation. Further detail is provided in [Appendix 6](#).
- A Consent application will need to be screened by the LLFA to establish if the applicant needs to submit a WFD assessment as part of their application. If a WFD assessment is needed and has not been undertaken, the consent should be refused on WFD grounds. If you issue consent for a proposal which causes a water body to deteriorate or prevents the objectives of the WFD from being met, this will be reported to the European Union. This could result in the UK Government facing infraction (financial penalties) from the European Union. Further detail is provided in [Appendix 7](#).
- The LLFA should be aware of the implications of the latest Construction (Design and Management) Regulations. It is recommended that LLFAs make it clear to applicants that the LLFA is not designing the work and that it is for the applicant to ensure that the current requirements of the CDM Regulations are complied with.

The way that the FWMA will operate

Section 23 of the Land Drainage Act 1991 will be amended by the Flood and Water Management Act 2010 to say:-

23 Prohibition on obstructions etc. in watercourses

(1) No person shall—

(a) erect any mill dam, weir or other like obstruction to the flow of any ordinary watercourse or raise or otherwise alter any such obstruction; or

(b) erect a culvert in an ordinary watercourse, or

(c) alter a culvert in a manner that would be likely to affect the flow of an ordinary watercourse,

without the consent in writing of the drainage board concerned.

(1A) Consent under this section may be given subject to reasonable conditions.

(1B) An internal drainage board or lead local flood authority must consult the Environment Agency before carrying out work within subsection (1)(a), (b) or (c) if the board or authority is “the drainage board concerned” for the purposes of this section.

(1C) The drainage board concerned must have regard to any guidance issued by the Environment Agency about the exercise of the board's functions under this section.

- Consent post transfer will be required for the erection of any culvert and any alteration likely to affect the flow in an ordinary watercourse; this is more widely drawn than pre transfer.
- Post transfer, consent may be given subject to reasonable conditions. [Appendix 4](#) includes some suggested topics and wording for conditions and informatives. LLFAs may wish to use a condition to time limit the proposed works to ensure a consent is implemented within a given timescale.
- After transfer, where a LLFA intends to undertake works on an ordinary watercourse for which it has regulatory responsibility, it must consult the Environment Agency. However where an LLFA is doing work for FCRM purposes, they do not need to consult the Environment Agency, provided there is a local FRM strategy published for the area the work is within and the works are consistent with it. Until the local FRM strategy is published, LLFAs will need to consult the Environment Agency.
- Conversely when the Environment Agency no longer holds powers relating to works on ordinary watercourses, it will have to apply for consent from the Local Authority.
- The LLFA is also likely to become the SuDS Approving Body (SAB) under the FWMA and there may be some overlap between SuDS activities and ordinary watercourse consenting.

Transitional arrangements

- Any application in England received before 6th April 2012 will be considered by the Environment Agency and the Environment Agency's responsibility for such applications will end when the consent or refusal letter is issued. The Environment Agency will be responsible for any appeals for these refusals.
- If, on or after 6th April 2012, a Consent application for works on an ordinary watercourse for which the LLFA will have regulatory responsibility is received by the Environment Agency it will be returned to the applicant with a covering letter. This letter will be copied to the LLFA for information.
- Works that the Environment Agency have already consented will not be required to seek consent anew from the LLFA and conversely structures that do not have consent prior to 6th April 2012 will continue to be without consent from 6th April onwards.
- LLFAs should be responsible for (new) enforcement activities from 6th April 2012 even if the works took place before the LLFA took responsibility for section 23 consents on ordinary watercourses. Where enforcement procedures have been commenced prior to 6th April 2012 the Environment Agency will be responsible for concluding these.

Environment Agency historical records

The Environment Agency holds records of ordinary watercourse consents and enforcements. It is likely that the Environment Agency will provide the LLFA with a list of its records for the period covered by the Environment Agency's retention schedule. Individual records will be provided where necessary but, where required upon legal advice; certain parts of records may be redacted.

Definitions

The following table defines terms set out in the Flood and Water Management Act 2010

| Term | Definition | Source |
|----------------------|--|--|
| ordinary watercourse | a “watercourse” that does not form part of a “main river” | Flood and Water Management Act 2010 |
| watercourse | includes all rivers and streams and all ditches, drains, cuts, culverts, dikes, sluices, sewers (other than public sewers within the meaning of the Water Industry Act 1991) and passages, through which water flows. | Land Drainage Act 1991 [section 72(1)] |
| main river | watercourse shown as such on a main river map. Main river maps are held by Defra and Welsh Government and copies are available to LLFAs as a GIS layer on GEOSTORE. | Water Resources Act 1991 [section 113] |
| public sewer | a sewer for the time being vested in a sewerage undertaker etc | Water Industry Act 1991 |
| culvert | a covered channel or pipe designed to prevent the obstruction of a watercourse or drainage path by an artificial construction. There is no definition in current legislation. This definition will be added to Section 72 of the Land Drainage Act | Flood and Water Management Act 2010 Paragraph 39 |

Sources of Information

- The Defra / Welsh Government “main river” map is available to LLFAs as a GIS layer on GEOSTORE.
- LLFAs will be able to use this, along with their own mapping showing “watercourses” and application of the definitions above to identify “ordinary watercourses” within their individual authority areas.
- A number of bodies will be responsible for ordinary watercourse consenting post transfer.
- The Environment Agency has a mapping layer showing the boundaries of LLFAs.
- The Environment Agency also has a mapping layer showing the boundaries of internal drainage districts, however this is out of date and a revised layer will be published in due course.
- These layers will be used to produce, mainly for the use of the Environment Agency National Customer Contact Centre (NCCC), a composite map that will show the boundaries of authorities who will be responsible for ordinary watercourse regulation.
- With regard to information on locations of features such as designated sites. LLFAs are likely to have such information because of the other responsibilities of their authorities, including planning (policy and development control) purposes. If they have not, GIS mapping layers for designated sites (SSSIs, SACs, SPAs) can be downloaded from the NE website at:
http://www.gis.naturalengland.org.uk/pubs/gis/gis_register.asp
- Countryside Council for Wales provides a similar service:
<http://www.ccw.gov.uk/landscape--wildlife/protecting-our-landscape/gis-download---welcome/gis-boundary-downloads.aspx>
- Technical documents and guidance that may also be of use include:
[‘Living on the Edge’ – Riparian owners guide](#)
[The fluvial design guide;](#)
[Building a better environment - a guide for developers;](#)
[Culvert design and operation guide](#)
[Hydropower good practice guide.](#)

Advice Note

Ordinary Watercourse Regulation - Enforcement February 2012

This advice note aims to assist the transfer of ordinary watercourse enforcement Powers from the Environment Agency to Local Authorities as required in the Flood and Water Management Act (FWMA) 2010.

Local Authorities will lead on ordinary watercourse enforcement unless it is in an Internal Drainage District where Internal Drainage Boards (IDBs) will retain their existing powers. The Land Drainage Act 1991 will underpin the enforcement actions undertaken by Local Authorities. This will occur following commencement of paragraphs 32-34 of Schedule 2 of the Flood and Water Management Act 2010.

Local Authorities may also be able to consider enforcement for some activities under Town and Country Planning Law. The Environment Agency will continue to lead enforcement on main rivers and tidal flood defences.

Enforcement Actions

The aims of enforcement in flood risk management are to ensure the proper flow of water in a watercourse and over the floodplain; the control of water levels and the security of existing assets. To achieve these aims, enforcement action is used to rectify unlawful and damaging or potentially damaging work, always using a risk based approach.

Enforcement action (not necessarily criminal sanction) may be taken where damaging or potentially damaging works have been undertaken without consent or are in contravention to an issued consent.

Some incidents are so serious that immediate action is required to mitigate the risk. Other incidents may only require a letter to the offender so that the requirements are clear.

Methods of undertaking enforcement include:

- site visits and face to face meetings with perpetrator;
- sending advisory letters
- sending warning letters;
- using notices to enforce, prohibit or carry out works;
- prosecution and reclaiming costs of prosecution;
- direct remedial action plus recharge of costs of remedial action

Appendix 5 includes offence summaries, sample letters and notices to assist.

Ordinary Watercourse Enforcement Activities

The table below outlines the typical steps in an ordinary watercourse enforcement case. The individual circumstances of each case, both legal and factual, will inform and determine which step in the enforcement process is applicable at any one time.

| Activity | Description | Suggested Action |
|---|--|---|
| Legislation | The Land Drainage Act 1991, as amended by the Flood and Water Management Act 2010, underpins regulation of ordinary watercourses. | Familiarise yourself with The Land Drainage Act 1991 (particularly section 23) and Flood and Water Management Act 2010 (principally paragraph 32 of schedule 2). |
| Training prior to carrying out enforcement | Persons undertaking an enforcement role should be trained and authorised in writing to do so. This will ensure that the required enforcement tasks are carried out safely and legally and that they have the right to lawfully enter land. | Receive training and ensure necessary authorisations in place prior to undertaking enforcement work. |
| Establish if an offence has been committed | A report or visual inspection of an asset may identify a problem which could be deemed an enforcement case. | Keep a record of any enforcement action taken including all relevant correspondence and telephone calls. <ul style="list-style-type: none"> - Seek advice from other colleagues or stakeholders with an interest in the case; - Assess whether consent has or may have been issued for problem; - Collect further information e.g. initial site visit to understand issues involved and extent of damage. |
| Classify risk and decide appropriate response | Carry out an initial assessment on whether the issue could cause a risk to life and property. Consider: <ul style="list-style-type: none"> - criticality of location (e.g. proximity to critical assets e.g. culverts); - visible extent of damage to any assets or any water escape; - potential consequence of a failure - forecast weather conditions | If damage is considered high risk consider compiling a recommendations record. The final version forms part of any case file. Prepare for undertaking site specific enforcement action. If damage is considered low risk consider sending a warning letter with future monitoring to measure change. |
| Investigate and gather evidence | Evidence is collected for a case. | Consider requirements for setting up an investigation, collecting evidence and bringing a matter before the courts, including preparation of a case file. |
| Choose and apply response to offence | If you intend to issue a letter or legal notice you should give: <ul style="list-style-type: none"> - written explanation of problem; - outline of what needs to be done and by when. Where time permits, aim to serve a notice to give the offender an opportunity to rectify the problem without needing to go to court. | Consider issuing appropriate Notice or letter. ! Important cases for prosecution must be presented within 6 months of the Notice lapsing. Within this period you must leave sufficient time to prepare a case. A delay could lead to a situation where no prosecution can be commenced. |
| Review | Ongoing monitoring and review is important feedback to inform future approach and work effectively with customers. | Consider raising public awareness by: <ul style="list-style-type: none"> - door to door visits; - letter and booklet drops; - speaking to Parish Councils or other community groups. |