

Guidance Note 12 a

UNLAWFUL WORKS ERECTED BEFORE 1 OCTOBER 2007.

1. If works were erected prior to Part 3 of the Commons Act 2006 ('the 2006 Act') coming into force on 1 October 2007, they contravene the legislation which existed at the time they were erected and section 41 of the Commons Act cannot be used to enforce against them. If the works were erected after 28 June 2005, but before 1 October 2007, action under section 194 of the Law of Property Act 1925 ('the 1925 Act'), may be taken by any person by virtue of a modification to section 194(2) effected by paragraph 6 of Schedule 4 to the 2006 Act. If they were erected before 28 June 2005 only certain people can take enforcement action: land owners, Local Authorities and any other person with a legal interest in the land (such as commoners).

2. Whilst section 194 of the 1925 Act has now been repealed by the commencement of Part 3 of, and Part 2 of Schedule 6 to, the 2006 Act, section 16(1) of the Interpretation Act 1978 provides that:

"...where an Act repeals an enactment, the repeal does not, unless the contrary intention appears,—

(b) affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment;

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment;

...

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed."

3. In Defra's view, where works were installed before 1 October 2007 without the consent required by section 194 of the 1925 Act, the liability under section 194(2) to be ordered by the court to remove those works would fall within the scope of section 16(1)(c) above, and section 16(1)(e) preserves the right to institute legal proceedings in respect of the enforcement of that liability. This means that you may still bring proceedings against unlawful works erected prior to 1 October 2007.

4. The courts may however, consider the time elapsing before action is taken and may be reluctant to enforce against longstanding unlawful works.