

HAMPSHIRE COUNTY COUNCIL**Decision Report**

Decision Maker:	Executive Member – Environment and Transport
Date:	6 March 2012
Title:	Ordinary Water Course Consents
Reference:	3736
Report From:	Director of Economy, Transport and Environment

Contact name: Peter Chadwick

Tel: 01962 846728

Email: peter.chadwick@hants.gov.uk

1. Executive Summary

- 1.1. The purpose of this report is to provide a briefing on the new duties for the County Council arising out of the Flood and Water Management Act 2010 in relation to ordinary water course consenting. These duties are being transferred from the Environment Agency to the County Council, as Lead Local Flood Authority, on 6 April 2012.
- 1.2. The report sets out the requirements and duties imposed on the Local Lead Flood Authority for ordinary water courses, and details the approach to be taken and resources needed to undertake this new duty.

2. Contextual information

- 2.1. The Flood & Water Management Act 2010 places a significant number of new duties on the County Council in its new role as a Lead Local Flood Authority (LLFA). These include new duties and powers in relation to ordinary water courses. An ordinary water course is any watercourse which is not a main river. The Environment Agency will retain duties in relation to main rivers. The purpose of ordinary watercourse regulation is to control certain activities that might have an adverse flooding impact.
- 2.2. 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 Section 25 of the Land Drainage Act 1991, although these are not duties.
- 2.3. Under paragraphs 32 and 33 of Schedule 2 of the Act the responsibility for issuing flood defence consents under Section 23 of the Land Drainage Act 1991 transfers from the Environment Agency to the LLFA. It was announced

by the Department for Environment, Food and Rural Affairs (DEFRA) on 5 December 2011 that this transfer of responsibility will be on 6 April 2012.

2.4. Section 23 of the Land Drainage Act 1991 (as amended) states

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.

2.5. The new consenting regime is accompanied by a duty to ensure the free flow of water through ordinary water courses and as of 6 April 2012 the LLFA will have permissive powers to require works to be undertaken to ensure free flow in ordinary water courses, along with internal drainage boards and district councils. However there are no such internal drainage boards in Hampshire.

2.6. The Environment Agency has produced an Advice Note covering Ordinary Watercourse Regulation - consenting and another covering Ordinary Watercourse Regulation – enforcement. Attached to these Advice notes are Appendices as follows;

Appendix 1: Map showing distribution of consents 2010/11

Appendix 2: Cross sections of consentable activities

Appendix 3: Template consent application form and supporting letters

Appendix 4: Standard conditions/informatives

Appendix 5: Applying Enforcement Sanctions

Appendix 6: List of other Environmental Permits

Appendix 7: Water Framework Directive Requirements

- 2.7. The amended section 23 subsection 1C requires that the County Council, as a LLFA, must 'have regard' to any guidance issued by the Environment Agency about the exercise of its functions under this revised section. The County Council must therefore 'have regard' to the Advice notes and Template consent application form and supporting letters.
- 2.8. The map showing distribution of consents confirms advice given to officers that the Environment Agency dealt with between 20 and 40 applications annually. However this could represent an underestimate of the scale of the work involved in these new duties because the Environment Agency took a risk based and proportionate approach and were not necessarily proactive in undertaking these activities, and the new consenting regime is more widespread in requiring consent for all culverts. Consequently this could increase the application workload, some estimates indicate this could be a ten fold increase. In addition there are the duties in relation to monitoring and enforcement of consents.
- 2.9. In determining applications it is necessary to consider other Legislation including, but not exclusively: The Wildlife and Countryside Act 1981 (as amended); Natural Environment and Rural Communities Act 2006; the E.U Habitats Directive 1992; the E.U. Water Framework Directive 2000 (WFD); the Countryside and Rights of Way Act, 2000; the Salmon and Freshwater Fisheries Act 1975; the Eel Regulations 2010.
- 2.10. 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.
- 2.11. Permissions may be required for works in relation to designated sites (Sites of Special Scientific Interests, Special Areas of Conservation, Special Protection Areas) and/or protected species. Currently, where a third party seeks consent for works, the Environment Agency undertakes to consult with Natural England on potential impacts on designated sites. Where protected species may be affected by works, the applicant should contact Natural England directly in case works need to be licensed under the protected species legislation.
- 2.12. 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 a consent is issued 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.

- 2.13. The LLFA should be aware of the implications of the latest Construction (Design and Management) (CDM) 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.

3. Finance

- 3.1. There is a fee attached to an ordinary watercourse consent application, this was set at £50 in the Land Drainage Act 1991. As well as the impact of inflation since 1991, the consent process has become more onerous and complex with the need to take into account the requirements of other Directives and legislation as set out in paragraphs 2.9 and 2.11. The Flood and Water Management Act 2010 has amended the Land Drainage Act 1991 to state “and the amount of the fee shall be determined in accordance with a prescribed charging scheme.” However, DEFRA has not yet finalised the charging scheme therefore the fee remains at £50.

4 Delivery options

- 4.1. The options for delivering this new duty are (i) delegating duty to District Councils; (ii) joint delivery through shared services; or (iii) delivering duty solely by LLFA.
- 4.2. DEFRA, in announcing the date of the transfer of responsibility from the Environment Agency to LLFAs states that it ‘recognise that district councils have held these powers outside of internal drainage districts in the past, and may be best placed to continue to carry out this function. Under the FWMA LLFAs may delegate their flood risk management functions to district councils. We would therefore urge LLFAs to work with district councils to put in place delegations where appropriate.’
- 4.3. However the audit which was carried out to establish the existing skills and resources available within the Local Authorities in Hampshire to support the delivery of the duties, in relation to the new duties as SAB and for ordinary watercourse consenting arising from the Flood & Water Management Act 2010, has shown that there are very few skills within the District Councils. The exception is New Forest District Council which has a land drainage section which has been exercising their powers under the Land Drainage Act (1991).
- 4.4. In the light of the skills audit it is not considered a feasible option to fully delegate ordinary watercourse consenting to the District Councils, as encouraged by DEFRA, as they do not have the resources and skills.
- 4.5. However, as New Forest District Council does have relevant skills and resources there is the possibility of shared service provision, together with additional resourcing within the LLFA to deliver the new responsibility. Where

there is the possibility of a shared service provision it is considered this should be the preferred option.

- 4.6. There is uncertainty about the number of applications/cases likely to be handled. Assuming the numbers are of the order that have been dealt with historically by the Environment Agency (i.e. less than 40 per year) the LLFA would need to assess the application, coordinate internal/shared service consultations for technical drainage advice and ecological advice (particularly in relation to Habitats Regulations and protected species legislation), and recommend decisions. There is a clear timescale issue as all applications for ordinary watercourse consent need to be determined within 8 weeks, otherwise it is a deemed consent, therefore decisions should be taken under the Director of Economy, Transport and Environment's delegated powers. Similarly there will be the same work related to enforcement and enquiries from landowners.
- 4.7. The preferred approach needs to be kept under review because of the uncertainties of scale. If the number of applications is significantly higher (in the order of 300 per year) there will clearly be the need for additional resources for administration and for technical officers proportionate to the increase. Similarly there will also be additional requirements on shared service/engineering/ ecology to provide the responses to enable the County Council to fulfil this new duty at this higher workload.
- 4.8. The approach also needs to be kept under review because of the implications for the County Council in relation to the potentially substantial and significant new duties for sustainable drainage as the Sustainable Drainage Approval Body (SAB). The implementation of these duties, draft Regulations and draft national standards are currently the subject of consultation by DEFRA. There will be similar administrative, technical and procedural issues with the SAB duty albeit they will be more significant and complex than ordinary watercourse consenting. Consequently, in the longer term the processes and procedures and resourcing will be reviewed to ensure opportunities for efficiencies between the two new duties are realised.

5 Conclusion

- 5.1. The Flood & Water Management Act 2010 has created a substantial new area of work for the County Council. New duties in relation to ordinary water courses will be transferred from the Environment Agency to the County Council, as LLFA, on 6 April 2012. The delivery of the duty solely by the County Council as LLFA will require additional resources and skills, where there is the possibility of a shared service provision it is considered that this should be the preferred option. The proposed approach to this new duty needs to be kept under review because of the uncertainties in number of consents, and because of the implications for the County Council in relation to the potentially substantial and significant new duties for sustainable drainage as the SAB.

6 Recommendations

- 6.1. That the option of carrying out the ordinary water course consenting duties by the County Council as Local Lead Flood Authority, with support from shared services, be approved.
- 6.2. That the powers and duties for ordinary water course consenting and enforcement under the Land Drainage Act 1991, as amended by the Flood and Water Management Act 2010, be delegated to the Director of Economy Transport and Environment.

Rpt/3736/PC

CORPORATE OR LEGAL INFORMATION:**Links to the Corporate Strategy**

Hampshire safer and more secure for all:	yes
Corporate Improvement plan link number (if appropriate):	
Maximising well-being:	no
Corporate Improvement plan link number (if appropriate):	
Enhancing our quality of place:	yes
Corporate Improvement plan link number (if appropriate):	

Section 100 D - Local Government Act 1972 - background documents

The following documents discuss facts or matters on which this report, or an important part of it, is based and have been relied upon to a material extent in the preparation of this report. (NB: the list excludes published works and any documents which disclose exempt or confidential information as defined in the Act.)

Document

Location

Working file

IMPACT ASSESSMENTS:

1. Equalities Impact Assessment:

1.1. No direct impact on equalities.

2. Impact on Crime and Disorder:

2.1. No direct impact on crime and disorder.

3. Climate Change:

a) How does what is being proposed impact on our carbon footprint / energy consumption?

No direct impact on our carbon footprint/energy consumption

b) How does what is being proposed consider the need to adapt to climate change, and be resilient to its longer term impacts?

Ordinary watercourses are important in managing surface water and address issues of flooding.