

WIRRAL COUNCIL

CABINET

27 SEPTEMBER 2012

SUBJECT:	THE FLOOD AND WATER ACT 2010 – ORDINARY WATERCOURSE CONSENTING & ENFORCEMENT
WARD/S AFFECTED:	ALL
REPORT OF:	INTERIM DIRECTOR OF TECHNICAL SERVICES
RESPONSIBLE PORTFOLIO HOLDER:	CLLR HARRY SMITH, STREETSCENE AND TRANSPORT SERVICES
KEY DECISION?	NO

1.0 EXECUTIVE SUMMARY

- 1.1 The Flood & Water Management Act 2010 (“the Act”) and the Flood Risk Regulations 2009 established Wirral Council as a Lead Local Flood Authority (“LLFA”). LLFA’s are required to lead the strategic management of local flood risk arising from surface water, groundwater and ordinary watercourses.
- 1.2 The statutory responsibilities attached to the LLFA role, place substantial new duties on Wirral Council in managing flood risk and from 6th April 2012 this has included Ordinary Watercourse Consenting and Enforcement which was formerly an Environment Agency (“EA”) function.
- 1.3 This report covers the transfer of these regulatory powers of consenting and enforcement on ordinary watercourses from the EA to LLFA. 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.
- 1.4 In order to manage this new duty efficiently, it will be necessary to establish administration processes and ensure appropriate and necessary delegated authority has been granted to relevant Council Officers.

2.0 BACKGROUND AND KEY ISSUES

2.1 The Flood & Water Management Act 2010

- 2.1.1 The initial parts of the Act commenced on 1 October 2010. These included new definitions of flooding, the requirement to develop national and local flood risk management strategies within a reasonable timeframe, to co-operate and share information, establish Scrutiny Committee arrangements and amendments to Building Regulations in relation to flood resilience.

- 2.1.2 In April 2011, further parts of the Act came into force, which included a duty for the LLFA to investigate surface water flooding incidents in its area and identify responsibilities; and a duty to maintain a register of structures or features which may have an effect on flood risk.
- 2.1.3 From April 6th 2012, LLFA's will lead on ordinary watercourse consenting and enforcement and the Land Drainage Act 1991 ("LDA 1991") will underpin ordinary watercourse regulation undertaken by them. This will occur following commencement of paragraphs 32-34 of Schedule 2 of the Act, which changes ordinary watercourse management. In particular, paragraph 32 (principally) of Schedule 2 of the Act that amends section 23 of the LDA 1991.
- 2.1.4 Prior to 6th April 2012 ordinary watercourse consenting and enforcement in Wirral was undertaken by the Environment Agency, however Wirral already had some enforcement powers under s25 of the LDA 1991. The changes result from recommendations contained in Sir Michael Pitt's independent review of the 2007 summer floods
- 2.1.5 The Act will continue to place additional duties and responsibilities on each LLFA.

2.2 Ordinary Watercourse Consenting

- 2.2.1 An ordinary watercourse is any watercourse that is not designated as a 'main river'; these are managed by the EA. The 'main rivers' within the Wirral are the Birket, the Fender, Arrowe Brook, Greasby Brook, Prenton Brook and the Dibbinsdale Brook.
- 2.2.2 The EA took a risk based and proportionate approach when it undertook ordinary watercourse consenting activities. However, the numbers of ordinary watercourse consents that the EA have dealt with in the past three years in the Wirral was only four.
- 2.2.3 Section 23 of the LDA 1991 will be amended by the Act as follows: -
- 23 Prohibition on obstructions etc. in watercourses
- (1) No person shall—
- (a) erect any milldam, 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.

- 2.2.4 Consent 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. Consent may be given subject to reasonable conditions, for example, we may wish to use a condition to time limit the proposed works to ensure the consent is implemented within a given timescale.
- 2.2.5 The EA uses certain procedures, including internal guidance notes, in determining ordinary watercourse consents and considering enforcement action and these have been provided to support the LLFA's in this new role and include a series of simple cross sections, which represent those activities/obstructions the EA considers to require consent and those which do not.
- 2.2.6 The EA recommends the use of local byelaws to control other forms of obstructions and to place easement controls on areas adjoining ordinary watercourses. They will be supplying a copy of those that they utilise, to LLFAs and the need for this will be considered further once the consent process is operating.
- 2.2.7 The EA has always encouraged early discussions in advance of consent application and has always sought first to resolve 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 at £50 and to change them requires a Ministerial Order. The estimated cost of dealing with consents has been assessed at between £300 and £500, depending on the complexity and level of negotiation. However, additional funding has been provided by the Government as part of the new burdens allocation to resource this new responsibility and for 2012/13 this is £167.9k.
- 2.2.8 The EA have provided a set of standard consent templates including guidance notes, forms and letters that it is proposed to utilise. The use of these forms should ensure there will be no confusion in paperwork, as they are clearly distinguishable from Main River consents
- 2.2.9 The EA have also provided a non-exhaustive list of issues that could support conditions and informatives based upon the EA's experience on main river environmental and ecological permits. In determining applications it will be 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.

- 2.2.10 In undertaking other activities the LLFA will need to have regard to its general obligations and these regulations in particular. 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. If the application has the potential to affect a main river or sea defences then the LLFA must consult the EA to ensure a partnership approach. The EA have indicated that they are prepared to support LLFA's with this new role at least in the short term, anticipating that Wirral would discuss issues and work together.
- 2.2.11 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 EA consults with Natural England on potential impacts on designated sites. The consent applicant is not specifically required to apply directly to Natural England for consent under the designated sites legislation. However, where works may affect protected species, the applicant must contact Natural England directly in case the works need to be licensed under the protected species legislation.
- 2.2.12 A consent application will need to be screened by Wirral 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 must be refused on WFD grounds. If we 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 (EU). This could result in the UK Government facing infraction (financial penalties) from the EU.
- 2.2.13 In order to identify if any of the environmental or ecological permits or permissions are necessary Wirral will need the consent applications to be screened by an ecologist. Although this expertise is not readily available within the Council it does have access to the Merseyside Environmental Advisory Services (MEAS), based at Sefton Council, which Wirral part funds and already has service level agreements with the Planning Department for similar issues. However, it is likely that a similar agreement may need to be put in place so that the consents can be addressed within the specific approval period.
- 2.2.14 Wirral also needs to be aware of the implications of the latest Construction (Design and Management) Regulations. It is recommended that it is made clear to applicants that the Council are not designing the work and that it is for the applicant to ensure that the current requirements of the CDM Regulations are complied with.
- 2.2.15 If Wirral intends to undertake works on an ordinary watercourse for which it has regulatory responsibility, it must consult the EA. However where it is doing work for Flood and Coastal Erosion Risk Management purposes, we do not need to consult the EA, provided that the work is within the local Flood Risk Management (FRM) strategy published for the area and the works are

consistent with it. However, until the local FRM strategy is published, Wirral will need to consult the EA. Conversely the EA will have to apply for consent from Wirral when proposing works on ordinary watercourses.

2.2.16 Following discussions with Planning, Legal and Emergency Planning staff it has been agreed that the Drainage Team with departmental administrative support should operate the consenting process from within the Technical Services Highway Management Group. However, it will be necessary through the Scheme of Delegation, to authorise the Director of Technical Services to be responsible for the consenting process, including its funding and any income generated.

2.3 Ordinary Watercourse Enforcement

2.3.1 LLFAs will lead on ordinary watercourse enforcement and the LDA 1991 will underpin the enforcement actions undertaken by them. This will occur following commencement of paragraphs 32-34 of Schedule 2 of the Act. 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.

2.3.2 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, but always using a risk based approach.

2.3.3 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.

2.3.4 Methods of undertaking enforcement include:

- site visits and face to face meetings with the 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.

2.3.5 The enforcement role requires specific specialist training but the number of expected incidents, based on past EA experiences, are expected to be few and therefore it is not considered cost effective to develop these skills with the existing drainage staff. However, a number of enforcement officers operate within the Highway Management Enforcement and Network Team and it is

proposed that the additional skills and knowledge necessary to undertake flood risk management enforcement is developed within this team.

2.3.6 Legal Services will need to be involved in any actual enforcement litigation action particularly as it may be necessary to issue enforcement notices and warrants.

2.3.7 Additional funding has been provided by the Government as part of the new burdens allocation to resource this new enforcement responsibility and for 2012/13 this is £167.9k.

2.3.8 If it is agreed that the enforcement role will be undertaken from within the Technical Services Highway Management Group and any contentious litigation action undertaken by Legal & Member Services, it will be necessary to amend the Council's Scheme of Delegation to Officers to authorise the Director of Technical Services to be authorised to take all requisite and necessary enforcement measures/action and for the Director of Law, HR and Asset Management to undertake any necessary litigation action.

3.0 RELEVANT RISKS

3.1 Wirral faces a significant risk of flooding with a substantial number of domestic properties identified as at risk from potential future flooding. The approval of these proposals will allow the Council to meet the relevant new duties/responsibilities brought about by the new flooding legislation and help reduce this future risk.

4.0 OTHER OPTIONS CONSIDERED

4.1 None considered.

5.0 CONSULTATION

5.1 Consultation has taken place with other Local Authorities and flood risk management partners, the EA, the Department of Regeneration, Housing and Planning; and Legal Services

6.0 IMPLICATIONS FOR VOLUNTARY, COMMUNITY AND FAITH GROUPS

6.1 Flooding affects all voluntary, community and faith groups whether it be directly with their properties being flooded, or in a responder or recovery capacity.

7.0 RESOURCE IMPLICATIONS: FINANCIAL; IT; STAFFING; AND ASSETS

7.1 Additional funding has been provided by the Government as part of the new burdens allocation to resource this new consenting and enforcement responsibility; and for 2012/13 this is £167.9k There are no additional IT, Staffing or Asset resource implications although it is likely that some training in connection with the enforcement role will be necessary and it is intended that any Consents will be recorded with the existing Drainage GIS asset management system, Seagulls.

8.0 LEGAL IMPLICATIONS

8.1 The legal implications are set out within the main body of the report.

9.0 EQUALITIES IMPLICATIONS

9.1 Yes, an impact review is attached. (<http://www.wirral.gov.uk/my-services/community-and-living/equality-diversity-cohesion/equality-impact-assessments/eias-2010/technical-services-0>)

10.0 CARBON REDUCTION IMPLICATIONS

10.1 There are no specific carbon reduction implications.

11.0 PLANNING AND COMMUNITY SAFETY IMPLICATIONS

11.1 The consenting and enforcement role will support the Council's strategy to reduce future local flood risk and hence improve community safety.

12.0 RECOMMENDATION/S

12.1 Cabinet is requested to:

- (i) Note the content of this report;
- (ii) Authorise the Director of Technical Services to establish and implement the necessary auditable process to ensure compliance with the legislative framework and other requirements detailed within the report;
- (iii) Recommend to Council that the Scheme of Delegation to Officers be amended to include as follows:
 - a. the Director of Technical Services to undertake all requisite and necessary consent and enforcement measures/action under the Flood & Water Management Act 2010, Land Drainage Act 1991 and associated secondary legislation as deemed necessary to ensure the Council (as Lead Local Flood Authority) discharges its enforcement/regulation obligations, duties and responsibilities; and
 - b. the Director of Law, HR and Asset Management (in consultation with the Director of Technical Services as necessary) to undertake any necessary formal litigation action in connection with the Council's (as Lead Local Flood Authority) enforcement/regulation obligations, duties and responsibilities under the Flood & Water Management Act 2010, Land Drainage Act 1991 and associated secondary legislation.

13.0 REASON/S FOR RECOMMENDATIONS

13.1 The proposals will allow the Council, as LLFA, to meet relevant new duties/responsibilities brought about by new flooding legislation and support it in its strategy to reduce future local flood risk.

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APPENDICES

None

REFERENCE MATERIAL

None used.

SUBJECT HISTORY (last 3 years)

Council Meeting	Date
Cabinet	12 th April 2012
Cabinet	21 st July 2011
Cabinet	17 th March 2011