

Flood and Coastal Erosion Risk Management

Ordinary Watercourse Enforcement Policy

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1. Introduction

The Flood and Water Management Act (FWMA) 2010 designated all county and unitary authorities, and thus Sefton Council, as 'Lead Local Flood Authorities' (LLFAs) and introduced a number of new duties in relation to flood investigation.

As the LLFA, Sefton Council is required to oversee and participate in the management of local flood risk, which includes the risk of flooding from surface water, groundwater and from ordinary watercourses. Ordinary watercourses include every river, stream, ditch, drain, cut, dyke, sluice, sewer (other than a public sewer) and passage through which water flows and which does not form part of a main river.

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.

As a result of changes introduced by the Flood and Water Management Act 2010, there are three main situations in which Sefton Council, as LLFA, can execute its enforcement powers under Sections 21, 23, 24 and 25 of the Land Drainage Act 1991 in relation to ordinary watercourses.

2. Legislation

On 6th April 2012, Schedule 2 (Sections 31, 32 and 33) of the FWMA amended the Land Drainage Act 1991 and transferred powers for the regulation of ordinary watercourses from the Environment Agency to the LLFA.

The powers of the LLFA to undertake enforcement action relating to ordinary watercourses are set out in the Land Drainage Act 1991 in three key sections:

- Section 21: Enforcement of obligations to repair watercourses, bridges, etc.
- Section 23 & 24: Prohibition on obstructions etc. in watercourses.
- Section 25: Powers to require works for maintaining flow of watercourse.

2.1 Section 21 - Enforcement of obligations to repair watercourses, bridges, etc.

Section 21 of the Land Drainage Act 1991, as amended by the Flood and Water Management Act 2010, relates to person(s) who, before the commencement of the LDA (i.e. 1st December 1991) had an obligation to do work to repair and maintain a watercourse, bridge or drainage work, but fails to do so, the drainage board (either the LLFA or Internal Drainage Board) can serve notice on them requiring them to complete the works to fulfil that obligation.

A common law obligation to carry out works to remove an obstruction from a watercourse, arising out of the riparian ownership responsibilities referred to above, falls within the “obligation” referred to in Section 21, and can therefore be subject to enforcement under this section.

2.2 Section 23 & 24 - Prohibition on obstructions etc. in watercourses.

Sections 23 and 24 of the Land Drainage Act 1991, as amended by the Flood and Water Management Act 2010, relate to enforcement action which may be undertaken where damaging or potentially damaging works on ordinary watercourses have been undertaken without the necessary consent. Enforcement action may also be taken where consented works have been undertaken in a manner contravening the consent.

It should be noted, however, that these powers are permissive and are not a duty and as such the exercising of these powers is at the Council's discretion.

2.3 Section 25 - Powers to require works for maintaining flow of watercourse.

Section 25 of the Land Drainage Act 1991, as amended by the Flood and Water Management Act 2010, gives the Council permissive powers to ensure that appropriate maintenance is carried out by riparian landowners on ordinary watercourses. These powers can be exercised if it is deemed that a lack of maintenance or an alteration to a watercourse pose a flood risk.

If a landowner carries out actions that adversely impact on the flood risk to another landowner's property, Sefton Council has the right to serve a legal notice on the responsible party to carry out remedial work to resolve the issue.

It should be noted, however, that these powers are permissive and are not a duty and as such the exercising of these powers is at Sefton Council's discretion.

2.4 Other legislation

There are a number of other legislative requirements that may need to be complied with in undertaking enforcement and implementing notices. This could include:

- Habitat Regulations
- Wildlife & Countryside Act
- Highways Act

3. Enforcement Policy

The FWMA requires anyone wishing to alter an ordinary water course to obtain consent from the Council prior to undertaking the work.

Sefton Council will use its permissive powers as set out in Sections 21, 23, 24 and 25 of the Land Drainage Act 1991 and amended by the Flood and Water Management Act 2010 to undertake enforcement action within available resources, by serving notice, where it is in overriding public interest and efforts of negotiation have failed to resolve.

Sefton Council will prioritise enforcement action as set out in the following table:

Priority	Likely consequence of flooding
1	<i>Internal flooding to a dwelling or business premises</i>
2	<i>Flooding to highways defined as part of Sefton’s Key Route Network or critical infrastructure*.</i>
3	<i>Flooding to highways defined as classified roads or local distributor roads.</i>
4	<i>Flooding to outbuildings, gardens ,open space and farmland that is not on part of the functional floodplain</i>

**Critical infrastructure refers to:*

- *Railway lines and stations;*
- *Police, ambulance and fire stations and command centres;*
- *Hospitals;*
- *Universities, colleges and schools;*
- *Local authority main offices;*
- *Residential institutions supporting vulnerable people*

Where enforcement has not been taken, there is legislation available for those affected through a civil action process.

The Public Health Act 1936, section 259, Nuisances in connection with water-courses, ditches, ponds.

This defines a statutory nuisance in relation to water as; any pond, pool, ditch, gutter or watercourse which is so foul or is choked or silted up as to obstruct or impede the proper flow of water and thereby to be prejudicial to health or cause a nuisance.

A Private nuisance case is concerned with protecting the rights of an occupier in respect of unreasonable interference with the enjoyment or use of his land.

For drainage issues relating to agricultural land, the First-tier Tribunal (Property Chamber) Agricultural Land and Drainage (AL&D) plays a role in settling certain kinds of disputes and issues relating to agricultural land and drainage in England.

3.1 Others with Enforcement Powers

In addition to Sefton Council, in its role as LLFA, the following also have enforcement powers to ensure that:

- The Environment Agency and any Internal Drainage Board also have permissive powers under the Land Drainage Act (1991) to undertake works in watercourses and regulate the activities of riparian owners.
- As the Highways Authority, Sefton Council also has powers under the Highways Act (1980) to ensure the public highway is effectively drained.
- In its role as Local Planning Authority, Sefton Council has enforcement powers for some activities under Town and Country Planning Law. For example, where the installation of a drainage system is not as conditioned and agreed as part of the planning permission, enforcement action can be taken to address the failings.
- United Utilities have powers under the Water Industry Act (1991) to ensure their assets are performing and do not pose a threat to flooding.

4. Links to the development management process

There will some instances where sites for which planning permission, other permissions and pre-application advice has been sought include or are adjacent to ordinary watercourses or 8 metre buffers around them, or may initially involve culverting of the ordinary watercourses. In such cases the Lead Local Flood Authority (LLFA) would usually be consulted. This would allow the LLFA to make comments on the planning applications and/or recommend that an “Informative” is added to the planning or other application Decision Notice to state that:

“Any changes to an ordinary watercourse must seek separate consent from the Council as Lead Local Flood Authority prior to works being undertaken, as set out in the Flood and Water Management Act 2010. Sefton Council’s position on consenting and enforcement is set out in its Ordinary Watercourse Culverting, Diverting, Enforcement and Flood Investigation Policies”. “Any changes to an ordinary watercourse must seek separate consent from the Council as Lead Local Flood Authority prior to works being undertaken, as set out in the Flood and Water Management Act 2010. Sefton Council’s position on consenting and enforcement is set out in its Ordinary Watercourse Culverting, Diverting, Enforcement and Flood Investigation Policies”.

Appendices

Appendix A Section 21, 23 and 25 Land Drainage Act 1991

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Section 21 of the Land Drainage Act 1991 states:

21. Enforcement of obligations to repair watercourses, bridges, etc.

- 1) *This section applies to any obligation to which any person was subject, before the commencement of this Act, by reason of tenure, custom, prescription or otherwise, except an obligation under an enactment re-enacted in this Act or the Water Resources Act 1991.*
- 2) *If any person:*
 - (a) *is liable, by reason of any obligation to which this section applies, to do any work in relation to any watercourse, bridge or drainage work (whether by way of repair, maintenance or otherwise); and*
 - (b) *fails to do the work,*

the drainage board concerned may serve a notice on that person requiring him to do the necessary work with all reasonable and proper despatch.
- 3) *Subject to section 107(2) of the Water Resources Act 1991, the powers conferred by this section shall not be exercisable in connection with a main river, the banks of such a river or any drainage works in connection with such a river. .*
- 4) *If any person fails, within seven days, to comply with a notice served on him under subsection (2) above by the drainage board concerned, the board may do all such things as are necessary for that purpose. .*
- 5) *Any expenses reasonably incurred, in the exercise of their powers under this section, by the drainage board concerned may be recovered from the person liable to repair. .*
- 6) *Subject to section 8 above, references in this section to the drainage board concerned—*
 - (a) *in relation to any watercourse, bridge or drainage works in an internal drainage district, are references to the drainage board for that district; and,*
 - (b) *in relation to any watercourse, bridge or drainage works in an area outside an internal drainage district, are references to the lead local flood authority for the area.*
- 7) *Lead local flood authority” has the meaning given by section 6 of the Flood and Water Management Act 2010.”*

Section 23 of the Land Drainage Act 1991 states:

23. Prohibition on obstructions etc. in watercourses.

- 1) No person shall:
 - (a) erect a culvert in an ordinary watercourse, or
 - (b) 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) The drainage board concerned may require the payment of an application fee by a person who applies to them for their consent under this section; and the amount of the fee shall be determined in accordance with a prescribed charging scheme.
- 3) Where an application is made to the drainage board concerned for their consent under this section:
 - (a) the consent is not to be unreasonably withheld; and .
 - (b) if the board fail within two months after the relevant day to notify the applicant in writing of their determination with respect to the application, they shall be deemed to have consented.
- 4) In subsection (3) above “the relevant day”, in relation to an application for a consent under this section, means whichever is the later of:
 - (a) the day on which the application is made; and .
 - (b) if at the time when the application is made an application fee is required to be paid, the day on which the liability to pay that fee is discharged.
- 5) If any question arises under this section whether the consent of the drainage board concerned is unreasonably withheld, that question shall be referred to a single arbitrator to be agreed between the parties or, failing such agreement, to be appointed by the President of the Institution of Civil Engineers on the application of either party.
- 6) Nothing in this section shall apply:
 - (a) to any works under the control of a navigation authority, harbour authority or conservancy authority; or
 - (b) to any works carried out or maintained under or in pursuance of any Act or any order having the force of an Act.
- 7) The power of the Ministers to make an order under subsection (2) above shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.
- 7A) In subsection (2) above “ prescribed ” means specified in, or determined in accordance with, an order made by the Ministers; and any such order may make different provision for different cases, including different provision in relation to

different persons, circumstances or localities.

- 8) Subject to section 8 above, references in this section and sections 24 and 25 below to the drainage board concerned— .
 - (a) in relation to a watercourse in an internal drainage district, are references to the drainage board for that district; and .
 - (b) in relation to a watercourse in an area outside an internal drainage district, are references to the lead local flood authority for the area.
- 9) “Lead local flood authority” has the meaning given by section 6 of the Flood and Water Management Act 2010.

Section 25 of the Land Drainage Act 1991 states:

25. Powers to require works for maintaining flow of watercourse.

- 1) Subject to section 26 below, where any ordinary watercourse is in such a condition that the proper flow of water is impeded, then, unless the condition is attributable to subsidence due to mining operations (including brine pumping), the drainage board or local authority concerned may, by notice served on a person falling within subsection (3) below, require that person to remedy that condition. .
- 2) For the purposes of this section in its application in relation to any watercourse— .
 - (a) the drainage board concerned is the drainage board for the internal drainage district in which the watercourse is situated; and .
 - (b) the local authority concerned is the local authority for the area where the land as respects which the powers under this section are exercisable is situated; .

but references in this section to the drainage board concerned shall, in relation to a watercourse which is not in an internal drainage district, be construed as references to the [Agency].
- 3) Subject to subsection (4) below, a notice under this section in relation to a watercourse may be served on— .
 - (a) any person having control of the part of the watercourse where any impediment occurs; or .
 - (b) any person owning or occupying land adjoining that part; or .
 - (c) any person to whose act or default the condition of the watercourse mentioned in subsection (1) above is due. .
- 4) No notice under this section requiring any person to carry out any work on land not owned or occupied by him shall be served without the consent of the owner and the occupier of the land, except in a case where it is not practicable, after reasonable inquiry, to ascertain the name and address of the owner or occupier. .

5) A notice under this section shall indicate— .

(a) the nature of the works to be carried out and the period within which they are to be carried out; and .

(b) the right of appeal to a magistrates' court and the period within which such an appeal may be brought under section 27 below.

6) Subject to the right of appeal provided by section 27 below, if the person upon whom a notice is served under this section fails to carry out the works indicated by the notice within the period so indicated— .

(a) the drainage board or local authority concerned may themselves carry out the works and recover from that person the expenses reasonably incurred by them in doing so; and .

(b) without prejudice to their right to exercise that power, that person shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 4 on the standard scale.

7) In proceedings by the drainage board or local authority concerned for the recovery of any expenses under subsection (6) above it shall not be open to the defendant to raise any question which he could not have raised on an appeal under section 27 below. .

8) Nothing in this section shall affect the right of an owner or occupier to recover from the other, under the terms of any lease or other contract, the amount of any expenses incurred by him under this section or recovered from him by the drainage board or local authority concerned.