

WORCESTERSHIRE LAND DRAINAGE ENFORCEMENT PROTOCOL
(REDDITCH BOROUGH COUNCIL – MAY 2009)

Introduction

Current legislation puts District Councils in the lead role in overseeing land drainage matters along “ordinary watercourses”, while “main rivers” are overseen by the Environment Agency. Councils have powers rather than duties to act. Decisions in any case will be down to individual authorities and will depend on the circumstances of each case. The purpose of this protocol is to promote a common approach to the exercise of these powers.

Riparian rights and responsibilities

In most cases the owner of the land next to a watercourse is the “riparian owner”. The legal responsibility for maintaining watercourses rests with the riparian owner. Where a watercourse passes over someone’s land, the riparian owner has to keep it clear to allow water to flow freely though it. Further, it is usually the landowner’s responsibility to maintain a watercourse that forms a boundary with a highway.

Dealing with reports about “ordinary watercourses” that need attention.

When a problem is reported to the district council a site inspection will be arranged, usually within 10 working days to assess the problem, and a decision made upon the course of action to be taken.

If the problem appears to be urgent, attendance will be arranged as soon as possible and in any event within 24 hours

Assessment

Consideration should be given to all of the facts of the matter, before proceeding with the request for action that may later lead to enforcement and possible prosecution.

Examples of factors that may influence action:

- Are any properties at risk of flooding
- Serious risk of harm
- All other attempts to remedy the situation have failed
- Deliberate and obvious action by landowner to obstruct watercourse
- The obstruction or problem has occurred fairly recently
- Support of parish council, community etc
- Unchecked natural growth has as a result of general lack of maintenance resulted in unacceptable restrictions to flow.

- Change in circumstances makes problem worse

Examples of factors that may influence against action:

- Obstruction has been in place for a number of years
- Action has no community support
- Other options are available
- Minimal risk of harm
- Change in circumstances makes problem better

Initial action

- ▶ Upon inspection, if it is considered that the matter complained of is not the cause of the drainage problem or the proper flow of water is not impeded, and no action is to be taken or required, the complainant will be advised accordingly. In any event, a written communication will be sent to the complainant explaining the reason why no action is to be taken.

Examples of matters not requiring action, may include – minimal silting of watercourse, slight vegetation overgrowth, small quantity of debris etc

- ▶ Where it is considered that action needs to be taken by the relevant landowner, person and/or Agency responsible, the following steps will be taken:-

Enquiries will be made to identify the landowner involved. This may mean conducting a land search to determine the owner of the land and where the land is not registered, making enquiries with appropriate parties, such as the relevant, local parish council, or serving an official land ownership request under Section 16 of the Local Government (Miscellaneous Provisions) Act 1976.

Contact will be made with the landowner. The authority will write to the landowner, explaining the problem and setting out the work required to remedy the problem. This will be done by reference to a map supplied with the letter. The deadline for completing the work will normally be 28 days from the date of the letter, although a different period may be specified if the problem requires earlier resolution or if the circumstances justify a longer time period.

Advice regarding what work is needed will be given at any time and take account of local issues that may legitimately cause delays.

If a positive response to the initial letter has not been received within four weeks (or time allowed to complete work), and on inspection no work has been satisfactorily undertaken as required

the matter should be discussed with Legal Services to obtain their agreement for enforcement action to be taken, if necessary.

A formal reminder will then be sent to the landowner giving him 14 days to respond positively before enforcement action is commenced.

Section 25 Notice

If a positive response to the letter of reminder has not been received within 14 days, and on inspection the watercourse's condition has not been remedied and the proper flow of water remains impeded, the authority will proceed to issue a Section 25 Notice.

Before serving a Section 25 Notice notify (in writing) the Environment Agency or other Internal Drainage Board of the proposed action. (Section 26 "Competing Jurisdictions under Section 25".)

- ▶ The relevant papers will be passed to Legal Services and a Notice under Section 25 of the Land Drainage Act 1991 will be prepared.
- ▶ The Notice will include the nature of the works to be carried out and the period within which they are to be carried out, and the right of appeal to a magistrates' court within 21 days of service of the notice.
- ▶ A letter will accompany the Notice and inform the responsible person that in the event of his failure to satisfactorily undertake the work, the local authority may carry out the work themselves and recover from the person responsible the expenses reasonably incurred in doing so? It shall also be stated that 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.
- ▶ Proper service of the Notice will be made.

Enforcement of Notice

Following service of the Notice.

- ▶ The responsible person may appeal the Notice. If the notice is upheld or varied, compliance will be pursued as appropriate.
- ▶ The responsible person may carry out the work to the satisfaction of the authority, or may carry out alternative work which remedies the condition
- ▶ The responsible person will fail to carry out the work to the satisfaction of the authority and the authority may arrange for the work to be completed in default and the reasonable costs incurred recovered.
- ▶ The relevant authority prosecute the responsible person under Section 25(6)b
- ▶ The authority will normally pursue enforcement by way of prosecution rather than by way of works in default. However, the circumstances of the case will always be considered and in exceptional circumstances works in default may be carried out. An example would be where prosecution is not in the public interest as the person responsible is elderly or seriously ill.

If it is considered appropriate to commence prosecution action in the Magistrates Court due regard must be given to the Rules of Evidence and the Crown Prosecution Service Guidelines.

Completion of Proceedings

If the responsible person complies with the Notice and completes the work to the satisfaction of the authority, the authority shall write to him confirming the closure of the case and the end of the action.

Illegal Structures

Where structures, such as pipes or revetments, have been constructed or altered in a watercourse without the consent of the Environment Agency, then the landowner or person responsible may face enforcement action by the Environment Agency in accordance with Section 23 of the Land Drainage Act 1991.

Riparian Rights and Responsibility under Common Law

Riparian landowners have certain rights and responsibilities in relation to a watercourse flowing through or adjacent to their property. These “rights” are based on common law. The “rights” of riparian owners include:

- Presumption of the ownership of the land up to the centre of the watercourse. (For artificial watercourses the presumption is that both banks belong to the land on which the original hedgerow is sited)?
- To receive the flow of water in its natural state without undue hindrance in quality or quantity.
- To discharge uncontaminated run-off from your land.
- The right to protect property from flooding and land from erosion.

The responsibilities of riparian owners include:

- To pass on the flow of water without obstruction, pollution or diversion affecting the rights of others
- Accepting the flood flows through the land maintaining the bed and banks of the watercourses including the removal of debris even if it originated elsewhere. There is no common law duty to improve a watercourse.
- Keeping the bed and banks clear of material that could cause obstructions either on the riparian owners land or by being washed downstream during high flows.
- Keeping clear structures owned by the riparian landowner such as culverts, trash screens, weirs and mill gates.

Changes in Legislation

The Draft Flood and Water Management Bill was published on 21 April 2009) and has been circulated for consultation, with comments to be made by 24 July 2009. To avoid confusion, the existing legislation references

have been used in this document and it is presumed that once the Bill becomes Statute, any corresponding references will be amended without the need to consult Members.

However, where new or amended powers or responsibilities are confirmed, it will be necessary for Members to formally approve such changes in this Protocol.