

Appendix F

Ordinary Watercourse Regulation and Culvert Policy

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1 Introduction and scope

- 1.1 Leicestershire County Council (LCC) is the Lead Local Flood Authority (LLFA)ⁱ for Leicestershire. The LLFA has permissive powers for consenting and enforcement of ordinary watercourses. Together, ordinary watercourse consenting, and enforcement are referred to as watercourse regulation.
- 1.2 “Watercourse” includes all rivers and streams and all ditches, drains, cuts, culverts, dikes, sluices, sewers (other than public sewers within the meaning of the Water Industry Act 1991) and passages, through which water flows as defined in section 72 Land Drainage Act (LDA) 1991ⁱⁱ
- 1.3 “Ordinary watercourse” means a watercourse that does not form part of a main river as defined in section 6.3 Flood and Water Management Act (FWMA) 2010ⁱⁱⁱ
- 1.4 A “culvert” means a covered channel or pipe which prevents the obstruction of a watercourse or drainage path by an artificial construction (LDA 1991)
- 1.5 This policy sets out the LLFA’s approach to the regulation of ordinary watercourses within the LDA (1991), including:
- **Section 14A:** Permissive power for a local authority to perform works for the prevention or mitigation of flood risk.
 - **Section 21:** Permissive power to serve notice on persons to repair or maintain watercourses, bridges, or drainage work.
 - **Section 23:** Permissive power to consent works which affect the flow of ordinary watercourses

- **Section 24:** Permissive power to serve notice requesting the removal of structures or rectification of alterations to watercourses which have not received consent under section 23 of the same act.
- **Section 25:** Permissive power to serve notice on persons requiring them to carry out necessary works to maintain the flow of any water course, and the power to carry out works in default and recover its reasonable expenses should the riparian owner fail to carry out their responsibility.
- **Section 64:** Permissive power to enter any land for the purposes of carrying out their functions under the Act and to survey any land and inspect the condition of drainage work on it.

- 1.6 The ordinary watercourse regulation criteria (see Section 2) are also relevant to the LLFA role as statutory consultee for surface water drainage matters for major planning applications.
- 1.7 The policy updates and expands upon the Culverting of Ordinary Watercourses Policy within Appendix 3 of the former Flood Risk Management Strategy. Section 3 is focused upon culverts, and how the regulation criteria in Section 2 may apply. It helps to inform and is supported by watercourse regulation guidance and internal processes.
- 1.8 The policy does not apply to ordinary watercourses within the Trent Valley Internal Drainage Board.

2 Ordinary watercourse regulation criteria

- 2.1 Regulatory decisions will be informed by the following criteria. The criteria are defined for the purposes of transparency, and there may be other criteria by which decisions are made.
- 2.1.1 **Legal and administrative:** applications and administrative details should have been made correctly and approved. This is mainly in relation to land drainage consents. It may also relate to other permissions, for example, those related to planning, highway, ecology, and rights of way.
- 2.1.2 **Flood risk and hazard:** the effects upon current and long-term flood risk are considered. There may be changes to fluvial risk through changes in hydraulic capacity, or risk of blockage. The effects of climate change should be considered. Impacts upon other sources of flood risk will also be considered; for example, groundwater throughflow to watercourses can be affected by watercourse structures. The flood risk hazard is also considered.
- 2.1.3 **Environmental impacts:** the impacts upon water quality and biodiversity (direct and indirect) are considered. Watercourse management should be consistent with environmental legislation and targets such as the Water Framework Directive and Local Nature Recovery Strategy. The whole life carbon footprint, and any potential impacts upon other benefits, such as the historical and cultural environment, will also be considered.
- 2.1.4 **Management and maintenance:** the long-term management and maintenance requirements for watercourses and other assets will be considered. Assessment will

be made as to whether assets are realistically maintainable, with regard to the capabilities of those with riparian responsibility.

- 2.1.5 **Public safety and amenity:** risk to riparian landowners and the public will be considered, and any impacts or benefits for public amenity.

3 Culverts

- 3.1 In general, the LLFA are opposed to the culverting of watercourses due to the adverse impacts. The LLFA will therefore only approve an application to culvert a watercourse if there is no reasonably practicable alternative, or if the detrimental effects of culverting would be so minor that they would not justify a more costly alternative.
- 3.2 If culverting is proposed by way of land drainage consent, applicants should justify why they believe there is no reasonably practical alternative.
- 3.3 In relation to the watercourse regulation criteria in section 2:
- 3.3.1 **Flood risk and hazard:** culverts can reduce the hydraulic capacity of watercourses if not sized adequately, increasing risk of fluvial flooding. Culverts can also inhibit groundwater throughflow to watercourses, potentially increasing risk of groundwater flooding. There may also be increased risk of blockage. Culverts may also disconnect a watercourse from its floodplain, straighten it, or reduce roughness, potentially increasing downstream flood risk.
- 3.3.2 **Environmental impacts:** Culverting can lead to loss of habitat within the watercourse and floodplain. The longitudinal connectivity of watercourses may also be reduced, leading to fragmentation of habitats. Culverts can also have a high carbon footprint within construction and installation.
- 3.3.3 **Management and maintenance:** When watercourses are culverted, different maintenance requirements are created. Blockages and other maintenance issues may not be visually apparent without specialist inspection equipment. Repairs can be costly. Drain connections are more easily made to open watercourses where the performance of drainage systems can be visually monitored. Maintenance of these outfalls is considerably easier in open channels. Culverts may also be built over, leading to long term management and maintenance issues.
- 3.3.4 **Public safety and amenity:** There are dangers associated with natural open watercourses, but culverted watercourses can be equally dangerous. Culverting does not remove the risk of drowning or injury and they can represent a considerable safety hazard. This can be minimised through the use of screens, although this creates maintenance requirements. An existing or potential amenity is also lost for present and future generations.

- 3.4 We do however understand there may be cases where culverting is unavoidable, such as short lengths for access purposes, or where highways cross small watercourses. In such cases the length should be restricted to a minimum, the hydraulic and environmental design assessed, and appropriate mitigating enhancements to the surrounding environment included.
- 3.5 However, culverting will not be considered until other options have been thoroughly explored, for example: clear open span bridges with existing banks and bed retained; revision of site layout to incorporate an open watercourse; diversion of the watercourse in an environmentally sympathetic channel and corridor. Any diversion of a watercourse is likely to require a substantial ecological and geomorphological assessment (including, for example, a Water Framework Directive assessment).
- 3.6 All culverts should be 450mm or greater in diameter.
- 3.7 Where it is appropriate to do so, adequate mitigation must be provided for environmental impacts.
- 3.8 The LLFA are also supportive of the de-culverting of watercourses and return them to a more natural condition.
- 3.9 Riparian owners are also responsible for accepting the natural flows from adjoining land and must not create or allow an obstruction to that natural flow where culverts are constructed.

4 Consenting

4.1 Under Section 23 LDA 1991, Individuals and or corporate or unincorporated bodies and associations are prohibited from placing an obstruction in a watercourse, specifically a mill, dam, weir, a culvert including altering a culvert or other obstruction to the flow without the consent of the LLFA. Applications for consent should be made direct to the LLFA, details of the application process can be found at:

- Ordinary Watercourse Land Drainage Consent Checklist
- LLFA Guidance Note: Ordinary Watercourse Land Drainage Consent Applications. New Consentable Activities document.

<https://www.leicestershire.gov.uk/environment-and-planning/flooding-and-drainage/regulation-of-activities-on-watercourses>

5 Unconsented works

5.1 Any works carried out without consent under Section 23 of LDA 1991 will be logged and recorded as 'unconsented'.

5.2 The circumstances for unconsented works could include the following:

- A consent application was refused, but works were still carried out
- A consent application was approved, but the works undertaken were not in accordance with the conditions of the certificate of consent.
- No application for land drainage consent was made

5.3 It is not possible to provide retrospective consent for unconsented works and therefore enforcement action under Section 24 of the LDA may be required.

5.4 An assessment of the risk associated with the unconsented works will be completed, and a decision made on whether further action is required. The Council will keep a register of all unconsented works. Some incidents of unconsented works may require structures to be added to the Council's Asset Register and Record.

5.5 If it becomes apparent that the unconsented works are presenting a flood risk at a point in the future, it may become necessary to take enforcement action against a responsible party. In other cases, the enforcement issue may be temporary in nature or may have already ceased by the time the Council has been made aware of the situation. Where this activity has not led to a significant flood risk. damage to the environment, or other significant issue with regards to the regulation criteria in section 2, then it is unlikely enforcement action will be taken.

6 Enforcement

Decision making

- 6.1 The use of the Council's enforcement powers is permissive however, enforcement action in relation to flood risk management will be based on our regulation criteria, and regard to any statutory duty. Assessment of risk will be based on current legislation, existing case and common law, relevant technical guidance, and the evidence available. In any case, enforcement action will only be used where the Council has exhausted all other avenues. Details of enforcement options are provided in section 7.
- 6.2 The Council's Constitution¹ includes delegations to the Chief Executive to Executive to: "Generally take action, and operate all legislative, enforcement and administrative procedures in relation to the Council's functions and duties as a drainage authority." The power is further delegated to the Director of Environment and Transport, who can also authorise other officers to do so on their behalf.
- 6.3 Officers will use their training and experience to make informed judgements taking into account all the evidence in each case. They will decide on appropriate action after considering the criteria within this Policy and any relevant written procedures. The Director for Environment and Transport will give prior approval to all formal action falling outside the scope of this Policy.

General enforcement principles

- 6.4 In enforcing relevant legislation, the Council will pay due regard to the following principles of good enforcement practice some of these are set out in the Regulators code 2014:
- 6.4.1 **Transparency:** Persons against whom enforcement action is taken will receive sufficient explanation to enable them to understand what is expected of them and what they can expect from the Council. Clear distinctions will be made between what are legal requirements and what are recommendations. Correspondence and advice will be delivered in plain and easy to understand language. Where necessary, translation will be provided and/or correspondence will contain a statement, in the recipient's language, indicating the importance of the correspondence.
- 6.4.2 **Consistency:** The Council recognises that businesses and citizens expect consistency from officers in the Council's flood risk management team with whom they come into contact, e.g., in securing compliance with the law, and the investigation of complaints. The Council will endeavour to co-ordinate enforcement services to minimise unnecessary overlap and time delays. The Council has set out internal process charts to be used by all officers embedding a culture of consistency. The Council will continue to take measures to promote consistency of enforcement. These include training, effective liaison with other local authorities, enforcement

¹ Leicestershire County Council Constitution
<https://politics.leics.gov.uk/ieListDocuments.aspx?CId=1187&MId=7227&Ver=4&Info=1>

bodies, and professional organisations, through attending local, regional, and national meetings and benchmarking exercises with similar providers.

6.4.3 **Proportionality:** Enforcement action will be proportional to the risk and the public interest. Any action taken by officers to achieve compliance with the law will depend upon the seriousness of any breach.

6.4.4 **Accountability:** If any person is aggrieved by the enforcement of legislation by the Council, they may register a complaint either:

- Using the online Complains, Comments and Compliments form <https://leicestershire.secure-forms.co.uk/>
- by telephone through the Customer Service Centre – 0116 232 3232; or
- in person - by visiting County Hall, Glenfield, Leicester, LE3 8RB; or
- by writing to the Director (Environment and Transport) County Hall, Glenfield, Leicester, LE3 8RB; or
- in the case of a legal notice, by appeal to the appropriate authority or body (in accordance with appeal details which will be enclosed with each statutory notice if applicable).
- The complaint or comment will be noted and responded to in accordance with the Council's "Corporate Complaints and Compliments Policy". Taking this action does not affect any right to complain to a local Councillor or to the Local Government Ombudsman.

7 Enforcement Options

7.1 Introduction

7.1.1 The Council recognises and affirms the importance of achieving and maintaining consistency in the approach to making decisions that concern regulatory enforcement action, including prosecution. To achieve and maintain consistency, relevant guidance and advice are always considered and followed where appropriate.

7.1.2 The Council may seek to secure compliance with regulatory legislation through the use of the following actions:

- informal action (written guidance, advice, and notices).
- statutory notices.
- simple cautions.
- carrying out work in default; and
- prosecution (as a last resort).

7.2 Informal action

7.2.1 Informal action will be the normal means of securing compliance with legislation, except where more formal courses of action are warranted. Informal action includes:

- offering advice.
- giving verbal and written warnings.
- negotiating agreements between complainants and other residents or businesses.
- the negotiation of specific conditions with licences; and
- the use of informal notices.

7.2.2 It is generally considered appropriate to take informal action in one or more of the following circumstances:

- where the act or omission is not serious enough to warrant enforcement.
- where the history of the business or the member of the public creates a reasonable expectation that informal action will achieve compliance with the law; and
- the consequence of non-compliance is unlikely to pose an unacceptable risk such as but not limited to death or serious injury or substantial damage to property

7.3 Statutory notices

7.3.1 Some legislation includes provisions for the use of statutory notices, these will be served by officers specifically authorised in writing to serve statutory notices. Notices will normally be served where:

- informal action has not achieved the desired effect.
- there is a lack of confidence that the individual/company will respond to an informal approach.
- there is a history of non-compliance with informal action.
- standards are generally poor with little management awareness of statutory requirements; and /or
- the consequences of non-compliance could be potentially serious to the health and safety of the public.

7.3.2 Where a notice is not complied with by the expiry date, a prosecution may be considered appropriate. In these circumstances a report, in accordance with the Constitution, will be made to decide what further enforcement action is appropriate.

7.4 Simple cautions

7.4.1 The Council may use Simple Cautions, this is a formal warning in writing to a person who admits to an offence. It is advocated by the home office in cases where there is evidence of a criminal offence, but where the public interest does not support a prosecution.

7.4.2 Simple Cautions may be used for cases involving first time low-level offences where a Simple Caution can meet the public interest. A decision to issue Simple Cautions

must be made in accordance with the Director of Public Prosecutions' Guidance on Charging under section 37A of the Police and Criminal Evidence Act 1984.

- 7.4.3 A simple caution must be accepted in writing by the offender (or officer of a limited company), who is then served a copy of the caution. A second copy is held as the official record. Failure to accept a simple caution leaves the authority with an option to instigate legal proceedings instead.
- 7.4.4 Simple cautions are viewed as valuable enforcement tools because they can be cited in court if the same person or organisation reoffends within three years of the original offence and typically both save officer time and reduce the burden placed upon the court system.

7.5 Work in default

- 7.5.1 In some circumstances, failure to comply with a notice may result in the Council arranging for the necessary works to comply with the notice to be carried out (work in default). This power is specific to certain legislation. A letter will be sent informing the person on whom the notice was served of the intention to carry out the work in default. This will detail timescales of the work to be carried out and the officer's contact details. In all cases the Council will seek to recover the money spent in carrying out any works in default.

7.6 Prosecution

- 7.6.1 All decisions to prosecute will be made by the Case worker and approved by the Head of Service.
- 7.6.2 A report document will be prepared for the County Council's legal services outlining the following
- The offence(s) committed
 - Evidence to support the prosecution and prospects of success
 - Effect on public/property/environment
 - Any aggravating or mitigating circumstances

Legal services will consider the report and will prepare a concurrence taking into full account the evidential and public interest tests and the threshold criteria, and subject to these being met the commencement of prosecution will be approved.

- 7.6.3 Any person subject to potential prosecution action will be informed in writing of the council's intention to prosecute and will be invited to send in written representations to the Council for consideration prior to any final decision being made. If circumstances change, cases may need to be reported back to the Head of Service for further consideration.
- 7.6.4 All prosecution will be reported for inclusion on relevant national or local databases of offenders, the Police National Computer, and others as considered appropriate.

8 Other relevant legislation

8.1 Consideration will be given to the provisions of the Human Rights Act 1998 when considering action in respect of regulatory enforcement work. Particular attention will be given to

- Article 6: Right to a fair trial.
- Article 8: Right to respect for private and family life, home, and correspondence.
- Article 14: Prohibition of discrimination on any grounds.

9 Publicity and sharing of evidence

9.1 We will endeavour to secure media presence at hearings in the Courts when we are seeking prosecution of offenders, with the aim of drawing their attention to the court case. Thereafter we will publicise any conviction, which could serve to draw attention to the need to comply with the law or, deter anyone tempted to act in a similar manner. Details of such cases will also be published on our website.

9.2 The Council will share intelligence and evidence, secured in the ordinary course of our business, with other statutory enforcement bodies and relevant partners in accordance with information sharing protocols signed by the Council and our duties under Crime and Disorder Act 1988 section 17.

9.3 Information will be made available in public registers where the legislation requires it. These will be freely available for public viewing within normal office hours.

10 Review

10.1 The Council will periodically review this Policy to reflect current political management arrangements, or changes in statute, guidance, and opinions.

ⁱ Section 6(7) Flood Management Act 2010 “Lead local flood authority” in relation to an area in England means—

(a) the unitary authority for the area, or

(b) if there is no unitary authority, the county council for the area.

ⁱⁱ Section 72 (1) Land Drainage Act 1991 “watercourse” includes all rivers and streams and all ditches, drains, cuts, culverts, dikes, sluices, sewers (other than public sewers within the meaning of the **M3**Water Industry Act 1991) and passages, through which water flows.

ⁱⁱⁱ Section 6(3) Flood Management Act 2010 “Ordinary watercourse” means a watercourse that does not form part of a main river.