

GUIDANCE NOTE ON ROLES & RESPONSIBILITIES FOR FLOODING ISSUES IN FIFE



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INTRODUCTION

The purpose of this report is to clarify the responsibilities of Fife Council in relation to flooding of roads and non-agricultural land, the functions and activities of which are exercised by Transportation Services on behalf of the Council. It also gives a brief insight into the role and responsibilities of other organisations involved in flooding issues.

Councils have several roles relating to flooding – one as Roads Authority, one as Planning Authority, and one as the local authority with various powers and responsibilities for flood prevention (commonly referred to as the “Flood Prevention Authority”, although no such legal term exists.) The first relates to drainage of roads and water/debris running onto them, the second relates to consideration of flooding risks in planning applications, and the third relates to the alleviation of flooding arising from watercourses. The latter two roles are linked.

As well as local authorities, the Scottish Government, Scottish Water and the Scottish Environment Protection Agency (SEPA) all have responsibilities in relation to flooding issues and flood alleviation in particular, and the Association of British Insurers also have an interest. Landowners have their own responsibilities.

The Scottish Government has national responsibility for flood alleviation. It administers the legislation and planning guidelines as appropriate, and gives approval for flood alleviation schemes, which it grant aids by allocation of additional finance within the block grant to Councils.

Scottish Water is the drainage authority throughout Scotland and therefore shares responsibility with Councils for the quantity and quality of surface water discharge into watercourses. Many existing urban drainage systems involve combined sewers with storm water overflows, and surcharges from these systems often contribute to flooding during flood events. It is expected that Scottish Water will take over responsibility for new sustainable urban drainage systems (SUDS), subject to the terms of Sewers for Scotland 2, enacted in October 2007.

SEPA's principal role relating to flooding is in monitoring rainfall and ensuring water quality. It uses discretionary powers for flood warning to monitor a number of river flow gauges throughout Scotland. SEPA also provides a number of flood warning schemes in monitored areas, and operates the more general Flood Watch and Floodline services to the public. SEPA is a statutory consultee for planning applications on developments where flood risk may be present, and is now taking on a major role in river basin management and flood risk mapping. Controlled Activity Regulations, enacted in April 2007 are enforced by SEPA, in order to protect the water environment and water quality.

The Association of British insurers (ABI) reflects the views of and gives guidance to insurance companies on flooding issues. The ABI has recently withdrawn the flood damage insurance guarantee given to the government, and it can therefore be increasingly difficult to obtain buildings insurance to cover flood damage if a property is in an area with a high risk of flooding.

It is essential that all parties involved in a flooding incident or in alleviating potential flooding work closely together to come to a solution, as it is often not possible to resolve such issues without an all-party agreement. This is particularly true if private landowners are unwilling or unable to take appropriate action.

ROLE AS ROADS AUTHORITY

RELEVANT LEGISLATION

Road (Scotland) Act 1984

Relevant sections within the Act relating to drainage are:

Section 31 - New Installation/Future Maintenance

The Roads Authority has the power to drain a public road by constructing or laying drains in adjacent or nearby land and draining surface water into inland or tidal waters. The roads authority has to scour, cleanse and keep open drains constructed or laid by them. The Roads Authority must serve notice of proposed drainage works on land owners affected. Anyone obstructing or interfering with a drain installed by the roads authority, or under their control, commits an offence and the authority may carry out necessary repairs and recover their reasonable expenses from the offender.

Section 32 - Contribution to new works/maintenance

The Roads Authority may contribute towards the costs of drainage works which appear to them desirable for protection or enjoyment of a public road.

Section 99 - Water, etc flow onto public road

There is a duty on owners and occupiers of land adjacent to a road to prevent water, filth, dirt or other offensive matter from flowing onto or across the public road. Failure to comply is an offence.

PRACTICAL PROBLEMS RELATING TO ENFORCEMENT

- On occasions, there may not be a practical solution for a landowner to prevent water flowing onto the road. A solution can sometimes be achieved by promoting a joint project.
- Notice can only be served on the owner of the land immediately adjacent to the road from which the flow of water emanates, but sometimes the source of the problem is not from this land. Transportation Services can approach the owner of land where the problem needs rectified but no enforcement powers are available under this Act.
- Problems can occur where ditches/drainage systems on land "downstream" from the public road become blocked due to a natural build up of silt or through normal wear and tear of drainage pipes/culvert, which in turn causes water to back up the system and flood the road. In this instance the Council does not have any statutory power to require the landowner to clean the ditch/repair drainage system concerned. Although there are no statutory powers available, the landowner is asked to clean ditch/repair system and the majority of landowners comply. In other situations the Council has undertaken the necessary work at its own expense.
- Blocked pipes under verge crossings causing water to flow out of the roadside ditch are a regular issue that arises. The landowner has the maintenance responsibility for the crossing, unless adopted, or installed, by the Council. This blockage is deemed an obstruction in a watercourse under the control of the Council, therefore it is an offence under Section 31. However, this is often disputed by the landowner and their most common opinion is that the problems have arisen due to the lack of ditch maintenance by the Council.

Pursuit of enforcement related matters can be very time consuming for staff resources.

ROLE AS “FLOOD PREVENTION AUTHORITY”

BACKGROUND

Legislation relating to flooding in Scotland has evolved slowly, and mainly it has to be said as a reaction to major flood events. There has also been a more political dimension. After the 1994 floods there has been a clear desire by central government in the form of the Scottish Government to shift responsibility for flood alleviation (or flood risk reduction) very firmly onto local authorities. This shift has resulted in local authorities having powers and additional duties in respect of flooding, although central government continues to exercise financial control.

RIPARIAN OWNERS

The Common Law rights & responsibilities of riparian owners are as follows:

- Accept water from upstream
- Right to protect own property
- Should not make situation (flooding) worse for others
- Undertake maintenance of watercourses

These apply equally to local authorities when they are the landowner.

Because flooding has always occurred the main responsibility for reducing the risk lies with the owner of the affected property. It is long established that a property owner should take responsibility for the safety and security of his/her own property, which includes a right to take steps to reduce the risk of flooding.

A consequence of that right is that the works to reduce the risk must not increase the risk to other property. The acceptance of water from upstream is a common law requirement, but if flood risk reduction works cause changes in the volume, rate of flow or depth of that water, and these changes result in damage, or pose a reasonable threat of damage, legal action may follow to prevent the works or obtain recompense for the damage.

A landowner also has a common law responsibility to prevent the flooding of other property. If, for example, a watercourse becomes blocked by debris and this blockage results in flooding of other land, the landowner should remove the blockage. Failure to do so may result in legal action, and if it can be demonstrated to a court that failure to maintain resulted in loss the landowner would be liable for that loss. However, this issue has become clouded by the Flood Prevention and Land Drainage (Scotland) Act 1997 (see later.)

RELEVANT LEGISLATION

Flood Prevention (Scotland) Act 1961

The actions of local authorities in undertaking works to reduce flood risk were harmonised by the passage in 1961 of the Flood Prevention (Scotland) Act. The Act has some sixteen main sections, the contents of which can be summarised as follows:

- powers refer to non-agricultural land
- powers refer to fluvial (watercourse) and tidal flooding
- powers are permissive or discretionary only, i.e. the authority may exercise the powers but does not have a duty to
- the powers relate to both watercourse maintenance and new works
- no work other than maintenance carried out under the Act can be carried out without the promotion of a flood prevention scheme by the authority
- an authority may make bylaws with regard to dumping of rubbish in watercourses
- an authority may contribute financially to the cost of works undertaken by others

Because the powers conferred by the 1961 Act are discretionary, local authorities (who are subject to financial constraints) have tended to be sparing in the use of the Act. Exceptions are the promotion of flood prevention schemes, usually involving major capital works, which are agreed and financially supported by the Scottish Government.

Flood Prevention and Land Drainage (Scotland) Act 1997

Following the 1994 flooding in Central Scotland it was realised that many of the problems arose from poorly maintained watercourses. This included culverts and culvert screens blocked by debris and rubbish, and sediment reducing channel capacity. There thus seemed to be a need to place responsibility for watercourse maintenance on some statutory body, and the political choice was the new unitary authorities.

The Flood Prevention and Land Drainage (Scotland) Act of 1997 essentially amends the 1961 Act. Local authorities must now assess watercourses from time to time, and maintenance by them is no longer discretionary, but a duty in prescribed circumstances where the work, (such as the removal of debris or obstructions), would substantially reduce the likelihood of flooding. The main sections of the Act can be summarised as follows:

- relates only to non-agricultural land
- requires local authority to assess flood risk from watercourses
- requires local authority to maintain watercourses to mitigate flood risk, but this does not apply where failure to maintain would result only in flooding of land in same ownership as watercourse requiring maintenance
- does not place any duty to undertake capital works, i.e. these are still discretionary
- requires local authority to publish biennial reports on what they need to do and have done about flood risk (refer to Fife Flood Prevention Report 2007.)

Clearly the major change is Section 4(b) of this Act which states that where the exercise of powers to maintain a watercourse in an efficient state would substantially reduce the risk of flooding, **the local authority 'shall exercise that power accordingly'**.

Note there is no provision in the Act for Councils to recharge maintenance to riparian owners.

Other Legislation

The Land Drainage (Scotland) Act 1958 -Flooding of agricultural land is covered by this Act.

Coast Protection Act 1949 – Where flooding of property is caused by the sea through the action of waves and tides a local authority has powers under the Coast Protection Act of 1949 to undertake works to reduce the risk of flooding. The works include both maintenance and capital, but the powers are again permissive and do not impose any duty.

FLOOD PREVENTION STRATEGY

A database of watercourses in Fife has been established to manage the Council's duties effectively. Currently the database contains 151 watercourses which have a perceived risk, however small, of causing flooding to properties. These watercourses have been prioritised based upon historical flooding information and are reassessed for flood risk from time to time. Such inspections check general condition, identify factors that may lead to flooding, and recommend measures that would reduce flood risk.

An inspection and maintenance programme has been developed to prioritise measures required at locations most severely affected by potential flooding, which consists mainly of clearing rubbish and blockages formed by water borne debris. Vegetation and excess sediment is removed in some places only after full consideration of the environmental consequences and impact on wildlife. The amount of maintenance work carried out is inevitably constrained by available revenue budgets.

Flood prevention schemes have already been constructed at Cairneyhill, Parkneuk in Dunfermline, Kincardine, Pitscottie & Ceres, Millfield in Cupar, and Auchtermuchty & Dunshalt. Regular inspections and maintenance of these 6 existing flood prevention schemes are carried out.

A flood prevention scheme for the Lyne, Tower and Calais Burns in the south-west area of Dunfermline is in the process of being constructed. Flood Studies have been completed for identified high risk areas, such as the Brankholm & Keithing Burns, Inverkeithing and the Lochty Burn, Kinglassie. These determine the causes of flooding, what measures are necessary to alleviate the problems and whether the promotion of a flood alleviation scheme is economically viable. Further studies are already programmed or underway for the Den & East Burns, Kirkcaldy, the River Eden, Cupar, the Kinnessburn, St Andrews, Strathmiglo and Dunshalt. These are all dependent upon availability of funding.

The database contains the following information for the identified watercourses:

- Flooding history
- Maintenance measures identified
- Maintenance measures taken
- Recommended maintenance regimes

PLANNING & BUILDING CONTROL

Under the terms of the Flood Prevention (Scotland) Act 1961 and the Flood Prevention and Land Drainage (Scotland) Act 1997, Fife Council, in common with all local authorities in Scotland, have a role of checking the adequacy or otherwise of development proposals in terms of surface water runoff control and flood alleviation.

Scottish Planning Policy 7 : Planning and Flooding; places a responsibility on planning authorities to fully consider flood risk as a material factor in determining applications for developments. It includes guidance on building in flood-prone areas, consultation and the formation of Flood Appraisal Groups to achieve a uniform policy when requesting information on flood risk, and specifying design parameters. Transportation Services works closely with Development Services in dealing with applications where there may be a flood risk, or where sustainable urban drainage systems (SUDS) are appropriate. A protocol has also been established between local authorities and SEPA regarding flood risk consultation.

In Fife, all new developments with a gross area greater than 0.5ha are required to implement a sustainable urban drainage system to treat and control surface water runoff. There may also be circumstances where developments less than 0.5ha gross area require SUDS. As well as treating the water as close to its source as possible, the aim of SUDS is to ensure that developments have no overall negative impact on flood risk in the receiving watercourses, i.e. the surface water runoff post-development is no greater than pre-development.

Under the Building Standards (Scotland) Regulations 1990, a building site and the ground immediately adjoining it must be so drained or otherwise protected as to protect the building and its users.

FIFE FLOOD APPRAISAL GROUP

The Fife Flood Appraisal Group comprises representation from Development Services, Transportation Services, SEPA, Scottish Water, and the insurance industry. The Group meets six monthly and is a vehicle for discussing the various issues concerning Fife. Other parties such as Fife Constabulary, the Emergency Planning Unit, house builders' representatives and Network Rail may also be invited to attend from time to time as required.

SCOTS FLOODING WORKING GROUP

The SCOTS (Society of Chief Officers of Transportation in Scotland) Flooding Group was originally formed in 1999 to consider the implications of the flooding legislation and promote a uniform approach by Councils towards complying with the requirements of the 1997 Act. They have close links with relevant personnel within the Scottish Government and are relied upon to advise COSLA if and when necessary. The Group was recently reformed under the title SCOTS Flooding and Emergencies Group. Fife Council Transportation Services is an active participant in this group.

FURTHER INFORMATION / CONTACTS

Further information on particular flooding issues can be obtained from Transportation Services contacts as detailed below:

- External calls – dial 08451 555555 and request the extension number.
- Internal calls (VOIP) – dial the extension number

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