

Draft Order laid before the National Assembly for Wales under paragraph 14(5)(b) of Schedule 3 to the Flood and Water Management Act 2010, for approval by resolution of the National Assembly for Wales.

W E L S H S T A T U T O R Y
I N S T R U M E N T S

2018 No. (W.)

WATER INDUSTRY, WALES

**The Sustainable Drainage
(Enforcement) (Wales) Order 2018**

EXPLANATORY NOTE

(This note is not part of the Order)

This Order provides for the enforcement of any breach of the approval required under paragraph 7(1) of Schedule 3 to the Flood and Water Management Act 2010 in relation to drainage systems for construction work.

Part 2 provides for the exercise of powers of entry by an authorised person and the exercise of enforcement functions by the local planning authority.

Part 3 provides for temporary stop notices, enforcement notices and stop notices to be given to a developer who breaches the requirement for approval.

Part 4 provides for appeals to the Welsh Ministers against enforcement notices and makes provision for procedure.

Part 5 contains provision about offences.

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WATER INDUSTRY, WALES

**The Sustainable Drainage
(Enforcement) (Wales) Order 2018**

Made ***

Coming into force ***

The Welsh Ministers, in relation to drainage systems in Wales, in exercise of the powers conferred by sections 32 and 48(2) of, and paragraphs 4 and 14 of Schedule 3 to, the Flood and Water Management Act 2010⁽¹⁾, make the following Order.

A draft of this instrument has been approved by a resolution of the National Assembly for Wales pursuant to paragraph 14(5)(b) of that Schedule.

PART 1

Introduction

Title and commencement

1. The title of this Order is the Sustainable Drainage (Enforcement) (Wales) Order 2018 and it comes into force on *** May 2018.

Interpretation

2. In this Order—

“the Act” means the Flood and Water Management Act 2010;

⁽¹⁾ 2010 c. 29. The Welsh Ministers are “the Minister” for the purposes of paragraph 4 to Schedule 3 in relation to drainage systems in Wales.

“appellant” means a developer who makes an appeal under this Order;

“approval” means the approval required under paragraph 7(1) of Schedule 3 for a drainage system for construction work;

“authorised person” has the meaning given in article 4(1);

“breach”, in relation to the requirement for approval, means—

- (a) construction work is commenced without approval,
- (b) a condition of approval is breached, or
- (c) construction work does not conform to the approved proposals;

“construction area” means—

- (a) the area of land identified on a plan accompanying an application for planning permission, or
- (b) if an application for planning permission has not been made, the area of land on which construction work has commenced or is proposed to be commenced;

“construction work” means construction work which has drainage implications⁽¹⁾;

“developer” means a person who commences or proposes to commence construction work;

“enforcement notice” has the meaning given in article 8;

“local planning authority” has the meaning given in section 1 of the Town and Country Planning Act 1990⁽²⁾;

“notice of appeal” means a notice that complies with article 13(1);

“planning enforcement appeal” means an appeal against an enforcement notice under section 174 of the Town and Country Planning Act 1990;

“powers of entry” means the powers conferred by article 4;

“Schedule 3” means Schedule 3 to the Act;

“stop notice” has the meaning given in article 10;

“temporary stop notice” has the meaning given in article 6; and

(1) See paragraph 7(2) of Schedule 3 to the Flood and Water Management Act 2010 which provides (a) construction work means anything done by way of, in connection with or in preparation for the creation of a building or other structure; and (b) construction work has drainage implications if the building or structure will affect the ability of land to absorb rainwater.

(2) 1990 c. 8.

“time limit for making an appeal” has the meaning given in article 15.

PART 2

Exercise of enforcement functions

Agreement to exercise enforcement function

3.—(1) An approving body may agree with the local planning authority that the authority may exercise an enforcement function under this Order as if it were the approving body.

(2) The agreement—

- (a) may relate to any breach of the requirement for approval; and
- (b) may contain arrangements to reimburse the costs incurred by the local planning authority in exercising the enforcement function.

(3) In this article, “enforcement function” means any function exercisable by the approving body in relation to—

- (a) powers of entry; or
- (b) a temporary stop notice, enforcement notice or stop notice.

Powers of entry

4.—(1) A person authorised by an approving body (“authorised person”) may at any reasonable time enter a construction area (except any premises in the construction area used wholly or mainly as a private dwelling house) to determine if—

- (a) there has been a breach of the requirement for approval; or
- (b) a temporary stop notice, stop notice or enforcement notice has not been complied with.

(2) The authorised person must on request produce evidence of authorisation.

(3) In an emergency, powers of entry may be exercised at any time.

(4) An authorised person may not exercise powers of entry to determine if there has been a breach of the requirement for approval if a drainage system for the construction work has been adopted.

(5) A justice of the peace may, by signed warrant, permit an authorised person to enter any premises in a construction area, if necessary by reasonable force, if the justice on sworn information in writing is satisfied—

(a) that there are reasonable grounds to enter the premises for the purpose of enforcing this Order; and

(b) that any of the conditions in paragraph (6) is met.

(6) The conditions are—

(a) entry to the premises has been, or is likely to be, refused, and notice of the intention to apply for a warrant has been given to the occupier;

(b) asking for admission to the premises, or giving such a notice, would defeat the object of the entry;

(c) entry is required urgently; or

(d) the premises are unoccupied or the occupier is temporarily absent.

(7) A warrant is valid for 3 months.

(8) An authorised person entering premises which are unoccupied or from which the occupier is temporarily absent must leave the premises as effectively secured against unauthorised entry as they were before entry.

Compensation for loss resulting from exercise of powers of entry

5.—(1) A developer or other person is entitled to compensation if—

(a) an authorised person enters a construction area or any premises in a construction area in exercise of powers of entry but finds no evidence of a breach of the requirement for approval; and

(b) as a result of the exercise of those powers the developer or other person incurs loss.

(2) If a breach of the requirement for approval is found, compensation is payable—

(a) to the developer for any loss resulting only from an unreasonable exercise of those powers; and

(b) to any other person as if no evidence of a breach were found.

(3) Any claim for compensation must be made to the approving body within 12 months after the exercise of those powers.

(4) Disputes about compensation are to be determined by the Upper Tribunal.

PART 3

Notices

Temporary stop notices

6.—(1) An approving body may give a notice (“a temporary stop notice”) to a developer if the approving body has reason to believe that—

- (a) the developer has breached the requirement for approval; and
- (b) it is expedient that the construction work stop immediately.

(2) A temporary stop notice must be in writing and must—

- (a) specify the activity that is believed to be a breach;
- (b) give reasons for that view;
- (c) prohibit the developer from continuing with the activity; and
- (d) specify the consequences of non-compliance with the notice.

(3) An approving body may at any time withdraw a temporary stop notice by giving written notice to a developer setting out reasons for the decision to withdraw it.

(4) A temporary stop notice has effect from the time it is given and, unless it is earlier withdrawn, ceases to have effect at the end of—

- (a) the period of 4 weeks beginning with the day it is given; or
- (b) any shorter period specified in the notice, beginning with the day it is given.

(5) A second or subsequent temporary stop notice must not be given in respect of the same activity unless the approving body has first taken some other enforcement action in relation to the breach.

Compensation for loss resulting from temporary stop notice

7.—(1) A developer who suffers loss as a result of being given a temporary stop notice is entitled to compensation if the approving body—

- (a) withdraws the notice; or
- (b) does not take any further enforcement action.

(2) Any claim for compensation must be made to the approving body within 12 months after the notice is withdrawn or ceases to have effect, whichever is the earlier.

(3) Disputes about compensation are to be determined by the Upper Tribunal.

Enforcement notices

8.—(1) If a developer breaches the requirement for approval, the approving body may give a notice to the developer requiring the developer to take steps to remedy the breach (“an enforcement notice”).

(2) An enforcement notice may be given at any time before a drainage system for the construction work is adopted but not later than 4 years after the breach occurs.

(3) An enforcement notice must be in writing and must specify—

- (a) the construction area to which the notice relates;
- (b) details of the breach;
- (c) the steps which the developer must take to remedy the breach;
- (d) the date by which the steps must be taken;
- (e) rights of appeal, including the time limit for making an appeal; and
- (f) the consequences of non-compliance with the notice.

(4) An enforcement notice may not require the developer to take any steps until at least 4 weeks after the date on which the notice is given.

(5) An approving body may at any time by written notice to a developer—

- (a) withdraw an enforcement notice, giving reasons; or
- (b) vary an enforcement notice by—
 - (i) reducing the amount of work necessary to comply with the notice, or
 - (ii) extending the time for taking any step specified in the notice.

Steps required by an enforcement notice

9.—(1) For construction work commenced without approval, the enforcement notice must require the developer—

- (a) to apply for approval (the application to be made as if construction work had not commenced); or
- (b) to restore the construction area to the condition it was in before the construction work began.

(2) For a breach of a condition of approval, the enforcement notice must require the developer—

- (a) to carry out work to ensure the drainage system complies with the approved proposals; or

(b) to restore a construction area to the condition it was in before the construction work began.

(3) For construction work that does not conform to the approved proposals, the enforcement notice must require the developer—

(a) to carry out work to ensure the drainage system complies with the approved proposals; or

(b) to restore a construction area to the condition it was in before the construction work began.

(4) If a developer fails to comply with an enforcement notice, the approving body—

(a) may take the steps specified in the enforcement notice or authorise another person to take the steps; and

(b) may require the developer to pay expenses incurred under sub-paragraph (a), such expenses to be recoverable as a debt.

(5) The approving body or a person authorised under paragraph (4)(a) may at any reasonable time enter a construction area to take the steps specified in the enforcement notice.

Stop notices

10.—(1) An approving body may give a notice (“a stop notice”) to a developer if—

(a) the developer has appealed against an enforcement notice; and

(b) the approving body thinks it is expedient that construction work on the land to which the enforcement notice relates should stop immediately.

(2) A stop notice may prohibit a developer from continuing with the construction work specified in the notice until—

(a) the appeal against the enforcement notice is determined or withdrawn; or

(b) the approving body—
(i) withdraws the stop notice, or
(ii) takes further enforcement action.

(3) A stop notice must be in writing and must specify—

(a) the date on which it takes effect;
(b) the grounds on which it was served;
(c) the consequences of not complying with it; and
(d) the enforcement notice to which it relates.

(4) A copy of the enforcement notice must be annexed to the stop notice.

(5) An approving body may at any time withdraw a stop notice by giving written notice to a developer setting out reasons for the decision to withdraw it.

Register of notices

11.—(1) An approving body must keep a register containing information relating to all temporary stop notices, enforcement notices and stop notices it gives.

(2) The register must contain the information prescribed for the purpose of section 188 of the Town and Country Planning Act 1990 Town and Country Planning (Development Management Procedure) (Wales) Order 2012(1) but with the modifications described in paragraph (3).

(3) The modifications are—

- (a) any reference to the authority is to be read as a reference to the approving body;
- (b) any reference to service of the notice or copies of the notice is to be read as a reference to the giving of the notice;
- (c) any reference to a breach of planning control is to be read as a reference to a breach of the requirement for approval;
- (d) any reference to a breach of condition notice is to be read as a reference to a stop notice or temporary stop notice.

(4) The information must be entered on the register as soon as is practicable but not more than 2 weeks after a notice is given.

(5) An entry relating to a notice must be removed from the register if the notice is withdrawn or ceases to have effect.

PART 4

Appeals against enforcement notices

Right of appeal

12.—(1) A developer who is given an enforcement notice may by notice appeal to the Welsh Ministers(2) against the decision to give it.

(2) The grounds of appeal are that—

- (a) the decision was based on an error of fact;
- (b) the decision was wrong in law;
- (c) the decision was unreasonable;

(1) S.I. 2012/801.

(2) See paragraph 4 of Schedule 3 to the Act. The Welsh Ministers are “the Minister” for the purposes of paragraph 4 to Schedule 3 in relation to drainage systems in Wales.

(d) there is no breach of the requirement for approval.

(3) An enforcement notice is suspended until an appeal is determined or withdrawn.

Making an appeal

13.—(1) Notice of an appeal against an enforcement notice must—

- (a) be in writing, on a form obtained from the Welsh Ministers;
- (b) state the grounds of appeal;
- (c) state briefly the facts on which the appellant will rely in support of each of those grounds; and
- (d) include the name, address (including any email address) and telephone number of the appellant and any agent acting for the appellant.

(2) The notice must be sent to the Welsh Ministers accompanied by—

- (a) a statement as to whether the appellant wishes to have the appeal dealt with by way of written representations, a hearing or an inquiry;
- (b) a copy of the enforcement notice; and
- (c) a copy of any related stop notice or temporary stop notice.

(3) A developer who sends a notice of appeal to the Welsh Ministers must, at the same time, send a copy of the notice of appeal and accompanying documents to the approving body.

(4) In this article, “accompanying documents” means the documents mentioned in paragraph (2).

Notice of appeal given electronically

14.—(1) A developer who gives notice of an appeal using electronic communication is taken to have agreed—

- (a) to the use of electronic communication for all purposes relating to the appeal which are capable of being carried out electronically; and
- (b) that the developer’s email address is the address for the purposes of communication relating to the appeal.

(2) A developer may revoke an agreement under paragraph (1) by written notice to the Welsh Ministers and the approving body, specifying the date on which the revocation takes effect.

(3) The date of revocation must be at least 7 days after the date on which the notice is given.

(4) In this article, “electronic communication” has the meaning given in section 15(1) of the Electronic Communications Act 2000⁽¹⁾.

Time limit for making an appeal

15. An appeal must be made within the period of 4 weeks beginning with the day on which a developer is given an enforcement notice.

Decision about procedure

16.—(1) Within 7 days after the date of receipt of a valid appeal, the Welsh Ministers must decide whether an appeal is to be considered by way of written representations, a hearing, or an inquiry.

(2) As soon as is practicable after making a decision under paragraph (1), the Welsh Ministers must notify the appellant and the approving body of—

- (a) the decision; and
- (b) details of the procedure for dealing with the appeal.

(3) The Welsh Ministers must publish the criteria that are to be applied in making a decision under paragraph (1).

(4) In this article—

“valid appeal” means a notice of appeal—

- (a) that is sent to the Welsh Ministers—
 - (i) within the time limit for making an appeal, and
 - (ii) in accordance with article 13(2), and
- (b) that the appellant certifies has been sent to the approving body in accordance with article 13(3).

Procedure for hearings

17.—(1) The Town and Country Planning (Referred Applications and Appeals Procedure) (Wales) Regulations 2017⁽²⁾ apply with the modifications described in paragraph (2) to an appeal under this Order as they apply to an appeal under those Regulations for the purpose of a planning appeal—

(2) The modifications are—

- (a) any reference to an application is to be read as a reference to an application for approval; and

(1) 2000 c. 7. Section 15 was amended by the Communications Act 2003 (c. 21), section 406(1), Schedule 7, paragraph 158.
(2) S.I. 2017/544.

- (b) any reference to the local planning authority is to be read as a reference to the approving body which gave an enforcement notice under this Order;
- (c) any reference to an enforcement notice is to be read as a reference to an enforcement notice under this Order;
- (d) any reference to an enforcement appeal is to be read as a reference to an appeal against an enforcement notice under this Order;
- (e) any reference to the starting date is to be read as a reference to the date on which a notice under article 16(2) is given; and
- (f) “appellant” has the meaning given in article 2.

(3) Any provision in those Regulations relating to procedure does not apply if it is inconsistent with this Order.

Determination of an appeal

18. When determining an appeal against an enforcement notice, the Welsh Ministers may—

- (a) determine that the notice is to cease to have effect; or
- (b) confirm or vary the notice.

Giving effect to the determination of an appeal

19.—(1) As soon as is practicable after determining an appeal, the Welsh Ministers must notify the appellant and the approving body in writing of the determination.

(2) The Welsh Ministers may notify any other person who, in the opinion of the Welsh Ministers, is affected by the determination.

Evidence and costs

20.—(1) Subsections (2) to (5) of section 250 of the Local Government Act 1972⁽¹⁾ (local inquiries: evidence and costs) apply with the modifications described in paragraph (2) to a hearing or inquiry under this Order as they apply to local inquiries under that section.

(2) The modifications are—

- (a) any reference to the person appointed to hold the inquiry is to be read as a reference to the Welsh Ministers; and

(1) 1972 c. 70. Section 250 has been amended by the Criminal Justice Act 1982 (c. 48), sections 37, 38 and 46, by the Housing and Planning Act 1986 (c. 63), section 49(2) and Schedule 12, and by the Statute Law (Repeals) Act 1989 (c. 43).

(b) any reference to a local authority is to be read as a reference to an approving body.

(3) Section 322C of the Town and Country Planning Act 1990(1) (costs: Wales) applies in relation to a hearing or inquiry under this Order as it applies in relation to a hearing or local inquiry referred to in that section.

(4) Subject to paragraphs (1) and (3), the costs of a hearing or inquiry held under this Order must be defrayed by the Welsh Ministers.

PART 5

Offences

Offence of failure to comply with a notice

21.—(1) A person who fails to comply with a temporary stop notice, enforcement notice or stop notice is guilty of an offence, and is liable—

- (a) on conviction on indictment, to a fine; or
- (b) on summary conviction, to a fine not exceeding £20,000.

(2) In determining the amount of the fine the court must have regard in particular to any financial benefit which has accrued or has appeared to accrue to the person convicted in consequence of the offence.

Offence of obstruction

22. A person who wilfully obstructs an authorised person who is exercising powers of entry—

- (a) is guilty of an offence; and
- (b) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

Offences by bodies corporate

23.—(1) If an offence under this Order committed by a body corporate is proved—

- (a) to have been committed with the consent or connivance of an officer; or
- (b) to be attributable to any neglect on the part of an officer,

the officer, as well as the body corporate, is guilty of the offence and liable to be proceeded against and punished accordingly.

(2) In paragraph (1), “officer”, in relation to a body corporate, means—

(1) 1990 c. 8.

- (a) a director, manager, secretary or other similar officer of the body; or
- (b) a person purporting to act in any such capacity.

(3) If the affairs of a body corporate are managed by its members, paragraph (1) applies in relation to the acts and defaults of a member in connection with the member's functions of management as it applies to an officer of a body corporate.

Offences by partnerships and unincorporated associations

24.—(1) Proceedings for an offence under this Order alleged to have been committed by a partnership or an unincorporated association must be brought against the partnership or association in the name of the partnership or association.

(2) For the purposes of such proceedings—

- (a) rules of court relating to the service of documents have effect as if the partnership or unincorporated association were a body corporate; and
- (b) the following provisions apply as they apply in relation to a body corporate—
 - (i) section 33 of the Criminal Justice Act 1925;
 - (ii) Schedule 3 to the Magistrates' Courts Act 1980.

(3) A fine imposed on a partnership or unincorporated association on its conviction of an offence under this Order is to be paid out of the funds of the partnership or association.

(4) If an offence under this Order committed by a partnership is proved—

- (a) to have been committed with the consent or connivance of a partner; or
- (b) to be attributable to any neglect on the part of a partner,
- (c) the partner, as well as the partnership, is guilty of the offence and liable to be proceeded against and punished accordingly.

(5) In paragraph (4), "partner" includes a person purporting to act as a partner.

(6) If an offence under this Order committed by an unincorporated association (other than a partnership) is proved—

- (a) to have been committed with the consent or connivance of an officer of the association; or
- (b) to be attributable to any neglect on the part of such an officer,

the officer, as well as the association, is guilty of the offence and liable to be proceeded against and punished accordingly.

(7) In paragraph (6), “officer”, in relation to an unincorporated association, means—

- (a) an officer of the association or a member of its governing body; or
- (b) a person purporting to act in such a capacity.

Name

Cabinet Secretary for Energy, Planning and Rural Affairs, one of the Welsh Ministers

Date

DRAFT