

Not Protectively marked

English Severn and Wye Regional Flood and Coastal Committee

Meeting date: 9 October 2012

Item no. 10

Appendix 1: Background

Appendix 2: Phased approach

Appendix 3: Criteria for Designation

Paper by: Director of Flood and Coastal Risk Management

Subject: Use of our new FCRM Designation Powers

Recommendation

RFCCs are asked to note and support the proposed approach to the implementation of the new powers to designate structures and features for FCRM purposes.

1.0 Introduction

- 1.1 This paper sets out proposals for the use of new permissive powers under Schedule 1 of the Flood and Water Management Act 2010. These powers allow the Environment Agency and other designating authorities to designate structures and features that contribute to the management of flood and coastal erosion risk. The proposed overall approach and actions are consistent with policy guidance from Defra and Welsh Government.

Background to the new designation powers is included as Appendix 1.

2.0 Overall approach to implementation

- 2.1 Defra and Welsh Government have issued guidance to all designating authorities including the Environment Agency. This guidance sets out recommendations on how designations should be made, recorded and managed effectively in the interests of flood and coastal erosion risk management. Regional Flood and Coastal Committees have no formal role in the designation process.

- 2.2 The published Defra and Welsh Government guidance states:

“Whilst it is entirely for designating authorities to set their designation policy and make designation decisions, it is not envisaged that they will seek to designate all features that fit the very broad conditions set out in the legislation. As a priority, it is recommended that authorities direct designation to those situations where the considered flood risk and vulnerability to damage most justifies its use.”

- 2.3 The recommended approach for implementation is a phased introduction. Phase 1 will consist of small scale pilots in each Area using the published generic guidance. This will allow us to gain a better understanding of the

Not Protectively Marked

costs, benefits and practicalities of designation. It will also help us to refine our operational guidance and inform the future programme of designation. Phase 2 will be to adopt the lessons learnt from Phase 1 and agree the future programme of designation. (See Appendix 2 for more details.)

3.0 Staff and resources issues

3.1 The main tasks involved with creating and managing designated assets are:

Assessment - Identification of assets and features as possible candidates for designation including assessment of their flood risk importance, vulnerability to damage, and prioritisation.

Consultation - Dialogue with asset owners and interested parties.

Notices and appeals - Issue of legal notices and managing appeals.

Consents – Processing applications for works affecting designated structures.

Asset performance - Maintaining records of designations on asset register, asset inspections and enforcement.

3.2 The tasks set out in section 3.1 above should be part of the routine activities for the Area teams and no additional resources are envisaged as being necessary, provided the phased risk based approach is adopted from the onset. For example, the increased consents workload is not expected to be significant provided a proportionate approach to designation is adopted.

3.3 A suggested timetable for implementation and communications is included in Appendix 2.

4.0 Proposed Governance

4.1 The FCRM Directorate will take the lead role in overseeing and monitoring the first phase of work to ensure that the experiences gained are used to update guidance and ensure a consistent national approach.

4.2 A national Project Team will manage and co-ordinate the implementation of the pilots reporting to the FCRM Director's Leadership Team and working with the Regional Flood and Coastal Risk Managers.

4.3 Representatives from the FCRM directorate and from Operations at Head Office, the Regions and the Areas will support the work to share experiences and seek solutions to any issues arising during Phase 1.

4.4 We will seek to work jointly with Lead Local Flood Authorities and IDBs to share lessons from the Phase 1 pilots, answer questions and refine guidance. We are currently discussing setting up a task and finish group to include representatives of other authorities. Use of the Defra web based Flownet and Local Government Flood Risk Portal forums is also planned.

Not Protectively Marked

5.0 Implications for Wales

- 5.1 The new powers apply to both England and Wales. Their future use will need to be reviewed by the Single Body responsible for Natural Resource Management in Wales after April 2013.

6.0 Impact on customers

- 6.1 Both the legislation and the guidance issued by government seek to minimise the burden of designation on the asset owners. However, it is recognised that some customers could react negatively to designation and our engagement with them will need to be sensitive to this.
- 6.2 The owner of a designated structure or feature has rights of appeal to the First-tier Tribunal which is administered by Her Majesty's Courts and Tribunals Service, an executive agency of the Ministry of Justice.

7.0 Conclusion and recommendations

- 7.1 These new powers provide us with a new form of regulatory control that complements rather than replaces existing controls. Their use can be blended into existing processes and systems provided we use the pilots to develop a risk and needs based approach.
- 7.2 RFCCs are asked to note and support the proposed approach to the implementation of the new powers to designate structures and features for FCRM purposes.

Ken Allison
Head of Allocation and Asset Management
Acting Director of Flood and Coastal Risk Management

August 2012

Not Protectively Marked

Appendix 1: Background

The commencement on 1 August 2012 of Section 30 and Schedule 1 of the Flood and Water Management Act 2010 gave the Environment Agency additional legal powers in both England and Wales to formally designate structures or features which affect flood or coastal erosion risk. Local Authorities (LLFAs or District Councils), and IDBs gained similar powers in relation to their interests.

These new permissive powers increase the regulatory control we have over a large number of assets or features which are not currently maintained or operated by flood and coastal risk management authorities. Such structures or features can be natural or man-made and can include garden walls, culverts, raised ground, embankments and other features, as long as in our opinion they affect flood or coastal erosion risk management.

Existing primary legislation and byelaws for defences we have built or maintain remain in place. The new powers apply to structures or features previously outside our control.

As a "designating authority" we are able to designate assets or features. We become the "responsible authority" for that asset or feature once a designation is in place. Anyone wishing to undertake alteration, removal or replacement works on a designated structure or feature must seek consent from the responsible authority.

The main purpose of designation is to ensure that owners do not inadvertently damage or alter structures or features and increase flood or coastal erosion risk to themselves, their neighbours and the wider community. Those who undertake work without consent face possible enforcement action.

The creation and management of designated assets must follow a procedure set out in the legislation but there are no requirements for us to designate anything unless we consider it to be cost and risk effective. The powers exist to be used where there is a need. Decisions on the merit or otherwise of the use of designation need to be made in a local context.

Externally we have worked with Defra and Welsh Government colleagues to develop:

- The published [information note](#) for LLFAs, District Councils, Internal Drainage Boards, and ourselves.
- The published [public information leaflet for asset owners](#)
- Eleven Capacity Building workshops with LLFAs, District Councils, IDBs and our own staff,
- An e-learning package which will be available shortly.

Internally we have been preparing:

- to adopt the generic guidance and training material issued by Defra / WG which we helped to develop
- revised consents application paperwork and staff guidance
- a public information leaflet to hand to customers directly affected by designation proposals following initial contact.
- live meeting telephone conference style staff training briefings.

Not Protectively Marked

Appendix 2: Proposed phased approach

Implementation in two phases is considered to be the best option in order to avoid mistakes and inconsistency.

Phase 1: Starting in October 2012, each Environment Agency Area will identify 3 or 4 assets which are candidates for possible designation. Using the published generic guidance and with support from the national project team, each Area will progress at least one asset per Area to full designation status by the end of March 2013. Draft principles and criteria for determining appropriate candidates for designation are being prepared for the start of the pilots (see Appendix 3).

Robust project management governance arrangements will be put in place prior to commencement. These are currently being finalised with the intended appointment of a Project Manager and Project Executive as soon as possible. The FCRM Directorate will take the lead role in overseeing and monitoring the progress in use of these powers to ensure that the experiences gained are used to inform future resource and policy guidance decisions. The operations directorate through the Regional Flood and Coastal Risk Managers will be responsible for implementation following the pilot phase and issue of final operating instructions and guidance.

Nationally, a programme approach will be adopted with a national Project Team managing and co-ordinating the implementation of the pilots. A small virtual sub-group will be set up to share experiences and seek solutions to any issues arising during Phase 1. The sub-group will consist of a mix of representatives from Regions and Areas.

This project will provide a good opportunity to work jointly with Lead Local Flood Authorities and IDBs.

The pilots will be completed at the end of March 2013 which allows sufficient time for compliance with the statutory notice periods.

Phase 2: The results from Phase 1 will be used to refine and update guidance and instructions. This will enable a revised implementation plan and procedures to commence from summer 2013.

Summary Timetable

Group	Description / Purpose	Date
Area FCRM and Area Ops Managers	Briefings / requests to undertake pilots	September 2012
Areas	Phase 1 Pilots start	October 2012
Area pilots end	(Note: Statutory requirement is minimum 90 days for creation of designation)	End of March 2013
DLT/ Flood Execs	Results of pilots	May /June 2013
RFCCs	Paper on results of Pilots	June / July 2013
Areas	Phase 2 - Routine Implementation	Summer 2013

Not Protectively Marked

Appendix 3: Criteria for Designation

What should be designated?

The Flood and Water Management Act 2010 and the associated guidance define what can be designated but not what should be designated. In adopting a risk and needs based approach we need to define criteria by which we can both decide what to consider designating and how to prioritise our list of candidates.

What can be designated?

The legislation broadly refers to a structure or feature of the environment. It then sets out four legal conditions to narrow this down slightly.

The legal conditions for designation are:

Condition 1: The structure or feature must relate to flood risk or coastal erosion risk and it is vital that we have appropriate evidence to demonstrate that this is the case. Ideally we should have photographic or other documented evidence following actual flood events involving the assets in question. Alternatively appropriate model studies should be used to assess the flood risk role of these assets.

Condition 2: The structure or feature must be relevant to the authority managing the risk. Simplistically the Environment Agency manages risks associated with Main River; Local Authorities manage risks associated with Ordinary Watercourses and IDBs manage risks associated with their drains.

Condition 3: The structure or feature must not be already designated by another authority. For example, at a confluence there can be the potential for more than one authority to want to designate the same structure but Condition 3 rules this out to ensure that there can only be one designation per structure. This is about avoiding duplication rather than it being a contest or a race between authorities.

Condition 4: The owner of the structure or feature must not be a Designating Authority (DA). This means that a DA can't designate things it already owns. Note also that by virtue of the definition of "owner" a DA can't designate something it already maintains using its permissive powers.

Failure to meet any one or more of the four conditions rules out designation. However it will be relatively easy to satisfy all four conditions so authorities need to further consider their needs and priorities.

When and what to designate?

It is expected that more things than we will need or want to designate will meet the four legal conditions. Therefore an assessment of the flood risk importance, vulnerability to damage, and priority for designation needs to be carried out. The results of such assessment need to be recorded on file as possible evidence in the event of challenges (appeals) from landowners. We don't have to designate unless there is a need and a benefit to be gained. For example there is probably no need to designate something if the risk of damage is low and the consequences of any damage are also low.

We need to consider what other factors we might want to take into account in order to assess whether designation is appropriate. Examples of factors we can evaluate and compare include:

- Consequences of damage or removal leading to flooding

Not Protectively Marked

- Vulnerability or likelihood of accidental damage to structure or feature

Consequence of damage can range from high (loss of life and large numbers of properties flooded) to low where nothing significant will happen

Likelihood of accidental damage can be based on several criteria in the local context such as location relative to the watercourse or sea, prominence (whether the flood risk function of the structure is obvious), and the nature of the owner or how often ownership tends to change. For example a feature relatively remote from a watercourse, vulnerable to many vehicle movements and in multiple ownership can rank as high whereas one located near to the watercourse and in the ownership of one landowner may rank lower.