

SCHEDULE 25

Regulation 35(1)

Flood risk activities and excluded flood risk activities

PART 1

Flood risk activities

Application

1. This Schedule applies in relation to every flood risk activity.

Interpretation

- 2.—(1) In this Schedule—

“application” has the meaning given in paragraph 1 of Schedule 5;

“drainage” has the meaning given in section 113(1) of the 1991 Act⁽¹⁾ and “drainage work” is to be construed accordingly;

“emergency” means an occurrence which presents a risk of—

- (a) serious flooding;
- (b) serious detrimental impact on drainage;
- (c) serious harm to the environment;

“flood defence structure” means any permanent works constructed, operated or maintained by the regulator for the purposes of managing flood risk;

“land” includes—

- (a) water;
- (b) land covered by water;

“main river” has the meaning given in section 113(1) of the 1991 Act⁽²⁾;

“navigation authority” means any person who has a duty or power under any enactment to work, maintain, conserve, improve or control any canal or other inland navigation, navigable river, estuary, harbour or dock;

“non-tidal main river” means any part of a main river that is not a tidal main river;

“tidal main river” means that part of a main river downstream of the normal tidal limit;

“unauthorised flood risk activity” means a flood risk activity which is not authorised by an environmental permit but excluding any exempt or excluded flood risk activities;

“watercourse” has the meaning given in section 221 of the 1991 Act⁽³⁾, as read with section 113(1) of that Act.

- (2) In this Schedule—

- (a) except in the definition of “sea defence” in paragraph 3, “bank” means any bank, berm, wall or embankment that adjoins or confines any watercourse and includes the side of the bank that stretches down to the mean low-water mark (in the case of a watercourse in which tidal waters flow) or to the bed of the watercourse (in any other case);

(1) The definition of “drainage” was amended by section 100(1) of, and Schedule 24 to, the 1995 Act.

(2) The definition of “main river” was amended by section 59(3) of the Water Act 2014 (c. 21).

(3) The definition of “watercourse” was amended by paragraph 128 of Schedule 22 to the 1995 Act, section 59(4)(b) of the Water Act 2014, and by S.I. 2013/755 (W. 90).

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- (b) for the purposes of paragraph (a), in the case of a watercourse in which tidal waters flow, the bank includes any wall or embankment constructed or maintained by the regulator in the sea or an estuary for the purposes of or in connection with a river;
- (c) any reference to a distance of 8 metres or 16 metres from a river is a reference to that distance as measured horizontally from the foot of the bank on the landward side of the river;
- (d) any reference to a distance of 8 metres or 16 metres from any flood defence structure or culvert is a reference to that distance as measured from the foot of the flood defence structure or from the outside edge of the culvert, as the case may be.

Meaning of “flood risk activity”

- 3.—(1) Subject to sub-paragraph (2), a “flood risk activity” means—
- (a) erecting any structure (whether temporary or permanent) in, over or under a main river;
 - (b) the carrying out of any work of alteration or repair on any structure (whether temporary or permanent) in, over or under a main river if the work is likely to affect the flow of water in the main river or to affect any drainage work;
 - (c) erecting or altering any structure (whether temporary or permanent) designed to contain or divert the floodwaters of any part of a main river;
 - (d) any dredging, raising or taking of any sand, silt, ballast, clay, gravel or other materials from or off the bed or banks of a main river (or causing such materials to be dredged, raised or taken), including hydrodynamic dredging and desilting;
 - (e) any activity which is likely to divert the direction of the flow of water into or out of a main river or alter the level of water in a main river;
 - (f) any activity within 8 metres of a non-tidal main river (or within 8 metres of any flood defence structure or culvert on that river) or any activity within 16 metres of a tidal main river (or within 16 metres of any flood defence structure or culvert on that river) which is likely to—
 - (i) cause damage to or endanger the stability of the banks of that river or of any culvert,
 - (ii) cause damage to any river control works,
 - (iii) alter, reconstruct, discontinue or remove any river control works,
 - (iv) divert or obstruct flood waters or affect the drainage of that river, or
 - (v) interfere with the regulator’s access to or along that river;
 - (g) any activity (other than an allowed activity) on a flood plain that is—
 - (i) more than 8 metres from a non-tidal main river or more than 16 metres from a tidal main river, or
 - (ii) more than 8 metres from any flood defence structure or culvert on a non-tidal main river or more than 16 metres from any flood defence structure or culvert on a tidal main river,
 which is likely to divert or obstruct floodwaters, to damage any river control works or to affect drainage;
 - (h) any activity within 16 metres of the base of a sea defence which is likely to—
 - (i) endanger the stability of, cause damage to or reduce the effectiveness of that sea defence, or
 - (ii) interfere with the regulator’s access to or along that sea defence;
 - (i) any activity within 8 metres of the base of a remote defence which is likely to—

- (i) endanger the stability of, cause damage to or reduce the effectiveness of that defence,
or
 - (ii) interfere with the regulator’s access to or along that defence;
 - (j) any quarrying or excavation within 16 metres of the base of a remote defence which is likely to cause damage to or endanger the stability of that defence;
 - (k) any quarrying or excavation within 16 metres of a main river or any flood defence structure or culvert on that river which is likely to cause damage to or endanger the stability of the banks of that river.
- (2) The following paragraphs of sub-paragraph (1) are excluded from the definition of flood risk activity in respect of a statutory function to which this sub-paragraph applies—
- (a) in respect of England, paragraphs (d) to (k);
 - (b) in respect of Wales, paragraphs (e) to (k).
- (3) Sub-paragraph (2) applies to a statutory function—
- (a) exercisable by a person carrying on an undertaking referred to in paragraph 1(4) of Schedule 22 to the 1991 Act, as read with sub-paragraphs (4A) and (5) of that paragraph(4),
or
 - (b) relating to the management of flood risk exercisable by a risk management authority within the meaning of section 6(13) of the Flood and Water Management Act 2010(5).
- (4) In this paragraph—
- “allowed activity” means—
- (a) any activity that has been granted planning permission by a local planning authority or the Secretary of State under the Town and Country Planning Act 1990(6), a certificate under section 191 of that Act or an established use certificate under section 192 of that Act, as originally enacted(7), which continues to have effect for the purposes of subsection (4) of section 192, or
 - (b) the construction of hay or straw stacks, clamps or manure (or similar) heaps, in accordance with accepted agricultural practice;
- “conservancy authority” means any person who has a duty or power under any enactment to conserve, maintain or improve the navigation of a tidal water and is not a navigation or harbour authority;
- “culvert” means a covered channel or pipe which prevents the obstruction of a main river or drainage path by an artificial construction;
- “harbour authority” has the meaning given in section 313 of the Merchant Shipping Act 1995(8), other than a navigation authority;
- “remote defence” means any berm, wall or embankment that is constructed for the purposes of preventing or alleviating flooding from, or in connection with, any main river, other than any berm, wall or embankment which is a bank within the meaning of paragraph 2(2);
- “river control works” means any structure or appliance used for measuring or regulating—

(4) Paragraph 1 of Schedule 22 was amended by paragraph 43(1) of Schedule 9 to the Coal Industry Act 1994 (c. 21), paragraph 15 of Schedule 5 to the Transport Act 2000 (c. 38), paragraph 114(2) of Schedule 17 to the Communications Act 2003 (c. 21), paragraph 18 of Schedule 19 to the Energy Act 2004 (c. 20), paragraph 138 of Part 3 of Schedule 12 to the Postal Services Act 2011 (c. 5), and by S.I. 2001/1149 and 2013/755 (W. 90).

(5) 2010 c.29; section 6(13) was amended by S.I. 2013/755 (W. 90).

(6) 1990 c. 8.

(7) Sections 191 and 192 were substituted by section 10(1) of the Planning and Compensation Act 1991 (c. 34).

(8) 1995 c. 21; the definition of “harbour authority” was substituted by paragraph 19(2)(a) of Schedule 6 to the Merchant Shipping and Maritime Security Act 1997 (c. 28).

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- (a) the level of water in a main river,
 - (b) the flow of water in, into or out of, a main river, or
 - (c) the drawing of water from, or the delivering of water into, a main river,
- and includes any sluices, flood gates, lashers, valves, paddles, penstocks, locks, weirs, dams, pumps, pumping machinery and pipes;
- “sea defence” includes any bank, wall, embankment (and any berm, counterwall or cross-wall connected to any such bank, wall or embankment), barrier, tidal sluice and other defence, whether natural or artificial, against the inundation of land by sea water or tidal water, including natural or artificial high ground which forms part of or makes a contribution to the efficiency of the defences of the regulator’s area against flooding, but excludes any sea defence works which are for the time being maintained by a coast protection authority under the provisions of the Coast Protection Act 1949⁽⁹⁾ or by any local authority or any navigation, harbour or conservancy authority.

Excluded flood risk activities

4. An “excluded flood risk activity” means a flood risk activity that—
- (a) falls within a description in Part 2 of this Schedule, and
 - (b) satisfies the conditions specified in Part 2 of this Schedule for an activity of that description.

Exercise of relevant functions

5. The regulator must exercise its relevant functions for the purposes of achieving the following objectives—
- (a) managing flood risk;
 - (b) managing impacts on land drainage;
 - (c) environmental protection.

Conditions for operation and maintenance of structures and works

6. Without prejudice to its powers to grant an application subject to such conditions as it sees fit, the regulator may grant an application subject to such conditions relating to—
- (a) the operation and maintenance of such structure or works as the regulator considers to be necessary—
 - (i) to manage impacts on land drainage,
 - (ii) to manage flood risk, or
 - (iii) to secure environmental protection;
 - (b) access by the regulator to any structure, works or watercourse, including access to any surrounding land where this is necessary to access the structure, works or watercourse.

Emergency works notice

- 7.—(1) In an emergency, the regulator may serve an emergency works notice on the operator, owner or occupier of the premises or any other person responsible for a flood risk activity (“A”).

(9) 1949 c. 74.

(2) An emergency works notice may be served whether or not the activity is an excluded or an exempt flood risk activity.

(3) An emergency works notice may require A—

- (a) to remove any specified structure in accordance with requirements set out in the notice;
- (b) to modify any specified structure in accordance with requirements set out in the notice;
- (c) to carry on the activity in accordance with requirements set out in the notice;
- (d) to remedy the environmental effects caused by the activity in accordance with requirements set out in the notice;
- (e) not to carry on the activity without an environmental permit, unless the activity is an excluded or exempt activity.

(4) An emergency works notice must—

- (a) specify the period within which A must comply with the notice requirements;
- (b) set out the rights of appeal that A has under regulation 31(1)(f).

(5) In sub-paragraph (3)(d), “environmental effects” means—

- (a) flooding or risk of flooding;
- (b) harm to the environment or risk of harm to the environment;
- (c) detrimental impact on drainage or risk of detrimental impact on drainage.

Remediation notice

8.—(1) Where the regulator considers that an unauthorised flood risk activity is being or has been carried on, it may serve a remediation notice on the operator, owner or occupier of the premises or any other person responsible for the unauthorised flood risk activity (“A”).

(2) The remediation notice must—

- (a) state the regulator’s view under sub-paragraph (1);
- (b) specify the steps that must be taken by A;
- (c) specify the period within which those steps must be taken;
- (d) set out the rights of appeal that A has under regulation 31(1)(f).

(3) Steps that may be specified in the remediation notice include steps—

- (a) to cease carrying on the activity;
- (b) to carry on the activity in a particular manner;
- (c) to remove or reduce flood risk;
- (d) to remedy detrimental impact on drainage;
- (e) to remedy harm to the environment;
- (f) to restore the main river to its previous condition or a condition otherwise specified in the notice.

(4) Where—

- (a) the regulator has served a notice on A, but A does not comply with the remediation notice within the time specified in the notice, or
- (b) the regulator determines that it is not possible or practical to serve a remediation notice on A,

the regulator may serve a remediation notice on any other person who appears to the regulator to have the necessary authority to take the steps specified in the notice.

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(5) Where a notice is served under sub-paragraph (4), sub-paragraphs (2) and (3) apply as if the references in those sub-paragraphs to “A” are references to the person on whom a notice under sub-paragraph (4) is served.

Regulator’s power to take steps to remove and remedy etc.

9.—(1) Subject to paragraph 10(4) and (5), the regulator may take steps to—

- (a) remove, alter or pull down any works carried out pursuant to an unauthorised flood risk activity;
- (b) remedy the effects caused by an unauthorised flood risk activity.

(2) Before taking any steps under sub-paragraph (1) the regulator must serve a notice of intent on the person responsible for the unauthorised flood risk activity (“A”).

(3) The requirement to serve a notice of intent under sub-paragraph (2) does not apply where the regulator—

- (a) is required to act in an emergency, or
- (b) cannot determine who is the person responsible for the unauthorised flood risk activity.

(4) A notice of intent must—

- (a) specify the steps the regulator intends to take;
- (b) specify the date on which the regulator intends to take those steps;
- (c) set out the rights of appeal that A has under regulation 31(1)(f).

(5) Where the regulator determines that it is not possible or practical to serve a notice of intent on A, the regulator may serve the notice on any other person who it appears to the regulator may be affected.

(6) Where a notice is served under sub-paragraph (5), sub-paragraph (4)(c) applies as if the reference in that sub-paragraph to “A” is a reference to the person on whom a notice under sub-paragraph (5) is served.

(7) The regulator may recover from A, or a person served with a notice under sub-paragraph (5), the costs of any steps taken by the regulator under sub-paragraph (1).

Protected undertakings, railways and bridges

10.—(1) For the purposes of this paragraph, “protected undertaking” means the undertakings referred to in paragraph 1(4) of Schedule 22 to the 1991 Act, as read with sub-paragraphs (4A) and (5) of that paragraph.

(2) The regulator must not exercise its functions under these Regulations in relation to any flood risk activity in a manner that prejudices the exercise of any statutory power, authority or jurisdiction by a person carrying on a protected undertaking.

(3) Sub-paragraph (2) does not have the effect of exempting any person carrying on a protected undertaking from the requirement to hold an environmental permit.

(4) The regulator must obtain the consent of the person carrying on a protected undertaking where—

- (a) the regulator is proposing to take steps under paragraph 9(1) that will directly or indirectly interfere with works or property (or with the use of works or property) vested in, or under the control of, a person carrying on that undertaking, and
- (b) that interference will adversely affect those works, that property (or with the use of those works or that property) or the carrying on of that undertaking.

(5) Sub-paragraph (4) does not apply where the regulator is required to act in an emergency but, in such a case, the regulator must notify the person carrying on the protected undertaking as soon as possible of any steps that have been taken under paragraph 9(1).

(6) Without prejudice to the preceding provisions of this paragraph, nothing in these Regulations that relates to a flood risk activity authorises any person, except with the consent of the railway company in question, to interfere with—

- (a) any railway bridge or any other work connected with a railway, or
- (b) the structure, use or maintenance of a railway or the traffic on it.

(7) Where consent is required under sub-paragraph (4) or (6), the consent may be subject to reasonable conditions but must not be unreasonably withheld.

(8) There must be a referral to the arbitration of a single arbitrator, to be appointed by agreement between the parties to the dispute or, in default of agreement, by the President of the Institution of Civil Engineers⁽¹⁰⁾, of any dispute as to whether—

- (a) anything done or proposed to be done interferes or will interfere as mentioned in sub-paragraphs (4) and (6);
- (b) any consent for the purposes of this paragraph is being unreasonably withheld;
- (c) any condition subject to which any such consent has been given is reasonable.

(9) Nothing in this Schedule affects any enactment requiring the consent of any government department, Minister or Welsh Minister for the erection of a bridge, or any powers exercisable by any government department, Minister or Welsh Minister in relation to a bridge.

PART 2

Excluded flood risk activities

SECTION 1

Introductory

1.—(1) The descriptions in this Part are set out in paragraphs 2 to 13, in their respective first sub-paragraphs.

(2) The specific conditions relating to each description in this Part are set out in paragraphs 2 to 13, in their respective second sub-paragraphs.

(3) The general condition for the descriptions in paragraphs 3 to 13 of this Part is that the activity is not carried out in, or (where the activity is carried out in Wales) within 100 metres of, a water body in Wales that is part of a main river classified as of high morphological status by the NRBW in accordance with the relevant directions.

(4) For the purposes of paragraphs 3 and 4, “licensable marine activity” and “marine licence” have the same meaning as in Part 4 of the Marine and Coastal Access Act 2009⁽¹¹⁾.

(5) For the purposes of this Part, “relevant directions” means the Water Framework Directive (Standards and Classification) Directions (England and Wales) 2015⁽¹²⁾.

⁽¹⁰⁾ Registered charity number 210252.

⁽¹¹⁾ 2009 c. 23; Part 4 was amended by section 76(2) of the Energy Act 2016 (c. 20) and by S.I. 2011/405, 1043, 1210, 2015/374, 664 and 2016/738. It is prospectively amended by sections 76 to 80 of the Environment (Wales) Act 2016 (anaw. 3) from a date to be appointed.

⁽¹²⁾ These Directions were made on 9th September 2015 in exercise of powers in section 40(2) of the 1995 Act and are available at http://www.legislation.gov.uk/ukxi/2015/1623/pdfs/ukxi0d_20151623_en.pdf. A copy may be obtained from the Flood Risk

SECTION 2

Descriptions and conditions

Emergency activity

- 2.—(1) Any activity carried on in an emergency.
- (2) For the purposes of this paragraph, the specific conditions are that—
- (a) the activity is not a pre-planned emergency activity, and
 - (b) the person carrying on the activity provides the regulator with notice in writing as soon as practicable of the carrying on of the activity and the circumstances in which it was carried on.
- (3) For the purposes of sub-paragraph (2)(a), a “pre-planned emergency activity” means any activity which has been planned in response to an emergency before it occurs.
- (4) The power of the regulator to serve a remediation notice under paragraph 8 of Part 1 of this Schedule applies where an activity has been carried on in reliance on this exclusion as if that activity were an unauthorised activity.

A licensable marine activity in England

- 3.—(1) A licensable marine activity in England.
- (2) For the purposes of this paragraph, the specific conditions are that—
- (a) an application for a marine licence has been made in respect of that activity,
 - (b) the Agency has received notice that the application has been made,
 - (c) in view of the terms and conditions that will be included in the marine licence, the Agency considers that an environmental permit is not necessary, and
 - (d) a notice to that effect has been issued by the Agency to the applicant.

A licensable marine activity in Wales

- 4.—(1) A licensable marine activity in Wales.
- (2) For the purposes of this paragraph, the specific condition is that an application for a marine licence has been made in respect of that activity.

Ladders and scaffold towers

- 5.—(1) The erection and use of ladders and scaffold towers (“equipment”).
- (2) For the purposes of this paragraph, the specific conditions are—
- (a) the suitability of river conditions is reviewed by the operator each working day,
 - (b) the equipment is erected on each working day on which it is required, and
 - (c) the equipment is removed at the end of each working day and is stored outside the river and its banks.

Service crossings within an existing structure

- 6.—(1) The construction and use of service crossings within an existing structure.

- (2) For the purposes of this paragraph, the specific conditions are—
- (a) the crossing is entirely within the original profile of the existing structure,
 - (b) the regulator has not sent a notification to the landowner that the structure has been identified for removal or modification in order to achieve the measures set out in the relevant River Basin Management Plan, within the meaning of Article 13 of the Water Framework Directive, that are designed to move a water body to good status pursuant to Article 4 of that Directive,
 - (c) equipment associated with the works is not stored on the bed or banks of the main river, and
 - (d) no works are carried out from the main river or from the banks of the main river.

Flood protection devices attached to buildings

7.—(1) The attachment of a flood protection device directly to a building in order to protect the interior of that building.

(2) For the purposes of this paragraph, the specific condition is that the flood protection provided by the device extends only to the building to which the device is fitted.

Minor works on or affecting bridges and culverts

8.—(1) The carrying out of minor works on or affecting bridges and culverts for highways and public rights of way (“minor works”).

- (2) For the purposes of this paragraph, the specific conditions are—
- (a) the minor works do not affect, or have the potential to affect, the bed, banks, water level, normal flow or flood flow in the main river,
 - (b) equipment associated with the minor works is not stored on the bed or banks of the main river, and
 - (c) no works are carried out from the main river or from the banks of the main river.

Fencing

9.—(1) The erection of fencing.

- (2) For the purposes of this paragraph, the specific conditions are—
- (a) the fencing is not located on the bed or banks of the main river, and
 - (b) the fencing is constructed of—
 - (i) post and rail,
 - (ii) post and wire mesh of at least 100 mm spacing, or
 - (iii) post and wire strands.

Fish traps

10.—(1) The temporary use of fish traps.

- (2) For the purposes of this paragraph, the specific conditions are—
- (a) the trap has dimensions of no greater than 2 metres x 1 metre x 0.75 metre,
 - (b) any trap, or combination of traps, placed in the main river is less than one third of the width of the channel,
 - (c) the trap is not used when the main river is in a condition of high flow, and

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- (d) the trap is located more than 50 metres upstream or downstream from any dam or other obstruction.

Notice boards

11.—(1) Erection of notice boards.

(2) For the purposes of this paragraph, the specific conditions are—

- (a) the board is attached to existing fencing or freestanding, permanent posts,
- (b) the board is more than 2 metres from any culvert, remote defence or flood defence structure on the main river and from any sea defence, and
- (c) the board is more than 2 metres from the landward side of the bank.

Purpose-built sediment traps

12.—(1) Clearance of purpose-built sediment traps.

(2) For the purposes of this paragraph, the specific conditions are—

- (a) only sand and silt is cleared from the trap,
- (b) the works do not result in sand or silt being transmitted downstream, and
- (c) where the sand and silt from the clearance is spread on the floodplain, it is spread to a depth of no more than 100mm and no closer than 8 metres from the landward side of either bank.

Site investigation boreholes and trial pits

13.—(1) Site investigation boreholes and trial pits within a flood plain.

(2) For the purposes of this paragraph, the specific conditions are—

- (a) the works are more than 5 metres from any culvert, remote defence or flood defence structure on the main river and from any sea defence,
- (b) the works are more than 8 metres from the banks of a non-tidal main river,
- (c) the works are more than 16 metres from the banks of a tidal main river, and
- (d) the works are completed, including refilling of the borehole or pit, within 48 hours.