

**In the matter of
a Scheme under the Land Drainage Act 1991**

**Public inquiry into
THE RIVER ARUN INTERNAL DISTRICT ORDER 2017**

**OPENING STATEMENT
for the Environment Agency**

1. The purpose of the proposed Scheme is to secure the abolition of the existing River Arun Internal Drainage District. This Scheme is being promoted under the Land Drainage Act 1991, section 3 (Schemes for reorganisation of internal drainage districts).
2. This district is currently administered by the Environment Agency, acting as the Internal Drainage Board (IDB) under the Land Drainage Act 1991, in addition to its responsibilities for main rivers. It is not proposed to replace the IDD, or to set up another Board.
3. The Agency's Statement of Case deals with the issues that have been identified by the Minister, and I do not propose in opening to rehearse those points, but to concentrate on the main issues that seem to remain in contention.
4. If the order is confirmed, it is important to note that land drainage will continue to be regulated. The Agency will continue to regulate the main river, and continue to exercise general supervision over all matters of flood management. The local authorities will regulate the ordinary watercourses, and the private landowners will continue to have their private law responsibilities. There will be a change, as a matter of fact, because there will no longer be an internal drainage board. But the change will not be material. That proposition of course will need to be tested through this inquiry process.
5. The Minister can be satisfied that:
 - a. the general powers to deal with flood management and water level management would remain effective;
 - b. the specific issues to deal with the decommissioning of certain IDB Pumping Stations and Sluices can be satisfactorily resolved;
 - c. the specific nature conservation responsibilities to ensure the proper protection of certain designated areas will be satisfied, given the mitigation measures that are available.

The legal framework

6. Three main Acts are relevant to this matter: the Land Drainage Act 1991, the Water Resources Act 1991 and the Flood and Water Management Act 2010.
7. The powers relating to internal drainage boards in many cases go back a very long way. However, the powers were essentially codified in the Land Drainage Act 1930. The current regime is now found in the Land Drainage Act 1991 (“LDA 1991”).
8. Reference has been made in some of the objectors’ statements to the fact that the main purpose of an IDB is to manage land with “special drainage needs” –this is not a phrase found in the legislation. It is a description used by the ADA, to describe the work that IDBs do across the country. There is not some list of criteria as to what is or is not “special”.
9. The relevant context is the one set out in the Act, that “for the purposes of the drainage of land,” there shall continue to be IDD’s “*which shall be such areas ... as will derive benefit, or avoid danger, as a result of drainage operations*” (s.1(1)(a) of the LDA 1991, and s.1(5) of the LDA 1930). A board, known as the internal drainage board, for each district shall—
 - (a) exercise a general supervision over all matters relating to the drainage of land within their district; and
 - (b) have such other powers and perform such other duties as are conferred or imposed on internal drainage boards by [the LDA 1991].”
10. There is no requirement as such for an IDD to be established, and there are many examples around the country where the drainage of land continues without them.
11. The other main piece of legislation is the Water Resources Act 1991 (“the WRA 1991”). This sets out the main responsibilities for the Agency regarding main rivers. There is and has always been a considerable overlap between the management of main rivers and ordinary watercourses, and this division between the two is also of long standing.
12. The relationship between the LDA 1991 and the WRA 1991, and flood management in general, was overhauled by the Flood and Water Management Act 2010.
13. The 2010 Act is significant for two reasons in particular in this inquiry.
14. Firstly, the role of the Regional Committees has been changed, so that the Agency no longer has an effective local body to assist it to carry out these local functions. Until 2010, the Environment Agency Board had been able to delegate its role as the IDB for the 8 IDD’s in this area to the more locally representative Southern Regional Flood Defence Committee (RFDC). The 2010 Act replaced the RFDC with the Southern Regional Flood and Coastal Committee (RFCC). This is predominately a consultative body (see s.23 of the 2010 Act). It does not possess full power or authority to make decisions about the

management of the IDD which would be binding on the Environment Agency. No one has suggested that they can continue to fulfill the function that they used to do with regard to the IDB.

15. Secondly, the powers of the local authorities were amended so that they now have the same set of powers regarding “ordinary watercourses” as an internal drainage body would have – section 14A was inserted into the LDA 1991. Whilst there was a considerable overlap in the powers of the local authority and the IDB before, it is now a complete duplication.

The current arrangements

16. The Agency’s work in the Arun IDD is fairly predictable, and its costs does not change much from year to year. It is described in the evidence of the catchment engineer for this area, Richard Fuller, and the Catchment Officer for the River Arun catchment, Andy Strudwick. The IDD itself covers an area of some 3,304 hectares throughout the lower and middle reaches of the River Arun catchment. Most of this area is rural, with some small urban areas, including Arundel, Pulborough & Amberley. The local watercourses all drain into the main river Arun, which discharges into the sea at Littlehampton.
17. Like all river catchment areas, the way in which the local ordinary watercourses and the main river interact remains important. You will have seen reference to the Flood Risk Management Strategy that has been approved for this area. The Lower Tidal River Arun Strategy (LTRAS) covers an area very close to that of the IDD, but it fulfils a different purpose – it sets out recommendations for managing flood risk from the River Arun from Pallingham Weir to the A259 at Littlehampton on the east bank, and to Ford railway line on the west bank, for the next 100 years. The recommendations also include the Black Ditch tributary. The LTRAS divides the catchment into different policy units, each with its own associated options for the future management of the Main River Arun. The evidence shows that this will not be affected of the abolition of the IDD.
18. The Clerk and financial advisor to the River Arun IDB, Peter Carver, deals in his evidence with the internal administrative measures that have been taken by the Agency at a national and local level in order to administer the local drainage area. His evidence is also relevant when it comes to considering the implications for the Environment Agency of continuing to manage the internal drainage district or not.

The impetus for change

19. It is important to note that this is a Scheme that has its origins in the broader decision that the Agency needed to review whether it should continue to act as an internal drainage board. The evidence of David Robinson, Operations Manager East for Solent and South

Downs Area, deals with how this review has been carried out and why this particular Scheme has come forward.

20. This Scheme is part of a wider re-organisation of those 8 IDD's that the Agency used to administer in the region. Following consultation regarding the preferred future management arrangements, formal schemes were submitted to Defra with regard to these eight IDD's. Each Scheme reflected the nature of what future management arrangements were required:
- In the three IDD's where there was support from local councils and landowners, the proposed schemes involved the abolition of the IDD's and their replacement with two new IDD's, each with its own locally-elected IDB;
 - In the remaining 5 districts, where there was insufficient support or agreement from local councils and landowners for replacement IDD's, the proposed schemes involved the abolition of the IDD's with no replacement IDD and IDB's. This includes the Arun IDD.
21. No doubt we will need to consider the consultation that has been carried out in more detail as part of this inquiry. The draft scheme to abolish the River Arun IDD was advertised in September 2015. Defra prepared and advertised the draft order in March 2017, and this has led to this public inquiry.

The future arrangements

22. The current draft is set out in Appendix 2 of the Statement of Case. I note that there will be a session at the inquiry to deal with the terms of the Scheme. It is however worth picking out a few points now.
23. *Terms of the order* – The Agency has prepared and submitted to the relevant Minister for confirmation a scheme making provision for the matters specified in section 3(2) of the LDA 1991, in this case for:
- ‘(d) the abolition or reconstitution of any internal drainage district and of the drainage board for that district;
- ...
- (i) any matters supplemental to or consequential on the matters mentioned in paragraphs (a) to (h) above for which it appears necessary or desirable to make provision, including the transfer to the [appropriate supervisory body] or an internal drainage board of any property, rights, powers, duties, obligations and liabilities vested in or to be discharged by the [appropriate supervisory body] or by the internal drainage board affected by the scheme.’
24. The first significant point to note is that the draft Order would allow for a six months period before it comes into force. This is an important period during which transitional arrangements can be made – such as decommissioning assets.

25. The Order also does not refer to any previous legislation, and has been worded in broad and clear language, that the River Arun IDD “is hereby abolished”. We do not consider that anything materially turn on this. Despite extensive research, including in the relevant national and local authority archives, it has not been possible to locate a copy of the original Order regarding the transfer from the Commissioners of Sewers to the River Arun Catchment Board in 1933¹. Whilst it would be interesting to see the old documents, they are really only of historical interest. The River Arun Catchment Board took over the River Arun Internal Drainage District from the former Commissioners of Sewers in 1933. Since then, responsibility for the IDD has transferred through the various organisation which succeeded the Catchment Board and currently rests with Environment Agency.
26. *The IDD assets*. There is also a question about what will happen to the IDB’s assets, in particular with regard to the pumping stations and drainage structures, following abolition.
27. The draft Schedule to the Order refers to the “property” vested in the Agency in respect of the district, and that this will be transferred to the Agency in its own right. But most of the IDB’s assets do not fall within this category.
28. Because of the statutory powers of entry available (currently, s.64 of the LDA 1991), and the byelaws preventing interference with watercourse control works, it has been rare for land to be actually purchased (whether under compulsory powers or by agreement) to enable land drainage structures to be built. The Agency has been exercising its statutory powers of entry, just as it does for the Agency’s work on main rivers under sections 169 to 172 of the Water Resources Act 1991². The landowner will have been paid compensation for any loss that this caused him at the time that the structure was built (and account will also have taken of any benefits that it brought). It was a one-off payment, and was made under the terms of the statute.
29. The Agency only has occupation and control of the structures built on third party land pursuant to its statutory powers. As a result, if the Agency abandons a structure then – as would happen when a tenancy ends - any structure that is part of the land defaults back to the landowner who is free to do with it as he or she pleases. The landowner’s legal interest in the land subsists.
30. There has been much discussion about the position on the legal ownership of the pumping stations. So I will spend a little more time on that point now. This does depend on the extent to which the structures became part of the land or not. This is a familiar issue in

¹ All we know is that it is listed as “the River Arun Catchment Board (Transfer of Powers of the Rape of Arundel Commissioners of Sewers) Order 1933”. There are also Orders transferring the main river responsibilities from the Commissioners of Sewers to the Catchment Board in 1931, and one abolishing the Commissioners (made on 21 August 1933). This last one would have been made after their remaining powers as an IDB had already been passed to the Catchment Board.

² see the recent discussion of this in *R (on the application of Sharp and another) v North Essex Magistrates' Court* [2017] EWCA Civ 1143, Court of Appeal, 31 July 2017.

land law, and was considered by the House of Lords in the case of *Elitestone v Morris* [1997] 1 W.L.R. 687. The discussion by the court is of general application. The court had to consider if the defendant had a protected tenancy, which depended on him showing that his wooden bungalow was part of the land, and not just a moveable chattel (if you can forgive the legal tautology).

31. The House of Lords considered that the defendant's bungalow was part of the land. Lord Clyde (at 691) preferred to avoid the traditional twofold distinction between 'chattels' and 'fixtures', and to adopt the three-fold classification set out in the leading textbook of Woodfall on "Landlord and Tenant":

"An object which is brought onto land may be classified under one of three broad heads. It may be (a) a chattel; (b) a fixture; or (c) part and parcel of the land itself. Objects in categories (b) and (c) are treated as being part of the land."

32. As Lord Clyde also stated, by reference to the maxim "inaedificatum solo solo cedit", 'that which is attached to the land accrues to the land.' So, a house that was built in such a way that it could not be removed except by destruction could not have been intended to remain a chattel and must have been intended to form part of the land.

33. One of the useful analogies mentioned in the judgment of Lord Lloyd of Berwick (at 693) relates to the distinction:

"... a house which is constructed in such a way that it cannot be removed at all, save by destruction, cannot have been intended to remain as a chattel. It must have been intended to form part of the realty. I know of no better analogy than the example given by Blackburn J. in *Holland v. Hodgson*, L.R. 7 C.P. 328 , 335:

"Thus blocks of stone placed one on the top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones, if deposited in a builder's yard and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels."

34. So, a general answer in this case would be that a pumping house building that was built in such a way that it could not be removed except by its destruction could not have been intended to remain a chattel and must have been intended to form part of the land. Whilst the pumps and the equipment remain chattels, and can be removed, the building will remain and is part of the land. Compensation would have been paid for that at the time it was constructed.

35. There is one further matter to mention on this. The Agency also faces situations where the decision is made that flood defence structures are no longer to be maintained, and control of the land reverts to the landowner. There is a national Protocol that has been adopted by the Agency that applies in those situations³, and the Agency has applied this here as a matter of good public administration (see Peter Carver and David Robinson's evidence, including the correspondence with the landowners). Adequate notice will be

³ Protocol for the maintenance of flood and coastal risk management assets (England only) 27/01/2014

given when an individual is taking over the responsibility for an asset, and it can be appropriate to offer a commuted sum in lieu of the full period of notice as well.

36. The future management of the ordinary watercourses within the drainage district will rest with the landowners, as indeed it does now. I note that a query (by Thyme Consulting) has been raised about riparian rights on a tidal watercourse, but those rights are not affected here – the management of the main river is not being changed.
37. The aim has been to ensure that the assets are in fair condition, so that they can continue to be used, if the landowner chooses to do so. The Agency's evidence also analyses what the situation would be if the landowners chose to do nothing to assist in the land drainage of the area, and has identified the worst case scenario that reflects this. It is not expected that this will be what happens in practice, or that it is an all or nothing situation, but on the other hand we cannot dictate what the landowners will choose to do.

Nature conservation issues

38. We also need to show that the future arrangements following the abolition of the IDD will comply with the nature conservation obligations that arise.
39. This is a discrete area of concern. Whilst the IDD is managed in order to ensure effective land drainage in the area, those powers and responsibilities need to be exercised with due regard to the relevant nature conservation designations. The abolition of the Arun IDD represents more than a simple transfer of the administrative responsibilities, and due care and attention has been paid to these issues.
40. There are obligations that arise under the Wildlife and Countryside Act 1981, as well as under the Conservation of Habitats and Species Regulations 2017,⁴ regarding the Special Protection Areas, Sites of Community Importance, Special Areas of Conservation, Ramsar Sites and protected species. The Agency has been in discussion with the relevant landowners and with Natural England about how these areas are managed and what mitigation measures should be considered.
41. The evidence of Jane Birch, Biodiversity Technical Specialist (Botany) for the Solent and South Downs Area, deals with the details of this. The detailed written submissions from Natural England also describe the conservation designations (see in particular section 5). Indeed, whilst the main evidence before this inquiry has been concentrated on 3 particular SSSIs, given their wider role, there are in fact six which are within the IDD area:
- Arun Banks SSSI
 - Arundel Park SSSI

⁴ As of 30th November 2017, the 2010 Regulations and its various amendments were revoked and replaced by the Conservation of Habitats and Species Regulations 2017. These are indeed a consolidation measure - the 2017 Regulations do not change the underlying law, even though some of the numbering of the relevant regulations has changed.

- Amberley Wild Brooks SSSI
- Pulborough Brooks SSSI
- Waltham Brooks SSSI
- Upper Arun SSSI

42. Each needs to be considered separately. As NE record, the Arun Banks SSSI and the Upper Arun SSSI were scoped out of the assessment at an early stage. Both sites are part of the main river, with minimal overlap against the IDD, so that there would be no material changes in their management.
43. The ones that have a wider role are those at Amberley Wild Brooks SSSI, Pulborough Brooks SSSI and Waltham Brooks SSSI. These are component sites of the Arun Valley SPA and Ramsar site. They are comprised primarily of wet grassland meadows dissected by a network of ditches, which support rich and diverse assemblage of invertebrates, vascular plants, and assemblage of wintering and breeding birds. In addition, Amberley Wild Brooks and Pulborough Brooks are component sites of the Arun Valley SAC.
44. The Environment Agency has therefore carried out three HRAs for the three European Sites that are affected by the abolition of the Arun IDD. The ‘Stage 2’ assessments by the Environment Agency and by Natural England, having taken into account the mitigation measures proposed, have concluded that there is not likely to be a significant effect on the Sites, and that no Appropriate Assessment is required. The necessary SSSI assessments (under section 28H of the Wildlife and Countryside Act 1981 (as amended)) – for instance for Arundel Park SSSI - have also been carried out and approved by Natural England, and are in evidence.
45. One of the mitigation measures involves the proposed enmainment of some of the watercourses in the Amberley Wildbrooks SSSI (transferring responsibility of the watercourses to the EA). This is a separate legislative process, and is the subject of its own application and consultation process. The timing of the proposed abolition will need to be co-ordinated with the enmainment.
46. In conclusion, this Scheme represents the result of a long review process, and considerable consultation and analysis. As with the other 7 Schemes that have been promoted regarding the IDDs in this part of the country, the Minister can be satisfied that it is appropriate to make this Order for the Arun IDD in the light of all the circumstances.

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