

LEGAL LIABILITES FOR COASTAL EROSION AND FLOODING IN THE UNITED KINGDOM DUE TO CLIMATE CHANGE

**Report for the
Royal Commission on Environmental Pollution**

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Executive Summary

1 Introduction

This report analyses the legal liabilities for coastal erosion and flooding that will occur in the United Kingdom due to climate change and sea level rise. It also compares the different principles that govern these issues in England, Wales, Scotland and Northern Ireland, and discusses the legal implications of the Government's current policy for managed realignment of sea defences.

2 The legislative framework

For historical reasons, there are currently two separate statutory regimes applicable to both England and Wales that govern related aspects of the defence of coastal land against the sea. One (flood defence) deals with temporary flooding, and is administered by the Environment Agency, internal drainage boards and local councils, whereas the other (coast protection) concerns the prevention of permanent erosion and encroachment by the sea, and is the responsibility of coast protection authorities. However, the United Kingdom is required to adopt new legislation to implement the EC Floods Directive, and the Government has recently published a draft Flood and Water Management Bill, which proposes major reforms of the law on flooding and coastal erosion in England and Wales.

In Scotland, the Scottish Environment Protection Agency has a general duty to promote sustainable flood management, but most operational functions for flood defence and coast protection are undertaken by Scottish local authorities under outdated legislation that has been in place for half a century. Consequently, the new Flood Risk Management (Scotland) Bill, which transposes the EC Floods Directive in Scotland, will also introduce extensive changes to the Scottish regime for preventing and managing floods.

In Northern Ireland, the Rivers Agency is the statutory drainage and flood defence authority. Although the majority of its work is concerned with inland watercourses, it is also responsible for the maintenance of a few sea defences.

3 Common law and private law

Most of the legal rules governing flood defence and coast protection in the United Kingdom are now contained in legislation, but there are also some relevant principles of common law and Scottish private law, which have been applied by judges in decided cases, and reflect established custom. Thus, a landowner must normally not act so as to expose another's property to flooding by the sea, although a person who builds reasonable defences to protect his own property will not be liable if they increase the risk to neighbouring land. Likewise, coastal landowners are generally not required to keep the sea at bay, or to maintain defences for the benefit of their neighbours, but there are certain exceptions under the laws of nuisance and contract.

4 Statutory powers and duties

Although the legislation governing flood defence and coast protection imposes some general duties on the responsible authorities, their powers to carry out works are expressed in permissive rather than mandatory terms. Consequently, provided that they exercise their discretion reasonably and take account of all relevant factors (as well as complying with the requirements of human rights and nature conservation law), they will not normally be obliged to protect particular pieces of land that they consider uneconomic or inappropriate to defend.

The authorities' current operational powers contemplate positive action to construct, maintain and improve defensive works, but they do not expressly authorise negative measures such as might be involved in the dismantling of existing structures, unless the motive is also to facilitate the protection of land. However, the Flood and Water Management Bill and the Flood Risk Management (Scotland) Bill should clarify the right of authorities to remove barriers in order to manage flood risk and restore natural processes.

5 Statutory compensation

Flood defence and coast protection authorities throughout the United Kingdom have some statutory obligations to pay compensation for injury due to the exercise of their operational powers. Nevertheless, this is not strict liability, and a claimant must show that the conduct causing the injury would have amounted to an actionable nuisance or negligence if it had not been authorised by statute. Moreover, provided that the authorities behave responsibly within the scope of their statutory discretion, they will only be liable for the consequences of active intervention rather than passive inaction.

6 Human rights

Where coastal land is privately owned or occupied, the risk of flooding or erosion may also raise questions of human rights. Flood defence and coast protection authorities must respect the rights and freedoms guaranteed by the European Convention on Human Rights, which has been incorporated into United Kingdom law by the Human Rights Act 1998. Although the Convention does not expressly refer to flooding or erosion, two articles are potentially relevant to them. Article 8 declares the right to respect for private and family life, which includes a person's home, and Article 1 of the First Protocol provides for the peaceful enjoyment of possessions. These provisions, however, are subject to qualifications that allow the authorities a wide margin of discretion to balance other competing public interests against human rights; provided that they take all relevant considerations into account, their decisions should not be reviewable by the courts unless they are wholly unreasonable.

7 Nature conservation

The legal principles governing flood defence and coast protection also involve aspects of nature conservation law. This is particularly important if ecologically significant land is likely to be adversely affected by sea defence works or if such land is itself threatened by the sea. Flood defence and coast protection authorities have some general duties to support nature conservation, but they also have specific

responsibilities in relation to sites of special scientific interest (or areas of special scientific interest in Northern Ireland) and habitats protected under European Community law.

In particular, the EC Birds Directive and the EC Habitats Directive will prevent the creation of sea defences that adversely affect the integrity of a European special protection area (SPA) or special area of conservation (SAC), unless they are essential for imperative reasons of overriding public interest. As well as imposing restrictions on some flood defence and coast protection work, the Directives may also sometimes compel the authorities to intervene in order to prevent damage or destruction of SPAs or SACs resulting from sea level rise.

Recent appeals concerning private sea defences in Suffolk demonstrate the complex considerations that must be balanced when coast protection, nature conservation and human rights issues are involved.

8 Managed realignment

Managed realignment (*ie* the removal or deliberate breach of existing sea defences, or their relocation further inland, when it is no longer economic or practical to maintain them in their present position) is complicated by the traditional approach of current legislation, which assumes that flood defence and coast protection are concerned with the exclusion rather than the admission of the sea. However, the reforms proposed in the Flood and Water Management Bill and the Flood Risk Management (Scotland) Bill should provide the authorities with more flexibility in the future.

Current legislation already appears to be adequate to support managed realignment if it involves positive protective measures or is intended to promote nature conservation, but the dismantling of sea defences without ensuring some alternative protection may arguably be insufficient under existing law. Nevertheless, although there will undoubtedly be legal complexities in the implementation of managed realignment in the United Kingdom, it would appear from this survey of powers and responsibilities that they should not be insurmountable if the constraints and opportunities provided by the law are properly understood.

Report

1 Introduction

This report analyses the legal liabilities for coastal erosion and flooding that will occur in the United Kingdom due to climate change and sea level rise. It also compares the different legal principles that govern these issues in England, Wales, Scotland and Northern Ireland.

Section 2 describes the legislative framework for sea defence and coast protection in each country, and explains the role of the various authorities involved in implementing it, while section 3 discusses the rules of common law and private law affecting these bodies and coastal landowners. Section 4 provides a detailed examination of the statutory powers and duties of flood defence and coast protection authorities, and reviews prospective reforms under the draft Flood and Water Management Bill and the Flood Risk Management (Scotland) Bill. An evaluation of the statutory mechanisms for compensation for loss or damage resulting from flood defence and coast protection works is provided in section 5. Section 6 explores the legal significance for sea defence of provisions in the European Convention on Human Rights concerning interference with a person's home and property, and section 7 similarly examines the relevance of national and European Community legislation on nature conservation. Finally, section 8 summarises the ways in which the legal issues covered in this report affect the implementation of the Government's current policy for managed realignment of sea defences.

2 The legislative framework

2.1 England

In England, the laws governing the defence of coastal land against the sea have a long history, which has profoundly influenced their content, and has resulted in the creation of two separate statutory regimes. One deals with flood defence, and is currently administered by the Environment Agency under the Environment Act 1995 and the Water Resources Act 1991; this system is concerned with the protection of low-lying land against temporary inundation, and applies to inland as well as tidal waters. The other - coast protection - involves the prevention of permanent erosion and encroachment by the sea, and is carried out by district or unitary councils under the Coast Protection Act 1949. Because flood defence is closely related to land drainage, it is historically associated with agricultural land, and the origins of this body of law may be traced to the appointment of commissioners of sewers in the thirteenth century. In contrast, coast protection is more concerned with the urban coast, and was introduced as an emergency measure to repair the defences of coastal towns that had been neglected during the Second World War. A common factor between both regimes, however, is that they were designed to keep the sea at bay by artificial means, and they did not originally contemplate the possibility of managed realignment.

The flood defence functions of the Environment Agency primarily relate to ‘main rivers’,¹ which are designated on main river maps by the Secretary of State for Environment, Food and Rural Affairs. However, this geographical limitation does not apply to works for the purpose of defence against sea or tidal water, which may be undertaken anywhere.² Flooding of watercourses other than main rivers is the responsibility of internal drainage boards inside their districts and local authorities elsewhere; these functions are governed by the Land Drainage Act 1991. However, internal drainage boards are mainly concerned with the drainage of land behind flood defences, and in practice they are not significantly involved in carrying out sea defence works, although they may be affected by the consequences of managed realignment.

National policy for both flood defence and coast protection in England is decided by the Department for Environment, Food and Rural Affairs (Defra), which also funds most of the Environment Agency’s flood related work,³ and provides grants to local authorities and internal drainage boards. The United Kingdom is required to adopt legislation to implement the EC Floods Directive⁴ before 26 November 2009, and on 21 April 2009 Defra published a draft Flood and Water Management Bill for consultation,⁵ which would transpose the requirements of the Directive in England,⁶ and make additional reforms to flood and coastal erosion law.⁷ The Floods Directive requires EU Member States to carry out a preliminary flood risk assessment for each river basin district or unit of management,⁸ and to prepare flood hazard maps and flood risk maps by December 2013,⁹ and flood risk management plans by December 2015.¹⁰ ‘Flood’ is defined here as ‘the temporary covering by water of land not normally covered by water’, and includes floods from the sea in coastal areas.¹¹ The purpose of the Directive is ‘to establish a framework for the assessment and management of flood risks’,¹² but it does not impose an explicit legal duty to defend particular assets. Although flood risk management plans must focus on prevention, protection and preparedness, they must also take account of costs and benefits, and may include the controlled flooding of certain areas.¹³

¹ Water Resources Act 1991, s 107.

² *ibid*, s 165(2).

³ Environment Act 1995, s 47. The Water Act 2003, s 69, removes earlier doubts about the power of Ministers to make block grants to the Environment Agency for drainage works and flood warning systems instead of supporting individual projects.

⁴ Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks, *Official Journal of the European Union* L 288, 6.11.2007, p 27.

⁵ *Draft Flood and Water Management Bill*, Cm 7582, Department for Environment, Food and Rural Affairs, London, April 2009.

⁶ Although the draft Bill does not currently deal with the implementation of the Floods Directive in Wales, the Welsh Ministers are expected to include similar provisions in the final text. If the Parliamentary timetable does not permit the Directive to be transposed before the November 2009 deadline, it is possible that this may be achieved instead by regulations under the European Communities Act 1972, s 2(2).

⁷ See section 4.1.5 below.

⁸ EC Floods Directive, art 4.

⁹ *ibid*, art 6.

¹⁰ *ibid*, art 7.

¹¹ *ibid*, art 2(1).

¹² *ibid*, art 1.

¹³ *ibid*, art 7(3).

2.2 Wales

In Wales, the statutory framework governing operational responsibility for flood defence and coast protection is essentially the same as in England (see section 2.1 above), and functions are divided between the Environment Agency, internal drainage boards and the unitary Welsh local authorities. However, the supervisory and policy role of national government in relation to these matters is devolved to the Welsh Ministers under the Government of Wales Act 2006.¹⁴

2.3 Scotland

In Scotland, the Scottish Environment Protection Agency (SEPA) is given responsibility by the Environment Act 1995 for assessing flood risk and providing flood warning systems, and it also has a general duty to promote sustainable flood management under the Water Environment and Water Services (Scotland) Act 2003. However, most operational functions for flood defence and coast protection are undertaken by the unitary Scottish local authorities.

The Coast Protection Act 1949 applies to the whole of Great Britain, and is the only legislation dealing specifically with sea defences in Scotland, where it empowers local authorities to carry out work for the prevention of erosion or encroachment by the sea. There are separate Scottish statutes relating to land drainage and flood prevention, but these were designed for the needs of inland areas. The Land Drainage (Scotland) Act 1958 was intended to encourage voluntary co-operative action by farmers, and entitles landowners to apply to the Scottish Ministers for improvement orders authorising the construction of drainage works. However, the 1958 Act applies exclusively to agricultural land; financial grants for these works ceased to be available in the 1980s, and no improvement orders have been made since 1985. Separate legislation to deal with urban areas was introduced by the Flood Prevention (Scotland) Act 1961,¹⁵ which empowers local authorities to prepare flood prevention schemes for non-agricultural land, subject to approval by the Scottish Ministers. Since April 2008, funding for these flood prevention schemes has been included in the local government block grant.

The Flood Risk Management (Scotland) Bill, which is currently before the Scottish Parliament, is intended to implement the EC Floods Directive in Scotland (see section 4.2.1 below). It will introduce extensive changes to the Scottish regime for preventing and managing floods, and will replace the Flood Prevention (Scotland) Act 1961. However, the Coast Protection Act 1949 will be unaffected by the Bill, and the Land Drainage (Scotland) Act 1958 will continue in force with some amendments.

2.4 Northern Ireland

In Northern Ireland, the Rivers Agency, which is an executive agency within the Department of Agriculture and Rural Development (DARD), performs functions delegated to it by DARD as the statutory drainage and flood defence authority. The principal legislation under which the Rivers Agency operates is the Drainage

¹⁴ Schedule 11, para 30. See also National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672.

¹⁵ The 1961 Act has been amended by the Flood Prevention and Land Drainage (Scotland) Act 1997.

(Northern Ireland) Order 1973.¹⁶ This Order also governs the role of the Drainage Council, which is an independent non-departmental advisory body; the Council designates watercourses and sea defences that may be maintained by the Rivers Agency, and considers drainage proposals. Although the majority of the Rivers Agency's work is concerned with inland watercourses, it is also responsible for the maintenance of 26 kilometres of designated sea defences.¹⁷ In addition, an administrative arrangement is in place whereby government departments take responsibility for protecting their own coastal property (such as roads and railway embankments) from erosion.¹⁸ The Coast Protection Act 1949 does not apply to Northern Ireland, but the EC Floods Directive will need to be implemented there by new flood risk management legislation.

3 Common law and private law

Although most of the legal rules governing flood defence and coast protection in the United Kingdom are now contained in legislation, there are also some relevant principles of common law in England, Wales and Northern Ireland and of Scottish private law, which have been applied by judges in decided cases, and reflect established custom. The majority of these principles have arisen in England, because of the particular vulnerability of low-lying coastal land to the effects of flooding and erosion there. However, the common law is equally applicable to Wales and Northern Ireland, and it has also influenced the development of Scots law.

In 1609, Lord Chief Justice Coke stated that the Crown had a common law duty, as part of the royal prerogative, to defend the coast against the inroads of the sea. This was described as analogous to the Crown's responsibility to protect the borders of the realm against military invasion:

‘by the common law ... the King ought of right to save and defend his realm, as well against the sea, as against the enemies, that it should not be drowned or wasted ...’¹⁹

Nevertheless, this obligation cannot be enforced in the courts, since the Crown is not legally accountable for the exercise of its prerogative unless legislation declares it to be so. Although a statutory body to which the Crown expressly delegates its duty may be required to discharge it, this will depend on the wording of the grant.²⁰ On the other hand, the Crown's theoretical responsibility can be invoked to prevent others behaving in ways that would increase the risk of flooding or erosion. Thus, a landowner normally must not act so as to expose another's property to invasion by the sea, since this would cause a breach of the Crown's duty,²¹ and a statutory body which

¹⁶ SI 1973/69, amended by the Drainage (Amendment) (Northern Ireland) Order 2005, SI 2005/1453, and the Drainage (Environmental Impact Assessment) Regulations (Northern Ireland) 2006, SR 2006/34.

¹⁷ RPS Consulting Engineers, *Flood Management Policy Review: Final Report: Proposed Policy Framework*, Rivers Agency of Northern Ireland, Belfast, March 2007, p 8.

¹⁸ *ibid.*

¹⁹ *Isle of Ely Case* (1609) 77 English Reports 1139.

²⁰ *Lyme Regis Corporation v Henley* (1834) 6 English Reports 1180.

²¹ *Attorney-General v Tomline* (1880) 14 Chancery Division 58.

assumes that duty may take action to prevent such interference.²² However, if a person builds sea defences to protect his own property, he will not be liable if they increase the risk to neighbouring land, provided that he acts reasonably.²³ On the other hand, if flooding or erosion results from the unreasonable use of land or negligent conduct, there may be liability for damage under the common law torts of nuisance or negligence.²⁴

As a general rule, private owners of coastal land are not required to keep the sea at bay, and those who erect defences for their own protection have no obligation to maintain them for the benefit of their neighbours.²⁵ However, the Court of Appeal held in 2000 that an occupier owes a measured duty of care under the English common law of nuisance to take reasonable steps to prevent a risk of damage to neighbouring property due to the collapse of his own land through a cliff fall; but this duty is confined to an obligation to take care to avoid damage that ought to have been foreseen without further geological investigation, and it may be limited to warning the neighbour of the foreseeable risk and sharing information about it.²⁶

Coastal landowners may also sometimes owe contractual responsibilities for the maintenance of private sea defences to certain other landowners. This may be the result of covenants entered into on a transfer of title, which may involve reciprocal arrangements for the mutual benefit of adjoining estates;²⁷ the extent to which such covenants are enforceable by or against subsequent landowners depends partly on whether the land is leasehold or freehold. Duties of this kind can be of considerable antiquity, and in the absence of documentary evidence of a grant, the courts may be willing to infer a lawful origin on the basis of long usage or 'prescription';²⁸ alternatively, they may occasionally in principle have given rise to customary rights.²⁹ Although some private landowners are still bound to discharge such proprietary duties as a result of contract, tenure, prescription or custom, most of these obligations in England and Wales have been statutorily commuted since the 1930s, and transferred to the Environment Agency or internal drainage boards in return for payment.³⁰

²² *Canvey Island Commissioners v Preedy* [1922] 1 Chancery 179; *Symes and Jaywick Associated Properties Ltd v Essex Rivers Catchment Board* [1937] 1 King's Bench 548.

²³ *R v Commissioners of Sewers for Paghham* (1828) 108 English Reports 1075.

²⁴ In *Adcock v Norfolk Line Ltd* (1993) unreported, the tenant of a wharf, a water authority and two contractors were found liable for flooding due to the negligent design and construction of a temporary sea wall.

²⁵ *Hudson v Tabor* (1877) 2 Queen's Bench Division 290.

²⁶ *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] Queen's Bench 836. There is no corresponding authority for the application of this principle in Scotland, and it is not certain that the Scottish courts would adopt the same approach: see CT Reid and DJ McGlashan, 'Erosion, accretion and intervention' (2005) *Juridical Review* 73 at p 85.

²⁷ *Morland v Cook* (1868) Law Reports 6 Equity Cases 252.

²⁸ *R v Leigh* (1840) 113 English Reports 152.

²⁹ *London & North Western Railway v Fobbing Commissioners* (1896) 66 Law Journal Queen's Bench 127.

³⁰ See now: Land Drainage Act 1991, ss 33-34; Water Resources Act 1991, s 107(4).

4 Statutory powers and duties

4.1 England and Wales

4.1.1 *Environment Agency*

In England and Wales, the Environment Agency has a legal duty under the Environment Act 1995 to ‘exercise a general supervision over all matters relating to flood defence’,³¹ It is also required by the Water Resources Act 1991 to undertake periodic surveys of the areas in which it has flood defence functions,³² and to arrange for these functions to be carried out by regional flood defence committees.³³ All the activities of the Agency are subject to its principal statutory aim, which is to protect or enhance the environment so as to contribute towards attaining the objective of achieving sustainable development, although the likely costs must also be taken into account.³⁴ However, while these provisions impose mandatory obligations, most of the Environment Agency’s flood defence functions are defined in terms of permissive powers. Thus, section 165(2) of the Water Resources Act 1991, which provides legal authority for the Agency to build sea defences, states:

‘The Agency shall also have power, irrespective of whether the works are in connection with a main river, to maintain, improve or construct drainage works for the purpose of defence against sea water or tidal water; and that power shall be exercisable both above and below the low-water mark.’

The use of the word ‘power’ rather than ‘duty’ means that Environment Agency has a discretion to decide whether to perform this function in a particular situation. Such discretion is not absolute, since, as a principle of administrative law, Parliament is presumed to have intended that statutory powers should be used reasonably. Moreover, in considering whether or how to exercise any of its powers, the Agency is required by section 39 of the Environment Act 1995 to take account of the likely costs and benefits. Nevertheless, provided that the Agency exercises its judgment responsibly, and does not act in a wholly unreasonable way, decisions made within the scope of its discretion should not be reviewable by the courts.

In the leading case of *East Suffolk Rivers Catchment Board v Kent*,³⁵ the House of Lords held that a statutory authority which has been entrusted with a mere power is not liable in negligence if it fails to act to prevent damage caused by natural flooding. Nor will the authority be liable if it intervenes less effectively than it might have done, unless its conduct makes the damage worse than if no action had been taken at all.

Another important question is whether the statutory functions of the Environment Agency are sufficiently broad to authorise intervention for the purpose of managed realignment. The wording of section 165(2) of the Water Resources Act appears to contemplate positive action, and does not expressly allow negative measures such as

³¹ Environment Act 1995, s 6(4).

³² Water Resources Act 1991, s 105(2).

³³ *ibid*, s 106(1).

³⁴ Environment Act 1995, s 4(1).

³⁵ [1941] Appeal Cases 74.

might be involved in the dismantling of existing structures. Where managed realignment involves the creation of new defences further inland, the Agency's powers are probably wide enough to justify the controlled breaching of existing structures, but there must be some doubts about the adequacy of the legislation to encompass intervention unaccompanied by positive measures.

Nevertheless, the basis on which the Agency raises revenue for flood defence purposes by a combination of levies on local authorities and precepts on internal drainage boards³⁶ does not confer rights to protection on individual landowners, and this should be true even in the Anglian Region, where a general drainage charge is imposed on agricultural land and buildings.³⁷ Consequently, if the Agency concludes that, as part of a policy of managed realignment, certain existing flood defences should no longer be maintained, it should not be acting inconsistently with the provisions of the Water Resources Act 1991 and the Environment Act 1995. Moreover, since the consent of the Agency is required for the erection or alteration of structures by other persons in main rivers,³⁸ and in ordinary watercourses outside internal drainage districts,³⁹ private flood defences may not be built there without its permission.

The Agency also has a discretionary power under section 166 of the Water Resources Act 1991 to provide flood warning systems. However, this has been qualified by a ministerial direction, which has statutory force under the Environment Act 1995,⁴⁰ and the Agency is required to take reasonable steps to warn of the danger of flooding.

Although the Agency currently has no statutory responsibilities for coastal erosion under the Coast Protection Act 1949, it has performed many of Defra's strategic functions for coast protection since 1 April 2008 under ministerial delegation, including the approval of works undertaken by maritime local authorities (see section 4.1.3 below).

4.1.2 *Internal drainage boards and local authorities*

The statutory functions of internal drainage boards and local authorities for the construction, maintenance and improvement of flood defences in England and Wales are similar to those of the Environment Agency (see section 4.1.1 above), but are governed by the Land Drainage Act 1991, and are restricted to works that are unconnected with main rivers. In the case of internal drainage boards, they are only exercisable within the internal drainage district.⁴¹ Local authorities (principally unitary or district councils) may act to prevent or mitigate flooding throughout their local government area,⁴² but they may also promote schemes to facilitate the drainage

³⁶ Water Resources Act 1991, ss 133-141.

³⁷ General Drainage Charges (Anglian Region) Order 2006, SI 2006/826.

³⁸ Water Resources Act 1991, s 109.

³⁹ Land Drainage Act 1991, s 23.

⁴⁰ s 40.

⁴¹ Land Drainage Act 1991, s 14. Internal drainage boards are also responsible under section 23 for approving works, including private flood defences, in ordinary watercourses within their district.

⁴² Land Drainage Act 1991, s 14.

of small areas within it where the establishment of an internal drainage district would be impracticable.⁴³

A common feature of all these functions is that they are expressed in terms of permissive powers rather than mandatory duties, and the Land Drainage Act 1991 does not require them to be exercised. However, some internal drainage boards are the successors of former commissioners of sewers, whose functions under local Acts have sometimes been transferred under the schemes constituting the boards. In cases where those local Acts imposed positive duties on the commissioners of sewers to maintain specific works, it is possible that the internal drainage boards may still be legally liable to discharge them. Because such obligations might conflict with the objectives of managed realignment, it will be necessary to investigate the possibility of their existence in each case.

Another question to be considered is whether the payment of charges by landowners within internal drainage districts creates a legitimate expectation that their land will be protected. The funding arrangements for internal drainage boards entitle the boards to charge drainage rates on the occupiers of agricultural land and special levies on unitary or district councils in respect of other properties.⁴⁴ Since, however, these charges reflect the general benefit conferred on an internal drainage district, and are not related to particular works undertaken by an internal drainage board for the advantage of an individual landowner, payment of them should not create an enforceable right to protection in favour of such a person.

4.1.3 *Coast protection authorities*

Under the Coast Protection Act 1949, maritime district or unitary councils (described as ‘coast protection authorities’) in England and Wales have a general power ‘to carry out such coast protection work, whether within or outside their area, as may appear to them to be necessary or expedient for the protection of any land in their area’.⁴⁵ Coast protection work is defined as ‘any work of construction, alteration, improvement, repair, maintenance, demolition or removal for the purpose of the protection of any land against erosion or encroachment by the sea’.⁴⁶ The functions of coast protection authorities are confined to the open coast, and lines are specified across the mouths of rivers indicating the limits of their jurisdiction.⁴⁷ The Act also prevents any other person from undertaking coast protection work (apart from maintenance or repair) without the authority’s written consent.⁴⁸

The right of local authorities to carry out coast protection work is merely permissive, although the Secretary of State for Environment, Food and Rural Affairs (in England) and the Welsh Ministers have default powers to direct them to act if, after a local inquiry, they are satisfied that an authority has failed to take sufficient protective

⁴³ *ibid*, s 18. These schemes are subject to confirmation by Defra or the Welsh Ministers under Schedule 4 of the Land Drainage Act 1991.

⁴⁴ Land Drainage Act 1991, Part IV.

⁴⁵ Coast Protection Act 1949, s 4(1). The 1949 Act will be amended by the Marine and Coastal Access Bill to reflect the prospective new system of marine licensing in England and Wales, but these amendments will not change the functions of coast protection authorities.

⁴⁶ Coast Protection Act 1949, s 49(1).

⁴⁷ *ibid*, Schedule 4.

⁴⁸ *ibid*, s 16.

measures.⁴⁹ Proposals by local authorities to undertake coast protection work also require ministerial approval if objections are received.⁵⁰ In general, however, there is no obligation on the authorities to take positive measures to defend particular coastal land.

While the inclusion of demolition and removal in the definition of ‘coast protection work’ might also appear to cover the possibility of intervention for managed realignment, such work can only be undertaken if the objective is to prevent erosion or encroachment. Consequently, the statutory powers of coast protection authorities must be subject to the same qualifications as those of the Environment Agency in the context of managed realignment (see section 4.1.1 above), and the dismantling of existing defences may need to be combined with positive measures under the Coast Protection Act 1949.

There also remains a possibility that a landowner who, before the abolition of coast protection charges for works schemes in 1962,⁵¹ was required to contribute to the cost of works protecting his land⁵² may be legally entitled to the continued maintenance of those structures throughout their lifetime. This may be inferred from the provision in the Coast Protection Act 1949 that charges should be calculated on the assumption that the works would be maintained without expense to the contributor.⁵³ In such a situation, failure to maintain a coastal defence for reasons of managed realignment could be a breach of an implied duty to the landowner.

4.1.4 *Other public bodies*

Some public bodies, especially harbour authorities, that have been empowered by local Acts or orders to carry out coastal engineering operations such as land reclamation or the construction of harbour works, are subject to positive statutory obligations under that legislation to construct and maintain sea defences as a consequence. In such cases, a failure to comply with the requirements of those provisions would be actionable by either a neighbouring landowner whose property was rendered liable to flooding as a result or by the Environment Agency or coast protection authority responsible for the area.⁵⁴ Accordingly, land belonging to public bodies that are subject to local statutory duties of this kind is likely to be unsuitable for managed realignment.

⁴⁹ *ibid*, s 29.

⁵⁰ *ibid*, s 5. This ministerial function has been delegated to the Environment Agency since 1 April 2008 (see section 4.1.1 above).

⁵¹ *Coast Protection Act, 1949*, Circular 41/62, Ministry of Housing and Local Government, London, August 1962.

⁵² *Coast Protection Act 1949*, s 6.

⁵³ *ibid*, s 7(3).

⁵⁴ *Nitro-Phosphate Co v London & St Katherine Docks Co* (1877) 9 Chancery Division 503; *Bramlett v Tees Conservancy Commissioners* (1885) 49 Justice of the Peace 214.

4.1.5 *Draft Flood and Water Management Bill*

The draft Flood and Water Management Bill⁵⁵ and the accompanying consultation paper published by Defra in April 2009 provide not only for the transposition of the EC Floods Directive in England, but also seek to implement findings of the Pitt Review⁵⁶ and other policy initiatives, including *Making Space for Water*⁵⁷ and *Future Water*.⁵⁸ In addition to the public consultation exercise, the draft Bill will be subject to pre-legislative scrutiny by the House of Commons Environment, Food and Rural Affairs Committee.

One of the principal objectives of the draft Bill is create a comprehensive risk-based regime for managing the hazards of flooding and coastal erosion, which will address all sources of potential floods. The Bill will make the Environment Agency responsible for developing and applying a national strategy for flood and coastal erosion risk management in England,⁵⁹ which other authorities (including local councils and internal drainage boards) will be required to follow;⁶⁰ it may also issue guidance about the application of the strategy to public bodies.⁶¹ The Agency's statutory remit will include coastal erosion as well as flooding, and it will be given the same general powers as maritime local authorities to undertake coast protection work.⁶² It will also formally take over Defra's responsibility for approving works by local authorities under the Coast Protection Act 1949, which it currently performs under ministerial delegation.⁶³ In addition, the Agency will be required to maintain the main river map for England in place of Defra,⁶⁴ and the Government is currently considering whether there should be a similar requirement for the maintenance of a coastal map showing the distribution of responsibilities along the coast.⁶⁵

In England, unitary and county councils will be recognised as 'lead local flood authorities', and they must each develop a 'local flood risk management strategy' for their area.⁶⁶ This must be consistent with the national strategy, and must be respected by other authorities engaged flood and coastal erosion risk management in the area concerned, and by public bodies whose functions may affect those risks.⁶⁷ Lead local

⁵⁵ *Draft Flood and Water Management Bill*, Cm 7582, Department for Environment, Food and Rural Affairs, London, April 2009.

⁵⁶ *Learning lessons from the 2007 floods: An independent review by Sir Michael Pitt*, Cabinet Office, London, December 2007.

⁵⁷ *Making space for water: developing a new Government strategy for flood and coastal erosion risk management in England: a consultation exercise*, Department for Environment, Food and Rural Affairs, London, July 2004.

⁵⁸ *Future Water: The Government's water strategy for England*, Cm 7319, Department for Environment, Food and Rural Affairs, London, February 2008.

⁵⁹ Draft Flood and Water Management Bill, clause 15.

⁶⁰ *ibid*, clause 22.

⁶¹ *ibid*, clause 17.

⁶² *ibid*, clause 37.

⁶³ *ibid*, clause 38 (see also note 50 above).

⁶⁴ *ibid*, clause 64.

⁶⁵ *Draft Flood and Water Management Bill: Consultation Paper*, Cm 7582, Department for Environment, Food and Rural Affairs, London, April 2009, para 112.

⁶⁶ Draft Flood and Water Management Bill, clause 19.

⁶⁷ *ibid*, clause 22.

flood authorities may also issue guidance about the implementation of their strategies.⁶⁸

The draft Bill proposes to reconstitute the English regional flood defence committees of the Environment Agency as ‘regional flood and coastal committees’.⁶⁹ The remit of these bodies will be enlarged to include coastal erosion, but their principal role in the future will be to advise the Agency about the exercise of its flood and coastal erosion risk management functions, instead of discharging executive responsibilities on the Agency’s behalf.

The provisions in the draft Bill to transpose the EC Floods Directive are currently limited to England, but they are likely to be extended to Wales following consultation. The competent authorities for implementing the Directive will be the Environment Agency and the lead local flood authorities (*ie* unitary or county councils). The ‘preliminary flood risk assessments’, which are required by the Directive to record previous flooding and assess potential future impacts, will consist of ‘preliminary assessment maps’ produced by the Agency and ‘preliminary assessment reports’ prepared by both the Agency and the lead local flood authorities; the Agency’s reports will include information about flooding from the sea and main rivers, while those of the local authorities will cover ordinary watercourses.⁷⁰ On the basis of these documents, the Agency and the lead local flood authorities will identify ‘flood risk areas’ where there is a significant risk of flooding, and will then produce ‘flood hazard maps’ showing the source and extent of the danger, and ‘flood risk maps’ depicting the likely consequences; they must also publish ‘flood risk management plans’ setting out their objectives and proposed measures for managing each significant flood risk.⁷¹

Further proposals in the draft Bill include new definitions of the powers of the Environment Agency, local authorities and internal drainage boards in England to carry out structural or environmental work for managing flood risk, which are wide enough to permit managed realignment.⁷² Thus, ‘structural work’ is defined to include not only positive operations (*ie* construction, alteration, improvement, repair and maintenance), but also demolition and removal, while ‘environmental work’ means anything done to maintain or restore natural processes, or to reduce or increase the level of water in a place. Other clauses will enable the same bodies to undertake work for environmental reasons that may cause flooding or coastal erosion, provided that they have regard to the relevant flood risk management strategies, and do not harm human health, infrastructure, or social and economic welfare.⁷³ The draft Bill also empowers the Environment Agency, local authorities and internal drainage boards to designate structures or other features (such as roads and railway embankments) in both England and Wales that may affect the risk of flooding or coastal erosion, but are owned by third parties.⁷⁴ The owners would then need to

⁶⁸ *ibid*, clause 21.

⁶⁹ *ibid*, clauses 66-74.

⁷⁰ *ibid*, clauses 50-54.

⁷¹ *ibid*, clauses 55-63.

⁷² *ibid*, clauses 34 and 42.

⁷³ *ibid*, clauses 41 and 49.

⁷⁴ *ibid*, clauses 75-97.

obtain their consent to alter, remove or replace these assets, and the Government is also consulting about the desirability of imposing a statutory duty to maintain them.⁷⁵

In addition, the consultation paper discusses other possible measures, which have not been included in the text of the draft Bill. For example, it is suggested that internal drainage boards should be reconstituted as ‘local flood risk management boards’, and should be supervised by the lead local flood authorities instead of by the Environment Agency.⁷⁶ The Government is also investigating the changes that would be needed to create a single unifying Act to replace the remaining provisions on flooding and coastal erosion in other primary legislation.⁷⁷ Furthermore, the consultation paper invites comments on the extension of the English proposals in the draft Bill to Wales.⁷⁸

4.2 Scotland

4.2.1 *Scottish Environment Protection Agency*

The Scottish Environment Protection Agency (together with the Scottish Ministers and other designated authorities) currently has a general duty under the Water Environment and Water Services (Scotland) Act 2003⁷⁹ to promote sustainable flood management when exercising many of its functions. SEPA also has a statutory role under the Environment Act 1995⁸⁰ of assessing the risk of flooding in any area of Scotland, as far as it considers it appropriate, and it has a duty to advise planning authorities about such risks.⁸¹ In addition, it has a discretionary power to provide and operate flood warning systems under the Agriculture Act 1970.⁸²

These provisions will be changed by the Flood Risk Management (Scotland) Bill, which will implement the EC Floods Directive in Scotland, and will impose more extensive duties. Under clause 1 of the Bill, SEPA, the Scottish Ministers and responsible authorities will be required to exercise their flood-related functions with a view to reducing overall flood risk; they must have regard to social and economic impacts, and must promote sustainable flood risk management, raise public awareness and contribute to the achievement of sustainable development. The Bill also provides for the preparation of flood risk assessments by SEPA, together with flood hazard maps, flood risk maps and flood risk management plans;⁸³ it seeks to promote natural flood management techniques, and SEPA must assess the potential contribution of altering or restoring natural features and characteristics of river basins and coastal

⁷⁵ *op cit* (note 65 above), para 313. Clause 47 of the draft Bill will also transfer the Environment Agency’s responsibility for approving works by third parties in ordinary watercourses outside internal drainage districts to lead local flood authorities.

⁷⁶ *op cit* (note 65 above), paras 364-401.

⁷⁷ *ibid*, paras 497-502.

⁷⁸ *ibid*, Annex A.

⁷⁹ s 2(4). This duty applies to functions under Part 1 of the Water Environment and Water Services (Scotland) Act 2003 and to those specified in the Water Environment (Relevant Enactments and Designation of Responsible Authorities and Functions) Order 2008, SSI 2008/263. The 2003 Act implements the EC Water Framework Directive 2000/60/EC in Scotland.

⁸⁰ s 25(1).

⁸¹ Environment Act 1995, s 25(2).

⁸² s 92.

⁸³ Flood Risk Management (Scotland) Bill, Part 3.

areas.⁸⁴ Another significant amendment is that SEPA will have a statutory duty (instead of a discretion) to give warnings when it considers that floods are happening or likely to occur in the near future.⁸⁵ In addition, the Bill will oblige Scottish local authorities to prepare local flood risk management plans,⁸⁶ and will give them wide discretionary powers to do anything that they consider will contribute to the implementation of such a plan.⁸⁷ They will also be empowered to prepare flood protection schemes under the Bill.⁸⁸

4.2.2 *Land Drainage (Scotland) Act 1958*

The Land Drainage (Scotland) Act 1958⁸⁹ currently provides a right for the owner of agricultural land to apply to the Scottish Ministers for an improvement order authorising him to construct works in order to improve the drainage of that land or to prevent flooding or erosion there. The Scottish Ministers are not obliged to make an order, but they may do so if they are satisfied that it is in the interests of agricultural production. However, since improvement orders dealing with flooding could in future conflict with measures taken by local authorities to implement local flood risk management plans under the Flood Risk Management (Scotland) Bill, which will cover agricultural as well as non-agricultural land, the Bill will restrict the purposes for which new orders may be made under the Land Drainage (Scotland) Act 1958 to the improvement of land drainage or the mitigation of erosion.⁹⁰ It will also allow existing improvement orders to be revoked or varied if they conflict with local authorities' flood risk management measures.⁹¹

4.2.3 *Flood Prevention (Scotland) Act 1961*

The current powers of Scottish local authorities to prepare flood protection schemes for urban land under the Flood Prevention (Scotland) Act 1961⁹² are likewise generally discretionary. Although the 1961 Act was amended by the Flood Prevention and Land Drainage (Scotland) Act 1997⁹³ to impose a duty on local authorities to maintain watercourses that are in a condition which is likely to cause flooding of non-agricultural land, this would not apply to the sea. At present, flood prevention schemes need to be confirmed by the Scottish Ministers. However, the whole of the 1961 Act will be repealed by the Flood Risk Management (Scotland) Bill, which will substitute a new system of flood protection schemes, and local authorities will no longer need ministerial approval for a scheme unless the Scottish Ministers call it in for their consideration.⁹⁴

⁸⁴ *ibid*, clause 16.

⁸⁵ *ibid*, clause 64.

⁸⁶ *ibid*, clause 29.

⁸⁷ *ibid*, clause 49.

⁸⁸ *ibid*, clause 52.

⁸⁹ s 1.

⁹⁰ Flood Risk Management (Scotland) Bill, Schedule 3, para 1.

⁹¹ *ibid*, clause 54.

⁹² s 4.

⁹³ s 2.

⁹⁴ Flood Risk Management (Scotland) Bill, clause 52 and Schedule 2.

4.2.4 *Coast protection authorities*

The Coast Protection Act 1949 applies to Scotland, as well as to England and Wales, and Scottish maritime local councils have the functions of coast protection authorities there. Thus, the legal principles described in section 4.1.3 (above) are equally applicable in Scotland.⁹⁵

4.3 Northern Ireland

The Drainage (Northern Ireland) Order 1973 requires the Drainage Council to consider proposals from the Rivers Agency for the designation of watercourses and sea defences for the purposes of the Order, and decide whether they should be designated.⁹⁶ In an emergency, the Agency may act without the Council's approval if sea defences are in imminent danger of being breached.⁹⁷ 'Sea defences' are defined as 'works designed for the protection against flooding by the sea of land and existing at the commencement of this Order', but they exclude works to prevent erosion.⁹⁸ The Agency has a discretionary power (not a duty) to prepare drainage schemes for carrying out works on designated sea defences and watercourses;⁹⁹ such schemes are subject to environmental impact assessment¹⁰⁰ and consultation with the Drainage Council,¹⁰¹ and they must be confirmed by an order of the Department of Agriculture and Rural Development,¹⁰² which confers authority to do what is necessary to carry them out.¹⁰³ In addition, the Agency may also undertake repair or maintenance of designated watercourses and sea defences as it thinks fit, without the need for a drainage scheme.¹⁰⁴

5 Statutory compensation

5.1 England and Wales

5.1.1 *Water Resources Act 1991*

In England and Wales, the Environment Agency has a statutory obligation under the Water Resources Act 1991¹⁰⁵ to pay compensation for injury sustained by any person due to the exercise of its powers to carry out flood defence works. However, this is not strict liability, and in practice a claimant must show that the injury would have given rise to liability at common law in nuisance or negligence if it had been caused a

⁹⁵ The Coast Protection Act 1949 will be amended by the Marine (Scotland) Bill to reflect the prospective new system of Scottish marine licensing, but these amendments will not change the functions of coast protection authorities.

⁹⁶ Drainage (Northern Ireland) Order 1973, SI 1973/69, art 3(4)(a)-(b).

⁹⁷ *ibid*, art 9.

⁹⁸ *ibid*, art 2(2).

⁹⁹ *ibid*, art 11.

¹⁰⁰ *ibid*, arts 12-12H, substituted by the Drainage (Environmental Impact Assessment) Regulations (Northern Ireland) 2006, SR 2006/34, art 18.

¹⁰¹ *ibid*, art 3(4)(c).

¹⁰² *ibid*, art 13, substituted by the Drainage (Environmental Impact Assessment) Regulations (Northern Ireland) 2006, SR 2006/34, art 19.

¹⁰³ *ibid*, art 14.

¹⁰⁴ *ibid*, art 21.

¹⁰⁵ s 177 and Schedule 21, para 5.

private person acting without statutory authority (see section 3 above). Claims may cover the inevitable consequences of the Agency's authorised operations as well as the results of negligent conduct. If the Agency takes active as opposed to passive measures to implement managed realignment, it would also be liable to compensate coastal landowners. The amount of damages will be the difference between the value of the land before and after the works,¹⁰⁶ and will be assessed by the Lands Tribunal in the event of a dispute. However, any betterment or benefit to the land resulting from the works will be offset against the award. Compensation may be claimed both for injury experienced during the construction of the works and for damage that becomes apparent later, but the claim must be brought within the normal time limit of six years for actions founded on tort.¹⁰⁷

5.1.2 *Land Drainage Act 1991*

The Land Drainage Act 1991¹⁰⁸ imposes liabilities on internal drainage boards and local authorities to pay compensation for injuries due to the exercise of their drainage powers under that Act (see section 4.1.2 above) which are equivalent to those of the Environment Agency under the Water Resources Act 1991 (see section 5.1.1 above).

5.1.3 *Coast Protection Act 1949*

Coast protection authorities (see section 4.1.3 above) are similarly required by section 19 of the Coast Protection Act 1949 to pay compensation for depreciation in the value of land or for disturbance due to coast protection work, although claims must be made within a year after its completion. However, it is expressly stated that there will be no liability unless the act or omission causing the harm would have been actionable if done without statutory powers. Thus it will again be necessary for the claimant to prove nuisance or negligence, and since the powers of coast protection authorities are discretionary, they should only be liable for positive involvement in managed realignment, and not for passive inaction. Nevertheless, an authority may also be liable under section 19 to pay compensation for depreciation if it refuses consent for private coast protection works or imposes conditions on them.

Any disputes arising under this provision must be determined by arbitration. In the case of *Earle and Earle v East Riding of Yorkshire Council*,¹⁰⁹ the Lands Tribunal stated that a coast protection authority will not be liable in nuisance if its conduct is reasonable, and that statutory liability should also be limited to the immediate consequences of a construction rather than its long term effects. However, in *Fellowes v Rother District Council*,¹¹⁰ the High Court held that an authority which exceeds its statutory discretion under the Coast Protection Act 1949 may in principle be sued for damages under the common law of negligence. Nevertheless, the scope of a coast protection authority's discretion is expressed in such wide terms in the Act that it will rarely be exceeded if the authority behaves responsibly.

¹⁰⁶ *Farmer Giles v Wessex Water Authority* [1990] 18 Estates Gazette 102.

¹⁰⁷ Limitation Act 1980, s 2.

¹⁰⁸ s 14(5)-(6).

¹⁰⁹ [1999] Rating and Valuation Reporter 200.

¹¹⁰ [1982] 1 All England Reports 513.

5.1.4 *Draft Flood and Water Management Bill*

Because the draft Flood and Water Management Bill proposes to give the Environment Agency the same general powers as maritime local authorities to carry out coast protection work in England (see section 4.1.5 above), it will make the Agency equally liable to pay compensation for depreciation and disturbance.¹¹¹ However, the draft Bill will also extend the scope of the powers of the Agency, local authorities and internal drainage boards to undertake structural or environmental work, but the current text does not deal with the potential liabilities that might arise from their use.¹¹² The consultation paper accompanying the draft Bill explains that the issue of compensation is still being considered, and that further provisions about this will be inserted in the final legislation.¹¹³

5.2 Scotland

5.2.1 *Land Drainage (Scotland) Act 1958*

In Scotland, the owners of agricultural land in an area for which an improvement order has been made under the Land Drainage (Scotland) Act 1958 (see section 4.2.2 above) are required to pay compensation to an owner of non-agricultural land inside the same area for damage caused by the discharge of their functions, and they must similarly compensate an occupier of any land in the improvement area, provided that the owner or occupier was not in default.¹¹⁴ Claims must be brought within two years from the completion of the drainage works or the exercise of maintenance functions, and any disputes should be determined either by the Scottish Land Court or by arbitration. However, these provisions are primarily concerned with the immediate side effects of drainage works, and they do not imply obligations to defend land from the sea for the benefit of third parties.

5.2.2 *Flood Prevention (Scotland) Act 1961*

The Flood Prevention (Scotland) Act 1961¹¹⁵ (see section 4.2.3 above), which is due to be repealed and replaced by the Flood Risk Management (Scotland) Bill, currently requires Scottish local authorities to pay compensation for depreciation or disturbance caused by their flood prevention operations. However, the act or omission must be one that would have been actionable if it had occurred without the exercise of statutory powers. Claims must be brought within two years from the depreciation becoming apparent or the first occurrence of the disturbance, or within ten years from the completion of the flood prevention operations, whichever is the earlier. Any disputes should be referred to the Lands Tribunal for Scotland.

¹¹¹ Draft Flood and Water Management Bill, clause 40.

¹¹² *ibid.*, clauses 34 and 42 (see section 5.1.3 above).

¹¹³ *op cit* (note 65 above), para 69.

¹¹⁴ Land Drainage (Scotland) Act 1958, s 4.

¹¹⁵ s 11.

5.2.3 *Flood Risk Management (Scotland) Bill*

The Flood Risk Management (Scotland) Bill¹¹⁶ (see section 4.2.1 above) contains similar compensatory provisions to the Flood Prevention (Scotland) Act 1961 that it will replace (see section 5.2.2 above). However, in addition to the liabilities of local authorities for the consequences of flood prevention schemes and the exercise of their flood risk management powers, the Bill also covers the responsibilities of the Scottish Environment Protection Agency for damage due to the installation and maintenance of flood warning systems. Compensation must be paid for depreciation or disturbance, and the conduct of the local authority or SEPA must be otherwise actionable under private law. The time limits for claims and the forum for dispute resolution are the same as those under the 1961 Act.

5.2.4 *Coast Protection Act 1949*

Since the Coast Protection Act 1949 applies to Scotland, the principles discussed in section 5.1.3 (above) are also applicable there.

5.3 Northern Ireland

Under the Drainage (Northern Ireland) Order 1973¹¹⁷ (see section 4.3 above), the Rivers Agency is required to pay reasonable compensation to a landowner for loss due to the construction of drainage or sea defence works on his land or caused by direct interference with it. However, the Agency may be exonerated from liability by prior agreement in return for carrying out the works. Compensation may also be claimed for injury to fisheries or fishing rights caused by the operation of drainage works or sea defences, provided that the claim is made within ten years after their completion and there would be a right of action for damages apart from the 1973 Order.¹¹⁸ Disputed claims for compensation are assessed by the Lands Tribunal, and any benefit to property must be taken into account.¹¹⁹

6 Human rights

Where coastal land is owned or occupied by private individuals, the risk of flooding or erosion may also raise questions of human rights. The United Kingdom has incorporated the European Convention on Human Rights¹²⁰ into domestic law by means of the Human Rights Act 1998, which requires public authorities to act in ways that are compatible with the rights and freedoms protected by the Convention.¹²¹ All the statutory bodies and local councils that are involved in flood defence or coast protection are public authorities for the purposes of the Human Rights Act, and if they unlawfully interfere with Convention rights when performing their public functions,

¹¹⁶ clauses 71-72.

¹¹⁷ SI 1973/69, art 17.

¹¹⁸ *ibid.*, art 18.

¹¹⁹ *ibid.*, art 19.

¹²⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.

¹²¹ Human Rights Act 1998, s 6.

the victims may seek redress in a national court or tribunal,¹²² although final appeals may be made to the European Court of Human Rights in Strasbourg.

The Convention does not expressly refer to flooding or erosion, but there are two articles that are relevant to their potential effects on human rights. Article 8 declares the right to respect for private and family life, which includes a person's home:

‘1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

The right expressed in paragraph (1) of Article 8 is not absolute, since it is qualified by the exceptions in paragraph (2), which allow interference if it is supported by law and is necessary, for example on social or economic grounds. This inevitably requires competing interests to be balanced, and the restriction of a right must be proportionate to the importance of the purpose served, and must be applied without discrimination.¹²³ However, the European Court of Human Rights has repeatedly held that States have a wide ‘margin of appreciation’ or discretion in determining such questions, and the courts should not substitute their own assessment of the best policy to be adopted.

Article 1 of the First Protocol¹²⁴ concerns the protection of property:

‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.’

This right to the peaceful enjoyment of possessions, which can include land and buildings, is similarly subject to qualifications, and the public interest may justify deprivation of property or restrictions on its use.

While a number of cases have considered the responsibility of public authorities to prevent nuisances such as noise, atmospheric emissions and smells caused by the

¹²² *ibid*, s 7.

¹²³ European Convention on Human Rights, art 14.

¹²⁴ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, 20 March 1952.

activities of third parties that interfered with the enjoyment of private property,¹²⁵ there has been little litigation concerning the actual or potential effects of flooding on human rights. In *Marcic v Thames Water Utilities Ltd*,¹²⁶ the House of Lords held that a householder whose land was repeatedly flooded by surface water and effluent from an overloaded public sewer could not succeed in a court action against the water company under the Human Rights Act 1998, because the Water Industry Act 1991¹²⁷ provided a statutory scheme for the regulation of sewerage undertakers that was compatible with Convention rights. It was the function of the Director General of Water Services to balance public and private interests when deciding whether to take enforcement action against water companies.

The situation in the *Marcic* case related specifically to sewer flooding, and the authorities involved in sea defence and coast protection are not subject to equivalent regulatory schemes under their legislation. Consequently, the House of Lords' decision should not be interpreted as excluding the possibility of direct litigation against those bodies for breach of human rights. Nevertheless, they also enjoy the same margin of discretion, and provided that they take all relevant considerations into account, their decisions should not be reviewable by the courts unless they are wholly unreasonable.

7 Nature conservation

The legal principles governing flood defence and coast protection also involve aspects of nature conservation law. This is particularly important if ecologically significant land is likely to be adversely affected by sea defence works or if such land is itself threatened by the sea. Flood defence and coast protection authorities have some general duties to support nature conservation, but they also have specific responsibilities in relation to sites of special scientific interest and habitats protected under European Community law.

7.1 General conservation duties

In England and Wales, the Environment Agency is required by the Environment Act 1995¹²⁸ to promote the conservation and enhancement of the natural beauty and amenity of coastal waters and associated land to the extent that it considers desirable, as well as the conservation of flora and fauna that are dependent on an aquatic environment. In addition, it is the duty of Ministers and the Environment Agency to exercise their powers so as to further the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest when formulating or considering any proposals relating to the Agency's functions.¹²⁹ These responsibilities are expressed in broad terms, and they must also respect the Agency's principal statutory aim of contributing towards the

¹²⁵ *Baggs v United Kingdom* (1985) 9 European Human Rights Reports 235; *S v France* (1990) 65 Decisions and Reports of the European Court of Human Rights 250; *Lopez Ostra v Spain* (1994) 20 European Human Rights Reports 277; *Guerra v Italy* (1998) 26 European Human Rights Reports 357; *Hatton v United Kingdom* (2003) European Human Rights Reports 611.

¹²⁶ [2004] Appeal Cases 42.

¹²⁷ s 18.

¹²⁸ s 6(1).

¹²⁹ Environment Act 1995, s 7(1)(a).

achievement of sustainable development, taking into account any likely costs (see section 4.1.1 above). Internal drainage boards and local authorities (together with Ministers and Environment Agency) have similar obligations under the Land Drainage Act 1991¹³⁰ to further nature conservation when deciding how the drainage powers of those boards and authorities under that Act should be exercised.

In Scotland, the Scottish Ministers and the Scottish Environment Protection Agency are subject to a general duty under the Environment Act 1995¹³¹ to have regard to the desirability of conserving and enhancing the natural heritage of Scotland when considering proposals relating to any of SEPA's functions. They also have a discretionary duty to promote the conservation of coastal land and waters and their dependent flora and fauna in the same way as the Environment Agency in England and Wales.¹³²

In Northern Ireland, there are no equivalent general environmental duties imposed on the Department of Agriculture and Rural Development or its Rivers Agency by the Drainage (Northern Ireland) Order 1973,¹³³ although drainage schemes and works are subject to statutory requirements on environmental impact assessment.¹³⁴

7.2 Sites of special scientific interest

Sites of special scientific interest (SSSIs) in England, Wales and Scotland, and areas of special scientific interest (ASSIs) in Northern Ireland, are the fundamental national nature conservation designations for the protection of land in the United Kingdom.¹³⁵ In England and Wales, they are governed by the Wildlife and Countryside Act 1981;¹³⁶ the equivalent legislation in Scotland is the Nature Conservation (Scotland) Act 2004,¹³⁷ and in Northern Ireland it is the Environment (Northern Ireland) Order 2002.¹³⁸ Although there are three separate statutory regimes, there are major similarities between their provisions.

The national nature conservation agencies - Natural England, the Countryside Council for Wales (CCW), Scottish Natural Heritage (SNH) and the Northern Ireland Environment Agency (NIEA)¹³⁹ – are required to identify land that is of special interest because of its flora, fauna or geological or physiographical features,¹⁴⁰ and notify specified interested parties, including the owners and occupiers. This

¹³⁰ ss 61A-61B, inserted by the Land Drainage Act 1994, s 1.

¹³¹ s 32(1)(a).

¹³² Environment Act 1995, s 34(2).

¹³³ SI 1973/69.

¹³⁴ Drainage (Environmental Impact Assessment) Regulations (Northern Ireland) 2006, SR 2006/34.

¹³⁵ SSSIs and ASSIs do not currently extend below mean low water mark in England, Wales and Northern Ireland, or the position of mean low water spring tides in Scotland. However, the Marine and Coastal Access Bill, clause 144 and Schedule 13, will enable SSSIs in England and Wales to include land covered by estuarial waters or subtidal areas adjoining and related to an existing SSSI.

¹³⁶ Part II, amended by the Countryside and Rights of Way Act 2000, s 75 and Schedule 9, and the Natural Environment and Rural Communities Act 2006, s 105 and Schedule 11.

¹³⁷ Part 2.

¹³⁸ SI 2002/3153, Part IV.

¹³⁹ NIEA, which is an agency within the Department of the Environment, must consult the Council for Nature Conservation and the Countryside before declaring an ASSI.

¹⁴⁰ The Nature Conservation (Scotland) Act 2004, s 3(2), refers to 'geomorphological' instead of 'physiographical' features.

notification must be accompanied by a list of potentially damaging operations, which are described as ‘operations likely to damage’ (OLDs) in England and Wales, ‘operations requiring consent’ (ORCs) in Scotland and ‘notifiable operations’ (NOs) in Northern Ireland. An example of a potentially damaging operation that is regularly listed in relation to coastal sites is:

‘Erection of sea defences or coast protection works, including cliff or landslip drainage or stabilisation measures.’

An owner or occupier must not carry out a potentially damaging operation on the land (or cause or permit someone else to do so) without the written consent of the national nature conservation agency, unless the operation complies with a management agreement, scheme or notice (or a land management order in Scotland).¹⁴¹ There are statutory rights to appeal against a refusal of consent or the imposition of conditions.¹⁴² However, the execution of an OLD, ORC or NO without consent will not be an offence if it is authorised by a planning permission or a permit from another public authority, or if it is an emergency operation.¹⁴³ The construction of private sea defences in an SSSI or ASSI will be subject to these principles when the work involves a listed potentially damaging operation. Flood defence and coast protection authorities will also be affected as owners or occupiers of sea walls and other structures, although the legal concept of occupation requires a comprehensive and stable relationship with the land rather than mere temporary presence.¹⁴⁴

In addition, all the authorities involved in flood defence and coast protection are subject to a general statutory duty of public bodies in relation to SSSIs and ASSIs, and they also have particular obligations when carrying out operations themselves or authorising others to undertake them. Thus, if their activities are likely to affect an SSSI or ASSI, they must take reasonable steps, consistent with the proper exercise of their functions, to further the conservation and enhancement of the flora, fauna and other features for which the site is of special scientific interest.¹⁴⁵ If they propose to undertake an operation likely to damage an SSSI or ASSI, they must first seek the assent of Natural England, CCW, SNH or NIEA, even if the operation would take place outside the protected site; but if assent is refused or granted subject to unacceptable conditions, the authority may proceed after 28 days, provided that it informs the nature conservation agency, explains how it has taken account of any written advice from that body, causes as little damage as is reasonably practicable, and restores the site to its former condition if possible.¹⁴⁶ Similar restrictions and

¹⁴¹ Wildlife and Countryside Act 1981, s 28E; Nature Conservation (Scotland) Act 2004, s 16; Environment (Northern Ireland) Order 2002, SI 2002/3153, art 32.

¹⁴² Wildlife and Countryside Act 1981, s 28F; Nature Conservation (Scotland) Act 2004, s 18; Environment (Northern Ireland) Order 2002, SI 2002/3153, art 33.

¹⁴³ Wildlife and Countryside Act 1981, s 28P; Nature Conservation (Scotland) Act 2004, s 17; Environment (Northern Ireland) Order 2002, SI 2002/3153, art 46.

¹⁴⁴ *Southern Water Authority v Nature Conservancy Council* [1992] 3 All England Reports 481. In *Collier v Anglian Water Authority*, The Times, 26 March 1983, a local authority was held to be the occupier of a sea wall because it exercised control over the structure for sea defence purposes.

¹⁴⁵ Wildlife and Countryside Act 1981, s 28G; Nature Conservation (Scotland) Act 2004, s 12; Environment (Northern Ireland) Order 2002, SI 2002/3153, art 38.

¹⁴⁶ Wildlife and Countryside Act 1981, s 28H; Nature Conservation (Scotland) Act 2004, ss 13-14; Environment (Northern Ireland) Order 2002, SI 2002/3153, art 39.

safeguards apply to a decision by a flood defence or coast protection authority to permit potentially damaging operations by third parties.¹⁴⁷

7.3 European sites

European Community legislation on the conservation of wild birds and natural habitats has particular significance for flood defence and coast protection authorities if their operations may affect sites protected under Community law, or if such sites are threatened by the effects of sea level rise.

7.3.1 *EC Birds Directive*

The 1979 EC Birds Directive¹⁴⁸ relates to the conservation of all species of naturally occurring birds in the European territory of EU Member States. It covers their protection, management and control, and lays down rules for their exploitation. Member States must take requisite measures to maintain the population of these species at a level which corresponds to ecological, scientific and cultural requirements,¹⁴⁹ and must preserve, maintain or re-establish a sufficient diversity and area of habitats for them.¹⁵⁰ The measures to achieve these objectives include the creation of protected areas.

Annex I of the Birds Directive lists particularly vulnerable species that must be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution. Member States must in particular classify the most suitable territories in number and size as 'special protection areas' (SPAs) for the conservation of these species, taking into account their protection requirements in the geographical land and sea area.¹⁵¹ They must also take similar measures for regularly occurring migratory species not listed in Annex I, as regards their breeding, moulting and wintering areas and staging posts along their migration routes, and for this purpose must pay particular attention to the protection of wetlands, especially those of international importance. The Directive originally required Member States to take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds in SPAs, but this general duty has now been replaced by more specific obligations contained in the EC Habitats Directive (see section 7.3.2 below).

7.3.2 *EC Habitats Directive*

The EC Habitats Directive¹⁵² aims to promote the maintenance of biodiversity, and to ensure the restoration or maintenance of natural habitats of Community interest at a favourable conservation status. It extends many of the protective mechanisms originally established for wild birds under the Birds Directive to other species and

¹⁴⁷ Wildlife and Countryside Act 1981, s 28I; Nature Conservation (Scotland) Act 2004, s 15; Environment (Northern Ireland) Order 2002, SI 2002/3153, art 40.

¹⁴⁸ Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, *Official Journal of the European Communities* L 103, 25.4.79, p 1.

¹⁴⁹ *ibid.*, art 1.

¹⁵⁰ *ibid.*, art 3.

¹⁵¹ *ibid.*, art 4.

¹⁵² Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, *Official Journal of the European Communities* L 206, 22.7.92, p 7.

habitat types listed in Annexes. In particular, it provides for the designation of ‘special areas of conservation’ (SACs) in order to create a coherent European ecological network called ‘Natura 2000’. The Habitats Directive complements, but does not replace the Birds Directive, which remains in force. However, under Article 3(1) of the Habitats Directive, all SPAs designated under the Birds Directive automatically become special areas of conservation as well, and the following provisions in Article 6 of the Habitats Directive now apply to both SACs and SPAs:

- Member States must take appropriate steps to avoid the deterioration of natural habitats and the disturbance of the species for which the areas have been designated.
- Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect on it (either individually or in combination with other plans or projects) must be subject to an appropriate assessment of its implications in view of the site's conservation objectives. In the light of the conclusions of this assessment, the competent national authorities may only agree to the plan or project after having ascertained that it will not adversely affect the integrity of the site concerned.
- If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State must take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected, and must inform the European Commission of the compensatory measures adopted. However, where the site concerned hosts a priority natural habitat type and/or priority species,¹⁵³ the only considerations that may be raised are those relating to human health or public safety, beneficial consequences of primary importance for the environment, or (further to an opinion from the European Commission) other imperative reasons of overriding public interest.

7.3.3 Conservation (Nature Habitats, &c) Regulations

The Habitats Directive has been transposed in England, Wales and Scotland by the Conservation (Natural Habitats, &c) Regulations 1994,¹⁵⁴ and equivalent regulations have been made in Northern Ireland.¹⁵⁵ Over six hundred SACs in the United Kingdom were proposed by the Government, and have been formally adopted by the European Commission, including many that are located on the coast or in estuaries. All SACs and SPAs are described in the UK regulations as ‘European sites’, while those that consist of marine areas (*ie* land covered by tidal waters or sea up to the 12-mile limit of territorial waters) are called ‘European marine sites’.

The principal protection provided by the regulations is through the mechanism of SSSIs, ASSIs and management agreements (see section 7.2 above). However, Ministers, government departments and statutory undertakers *etc* (including flood

¹⁵³ Priority natural habitat types are indicated by an asterisk in Annex I of the Habitats Directive, and priority species are similarly identified in Annex II.

¹⁵⁴ SI 1994/2716.

¹⁵⁵ Conservation (Natural Habitats, etc) Regulations (Northern Ireland) 1995, SR 1995/380.

defence and coast protection authorities) with functions relevant to marine conservation are required to exercise them in relation to marine areas so as to secure compliance with the Habitats Directive.¹⁵⁶ In addition, these bodies, which are described as ‘competent authorities’, owe a general duty to have regard to the requirements of the Habitats Directive so far as these may be affected by the exercise of their functions.¹⁵⁷ This means that they must follow the principles in Article 6 of the Directive (see section 7.3.2 above).

Consequently, when a flood defence or coast protection authority is preparing a plan or considering some action or inaction that is likely to have a significant effect on an SAC or SPA, it must undertake an assessment of its implications for the site. This will apply even if the proposed activity would be located outside the boundaries of the protected area, since external operations may still have impacts within it (for example by affecting hydrological or geomorphological processes). If the assessment shows that the proposal will adversely affect the integrity of the site, it may only be permitted if there is no alternative solution, if there are imperative reasons of overriding public interest (which may normally include social and economic factors) and if compensatory measures are taken (such as the creation of an alternative habitat). However, if the site contains a priority habitat or species, the only justifications are overriding reasons of human health or public safety, environmental benefits of primary importance or (with the approval of the European Commission) other imperative reasons of overriding public interest. A case-by-case evaluation of each proposal will therefore be necessary, and while the preservation of human life should always be an imperative reason of overriding public interest, the protection of property may be less important, particularly if priority species or habitats are at risk.

In addition to placing restrictions on some flood defence and coast protection work, the Habitats Directive may also sometimes compel authorities to intervene in order to prevent damage or destruction of SACs and SPAs resulting from sea level rise, since Member States must take appropriate steps to avoid the deterioration of natural habitats irrespective of the cause.¹⁵⁸ Intervention may therefore be needed if the conservation value of a European site is threatened by flooding or erosion, particularly if it is exposed on the seaward side of an existing sea wall (a situation known as ‘coastal squeeze’).

7.3.4 *Nature conservation and human rights*

Recent appeals concerning private sea defences in an English site of special scientific interest illustrate the complex considerations that must be balanced when coast protection, nature conservation and human rights issues are involved. In 2005, Natural England extended the Pakefield to Easton Baven's SSSI in Suffolk to include an area on the landward side of a cliff, on which there were private houses. The scientific interest of the site arose from the prehistoric fossils that were progressively exposed by erosion of the cliff face, and the listed operations that required Natural England's consent included the ‘erection, maintenance, and repair of sea defences or coast protection works’. A landowner was subsequently refused permission by

¹⁵⁶ Conservation (Natural Habitats, &c) Regulations 1994, SI 1994/2716, reg 3; Conservation (Natural Habitats, etc) Regulations (Northern Ireland) 1995, SR 1995/380, reg 3.

¹⁵⁷ *ibid.*

¹⁵⁸ EC Habitats Directive, art 6(2).

Natural England to construct a sacrificial sea defence by depositing material on the beach in front of the cliff in order to slow the process of erosion. However, his appeal under the Wildlife and Countryside Act 1981¹⁵⁹ was allowed in March 2008 by the Secretary of State for Environment, Food and Rural Affairs, who agreed with an inspector that preventing the appellant from protecting his home would constitute an unnecessary and disproportionate interference with human rights.¹⁶⁰

In separate proceedings, another landowner challenged the designation of the same SSSI in the High Court.¹⁶¹ He claimed that promoting erosion was not a legitimate purpose for declaring an SSSI, since it involved destruction rather than conservation. However, in December 2008, Mr Justice Blair ruled that conservation is a dynamic concept, which may include allowing natural processes to take their course. Nevertheless, the judge accepted an alternative argument that Natural England had failed to discharge its duty under the Habitats Directive¹⁶² to carry out an assessment of the potential effect of designating the SSSI on a nearby SAC and SPA. Although merely declaring an SSSI would not normally amount to a plan or project requiring such an assessment, background documents prepared by Natural England stated that it was unlikely to give consent for sacrificial sea defences, and this intention constituted a plan requiring an appropriate assessment. The claimant therefore won his case on this ground, but Natural England is appealing against that aspect of the judgment to the Court of Appeal.

8 Managed realignment

The issues discussed in the previous sections of this report suggest several conclusions about the legal implications of managed realignment, when existing sea defences are removed, deliberately breached or relocated further inland because it is no longer economic or practical to maintain them in their present position.

The task of implementing managed realignment is complicated by the traditional approach of current legislation, which assumes that flood defence and coast protection are concerned with the exclusion rather than the admission of the sea, although the Flood and Water Management Bill and the Flood Risk Management (Scotland) Bill should provide greater flexibility in the future (see sections 4.1.5 and 4.2.1 above). However, the discretionary character of the powers of flood defence and coast protection authorities means that they generally have no legal obligation to preserve particular areas of coastal land, and consequently they should be able to abandon existing structures. On the other hand, since mere abandonment leading to uncontrolled failure may have unpredictable consequences, managed realignment is more likely to involve active intervention, which also needs to be compatible with statutory functions. Current legislation appears to be adequate to support managed realignment provided that this involves positive protective measures or is intended to

¹⁵⁹ s 28F.

¹⁶⁰ *Refusal of Natural England to permit maintenance of sacrificial sea defences: North Sea, Easton Lane, Easton Bavents, Suffolk: Pakefield to Easton Bavents Site of Special Scientific Interest: Report to the Secretary of State for Environment, Food and Rural Affairs*, Report NSAP37, Planning Inspectorate, Bristol, 19 February 2008.

¹⁶¹ *R (on the application of Boggis) v Natural England* [2008] EWHC 2954 (Admin).

¹⁶² art 6.

promote nature conservation, but the dismantling or deliberate breach of sea defences without ensuring some alternative protection may arguably be insufficient under existing law (see sections 4.1.1 and 4.1.3 above).

Public bodies operating under statute are only entitled to do what their legislation either expressly or impliedly authorises, and they may be subject to judicial review if they exceed their powers. Their conduct must also not be wholly unreasonable, in the sense that no reasonable authority would have behaved in the same way, and this test will apply not only to positive actions but also to omissions. Thus, an unjustifiable decision to abandon sea defences may still be challenged in the courts as an abuse of discretion. It is therefore very important for flood defence and coast protection authorities to take full account of all relevant considerations when deciding whether to exercise their powers.

The authorities must also ensure that managed realignment does not result in an unlawful interference with human rights, although the European Convention on Human Rights allows them a wide margin of discretion when competing public interests need to be balanced (see section 6 above). However, if coastal defences are abandoned by the State, it may be difficult to justify refusing permission for private landowners to undertake their own protective measures, and it will also be important to warn the public about the increased risk of floods.

Further limitations on managed realignment will arise under the EC Habitats Directive if SACs or SPAs are likely to be affected (see section 7.3.2 above), and the strict conditions of the Directive must always be satisfied in such cases, although controlled flooding may sometimes promote nature conservation through the creation of wetlands.

Finally, landowners will normally have no legal right to compensation if their land is eroded or flooded by the natural action of the sea, but flood defence and coast protection authorities have some statutory duties to pay compensation for depreciation or disturbance resulting from their operations (see section 5 above). Thus, while the authorities will rarely be liable if they do nothing, paradoxically they are more likely to incur liability if they intervene.

Managed realignment is a pragmatic policy to address a serious consequence of rising sea levels. Whether it is capable of achieving its objectives will depend not only on its practicality, but also on the legality of the procedures and techniques employed. Although there will undoubtedly be legal complexities in the implementation of managed realignment in the United Kingdom, it would appear from this survey of powers and responsibilities that they should not be insurmountable if the constraints and opportunities provided by the law are properly understood.

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