

**It never rains but it pours: the regulatory
framework for floods and droughts**



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Overview



- FLOODING
 - Organisational responsibility for flood defence
 - Risk management
 - Powers
 - Compensation

- DROUGHT
 - Organisational responsibility
 - Powers

Responsibility for flooding (1)

- Environment Agency
 - National flood risk management: “main rivers”
 - Wide-ranging supervisory role
 - Consultee on planning applications
- Internal Drainage Boards/Local Authorities
 - “ordinary” watercourses
 - IDBs established in such areas as will benefit (LDA s.1); principles for designation contained in the “Medway Letter”

Responsibility for flooding (2)

- Coastal Protection Authorities
 - Coastal erosion
 - EA has concurrent powers
 - DEFRA's powers to make grants also delegate to EA
- Statutory undertakers
 - Highways authorities
 - Sewerage undertakers

Flood risk management



- Section 3 of FMWA 2010 defines risk management very broadly

“anything done for the purpose of—

- (a) analysing a risk,
- (b) assessing a risk,
- (c) reducing a risk,
- (d) reducing a component in the assessment of a risk,
- (e) altering the balance of factors combined in assessing a risk, or
- (f) otherwise taking action in respect of a risk or a factor relevant to the assessment of a risk (including action for the purpose of flood defence).”

Flood risk management (2)

- In particular

“includes things done—

(a) that increase the probability of an event but reduce or alter its potential consequences,

or

(b) that increase the probability of an event occurring at one time or in one place but reduce the probability of it occurring at another time or in another place.”

- Defra Guidance (June 2009) on appraisal of risk and decision-making.

Powers



- EA and IDBs/local authorities have wide-ranging powers to:
 - Drain;
 - Construct new works
 - Maintain/operate existing works
 - Enter land
- IDBs also have supervisory powers
 - Notices requiring upkeep of ordinary watercourses (appeal to magistrates)
 - Designation of flood defence structures + enforcement notice procedure (appeal to FTT)

Compensation



- Water Resources Act 1991 and Land Drainage Act 1991 make provision for compensation where “injury” is sustained by reason of the exercise by the relevant authority of its flood defence or drainage powers.
- Must be shown that:
 - injury would have given rise to an actionable liability if carried out in absence of statutory authority
 - injury arises out of exercise of authority’s powers

Common law actions?



East Sussex Rivers Catchment Board v Kent [1941] A.C. 74



- Powers not duties so limited exposure to public law challenge or private law action for damages:
 - Very high tide breached defences on River Deben
 - Board was very slow in repairing damage. C's land flooded for longer than necessary.
 - HoL held no action lay for failure to exercise powers: although liability might arise where exercise of powers has made things worse.

Marriage v East Norfolk Rivers Catchment Board [1950] 1 K.B. 284

- Dredging by Board on River Waveney and raising of one bank caused water to escape on other side, undermining bridge buttresses and causing collapse.
- CoA relied on dicta Blackburn in **Geddis** case (1878) 3 App Cas 430 :

“... I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently”.

- Jenkins LJ sought to define the limits outside which common law rights of action remain. To be excluded:
 - Injury must be product of exercise of board's powers (so injury caused by a truck bringing materials would be actionable in normal way)
 - Injury must be product of the operation which board intended to carry out;
 - Operation must not be one which *“on the face of it is so capricious or unreasonable, or so fraught with manifest danger to others, that no catchment board acting bona fide and rationally, not recklessly, would ever have undertaken it.”*

Hall v Environment Agency [2018] 1 W.L.R. 1433



- Flood alleviation scheme had involved replacing section of roof of a culvert running close to C's property.
- Agency left it open for two weeks during which time there was heavy rainfall; the stream rose and flooded C's home.
- EA argued that s.177 of WRA formed an exclusive code for compensation

- High Court held that the second of Jenkins LJ's parameters had been breached.
- Leaving the roof off for two weeks so that culvert remained exposed was not a *“necessary or inevitable part of the authorised works and cannot have been intended or contemplated as the kind of consequence which would flow from carrying out the works.”*
- Widens scope for private actions against the EA?

Drought



Responsibility for droughts

- The main specific and general obligations are on EA and water undertakers.
- Secretary of State also under obligation to take steps to encourage conservation of water.
- All public authorities under duty to take account of desirability of conserving water supplied or to be supplied to premises (Water Act 2003 s.83)

Powers to respond to droughts

- Main powers
 - Water undertaker may impose **temporary ban** under ss.76-76C of the Water Industry Act 1991
 - **Drought order** under ss. 73-80 WRA 1991 made by Secretary of State.
 - **Drought permit** under s.79A WRA 1991 granted by EA to undertaker. Compensation payable.
 - **Spray irrigation restrictions** can be varied by EA under s.57 WRA 1991.
- See online government guidance

(i) Temporary bans (hosepipe bans)

- If undertaker thinks it is “experiencing or may experience, a serious shortage of water available for distribution” then it may impose a temporary ban
- Originally just hosepipes but now catches other domestic uses such as
 - Cleaning cars/walls/paths or patios
 - Filling or maintaining swimming pools/ornamental fountains
- Offence to breach.

(ii) Drought Orders

- SoS must be satisfied that there is either “a serious deficiency of water supplies” or “such a deficiency in the flow or level of water in any inland waters as to pose a serious threat to any of the flora or fauna which are dependent on it.”
- For emergency order, SoS must also conclude that the deficiency is likely to impair the economic or social well-being of persons in the area of the deficiency.
- Proposal may give rise to a inquiry or hearing (under expedited procedure).
Compensation payable.

(iii) Drought Permits

- Abbreviated procedure similar to drought order but only available to modify abstraction licences or to authorise taking water from a location.
- Also gives rise to compensation.
- Cannot be used to protect wildlife.

(iv) Emergency variation of irrigation licences

- EA may restrict abstraction licences “by reason of exceptional shortage of rain or other emergency”
- Only permitted in relation to underground strata if this is likely to affect ground level waters – where there are multiple licence holders which are “not far distant” this may require EA to seek proportionate reductions from all.
- No compensation is payable.



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