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EDITORIAL

The Pitt Review and the Floods and Water Bill

The summer 2007 floods in England were unprecedented in their scale and character. In June the main areas affected were in South Yorkshire and Hull. In July the impacts were upon Gloucestershire, Worcestershire and the Thames Valley. Rainfall of four times the monthly average fell upon some of these areas in the space of two days and the consequences were devastating.

The bare facts speak for themselves. Fifty-five thousand properties were flooded, 7,000 people rescued by the emergency services and 13 people lost their lives. The emergency involved the largest loss of essential services since World War II, with almost half a million people without mains water or electricity. Tens of thousands of people were made homeless and businesses put out of action for months – some are not yet back to normal. Transport networks failed and the breach of a major dam was narrowly averted. Insurance costs are expected to amount to more than £3 billion, with substantial additional amounts having to be met by public bodies, businesses and individuals.

The gravity of the events made a high level response by government imperative. The issues were the subject of a House of Commons Environment, Food and Rural Affairs Committee Report ('Flooding' HC 49 (2008)) which made recommendations which have been broadly endorsed by the Government Response (HC 901 (2008)). However, it is likely that, in the longer term, the most significant practical consequences will follow from the recommendations of an independent review undertaken by Sir Michael Pitt: 'Lessons to be Learned from the 2007 Floods'.¹

The Pitt Review

In August 2007 Pitt was asked to undertake a review of the flood-related emergencies which occurred in the summer of 2007. In December 2007 an interim report was published to identify issues needing urgent action, setting out the direction for the remainder of the review and providing a document for consultation (see Mark Stallworthy 'Regulatory Lessons from the Summer 2007 Floods' (2008) 19 *Journal of Water Law* 20).

In June 2008, almost exactly a year after the events, the final version of the Pitt Review was published. As anticipated, the final report is an exhaustive study of the events, running to nearly 500 pages and making over 90 recommendations. Many of these are of an administrative and operational kind, concerned with allocation of responsibilities; informing the public; assessment of risks, particularly for critical infrastructure; and the

need for a clear recovery plan from the outset of any major emergency. These findings have been initially welcomed by the government, which will be preparing a detailed response, including a prioritised action plan, later this year.

The legal implications

The Pitt Review encompasses detailed scrutiny of all aspects of flood defence practice and will be studied intently by all with an involvement in this area. However, from a legal perspective, attention is likely to focus upon Chapter 8, concerned with modernising flood risk legislation. This notes the existing arrangements, under which statutory responsibilities are set out in the Land Drainage Act 1991, the Water Resources Act 1991, the Environment Act 1995 and the Water Act 2003, with other relevant matters provided for under the Town and Country Planning Act 1990, the Building Act 1984, the Highways Act 1980 and the Civil Contingencies Act 2004. The key question is raised, is the current legislation up to date?

In the view of the report, 'the result is a confusing landscape with related statutory provisions being spread over different Acts', reflecting a need for more clarity in flooding legislation. Certainly, in the opinion of various bodies informing the review, the legislation fails to provide clarity in respect of allocating responsibility for all sources of flooding between the various bodies involved. This view is reflected in Recommendation 28 of the Review, that there should be a single unifying Act that addresses all sources of flooding, clarifies responsibilities and facilitates flood risk management.

Taken at face value, it is difficult to see how this rather lofty ambition could be achieved or indeed why it should be. It would be counterproductive somehow to detach the Environment Agency's supervisory and operational role in flood defence from its wider remit in respect of integrated environmental protection. Similarly, separating the flood defence powers of local authorities from the wider range of other responsibilities which they discharge is a recipe for a discontinuity of approach. Certainly, flood defence law is in need of clarification in some respects, but it also needs to be effectively integrated with the other responsibilities of the key bodies involved.

Nonetheless, the Review does identify some *particular* issues which need statutory attention. Perhaps the most compelling amongst these arises from the finding that a high proportion (estimated at two-thirds) of the 2007 flooding originated from surface water, rather than flooding from rivers or the sea which have been the traditional concerns of flood defence law.

¹ Defra.

The statutory preoccupation with river and coastal flooding is seen to have left a gap in respect of the responsibility for surface water, and this needs to be filled by a clarification of the powers and responsibilities. The view taken is that upper tier local authorities should take the lead on surface water management, with the possibility of powers being delegated to district councils or internal drainage boards. Alongside this, the Agency's overall remit should be expanded to encompass explicit responsibilities for groundwater and surface water flooding.

Other recommendations for legislative action concern the scope for alternatives to building and maintaining flood defences. Presently there is no clear mechanism to support measures for adaptation, such as enhancing the resistance or resilience of properties towards flooding, or for removing flood defences where this is the most sustainable option. This observation resonates with the growing appreciation that defence against flooding is not always the best option and there are many situations where retreat or preparation is a more sustainable alternative. Nevertheless, operating authorities need to be explicitly empowered to bring their practices into line with modern thinking.

Other matters ranged over in the Review include the longstanding difficulty in increasing the use of sustainable urban drainage systems (SUDS) which seek to attenuate the flow of floodwater into watercourses through groundwater infiltration, swales and floodwater storage areas that mimic the natural hydrology of an area. The government is urged to take action to resolve the uncertainties that surround ownership of SUDS and the continuing responsibility for their maintenance. Related to this, the Review notes the widely held view that there should be a removal of the automatic right of property owners to connect surface water drainage to the sewerage system (under section 106 Water Industry Act 1991). Removal of this right would provide a considerably increased incentive for property owners to make greater use of SUDS.

The Floods and Water Bill

The immediate government response to the publication of the Pitt Review was to welcome the direction that it set and to reaffirm increases in funding for local authorities in greatest need and for longer term funding for flood risk management, which is set to rise to £800 million in 2010–11. A more considered and detail response is due to appear shortly. However, it has been confirmed that a Floods and Water Bill will be put before the next session of Parliament for the purpose of giving effect to recommendations of the Review.

The precise content of the Floods and Water Bill is presently uncertain, but some indications may be drawn from ministerial speeches and statements. These suggest that the aims of the bill will be both to consolidate provisions relating to flood risk management and to address a range of other water-related

issues that have been identified in the government's recent water strategy for England, 'Future Water' (2008) (available at the Defra website) and the strategy for flood and coastal erosion risk, 'Making Space for Water' (2004).

In respect of flooding, the aim is to confirm the strategic role of the Environment Agency, but to expand this to *all* flooding issues. Most notably, this involves extending the Agency's remit to surface water flooding, which proved to be so damaging in the 2007 floods. Confirming the view taken in the Pitt Review, local authorities are to take responsibility for flooding in their areas, with assistance being given by the Environment Agency in drawing up surface water management plans. The role of surface water management plans is particularly significant in identifying who has responsibility for water management within an area. The purpose of this is to ensure that necessary maintenance work is being undertaken by the appropriate property owner, and consideration is being given to statutory powers to compel property owners to undertake that work.

In relation to other water issues, it is apparent that the bill will be used to update the legal framework for matters encompassing some of the concerns addressed in 'Future Water'. These include provision for universal water metering, subject to a system of tariffs that ensures fairness of charging for all customers, and measures to give effect to concerns about water supply and drought. These encompass the imposition of time limits upon water abstraction licences and extending the provisions for restricting water use during drought periods.

Another matter addressed in the Pitt Review and to be covered in the bill is that of reservoir safety. The 1975 Reservoirs Act fails to reflect modern thinking about flooding risks insofar as controls only apply to reservoirs over a stated capacity. The capacity of a reservoir does not necessarily reflect the degree of hazard involved if a breach were to occur, which may be more dependent upon factors such as the local population and infrastructure of the area likely to be affected. Amongst other things, the bill aims to put in place a risk-based approach to reservoir safety management which reflects this more adequately.

'The devil in the detail'

As always with legislative proposals, 'the devil lies in the detail'. It remains to be seen how broad statements of policy will be put into legislative effect. Nonetheless, the case has been effectively made for a range of measures to modernise the law. The Pitt Review and the Floods and Water Bill are to be welcomed insofar as they have highlighted new dimensions to the flooding problem and promised an appropriate legal response.

William Howarth

THE DRAFT MARINE BILL: A REVIEW

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INTRODUCTION

It is fair to say that the Marine Bill has had a gestation period of elephantine proportions.¹ In 2002 the Joint Nature Conservation Committee published the Marine Stewardship Report² which set out the government's vision for the marine environment both in terms of its economic development and its environmental protection. It was this report that first suggested the need for primary legislation to put into effect a new strategy for the marine environment.

This was followed in December 2004 by an announcement from the then Environment Secretary Margaret Beckett that it was government policy to work towards a new Marine Bill to implement its vision. This was endorsed in the government's 2005 manifesto.

It was not until March 2007 that the government published not the Bill itself but a Marine Bill white paper 'A Sea Change',³ which set out its detailed proposals for future regulation of the marine environment. In particular it set out the fundamental building blocks of the Bill, namely the creation of a marine management organisation, marine plans, and a marine licensing system. Consultation on the white paper ended in June 2007. Defra reported that 8519 responses were received. There was broad support for the objectives set out in the white paper, and in particular the streamlining of marine management.

As well as a radical overhaul of the management of the marine environment, the Marine Bill will update freshwater fisheries legislation. These measures have also had a long gestation, deriving from the Freshwater Review Group recommendations made in 2000.

The government has now indicated that the proposed Marine Bill will be promoted in the next session of Parliament, provided that enough time is available.

In the 'Sea Change' consultation document the government identified five strategic goals. These were to:

1. conserve and enhance the quality of seas
2. use marine resources sustainably
3. promote economic and sustainable use of resources
4. increase understanding of the marine environment
5. promote public awareness.

The government was also influenced by European directives relating to the marine environment, in particular the Integrated Coastal Management Zones Directive 2001/42/EC.⁴

It was clear that the existing hotchpotch of legislation was not fit for purpose, neither satisfying the need for a more coherent policy for the protection of the marine environment nor meeting the challenges of increasing economic exploitation of that environment. To illustrate this point, at present the marine environment is regulated under the Sea Fisheries Regulation Act 1966, the Sea Fisheries (Shellfish) Act 1967, Sea Fish (Conservation) Act 1967, the Sea Fish (Wildlife Conservation) Act 1992, the Salmon and Freshwater Fisheries Act 1975, the Wildlife and Countryside Act 1981, the Coastal Protection Act 1949, the Food and Environmental Protection Act 1985, and the Electricity Act 1989, and this is not an exhaustive list.

There is also a multiplicity of enforcement agencies including Sea Fishery Committees, the Environment Agency, the Marine and Fisheries Agency, the Secretary of State and the police.

Water Law has recently published a number of articles regarding the new Marine Bill.⁵ The purpose of this article is to give an overview of the principal provisions of the new legislation as now contained in the draft Marine Bill, by reference to the policy document, impact assessment, explanatory notes and draft Bill, all of which can be found at the Defra website.⁶ Given that the draft Bill consists of 301 clauses and 12 schedules, this review is inevitably selective, but set out below are some of the main provisions.

The policy statement accompanying the draft Bill sets out the terminology used for the various marine areas. Territorial waters are those lying on the coastward side of a 12 nautical mile baseline from the UK coast. Internal waters are those that lie within that baseline. The Bill refers to 'inshore regions', which means inshore waters adjacent to England, Scotland, Wales or Northern Ireland, as the case may be. There is also reference to the UK continental shelf as defined by the Continental Shelf Act 1976 and British fishery limits as defined by the Fishery Limits Act 1976, as well as a renewable energy zone and an exclusive economic zone. Unhelpfully these latter zones are broadly but not precisely the same.

1 Defra 'Marine Bill' published for public consultation 3 April 2008 <http://www.official-documents.gov.uk/document/cm73/7351/7351.asp>. See also <http://www.defra.gov.uk/marine/legislation/key-areas.htm>.

2 'Safeguarding our seas: a strategy for the conservation and sustainable development of our marine environment' 1 May 2002 <http://www.defra.gov.uk/environment/water/marine/uk/stewardship/index.htm>.

3 Defra <http://www.defra.gov.uk/marine/legislation/key-docs.htm>.

4 OJ L197/30.

5 A-M Slater 'A Marine Act: implications for Scotland' (2007) 18 WL 15; P Barham 'The UK Marine Bill – a View from Industry' (2007) 18 WL 339; T Appleby 'The Draft Marine Bill: will it deliver environmental protection for sea fisheries?' (2007) 18 WL 6 191.

6 <http://www.defra.gov.uk/marine/legislation/index.htm>.

MARINE MANAGEMENT ORGANISATION

A new independent non-departmental organisation to be known as the Marine Management Organisation (MMO) will be created. It will deliver marine functions for UK offshore waters (except where particular functions have been devolved) and also except in respect of English territorial waters.

Section 1 of the Bill provides for the creation of the MMO, and schedule 1, running to 29 paragraphs, gives detailed provisions for the appointment of members of the organisation and of its administration. Importantly, schedule 1 confirms that the MMO is a body corporate and not a servant or agent of the Crown. Chapter 3 of part I of the Bill sets out additional provisions for the administration of the MMO and its duties and powers.

The Policy Statement explains in more detail the government's vision for the MMO. There will be up to eight board members and a chair. Members will be sought from across what are described as the three pillars of sustainable development – economic exploitation, environmental protection and socially important uses of the marine environment.

The plan is to create a skeleton organisation after Royal Assent, which will then grow organically, rather than have a 'big bang' launch. The MMO will take over staff from existing Marine and Fisheries Agency offices, but it is anticipated that there will be at least 40 new posts. Many functions will be transferred to the MMO by way of secondary legislation.

The MMO will have a variety of functions, summarised in Annex F to the Policy Statement. It will be responsible for:

- marine planning; to underpin this function it will prepare a series of marine plans using the government's Marine Policy Statement for guidance
- marine licensing and regulating most activities in the marine environment; dealing with applications for wind farms, tidal and wave power projects, jetties, moorings, aggregate extraction, moorings and dredging as well as administering harbour orders
- contributing to decisions about the creation of marine conservation zones; it will have new powers to make conservation orders to regulate unregulated activity where necessary
- appointing marine enforcement officers and for the exercise of their powers, covering the enforcement of sea fisheries, nature conservation, and licensed activity in the marine environment
- delivering Defra's marine fisheries management functions, which include managing the UK fleet capacity, implementing the EU marketing regime, managing UK fisheries quotas, biological sampling of fish and shellfish, fishing industry grants and UK state aids, and managing, recording and providing data on fishing activity and catches.

The MMO will also appoint members to local Inshore Fisheries and Conservation Authorities (see below).

Chapter 2 of Part I of the Bill sets out the formal transfer of functions to the MMO under the Sea Fisheries (Conservation) Act 1967, the Conservation of Seals Act 1970, the Wildlife and Countryside Act 1981,

the Sea Fish (Wildlife Conservation) Act 1972 the Conservation (Natural Habitats etc) Regulations 1994, the Offshore Marine Conservation (Natural Habitats etc) Regulations 2007 and the Grants for fishing and Aquaculture Industries Regulations 2007.

The Policy Statement makes it clear that the success of the MMO will to a large extent be based on the quality of scientific evidence available to it. The government wants to ensure that information is shared effectively between organisations. It also acknowledges that a strong research programme is vital to the ability to make good policy and management decisions. It is stated that Defra will review its existing marine environment research programme, and presumably much of this research will in future be undertaken under the MMO umbrella.

MARINE PLANNING

The government has acknowledged that a comprehensive system of planning and licensing is needed for UK waters. Its intention is therefore to introduce a system of marine plans by reference to which decisions on marine licensing will be taken; this system will have parallels with the local plans used to inform land based planning decisions.

A Marine Policy Statement (MPS) will be created for the whole of UK waters; however, Scottish ministers will not participate in its development. Clause 40 of the Bill provides for the creation of marine policy statements by 'policy authorities'. In effect, this means the Secretary of State, but also involves government representatives from Wales and Northern Ireland. Schedule 4 sets out the procedure to be adopted when the MPS is prepared. Clauses 41–45 provide for the adoption of the statement.

Clauses 46–55 set out the proposed legislative framework for the creation of marine plans. These are to be prepared by marine plan authorities; the UK Government for UK waters or devolved government in the case of some territorial waters. The plans are to be prepared for every 'marine plan area'. These areas reflect the designation of waters as territorial ie close to the coast or further out to sea as far as the limits of the coastal shelf. Areas may be reduced in size if necessary to make the plan effective. There is an obligation for planning authorities to liaise with adjoining plan authorities to ensure compatibility between plans.

Clause 50 provides that the marine plan authority will be permitted to delegate the preparation of plans to other bodies, and in practice the MMO will be the body responsible for preparation of plans at least for UK waters and English territorial waters. However, the adoption or withdrawal of marine plans cannot be delegated. Marine plan authorities will be under a duty to keep plans under review and, if necessary, amend those plans to reflect changing circumstances.

Part II Chapter 4 sets out key provisions as to the implementation of the marine plans. Clause 53 provides that a public authority (thus including where appropriate not only the MMO but also for example

local authorities or the Environment Agency) must have regard to marine plans when making decisions, and that a public body taking a decision in relation to an authorisation affecting any marine area must do so in accordance with marine policy documents, including the marine policy statement and any relevant marine plan unless relevant considerations indicate otherwise. This is consistent with similar obligations imposed on land-based planning authorities.

Chapter 5 sets out provisions as to the validity of the plans and the basis on which they can be challenged. A legal challenge can only be considered by the relevant court (the High Court in the case of England). A 'person aggrieved' (not defined) may challenge a relevant document, ie a marine policy statement or a marine plan, but only on the grounds that the document is not within appropriate powers or that some procedural requirement has not been satisfied. This means that no challenge can be made as to the substantive content of the plan or statement. Any challenge that is made must be commenced within six weeks of the adoption of the documents in question. Clause 56 sets out the powers available to the court, which are to remit the decision back to the relevant authority or to quash it.

Schedule 5 of the Bill sets out detailed provisions as to the procedure that must be adopted when marine plans are being prepared. The Policy Statement gives some practical indications as to how the government sees the planning process developing. Planning authorities will need to 'use a series of tools and methodologies' in relation to plans and the government is looking to assist in developing these and working with a range of suitable qualified people to do so. When plan options have been prepared the planning authority will be obliged to carry out an appraisal of their sustainability and likely environmental, social, and economic effect.

The government believes it is important that regulators, coastal communities, and other individual organisations with an interest in the marine environment are involved in the planning process. This will place particular importance on the involvement of the Environment Agency and the Crown Estate.

It is suggested that marine planning authorities should form steering groups of stakeholders to inform the planning process. There is also provision in the Bill for planning bodies to ask an independent person to investigate the draft plan.

The government has indicated that it does not wish to be over-prescriptive. It anticipates that plans will be created 'in a gradual phased approach'. The initial view is that marine plans would normally be reviewed every six years.

MARINE LICENSING

As well as reaping the hoped-for benefits of marine planning decisions using Marine Policy Statements and marine plans, the Marine Bill includes a major overhaul of the existing licensing system. Licensing decisions that at present involve separate consents

under the Coast Protection Act and the Food and Environmental Protection Act will be made by the MMO. The MMO will also be responsible for the two main consents required for harbour construction and alteration, and the possible parallel need for marine environmental licences for the same project. The marine licensing system will apply to all UK waters except Scottish territorial waters.

The consolidation of existing legislation and creation of the MMO will allow all areas of possible concern, such as environmental, human health, navigational factors and, more generally the interests of other sea users, to be dealt with in a single application. Where applications involve an element of coastal engineering that would require the consent of the Environment Agency under land drainage legislation, the MMO will incorporate appropriate conditions in the marine licence after consultation with the Environment Agency.

Finally, the Marine Bill will dovetail with the Electricity Act⁷ in relation to renewable energy developments to ensure that there is a single process for obtaining consent for any such project.

The marine licensing provisions are set out at Part III Chapter 1 of the Bill. Section 59 provides that no person may carry on a marine licensable activity or cause or permit another to do so except in accordance with a marine licence. Section 60 defines licensable marine activity. It controls the deposit in the sea or on or under the seabed from vessels or containers or land-based structures designed for the purpose of depositing in the sea, as well the scuttling of vessels. Also covered is the construction, alteration, or improvement of any works in or over the sea, or on or under the seabed. Any form of dredging is included, and also incineration at sea, including the loading of vessels, marine structures or floating containers for that purpose.

Clause 61 provides a flexible system in relation to the manner in which applications can be made and gives the MMO the right to require the applicant to provide information, as well as allowing the MMO to carry out its own investigations if needed. Clause 62 contains provisions as to the requirements for notice of applications made for marine licences to be given.

Clause 63 sets out matters to which the MMO must have regard when determining applications. These are:

- a) the need to protect the environment
- b) the need to protect human health
- c) the need to prevent interference with legitimate uses of the sea
- d) such other matters as the authority thinks relevant.

The note to the draft Bill states that the word 'environment' should be given its ordinary meaning and should include both the local and global environment. The natural environment 'includes the physical chemical and biological state of the sea, the sea-bed and the sea-shore, and the ecosystems within it ...'. Legitimate uses of the sea are to include navigation,

⁷ BERR <http://www.berr.gov.uk/whatwedo/energy/sources/renewables/planning/legislation/electricity-act-1989/page18695.html>.

fishing, mineral extraction, and amenity use. The MMO may issue regulations setting out its procedural requirements in relation to licence applications. Inquiries may be held if required.

Clause 65 permits conditions to be attached to licences. These can relate to the whole life of a project or structure, including its maintenance and dismantling. Clause 66 creates powers for the MMO to vary, suspend, revoke and transfer licences. Clauses 68–74 deal with exemptions from the licensing system, and the relationship with other authorisations, for example routine dredging under the Harbour Acts,⁸ and pipelines and installations connected with oil extraction, the latter being licensed under the Petroleum Act 1998.⁹

Chapter 3 of Part III sets out enforcement provisions in relation to marine licensing. Clause 76 contains the principal offence of carrying on marine licensable activity without a licence or in breach of licence conditions. Clauses 77 and 78 provide exceptions where the activity was carried on in an emergency or in accordance with a foreign licence. Clause 87 allows the MMO to accept undertakings from persons in breach of conditions in relation to the remedying of those breaches.

Clause 80 gives the MMO the power to issue compliance notices as an alternative to prosecution where there are breaches of licence conditions, but this procedure cannot be used where serious harm to the environment or to human health has occurred or is likely to occur. Clause 81 allows the MMO to serve remediation notices where serious harm has been caused to human health or the environment or interference with legitimate users of the sea which may require damage to be put right. A remediation notice may not be served unless the MMO has first consulted the person on whom they intend to serve it. It will be an offence not to comply with such a notice.

Clause 89 sets out a defence under this chapter if the person charged with an offence can show that they took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

Chapter 5 of Part III contains provisions obliging the MMO to maintain public registers of information and issue regulations relating to its availability. The clause sets out exceptions in relation to state security and commercial confidentiality.

A final important provision of this part of the Act is the power to be given to MMOs to serve stop notices in relation to marine activity, whether licensed or not. Such notices will require the person to cease carrying on the activity complained of. The circumstances in which the notice can be served are the same as those allowing an enforcement to be served. It is an offence to fail to comply with a stop notice.

Finally, there is a general power for the MMO to take remedial action where damage is being caused to the marine environment.

8 Acts of Parliament created to regulate the use of individual harbours.
9 www.opsi.gov.uk/ACPS/acts1998.

MARINE CONSERVATION ZONES

Part 4 of the Bill sets out the statutory framework for the creation of marine conservation zones (MCZs). This regime will replace the existing powers to create marine nature reserves (MNRs) under the Wildlife and Countryside Act 1981 that in practice delivered very little. Existing MNRs will be converted into MCZs. It is envisaged that a network of MCZs will complement the Natura 2000 network¹⁰ and fulfil the UK's commitment under the OSPAR Convention.¹¹ The legislation relating to MCZs will apply to all UK waters except territorial waters of Scotland and Northern Ireland.

Defra has asked Natural England¹² and other appropriate agencies to develop programmes to enable designation of MCZs by 2012. This will involve stakeholder participation using available scientific evidence and taking economic and social issues into consideration. Defra will make final decisions as to site selection.

Clause 105 of the Bill therefore allows the creation of MCZs by the appropriate authority, ie Defra. Territorial waters off Scotland and Northern Ireland are excluded. Clause 105 provides that MCZs may be created if it is thought desirable to do so for the purpose of conserving marine flora or fauna; marine habitats or types of marine habitat; or features of geological or geomorphological interest. As far as flora and fauna are concerned, the trigger may be either limited numbers of a given species or a limited number of locations where the species is found. The diversity of species may be taken into account irrespective of whether individual species in the zone are threatened. The designating authority may also take into consideration economic and social consequences.

Clause 107 contains provisions as to consultation that must be undertaken except in an emergency. There is a duty to consult with the Crown and statutory conservation bodies, those with property rights that may be affected, and a range of other public bodies that may be concerned including the MMO.

Clause 108 states that the order must define the boundaries of the MCZ, state the protected features and the conservation objectives for it. The boundary of the MCZ may go up to the mean high water mark or beyond in exceptional circumstances, and may include islands and sand banks if appropriate. Correspondingly, Clause 133 provides that where appropriate the boundaries of sites of special scientific interest may extend outward from the mean high water mark.

Clause 109 contains statutory duties imposed on public authorities whose functions may be capable of affecting protected features in MCZs to exercise their functions so as to further the conservation objectives of the MCZ or, if that is not possible, in a manner least likely to hinder those objectives. Clause 110 goes on

10 The ecological network of protected areas in the EU being established under the Habitats and Birds Directives.

11 Convention for the Protection of the Marine Environment of the North-East Atlantic, entered into force March 1998.

12 Natural England came into being as a result of the Natural Environment and Rural Communities Act (NERC Act) in October 2006, amalgamating English Nature and the Countryside Agency.

to impose obligations on public authorities granting authorisations capable of affecting a MCZ. The applicant for the authorisation must either satisfy the authority that there is no significant risk of the act to be authorised hindering the conservation objectives or, if the act to be authorised cannot be carried out without hindering that objective, that it is in the public interest to grant the authorisation and that the applicant will undertake measures of equivalent benefit to the harm that will be caused.

Clauses 111 and 112 cover the involvement of nature conservation bodies in relation to MCZs. These bodies are able to give advice to public bodies in respect of a range of matters relevant to MCZs, and to request an explanation where the conservation body considers either that there has been a breach of the duty in clauses 109 or 110 or a failure to follow advice given under clause 111.

Clause 113 gives the MMO power to make conservation orders in relation to MCZs. These may regulate human activity and control the use of vessels. These orders are akin to byelaws. There are provisions for consultation before any order is made, except in case of emergency. There is an additional power to make interim orders if it is felt necessary to protect a MCZ while the consultation process goes on.

Clause 123 creates an offence of contravening a provision of a conservation order, and allows a penalty of up to £50,000 to be imposed. There are further detailed provisions as to penalties, including powers to impose fixed penalties which can be paid without the person being fined going to court.

Clause 129 allows appropriate authorities to accept undertakings in cases where they have reason to believe that a person has committed a conservation offence. The action specified in the undertaking must be one or more of:

- action to secure the offence does not continue or recur
- restoration of the position to what it was before the offence occurred
- compensation being made for the harm caused
- action to benefit any person affected by the offence.

Compliance with the undertaking prevents the person in question of being convicted of the conservation offence.

INSHORE FISHERIES AND CONSERVATION AUTHORITIES AND FISHERIES

Parts 6 and 7 of the Bill deal with the creation of new Inshore Fishery and Conservation Authorities (IFCAs) and amendments to existing fisheries legislation. IFCAs will replace the Sea Fisheries Committees. The intention is that IFCAs will pay greater attention to the environmental impacts of fishing as well as considering the economic and social benefits of managing fish stocks.

IFCAs' districts will extend around the coastline of England and Wales for six nautical miles and also into estuaries, taking over regulation of these from the Environment Agency. Fishing beyond the six mile limit

continues to be regulated predominantly by the EU's Common Fisheries policy.

Clause 138 contains the power to create inshore fisheries districts which refer to one or more local authority districts contiguous to the coast. There are obligations to consult with relevant authorities in relation to the creation of these districts. Clause 139 provides that there shall be an IFCA for each fishery district. Membership of IFCAs shall include members of adjacent local authorities, persons appointed by the MMO, and other persons. All such members must either be acquainted with the needs and opinions of the local fishing community or have knowledge of marine environmental matters.

Orders for the creation of IFCAs must include provisions for the appointment, conduct, and procedure of the IFCA. Orders may in due course be amended or revoked, and the Act sets out the procedures to be adopted when doing so.

Sections 142 onwards set out the duties imposed on IFCAs. Each authority must manage the exploitation of sea fisheries resources in its district. Sea fishery resource is defined to mean 'any living animals or plants ... that habitually live in the sea including those that are cultivated there'. Species such as salmon and sea trout that are already regulated by the Environment Agency are excluded.

In performing its duties, an IFCA must ensure that exploitation of sea fishery resources is carried on in a sustainable way; balance the economic and social benefits of exploitation against protection of the marine environment; and seek to balance the needs of different people engaged in the exploitation of the resource. The IFCA must ensure that the conservation objectives of any applicable MCZ are furthered.

Clause 144 gives byelaw-making powers to IFCAs, subject to approval by the appropriate national authority. There is a power to hold an inquiry if deemed appropriate. Byelaws can be made under any one of five headings set out in clause 145, namely:

1. prohibiting or restricting the exploitation of sea fishery resources by reference to area, individual effort or time
2. prohibiting exploitation without a permit for a given activity and providing for fees for such permits
3. prohibiting or restricting the use of vessels, fishing methods, and fishing equipment
4. providing for the regulation, protection and development of shell fisheries
5. provisions in relation to oyster cultivation.

IFCAs have the power to make emergency byelaws where they consider there is an urgent need in circumstances that could not have been foreseen. Such byelaws may not be for more than 12 months, unless extended with the consent of the relevant national authority. National authorities may revoke or amend byelaws made by IFCAs if they are considered unnecessary, inadequate or disproportionate. Clause 149 contains provisions as to the procedures to be adopted in relation to the creation of byelaws by way of regulations made by national authorities.

Clauses 152 onwards set out offences in relation to byelaws. A person, including the master, owner or

charterer of a vessel, is guilty of an offence if he or she contravenes a byelaw. The maximum penalty is £50,000, significantly more than the £5000 maximum in existing legislation. Courts will also be able to order forfeiture of fishing gear or sea fishery resources relevant to the offence, or order a financial penalty in lieu of forfeiture. Where the offence involves the breach of a permit issued by the IFCA, the court may order revocation or suspension of that permit.

IFCAs may appoint enforcement officers (Clause 156) to enforce byelaws. These officers also have the powers of enforcement vested under the Sea Fish (Conservation) Act 1967 and the Sea Fisheries (Shellfish) Act 1967, as well as in relation to orders made under this Bill.

Clauses 158–161 set out the IFCAs' additional powers and duties. They have a power to restock public fisheries and a general power to do anything that appears necessary for the exercise of their powers. There is a duty to collect such statistics in relation to the exploitation of sea fisheries as are necessary for the performance of the sustainability duty as set out in Clause 142. There is also a duty to cooperate with other IFCAs and with other public authorities.

AMENDMENTS TO FRESHWATER FISHERIES LEGISLATION

As indicated above, the Bill significantly changes existing freshwater fisheries legislation to implement the recommendations of the 2000 Salmon and Freshwater Fisheries Review.¹³ These measures will apply only to England and Wales.

The Bill expands the definition of freshwater fish for the purposes of the Salmon and Freshwater Fisheries Act 1975 (SAFFA) to include smelt and lamprey, as well as allowing marine fish to be included in future by order made by the minister. Clause 185 amends section 1 of SAFFA to prohibit the use of specified instruments for these additional species and clause 186 amends section 2 to prevent the use of roe as bait or to be offered for sale in relation to these species. The licensing system under section 25 of SAFFA is also updated to reflect these changes.

Section 25 is further amended to allow the Environment Agency to operate a licensing system for 'licensable' means of fishing. These means of fishing are rod and line, historic installations, and other means of fishing that may be specified by order. Historic installations are defined to include salmon traps that have been in existence since at least 1868 when the first Salmon and Freshwater Fisheries Act was passed, and which have hitherto been outside the scope of the licensing regime. The amendment now allows the Agency to regulate these fisheries, for example by limiting the numbers of fish that can be taken. The purpose of defining licensable means of fishing is to distinguish these means from authorised fishing methods.

The amendment also increases the flexibility of the Agency to issue licences for different categories of fish and for types of water as well as geographical areas.

Section 26 (which allows the Agency to apply for limitation orders in relation to certain types of fishing) is amended to reflect the amendments to section 25, but it is provided that procedure does not apply to fishing by rod and line or by historic installation. Defra has indicated that the licensing system will initially apply to various types of salmon and trout nets, eel nets and baskets, and some fisheries operating under certificates of privilege from earlier legislation. Importantly, the clause seeks to amend existing provisions that require an inquiry to be held if there are objections to a proposed order to make such an inquiry discretionary.

Clause 189 creates a new section 27A and B in SAFFA, introducing an authorisation system for certain types of fishery that are considered to pose a higher risk to fish stocks or the aquatic environment. This system will complement the licensing system and apply to fishing methods that are not licensable as defined by the amended provisions of SAFFA.

Section 27A permits the Agency to authorise fishing for the range of species set out above by means other than licensable methods. The authorisation may be limited as to area and time and be subject to conditions. The Agency will have the power to vary or revoke an authorisation, but when doing so must have regard to the fisheries and the aquatic and marine environment in that area.

Section 27B creates two offences in relation to authorisations. First, it will be an offence to fish for or take fish by a means (other than licensable means) that may be authorised where the person fishing has no authorisation. Secondly, it is an offence for a person to possess an instrument with intent to use it for a means of fishing that can be authorised. Penalties for these offences will be a fine of up to £50,000 if tried summarily and an unlimited fine if tried on indictment.

Defra has indicated that it envisages the authorisation system covering crayfish traps, eel racks, eel traps, coops, electric fishing, and stake nets, as well as fishing for scientific or management purposes.

Clause 196 introduces a new procedure for creating emergency fishery byelaws. At present it is not possible to create a byelaw without going through statutory consultation procedures. A new schedule 27 to SAFFA is proposed. Emergency byelaws can be made by the Agency where it considers that an event or likely event is or will occur which causes harm to relevant fish species; that the Agency considers that the byelaw will prevent or reduce such harm; that the byelaw is required urgently; and that the likelihood of the event could not have been foreseen.

An emergency byelaw will come into effect on the date specified in it, and there are obligations to notify ministers and publish the byelaw. Additionally, there are powers to amend and revoke these byelaws. Emergency byelaws will expire automatically after 12 months, if not before, and may only be extended with the approval of the relevant national authority.

¹³ <http://www.defra.gov.uk/fish/freshwater/sffrev.htm>.

There are also significant amendments to existing byelaw-making powers, which are contained in schedule 25 to the Water Resources Act 1990. First sub-para 3 of para 6 allowing the Agency to make byelaws as to close seasons or times is abolished. This ties in with the abolition of close seasons and times as a statutory requirement and leaves the Agency with complete discretion as to the imposition of restrictions on seasons and times of fishing. Also the byelaw making power as to the minimum size of fish that can be taken is amended to allow similar byelaws as to maximum size.

The machinery for introducing fish is given a major overhaul. At present all such introductions require a consent under section 30 of SAFFA. It is intended that the existing provisions of sections 28 and 30 will be replaced by new regulations authorised under clause 200 of the Bill. These regulations will apply to keeping fish in specified areas, and introducing or removing fish to or from such areas. The regulations give power to the Agency to issue permits for such activities. The clause sets out a range of powers in relation to the issue of permits, including the manner of application, the matters to be taken into consideration when considering the application, the imposition of conditions, provisions for revocation and amendment of permits, and exemption from the need to obtain permits.

Regulations will also make provision for criminal sanctions for failure to obtain permits. Defra has indicated that it expects to expand the scope of offences to include owners where the owners knew or ought to have known that an offence was being committed. In addition the maximum penalties are to be increased substantially (clause 200 (6)).

Practically speaking, what is envisaged is authorisation by reference to site rather than individual movements of fish. Each site would have a long-term consenting framework and any removal or stocking would require a consignment note to be lodged electronically with the Agency.

COASTAL ACCESS

The government has taken this opportunity to implement manifesto commitments to improved coastal access in Part 9 of the Bill. At present these measures only relate to England, but it is hoped that similar measures will be introduced for Wales.

Clause 272 imposes a coastal access duty on the Secretary of State and Natural England, by reference to two objectives. First, that there is a route along the whole of the English coast on foot or by ferry that passes over land that is accessible to the public. Secondly, that a margin of land is made accessible to the public for the purpose of enjoyment of that land in conjunction with the coastal route. Accessibility is defined by reference to definitions in the Countryside and Rights of Way Act 2000 (CROW).

Clause 273 provides that in discharging the duty, regard must be had to the safety and convenience of those using the access and the desirability of the route

following the periphery of the sea and affording views of the sea. It also provides that a balance must be struck between the need for access and the interests of any person with a relevant interest in the land. Clause 273 provides for Natural England to produce a coastal access scheme identifying how it will implement such access within 12 months of this part of the Act coming into force, and then exercise its duties in accordance with that scheme. The extent of the English coast and estuaries for the purposes of these sections are defined in Clauses 274 and 275.

There is a provision for Natural England to propose that a long distance path should be created under the provisions of the National Parks and Access to the Countryside Act 1949 in respect of coastal access routes, by adding new sections to the end of section 55 of that Act.

There are significant amendments to section 3 of CROW to extend the definition of access land to include coastal margin. This is achieved by excluding from the definition of open land both common land and coastal margin, meaning that coastal margin will be accessible irrespective of whether the land is open land. New section 3A of CROW gives the Secretary of State the power to specify the descriptions of land as coastal margin. Such orders must be approved by resolution of both Houses of Parliament. The section goes on to provide detailed provisions in relation to such orders.

The Bill sets out provisions in CROW relating to such matters as access, maintenance, the erection and maintenance of signs, powers of entry, and appeals that will be applicable to coastal routes. Clause 287 removes any liability from Natural England for negligence for its proposals for access failure to maintain signage and failure to restrict access to coastal routes. Likewise the effect of the Occupiers' Liability Act 1984 is disapplied in relation to owners over whose land coastal routes pass.

RESPONSES TO THE BILL

What has the response been to the draft Marine Bill? Given the length of time that it has been in preparation and the publication of the white paper last year, the Bill holds few surprises. Its broad thrust and, in particular, the creation of the MMO and IFCA, the marine planning regime and marine conservation zones, seem to have been universally welcomed across all sectors.

However, a number of reservations have been expressed. The Bill's geographical scope is one. The devolution picture is not clear, with the extent of devolved functions being different in the case of Wales, Scotland, and Northern Ireland, and also between inland waters and those out to 200 miles. As Anne-Michelle Slater pointed out in her article,¹⁴ the marine environment was much lower down the political agenda when the devolution settlement was first made, meaning that little thought was given to the possible strategic need to have a common policy for both English and Scottish waters.

¹⁴ Slater (n 1).

In Wales and Northern Ireland, the main framework of the marine planning system will apply. Scotland, however, is not included. While it is likely that the Scottish Parliament will legislate to create a broadly similar system, it seems something of a missed opportunity not to have a single vision for all British coastal waters. The parliamentary joint committee on the draft Marine Bill has strongly recommended that the proposed marine policy statement should be one that is endorsed by all devolved administrations as well as the Secretary of State, and that the Bill should include a machinery for achieving this.¹⁵ The Marine Conservation Society echoes this view.

A second area of concern is that the Bill is light on duties. The joint committee states that 'we are concerned that the Bill places very few statutory duties on the Secretary of State or other bodies'. It goes on to recommend that no fewer than nine further duties should be introduced to the Bill. These include duties on the MMO to further sustainable development; to promote the publicly-funded production of marine data and to make that data available to the public; a duty to ensure that marine plans are compatible with other plans; a recommendation that IFCA's should have a duty to further the conservation of coastal and marine flora and fauna; and also a duty to ensure that an environmental impact assessment is undertaken where a new type of fishing activity is applied for.

Some of these duties mirror duties that already exist in the Environment Act 1995¹⁶ relating to the regulation of the land-based environment. Given the limited opportunities for a legal challenge to the Act, the present lack of duties limits still further the ability to require relevant agencies to use their powers properly. For a Bill of such importance, it is essential that the statutory agencies responsible for delivering the government's vision are given effective powers but equally are subject to clear duties.

Greenpeace criticises the government for hiding behind the EU's Common Fisheries Policy and thereby failing to give the MMO and other agencies real teeth to tackle unsustainable fishing head-on. It considers that the marine conservation system does not go nearly far enough, and calls for 40 per cent of the world's seas to be fully protected marine reserves.

The Marine Conservation Society (MCS) is also concerned about the effectiveness of the proposed marine conservation zones to deliver a network of

protected areas. It wishes to see a duty imposed to designate such networks. The MCS further criticises what it sees as a get-out clause exempting government and industry from liability where damage is caused to a conservation zone where it is impossible or impractical to avoid it.

From an industry point of view, the British Wind Energy Association has broadly welcomed the Bill but expressed concerns that adequate resources are put into the provision of data, on the basis of which regulation of marine activity by licences is controlled. It also urges the government to deliver a transparent system and one that is flexible enough to embrace technological developments in the future.

The Crown Estates Commissioners, as owners of substantial areas of sea bed, express a fear that the Marine Bill may hinder commercial and environmental conservation developments while the new system is being developed, restricting the ability of the Commissioners to deploy sustainable business practices and to meet their statutory obligations to maximise the value of their assets to the benefit of the taxpayer.

A Bill of this nature was, of course, always going to be challenged by environmental groups for not going far enough and by industry as restricting economic activity by protecting the environment too much. The test will be whether the Bill strikes the right balance. It seems certain that climate change and economic exploitation of the sea are bound to increase the risk of serious harm to the marine environment. However, exploitation of the sea by industry for wind and wave power projects, as well as use of the sea bed for gas storage and carbon sequestration are growth areas that themselves offer environmental benefits as well as potential costs.

It seems that much will depend on the robustness of the MMO, and specifically the financial and human resources that are made available to it so that it can achieve an effective knowledge base to underpin its policy and decisions. Those long in the tooth of environmental legislative history know that the landscape is littered with the bones of good statutory intentions that failed because they were never fully implemented or because they were not properly resourced. Recent publicity about the £200 million funding cuts to Defra which affect a whole range of Defra-sponsored organisations, including Natural England and the Environment Agency, hardly inspires confidence.

15 www.publications.parliament.uk/pa/st200708.

16 http://www.opsi.gov.uk/acts/acts1995/Ukpga_19950025_en_1.htm.

The Act set up the Environment Agency, the Scottish Environment Agency, and the National Park Authorities.

MARCIC RULES OK? LIABILITY IN THE LAW OF NUISANCE IN SCOTLAND FOR ESCAPES FROM OVERLOADED SEWERS

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INTRODUCTION¹

The purpose of this article is to discuss the potential liability in the law of nuisance of Scottish Water for harm which is caused by escapes of sewage from public sewers which, although perfectly adequate when they were originally constructed, become overloaded with the passage of time, simply because of more properties discharging into the sewer.

As far as English law is concerned, liability for escapes which are caused by overloaded sewers was decided by the House of Lords in the leading case of *Marcic v Thames Water Utilities Ltd.*² The facts of the case could not have been simpler. Marcic was a customer of Thames Water Utilities Ltd. (TWUL) which was a statutory water and sewerage undertaker. Under section 94 of the Water Industry Act 1991 TWUL had a duty to maintain its sewers effectively and also to drain its area. Unfortunately, since 1992, during periods of heavy rain, Marcic's house had been seriously affected by persistent external flooding and the back flow of foul water from TWUL's sewers. Whereas, originally, the sewer had been properly constructed and had fulfilled its task, with the passage of time the sewer had become overloaded because more properties discharged into it. Major surface drainage work was necessary in order to alleviate the risk of flooding. Although it was technically feasible for TWUL to carry out those works given the necessary funding, there simply was no prospect of such funding becoming available in the foreseeable future.

Marcic claimed that the flooding constituted a nuisance at common law and, furthermore, that the flooding of his property also infringed his rights under Article 8(2) of the European Convention of Human Rights (the 'Convention') which guarantees the respect for private and family life, and, also Article 1 of the First Protocol of the Convention which guarantees the right to peaceful enjoyment of one's possessions, both of which are made applicable in the United Kingdom by the Human Rights Act 1998. At first instance it was held that, whereas at common law (that is to say, in terms of

both the law of nuisance and the rule in *Rylands v Fletcher* and an action for breach of statutory duty) a statutory undertaker was not liable to a person who sustained damage in its area as a result of the undertaker's failure to fulfil its statutory duty of carrying out drainage works necessary to prevent a nuisance which it had neither created nor caused, the undertaker could, however, be subject to liability under the Human Rights Act. In this respect TWUL's failure to prevent the flooding and resultant damage flouted Marcic's rights in terms of Article 8(1) of the Convention and also the peaceful enjoyment of his possessions in terms of the First Protocol of the Convention. In the view of the court the value of M's property must have been seriously affected by the nuisance of which he complained. That in itself constituted partial expropriation of M's property in terms of the Convention. The public interest defence in terms of Article 8(2) would apply if TWUL could prove that the flooding of Marcic's property was necessary to protect TWUL's other customers. The court held that TWUL had failed to prove this. What is also of interest as far as the subject matter of this article is concerned is that the nuisance in question was characterised as a 'continuing' nuisance. Therefore, notwithstanding the fact that the adverse circumstances had remained unchanged since before the date when the Human Rights Act came into force, namely, October 2000, TWUL was liable under the Act because it had continued the nuisance by its failure to suppress the relevant adverse state of affairs.

TWUL appealed against the decision to the Court of Appeal which held TWUL liable in nuisance in that, in the view of the court, TWUL should be regarded, in the eye of the law, simply as an owner of land by virtue of owning the relevant sewers. In turn, such ownership automatically brought with it a duty to do that which was reasonable in all the circumstances in order to prevent hazards on the land from causing damage to a neighbour. In effect, liability was governed by the law which was set out in the trilogy of cases of *Sedleigh-Denfield v O'Callaghan*,³ *Goldman v Hargrave*⁴ and *Leakey v The National Trust*.⁵ These cases establish the principle that an occupier of land is liable in law if he fails to abate a nuisance on his land, provided he knew, or ought to have known, of its existence and, furthermore, he had the wherewithal to abate the

¹ This article is based on a paper which was presented to the Environmental Law section of the Society of Legal Scholars at its annual conference held at the London School of Economics and Political Science 15–18 September 2008. The author would like to thank Christina Ashton, Alan Reid, Eleanor Russell and Duncan Spiers for commenting on an earlier draft of the article. Thanks are also due to Sarah Hendry. However, all errors, omissions and other shortcomings remain with the author.

² [2004] 1 All ER 135.

³ [1940] AC 880.

⁴ [1967] 1 AC 645.

⁵ [1980] 1 All ER 17.

nuisance.⁶ In the instant case TWUL had failed to demonstrate that it was not reasonably practicable for it to prevent the nuisance and was, therefore, liable. The court went on to hold that Marcic's entitlement to damages under common law displaced any right which he would have under the 1998 Act. TWUL appealed to the House of Lords.

On appeal, the House of Lords held⁷ that the flooding of Marcic's premises did not constitute an actionable nuisance at common law on the basis that to so hold would run counter to the intention of Parliament enshrined in the Water Industry Act 1991. Furthermore, it was inappropriate to treat TWUL as an ordinary owner of land in terms of liability in nuisance law since sewerage undertakers such as TWUL had no control over the volume of water which entered their sewerage system. It was, therefore, unlikely that Parliament had intended that every householder whose property was flooded could successfully sue TWUL whenever flooding occurred. In the last analysis, statute overrode the common law. Therefore, the only remedy which was available to Marcic was under section 18 of the Water Industry Act 1991 which laid down detailed machinery for redress in the event of an undertaker failing to drain its area effectually. However, section 18(8) of the Act did not preclude a civil action in respect of an act or omission otherwise than by virtue of its being a contravention of a statutory requirement enforceable under section 18 of the Act. Essentially, Marcic had claimed that the requisite adverse state of affairs of which he complained ranked as a nuisance, and therefore, fell within the exception to section 18. However, the House rejected this contention on the grounds that the nuisance in question was precisely a state of affairs which was covered by the Act and, therefore, fell to be dealt with solely by the machinery which was provided by the Act. An action in nuisance was, therefore, inappropriate.

Lord Nicholls was simply of the view that there was, 'no room' for a common law cause of action.⁸ His Lordship did not, however, expressly deny that the adverse state of affairs which constituted the complaint (that is a regurgitating sewer) was *per se* incapable of constituting a nuisance in law.⁹

Lord Hoffmann held that the learning on the law of nuisance which was contained in *Sedleigh-Denfield*, *Goldman* and *Leakey*, which the Court of Appeal had held was applicable to escapes from public sewers, was relevant solely in relation to disputes between neighbouring proprietors of land.¹⁰ Therefore, in his Lordship's view, such law was redundant when (as in

the instant case) one was dealing with the capital expenditure of a statutory undertaking which provided public utilities on a large scale. Furthermore, the issue of the requisite priorities which should be adopted by TWUL *vis a vis* the provision of new sewers etc should not fall to be determined by a judge. That would subvert the intention of the 1991 Act.¹¹

In the last analysis, *Marcic* is a deceptively difficult decision. The Court of Appeal had certainly made heavy weather of the concept of 'adoption' and 'continuation' as far as the escape from the sewer in question was concerned. Essentially, the court decided that the effect of TWUL becoming responsible, by means of statutory provision, for operating the offending sewer network, was that TWUL had automatically either adopted or continued (or both) the nuisance comprising the ineffective sewer and was, therefore, liable in law for the consequences of any escape. In short, the learning in *Sedleigh-Denfield*, *Goldman* and *Leakey* was applicable in the public law domain. The fact that TWUL inherited the offending sewer was tantamount to its adopting the adverse state of affairs. The House of Lords refused to follow this reasoning.

However, unfortunately, the House of Lords (with the exception of Lord Hoffmann) did not address the important point as to whether, apart from the provisions of section 18 of the Water Industry Act 1991, the adverse state of affairs would have ranked as a nuisance in law.¹² Rather, the majority of the House seemed simply content to hold that the adverse state of affairs fell under the evil which was covered by section 18 of the Act and, furthermore, such a state of affairs did not constitute an exception which could be dealt with other than by way of the machinery provided by the Act. In the last analysis, as far as the law of England is concerned, *Marcic* ranks as authority for the proposition that a public utility is not liable in law for simply remaining impassive in the face of escapes from its sewers, when such escapes are caused by the sewers becoming overloaded with the passage of time.

However, in the author's view, the House of Lords in *Marcic* accorded too little discussion as to whether the law of nuisance was applicable to regurgitating sewers. Also, too much store was laid by the principles of adoption and continuation¹³ of the 'nuisance' at the expense of the House identifying precisely the relevant adverse state of affairs which was the subject matter of the action.

In considering whether the decision in *Marcic* would represent the law of Scotland, and since this article essentially concerns the potential liability of a public authority for remaining impassive in the face of an overloaded sewer, it is necessary to consider the stance taken by the courts in relation to omissions in general.

6 For a general discussion of the decision of the Court of Appeal in *Marcic* see R Buckley 'Nuisance and the Public Interest' (2002) 118 LQR 508.

7 [2004] 2 AC 42.

8 *ibid* at 58.

9 As far as *Marcic's* claim under the Convention was concerned the House held that the claim failed in that it did not take sufficient account of the statutory scheme under which TWUL was operating the sewers which had given rise to the flooding. In determining the issue of liability a fair balance had to be struck between the interests of the individual and those of the community as a whole.

10 *ibid* at 64.

11 *ibid* at 66.

12 Even Lord Hoffmann did not give a detailed analysis of the relevance of the law of nuisance to the facts of the case.

13 For a discussion of the concept of continuation and adoption in the law of nuisance see B Parker 'A Continued Nuisance.' [2002] CLJ 260.

LIABILITY FOR OMISSIONS GENERALLY

As far as liability for pure omissions is concerned, it is trite law that the courts are not disposed to impose liability on the defender. The oft-cited example given by Eldridge to the effect that one can idly stand by and watch a baby to whom one is not related drown nearby in several inches of water, illustrates this point.¹⁴ This article, in effect, concerns the potential liability of Scottish Water in the law of nuisance for simply failing to take remedial action in respect of overloaded sewers. However, before focussing on the law of nuisance, since, as will be explained below, there is an overlap between the law of nuisance and negligence in terms of overloaded sewers, it is necessary briefly to examine the stance taken by the courts in relation to liability for omissions on the part of public authorities in terms of the law of negligence.

Unlike private individuals, public bodies owe their existence solely to statute. Public authorities are given powers to carry out a whole host of activities which range from the care of vulnerable children, repairing roads and fighting fires to apprehending criminals and protecting us from harmful food. As far as liability for pure omissions in general is concerned there is a marked reluctance as far as English law is concerned to impose liability on public authorities. The leading case on the subject is *East Suffolk Rivers Catchment Board v Kent*.¹⁵ In that case a public authority, which had statutory power to effect protective measures against flooding, negligently effected repair work to a protective wall, the upshot of which was that the plaintiff's land remained in a flooded condition longer than it would have if the wall had been effectively repaired. The House of Lords held, by a majority, that since the Board would not have been liable in negligence if it had decided simply to do nothing in relation to the wall, the Board was not liable for negligently attempting to repair the wall, the upshot of which was that it could not prevent the ingress of water into the plaintiff's land and the land remained flooded for longer than it would had the wall been effectively repaired. In the last analysis, the damage to the plaintiff's land was caused by the forces of nature and not by the defendant Board. However, Lord Atkin, in his dissenting judgement, was of the view that by dint of the Board's deciding to use its statutory powers to attempt to repair the wall in question, the Board owed a duty of care to the plaintiff to exercise such powers without negligence.¹⁶

More recently, in *Stovin v Wise*¹⁷ the plaintiff, who was riding a motorcycle, collided with a motor vehicle which was being driven by the defendant out of a junction. The plaintiff was seriously injured. The relevant highway authority knew that the junction was dangerous but refrained from using its statutory powers to negate that danger. The House of Lords held, in effect, that since the relevant passive inaction on the part of the highway authority was within its

statutory discretion it was under no common law duty of care to the plaintiff in respect of the injury which he received. Again, in *Gorringe v Calderdale MBC*¹⁸ the claimant was injured in a road traffic accident when her vehicle was in a head-on collision with a bus which had been hidden behind a sharp crest in the road until just before the appellant's vehicle reached the top. The layout of the road was conducive to making the appellant mistakenly believe that the bus was on the other side of the road. She alleged that the absence of suitable signage or road markings constituted a failure to maintain the highway in a safe condition and, therefore, the highway authority owed her a duty of care in law. The House of Lords held that the highway authority did not owe the claimant a duty of care in law. Whereas a highway authority could be liable at common law, *inter alia*, for dangers which it created, it could not be liable simply for failing to install road signs. Morgan expresses the view that *Gorringe* illustrates the traditional reluctance on the part of the courts to impose liability for pure omissions.¹⁹

Claimants in England have had similar lack of success in suing the rescue services in the law of negligence. In *Hill v The Chief Constable of West Yorkshire*²⁰ the mother of one of the victims of the 'Yorkshire Ripper' sued the Chief Constable for failure to apprehend the him. It was held that while it was reasonably foreseeable that if the Ripper was not apprehended he would inflict serious bodily harm on members of the public no duty of care was owed by the defendant. It was against public policy to impose a duty of care in such circumstances. Lord Keith stated:

A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime.

As far as potential liability for the rescue services is concerned in *Capital and Counties Ltd v Hampshire County Council*²¹ the Court of Appeal held that a fire brigade was not under a common law duty to answer a call for help. Furthermore, simply because a fire brigade attended the scene of a fire and failed to extinguish it did not confer a private action on a person who had suffered harm as a consequence.

The above cases emphasise the fact that as far as the law of England is concerned a public authority is not liable in the law of negligence for a pure omission in terms of the exercise of its powers.²² The crucial question, of course, is whether the above English case law is authoritative as far as the law of Scotland is

18 [2004] PIQR 521.

19 J Morgan, 'Slowing the Expansion of Public Authorities Liability' (2005) 121 LQR 43 at 44. For further discussion of *Gorringe* see E Russell, 'Effect of Statutory Powers and Duties on Common Law Liability' 2005 SLT 27.

20 [1989] AC 53.

21 [1996] 4 All ER 336.

22 See, however, *Kent v Griffiths* [2001] 1 QB 36. There an ambulance authority failed to turn up in time in response to a '999' call, the upshot of which was that the claimant suffered brain damage. The Court of Appeal held that the authority owed the claimant a duty of care. The acceptance of the call established the duty of care.

14 See Eldridge *Modern Tort Problems* at 12.

15 [1941] AC 74.

16 *ibid* at 91.

17 [1996] AC 923.

concerned. In *Duff v Highland and Islands Fire Board*²³ a fire in a chimney was attended to by a fire brigade, but it restarted after the brigade had left. The pursuer's premises were damaged as a consequence. The Outer House held that the fire authority owed the pursuer a duty of care to exercise its powers without negligence. Lord Macfadyen stated *obiter* that, on the question of causation of loss which would have been suffered if there had been no intervention, he preferred the dissenting view of Lord Atkin in *East Suffolk Rivers Catchment Board* to the effect that a public authority can be liable in relation to the exercise of its powers notwithstanding the fact that the exercise of the power makes matters no worse than would have been the case if the authority had simply decided not to exercise them at all.

Liability in negligence on the part of a fire authority was considered again in *Burnett v Grampian Fire and Rescue Service*.²⁴ In that case a fire broke out in a tenement flat in Aberdeen. Fire-fighters who were employed by the defenders, forced entry to the pursuer's flat in order to ascertain that the fire had not spread to that flat. However, the fire-fighters failed to make a thorough search for traces of fire, the upshot of which was that the fire spread to the pursuer's flat which was damaged. The pursuer claimed that the defenders owed him a duty of care in the law of negligence. However, Lord Macphail, in the Outer House, refused to follow the decision of the Court of Appeal in *Capital and Counties* and went on to decide that if the circumstances were as the pursuer claimed, the fire authority would owe the pursuer a duty of care in law. This was so because the law of Scotland drew no distinction between acts and omissions comparable to that which exists in English law between misfeasance and non-feasance.²⁵ In His Lordship's view there was no reported case so far as Scots law was concerned, in which a public authority could not be held liable in the law of negligence simply because it had failed to exercise a statutory power. In other words, the view that a public body which exercises statutory powers is liable only for damage which it causes if it makes matters worse, was not part of the law of Scotland – *East Suffolk Rivers Catchment Board* was not good authority as far as Scots law was concerned. However, the views of Lord Macphail in *Burnett* are technically *obiter* because the fire brigade had not acted impassively, in that it had gone into action by forcing its way into the pursuer's flat. By so doing the brigade had assumed responsibility to the pursuer and had thereby created a relationship with the pursuer. In other words, there was a sufficient relationship of proximity to ground a duty of care.²⁶

By way of conclusion as far as liability in the law of negligence is concerned a public authority may be liable for failing effectively to use its powers to remedy or mitigate the harm which is caused by a potentially harmful situation which falls within the scope of those powers.

23 1995 SLT 1362.

24 2007 SLT 61.

25 *ibid* at 67.

26 *ibid* 73.

SCOPE OF THE LAW OF NUISANCE IN SCOTLAND

In *Marcic* the House of Lords unfortunately failed to accord much discussion as to whether, apart from the relevant statutory background, a regurgitating sewer would have ranked as a nuisance in law. We will now consider whether an overloaded sewer would rank as a nuisance in the law of Scotland.²⁷

According to Smith a nuisance comprises an operation on the part of the defender which, taking into account the natural rights of his neighbours, is unreasonable or extraordinary on account of being unnatural, dangerous or offensive; and such operation must have caused material injury.²⁸ Walker, in turn, in taking a more general approach, regards nuisance as a general term which is employed rather loosely, to cover any use of property which causes trouble or annoyance to neighbours.²⁹ Buckley regards the unifying feature of the tort of nuisance to lie in its focus upon the particular *interest* of the plaintiff which it protects.³⁰ Essentially, the law recognises that a proprietor of land has a right to the free and absolute use of his own property, but only to the extent that such use does not discomfit or annoy his neighbour. In other words, the law recognises one's right to enjoy one's land by the law imposing a reciprocal duty on one's neighbour not to interfere with such enjoyment.³¹ The law of nuisance is, therefore, concerned with striking a balance between the competing rights or interests³² of proprietors in relation to land, each one of whom has the right to enjoy his land.³³ This conflict between proprietors of land is pragmatically resolved by the

27 There is a non-statutory scheme for compensation for sewer flooding in Scotland for individual properties – see the Water Industry Commission Customer Service Report 2002–3 at pp 42–43.

28 *Short Commentary on the Law of Scotland*, 1132.

29 D Walker, *Delict* 2nd ed (Edinburgh: W. Green, 1981) at 955.

30 *The Law of Nuisance*, 2nd ed (Butterworths, 1996) p 3.

31 See *Fleming v Hislop* (1886) 13 R (HL) 43 and *Watt v Jamieson* 1954 SC 56. Cf the approach which is taken by R Dworkin, *Taking Rights Seriously* (Duckworth, 1997) at 188, who argues that in most cases when we say that someone has a right to do something, we imply that it would be wrong to interfere with his doing it. See also R Dworkin, "Rights as Trumps in J Waldron, *Theories of Rights* (Oxford University Press, 1994) at 153.

32 See K Lulow, "Genetically modified organisms and private nuisance liability," (2005) 13 Tort L. Rev. 92 at 101. See also *Hunter v Canary Wharf Ltd* [1997] EnvLR 488 at 523 where Lord Cooke stated that as far as the impairment of the enjoyment of land was concerned, the governing principle was that of reasonable user – the principle of give and take.

33 See, eg the judgement of Lord Wright in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903 and that of Lawton LJ in *Kennaway v Thompson* [1980] 3 All ER 329 at 333. See J Steele, "Private Law and the Environment: Nuisance in Context" (1995) 15 LS 236 at 251; *Winfield and Jolowicz on Torts* 17th edn (2004) p510 and J Brenner, "Nuisance Law and the Industrial Revolution," (1974) 3 *Journal of Legal Studies* 403 at 440; and J McLaren, "The Common Law Nuisance Actions and the Environmental Battle-Well-Tempered Swords or Broken Reeds?" (1972) 10 *Osgoode Hall LJ* 505 at 528. In *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903 Lord Wright stated that, "a balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with." See also *Miller v Jackson* [1977] QB 966. In *Hunter v Canary Wharf Ltd* [1997] EnvLR 488 at 536 Lord Hope stated that "the function of the tort of nuisance is to control the activities of the owner or occupier of property within the boundaries of his own land which may harm the interests of the owner or occupier of other land."

courts imposing a duty on each not to use his or her land in such an unreasonable way that the pursuer's enjoyment of his land is prejudiced.³⁴

This duty is sometimes expressed in the maxim *sic utere tuo ut alienum non laedas*. The law was succinctly summarised by Lord President Cooper in *Watt v Jamieson*³⁵ where he stated:

The balance in all such cases has to be held between the freedom of a proprietor to use his property as he pleases and the duty on a proprietor not to inflict material loss or inconvenience on adjoining proprietors or adjoining property and in every case the answer depends on considerations of fact and degree ... *Any type* (emphasis supplied) of use which in the sense indicated above subjects adjoining proprietors to substantial annoyance, or causes material damage to their property, is *prima facie* not a reasonable use.

However, importantly, for the purposes of this article, the Lord President went on to state³⁶ that in deciding whether a nuisance existed, the proper angle of approach was from the standpoint of the victim as opposed to that of the alleged offender.³⁷ The approach which was taken by Lord Cooper in *Watt* therefore supports the view that as far as the law of nuisance in Scotland is concerned, less relevance is attached to the nature of the activity which gives rise to a nuisance than as to the manner in which the adverse state of affairs impacts on the pursuer. Further support for the broad approach accorded to what state of affairs can rank as a nuisance is seen in *Fleming v Hislop*³⁸ where Lord Selborne expressed the view that that which causes material discomfort and annoyance for the ordinary purposes of life to a man's house or to his property is to be restrained. Again, in *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council*³⁹ which concerned liability in relation to an isolated escape from a sewer, Lord Wheatley, in adopting an all-embracing approach to potential liability in nuisance, expressed the view that the law of nuisance applies without exception to provide a remedy for *any* relevant damage which is suffered by a neighbouring proprietor as the result of *any* type of use of adjoining property.⁴⁰ This somewhat generous approach to liability in the law of nuisance was followed in the same case by Lord Fraser in the House of Lords. His Lordship stated that in determining liability for nuisance the proper angle of approach is from the standpoint of the victim.⁴¹ Of particular importance, in the context of this article, His Lordship expressed the view that the mere fact that the owner (that is the owner of the property which is adversely affecting the enjoyment of the pursuer's property) is a public authority cannot by itself affect the ground on which

he is liable for nuisance at common law. In other words, in sharp contrast to the approach which was taken by the House of Lords in *Marcic*, Lord Fraser's approach in *RHM* supports the view that the general principles which apply in the law of nuisance should apply to public authorities in relation to escapes from sewers.

Therefore in conclusion it seems that a regurgitating sewer can rank as a nuisance in law and, secondly, a public authority which owns such a sewer is to be regarded as any other occupier of land as far as the law of Scotland is concerned.

We will now examine first, English and secondly, Scottish cases which relate to liability for overloaded sewers.

LIABILITY FOR OVERLOADED SEWERS IN ENGLAND

There are a number of English cases which were decided in the Victorian era consisting of claims which were brought by proprietors of premises which have become flooded by virtue of sewers becoming overloaded with the passage of time. For example, in *Stretton's Derby Brewery Co v Mayor of Derby*⁴² a local authority had, during the middle of the nineteenth century, constructed a sewer under a road within its district. Many years later a brewery was erected at the side of the road. Pursuant to the relevant public health legislation the drains of the brewery discharged into the sewer. The sewer was perfectly adequate when it was originally constructed. However, with the passage of time the sewer became overloaded, and, on a number of occasions, the brewery became flooded. The proprietors of the brewery raised an action against the local authority for an injunction and also for damages. The plaintiffs failed. Romer J held that the local authority had not been negligent in allowing the sewer to become overloaded. In reaching his decision His Lordship set store by the fact that the flooding would not have occurred if the plaintiffs predecessors in title had not connected their drains with the sewer in question.⁴³ It was also important that the defendant local authority was, by statute, bound to allow the brewery drains to connect with the sewer in question.⁴⁴

His Lordship then went on to state that when a public body carried out works for the benefit of the public or a section of the public, and a member of the public, in exercise of his statutory rights, uses those works and as a result, suffers damage, the rights of that member and the liability of the public body are to be ascertained not by considering how matters would stand if the parties could be regarded as strangers but solely by reference to the statutes under which the works were made, maintained and enjoyed. In order to determine whether the public authority was liable under such circumstances it was necessary to ascertain whether Parliament had intended liability to lie either by express provision or reasonable intention. In the

34 N Whitty, "Reasonable Neighbourhood: The Province and Analysis of Private Nuisance in Scots Law." 1982 JLS 497 at 500. See also G Cross, "Does Only the Careless Polluter Pay?" (1995) 111 LQR 445 at 449.

35 1954 SC 56 at 58.

36 *ibid* at 57.

37 This approach was approved by the First Division in *Lord Advocate v The Reo Stakis Organisation Ltd* 1981 SC 104 at 108.

38 (1886) 13R 43 at 45.

39 1985 SC(HL) 17.

40 *ibid* at 25-26.

41 *ibid* at 43.

42 [1894] 1 Ch 431.

43 *ibid* at 441.

44 *ibid* at 442.

last analysis, the relationship between the plaintiff and the defendant local authority deflected liability at common law. *Stretton* is, therefore, authority for the proposition that in terms of escapes from sewers a local authority stands in a different position to a private individual. However, the court failed to discuss the fundamental question of whether the adverse state of affairs in question ranked as a nuisance.

In *Robinson v Workington*⁴⁵ on facts which were similar to those in *Stretton*, Lopes LJ in the Court of Appeal expressed the view⁴⁶ that in general no right was given to an individual against a public body in respect of an act of non-feasance, that is to say there was no liability for the local authority simply remaining impassive in the face of the relevant adverse state of affairs, namely a regurgitating sewer. However, there was an even stronger case for denying a private individual a remedy if, in the same Act of Parliament which creates the duty in question, a remedy is found for non-feasance on the part of the local authority. In the instant case the plaintiff had the right to complain to the Local Government Board in relation to the damage which was inflicted by the regurgitating sewer. Another reason for denying the plaintiff a remedy was the fact that if a private individual was allowed the right to sue a local authority for damages there was no guarantee that the money awarded would be used to improve the adverse state of affairs. In the last analysis, therefore, the plaintiff failed in his action.⁴⁷

In *Pride of Derby Angling Association Ltd v British Celanese Ltd*⁴⁸ sewage from the local authority defendant's sewage works had caused a river to become polluted. Whereas the works were adequate at the time of their construction, with the passage of time by virtue of having to deal with sewage from more premises, the works became ineffectual. It was held by the Court of Appeal that no liability lay in the law of nuisance for a local authority simply remaining passive in the face of a sewer becoming overloaded with the passage of time. The only remedy which a person who suffered injury by reason of the escape from the sewer was by way of complaint to the Minister of Health. However, of import was the fact that whereas the court held that the defendant local authority had neither adopted nor continued the nuisance in question, the relevance of the common law rules of nuisance to the facts of the case was not rejected.⁴⁹

A year later, in *Smeaton v Ilford Corp*⁵⁰ the plaintiff's premises were damaged when effluent escaped from an overloaded sewer which had become ineffective

with the passage of time. Upjohn J was of the view that the learning in *Sedleigh-Denfield v O'Callaghan* was applicable to the liability of local authorities for nuisance caused by overloaded sewers.⁵¹ However, His Lordship went on to hold⁵² that the overloading in question had not been caused by any act on the part of the defendant authority. The overloading of the sewer and the subsequent damage to the plaintiff's premises had been caused by the fact that the local authority had been bound to permit occupiers of premises to connect to the sewer. In His Lordship's view it was not the sewer which constituted the nuisance but simply the fact that the sewer had become overloaded. The plaintiff had, therefore, failed to establish that the defendant had either caused or continued the nuisance in question. However, there was little discussion as to whether the conventional rules of the law of nuisance were applicable to determining liability for regurgitating sewers. *Smeaton* is interesting in that it illustrates the difficulty which the courts have traditionally experienced in identifying the precise state of affairs which constitute a nuisance.

The approach of the English courts to liability for escapes from overloaded sewers was reviewed by the House of Lords in *Marcic* in which, as explained above, the House held that the common rules governing liability in nuisance between neighbours was inapplicable in relation to liability of public authorities for overloaded sewers.

We now examine how the Scottish courts have decided cases concerning overloaded sewers.

LIABILITY FOR OVERLOADED SEWERS ETC IN SCOTLAND

Professor Whitty expresses the view that it is well-established that, in the absence of negligence, a local authority is not liable in the law of nuisance for damage which is caused by escapes from overloaded sewers. In the learned author's view the English cases, which have been discussed above, also represent Scots law.⁵³ Unfortunately, no Scottish caselaw is cited to support this view. Is Scots law indeed four-square with English law in relation to damage which is caused by overloaded sewers?

In *Gourock Ropework Co Ltd v Greenock Corp*⁵⁴ the facts of the case were that a mill lead which passed through a site (which was owned by a local authority) became blocked by detritus as it passed through ground which was owned by the authority. The mill lead overflowed and flooded the pursuer's premises. Lord Fraser approved⁵⁵ the learning in *Sedleigh-Denfield* as being applicable to the facts of the case. However, since the defender lacked either knowledge, or the means of knowledge, of the existence of the relevant adverse state of affairs, the defender was not

45 [1897] 1 QB 619.

46 *ibid* at 622.

47 See also *Pasmore v The Oswaldtwistle UDC* [1898] AC 387. In that case it was held that the duty which was imposed on a local authority under s 15 of the Public Health Act 1875 to make such sewers as may be necessary for effectual draining of the district could not be enforced by an action of mandamus brought by a private person. The only remedy for neglect of the duty lay by way of complaint to the Local Government Board.

48 [1953] 1 All ER 179.

49 For example Denning LJ (as he then was) accepted (at 203) that the learning in *Sedleigh-Denfield v O'Callaghan* was relevant to the facts of the case.

50 [1954] 1 All ER 923.

51 *ibid* at 927.

52 *ibid* at 928.

53 *The Laws of Scotland, Stair Memorial Encyclopaedia* 'Nuisance' Re-Issue at para 122.

54 1966 SLT 125.

55 *ibid* at 128.

liable in nuisance. Furthermore, whereas *Gourock Ropework* did not, as stated, concern liability for escapes from overloaded sewers, the case is of importance in that His Lordship was of the opinion that, as far as the law of Scotland was concerned, a nuisance was established if material damage was caused to one's property by deleterious substances which came from the property of another. It was necessary, therefore, to adopt a victim-centred approach to the adverse state of affairs. This case also supports the view that a local authority does not enjoy special protection in the law of nuisance in relation to damage which is caused by escapes from its land.

Similarly, in *Bybrook Barn Garden Centre Ltd v Kent*⁵⁶ the defendant's predecessors had constructed a culvert which impeded the natural flow of a stream. At the time when the culvert was constructed it was adequate to deal with the volume of water which flowed through it. However, with the passage of time the volume of water which flowed through it increased and the culvert became unable to take the water flowing down into the stream. On one occasion this caused the stream to burst its banks and flood the claimant's premises. The Court of Appeal held that the local highway authority was liable in nuisance on the basis that once the authority became aware that the culvert was inadequate the local authority came under a duty to remedy the situation. Of importance was the fact that Waller LJ stated⁵⁷ that statutory bodies did not occupy a special position as far as liability for nuisance was concerned unless statute put them in that position.

In *Lord Advocate v The Reo Stakis Organisation Ltd*⁵⁸ the pursuers averred that they suffered serious structural damage to their property as a result of building operations which were being carried out nearby on behalf of the defender. It was held by the Inner House that the proper angle of approach in relation to an alleged nuisance was from the standpoint of the victim of the loss or inconvenience, as opposed to that of the alleged offender. Furthermore, if any person uses his property to occasion serious disturbance or substantial inconvenience to his neighbour's property it was irrelevant by way of a defence that the defender was making normal or familiar use of his property.⁵⁹ A similar approach was adopted by the Supreme Court of Canada in *Royal Anne Hotel Co Ltd v Ashcroft*.⁶⁰ In that case there was an escape from a sewer which was operated by the defendant municipality which caused damage to neighbouring property. McIntyre JA expressed the view⁶¹ that the rationale of the law of nuisance was to reconcile conflicting uses of land. The law of nuisance protected the plaintiff against the unreasonable invasion of interests in land. Where the conduct of the defendant caused actual physical harm to the plaintiff's property, the mere fact

that such conduct may be of great social utility did not attract greater licence or immunity. Furthermore, there was no reason why a disproportionate share of the cost of a beneficial service should be visited upon one member of the community by leaving him uncompensated for damage caused by the existence of that which benefits the community at large.⁶² The fact that the defendant was a municipal authority placed it in no favoured position as far as the law was concerned.⁶³ Again, in *Tock v St John's Metropolitan Area Board*⁶⁴ the issue was whether the defendant municipal authority was liable for damage which had been caused by an escape from a sewer. La Forest J adopted a 'victim-centred' approach to the issue and expressed the view that if the parties concerned had been private individuals the damage would have clearly constituted a compensatable nuisance.⁶⁵ The main issue which had to be determined by the court was whether on a consideration of all facts of the case it was either reasonable or unreasonable to award compensation for the damage which was suffered. The plaintiff was entitled to compensation if he had suffered an unreasonable invasion of an interest in his land. The meaning of what constituted an unreasonable invasion could not turn on the sole question whether the defendant had taken reasonable care in the circumstances.⁶⁶ Again, this case illustrates a 'victim-centred' approach as far as liability in nuisance is concerned. Furthermore, the court did not accord special protection as far as the law of nuisance was concerned to a local authority.

However, the approach taken by the court in *Tock* contrasts with that taken in the Outer House in *Rae v Burgh of Musselburgh*.⁶⁷ In that case a householder claimed that a sewer to which his house drains were connected was inadequate for the effective draining of his house and that, as a consequence, his house became flooded from time to time. He sought a declarator against the local authority, claiming that it was in breach of its statutory duties to provide effective drainage in terms of the relevant public health legislation. The pursuer failed in his action. Lord Keith followed the English cases which have been discussed above and held that the pursuer was simply trying to compel the local authority to perform a duty which was owed to the public at large.⁶⁸ However, His Lordship stated *obiter*⁶⁹ that where, by statute, a local authority has been required to provide a particular service to the community and an individual has connected himself to the system and availed himself of its advantages, it would be unreasonable to hold the authority liable in nuisance. This decision would

56 [2001] EnvLR 543.

57 *ibid* at 550–51.

58 181 SC 104.

59 *ibid* at 108.

60 (1979) 95 DLR (3rd) 756.

61 *ibid* at 760.

62 *ibid* at 761.

63 *ibid* at 762.

64 (1989) 64 DLR (4th) 620.

65 *ibid* at 640.

66 *ibid* at 643.

67 1974 SLT 29.

68 *ibid* at 31. Lord Keith was of the view that the proper mode of redress was by way of invoking the procedures which are contained in s 146 of the Public Health (Scotland) Act 1897 (which is prospectively repealed by the Public Health (Scotland) Act 2008) or by way of complaint to the minister in terms of s 356 of the Local Government (Scotland) Act 1947 (repealed).

69 *ibid* at 32.

therefore support the view that the Scottish courts would be inclined to follow the English line of cases which was discussed above, including *Marcic*. However, it is important to note that the pursuer in *Rae* did not aver that the adverse state of affairs of which he complained ranked as a nuisance. Therefore, *Rae* does not take the law further forward in relation to whether a regurgitating sewer ranks as a nuisance in the law of Scotland.

More recently in *McGregor v Scottish Water*⁷⁰ the pursuer was a tenant of a house which was situated in a low-lying area near to a burn. The drainage from the area was achieved by a system of pipes. At times of high flow, sewage would discharge into the burn. Flooding had occurred in the area in 1985 and 1992. In 1994 after a heavy rainfall, the system could not cope and the pursuer's home was flooded. The pursuer attributed the flooding *inter alia* to the presence of new developments in the area. Although *Marcic* was not discussed in any detail, Lord McEwan, in allowing proof before answer, expressed the opinion⁷¹ that *Marcic* might 'hold some uncomfortable words' for the pursuer.

In *Viewpoint Housing Association Ltd v Edinburgh City Council*⁷² the pursuers were heritable proprietors of a sheltered housing complex which was situated roughly half a kilometre from where a burn was culverted through an embankment. The embankment and associated culverting had been constructed by the council's predecessors in its capacity as a roads authority. Since the construction of the culvert the defendant authority and its predecessors had been the relevant roads authority. It was alleged on the part of the pursuers that there had been a history of flooding in the area which was due *inter alia* to the inadequate size of the culvert. Of importance was the fact that Lord Emslie was not prepared to accept that as far as liability at common law was concerned a public body stood in a different position from a private individual.⁷³ His Lordship went on to distinguish *Marcic* on the basis that the relevant adverse state of affairs in the instant case, in sharp contradistinction to those in *Marcic*, derived from a state of affairs which the defenders and also their predecessors had created and maintained through the negligent exercise of their functions.⁷⁴ Furthermore, the remedial works which were required were of a local nature.⁷⁵

Lord Emslie allowed proof before answer, stating that the action was not bound to fail either on the ground of nuisance or in terms of the law of negligence *where that was the form of culpa on which the nuisance claim was based*. (Emphasis supplied).⁷⁶ In other words, there was no substantive difference in terms of the degree of fault required in order successfully to ground an action in either the law of negligence or nuisance. Lord Emslie therefore adopted a similar

approach to Lord Wilberforce in *Goldman v Hargrave*⁷⁷ where he stated:

[T]he tort of nuisance, uncertain in its boundary, may comprise a wide variety of situations, in some of which negligence plays no part, in others of which it is decisive. The present case is one where liability, if it exists, rests upon negligence and nothing else; whether it falls within or overlaps the boundaries of nuisance is a question of classification which need not here be resolved.

Indeed, Lord Emslie stated⁷⁸ that nuisance was a species of delictual liability which arose where interference with neighbouring property rights was *plus quam tolerabile*. On the same set of facts, however, cases of nuisance and negligence might run side by side. The judgement of Lord President Hope in *Kennedy v Glenbelle*⁷⁹ was quoted where he stated:

[L]iability for nuisance (does) not arise merely *ex domino* and without fault. The essential requirement is that fault or *culpa* must be established. That may be done by demonstrating negligence, in which case the ordinary principles of the law of negligence will provide an equivalent remedy.

In *Goldman* the adverse state of affairs which gave rise to the action arose when the defendant allowed a gum-tree which had been set on fire by lightning to remain on fire, the upshot of which was that the fire spread and damaged adjoining property. *Goldman* is, therefore, authority for the proposition that the duty which is owed by the occupier of land not to harm a neighbour in terms of the law of negligence by activities which take place on his land is four-square with the legal duty which is imposed on an occupier of land in terms of the law of nuisance not to allow an adverse state of affairs which exists on the land to harm his neighbour.⁸⁰

By way of conclusion on *Viewpoint*, that case is interesting in that Lord Emslie did not, as did the House of Lords in *Marcic*, specifically reject the learning in *Sedleigh-Denfield* on the basis that the learning in the latter was not applicable to a nuisance which was caused by a public authority.

The recent Court of Appeal case of *Birmingham Development Co Ltd v Tyler*⁸¹ is interesting in the context of the relationship between negligence and nuisance. In that case the claimant was developing a building site. The defendant owned land which was the site of a factory. The demolition of the gable wall of the building on the claimant's site exposed part of the flank of the wall of the building. The claimant took the view that an area of the brickwork on the flank of the wall of the factory presented an imminent danger to the workers on its site because the bricks were unbonded and a number had been dislodged. The claimant based its claim on the tort of private nuisance and also negligence. On appeal it was held that the

70 [2007] CSOH 11.

71 *ibid* at para 8.

72 [2007] CSOH 114.

73 *ibid* at para 13.

74 *ibid* at para 14.

75 *ibid* at para 14.

76 *ibid* at para 21.

77 [1967] 1 AC 645 at 657.

78 [2007] CSOH 114 at para 9.

79 1996 SC 95 at 100.

80 See also *Rees v Skerrett* [2001] 1 WLR 1541 at 1553 where Lloyd J in the Court of Appeal expressed a similar view.

81 [2008] EWCA Civ 859.

claimant had no cause of action against the defendant in nuisance since it was not sufficient for the former to prove that he was frightened by an adverse state of affairs. Rather, what was required was proof that the fear was well-founded. However, of greater importance as far as this article is concerned is that the Court of Appeal did not draw a distinction between the law of nuisance and common law negligence in relation to determining liability in relation to a state of affairs which existed on land and affected the enjoyment of adjoining property. The approach which was taken by the Court of Appeal was followed by Lord Cooke in the House of Lords case of *Delaware Mansions Ltd v Westminster City Council*⁸² which concerned liability for damage which was caused by the defendant local authority's tree roots damaging the foundations of the claimant's property which was situated in close proximity to the trees. His Lordship expressed the view that neither the label of nuisance nor negligence was to be treated as of any real significance. He stated:⁸³

In this field, I think the concern of the common law lies in working out the fair and just content and incidents of a neighbour's duty rather than affixing a label and inferring the extent of the duty from it.

CONCLUSIONS

By way of conclusion, the question is, does the learning in *Marcic* represent the law of Scotland? That is to say, is Scots law four-square with English law as far as escapes from overloaded sewers are concerned?

It would seem that an overloaded (or regurgitating) sewer the effluent from which inflicts damage on property which is served by the sewer would be capable of ranking as a nuisance in Scots law. However, in order for such a state of affairs to rank as a nuisance

in law *culpa* would be required to be proved on the part of the defender.⁸⁴ One, therefore, must consider whether Scottish Water's simply doing nothing to improve an overloaded sewerage system would rank as *culpa* or fault in terms of the law of nuisance. In relation to harm which is inflicted on the pursuer's property by emanations which are caused by the physical state of the defender's property *Goldman v Hargrave*, which is good law in Scotland, is authority for the proposition that the law of nuisance and negligence are at one with each other.⁸⁵

If *Burnett* is good law, does pure inaction on the part of a public authority in a '*Marcic* situation' render the defender liable in nuisance by imbuing such inaction with the stamp of culpability? If *Burnett* does, indeed, represent the law of Scotland as far as liability of public authorities in negligence for inaction is concerned, there would seem to be no theoretical difference between a fire brigade failing to exercise its statutory powers to extinguish a fire in a dwelling house and Scottish Water failing to protect one of its customers by failing to utilise its powers under the Sewerage (Scotland) Act 1968⁸⁶ to provide an effective sewerage system. Given that on the authority of *Sedleigh-Denfield*, in relation to an adverse state of affairs which derives from the defective state of land and which affects the enjoyment of neighbouring land, one need not draw a distinction between the law of nuisance and negligence and also, given the fact that pure passiveness in the face of an adverse state of affairs on the part of a public authority defender can rank as negligent in the law of Scotland, such a breach of duty of care in terms of the law of negligence could automatically satisfy the requirements of *culpa* in terms of the law of nuisance.⁸⁷ It would seem, therefore, that a regurgitating sewer would rank as a nuisance in Scots law.

82 [2002] 1 AC 321.

83 *ibid* at 333.

84 *RHM Bakeries v Strathclyde Regional Council* 1985 SLT 214.

85 See F McManus 'Nuisance from sewage works' (2008) 125 SPEL 21 at 22 where the author argues that it may be difficult for a court to juxtapose the common law of negligence, with its adherence to an objective approach to ascertaining whether the defender has breached its common law duty of care, with the learning in *Leakey*.

86 S2.

87 Per Lord Hope in *Kennedy v Glenbelle* 1996 SCLR 411 at 416.

THE UNWELCOME RETURN OF CRYPTOSPORIDIUM IN DRINKING WATER IN NORTHAMPTONSHIRE AND NORTH WALES

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The regulations dealing with cryptosporidium in drinking water appear to have successfully limited its effect on public health. However, outbreaks can still cause substantial losses for water authorities and insurers.

The mayhem cryptosporidium can cause should not be underestimated. Cryptosporidiosis, the disease caused by the cryptosporidium parasite, was first identified in humans in 1976. It causes stomach upsets and diarrhoea which can last for several weeks. It can be serious in the vulnerable, namely the elderly, the very young, and those with weak immune systems. There is no cure for the disease but most people with a healthy immune system recover within a month.

In spring 1993, one of the largest documented water-borne disease outbreaks in US history occurred in Milwaukee, Wisconsin, and cryptosporidium was identified as the cause. Over a period of two weeks, more than 400,000 of an estimated 1.61 million people were affected by contaminated drinking water, and over 100 deaths were attributed to the outbreak. The total cost of the outbreak was estimated at \$31 million in medical costs and \$64 million in productivity losses.

In Australia in 1998, the Warragamba Dam, which is Sydney's main water supply, was contaminated with cryptosporidium. Although a problem was first detected on Friday 24 July, the water authority delayed meeting to discuss notifying the public until Monday 27 July. When those affected were eventually notified, the incident was highly publicised and caused widespread alarm, and 3,000,000 residents were told to boil their water for three months. An investigation showed that the levels had actually been severely overestimated and the true levels were not harmful to human health. Nobody was injured but massive disruption resulted, it seems from incompetence in analysing samples.

Anglian Water's Pitsford water treatment works supplies some 250,000 people in Northamptonshire. The cryptosporidium outbreak detected in June 2008 was the first incident at the plant and was apparently caused by an unexpected event – a rabbit entering an ancillary tank. However, it is unclear whether the rabbit was alive or dead on entry. If alive, the question is how it entered the tank, which the water authority has described as being designed to ensure that not even a fly can enter.

If dead it must have been placed there deliberately, which would suggest that security was insufficient. The results of the post-mortem are eagerly awaited.

Twenty-two cases of cryptosporidiosis were confirmed by the Health Protection Agency as being linked to the parasite at Pitsford. The parasite was detected during the evening of Tuesday 24 June and Anglian Water immediately consulted with health and local authorities. A joint decision was made to issue 'boil water' notices during the early hours of Wednesday 25 June. The incident should have been of minimal risk to health and it is hard to imagine how Anglian Water could have reacted more quickly. Nevertheless, 22 confirmed cases suggest that the parasite was not detected soon enough and the Drinking Water Inspectorate (DWI) is continuing the investigation.

Daventry District Council is working with Northamptonshire Borough Council to review Anglian Water's handling of the incident and meetings have been held to enable residents to pass on their experiences and highlight where responses could have been better. It seems that at the time of the event, Anglian customers complained about the inconvenience of having to boil water but have since been compensated by the monetary equivalent of six weeks' water. According to the local press, customers were understanding about the need to investigate the contamination and were comforted by the frequency of the testing which was revealed following the outbreak. Less frequent testing, or a slower reaction, would no doubt have resulted in more confirmed cases.

Even more recently, in August 2008, there were outbreaks of cryptosporidium in North Wales, and Welsh Water advised 45,000 people to boil their drinking water as a precaution. Welsh Water said an increase in the levels of cryptosporidium was found after routine sampling and commented that extensive further water sampling was needed. Investigations into this outbreak are continuing, but so far there are nine reported cases of cryptosporidiosis which may be linked to the outbreak. No doubt as a consequence of these fairly frequent outbreaks in North Wales, Welsh Water have recently announced that they are to spend in excess of £100 million in North Wales on upgrading 13 drinking water treatment works.

An expert group on cryptosporidium was established by the government in response to outbreaks of cryptosporidiosis affecting 5000 people in Swindon and Oxfordshire in 1989. Under the chairmanship of the late Sir John Badenoch and subsequently Professor

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Ian Bouchier, this group has carried out research and guided the development of policy on reducing the risk of cryptosporidium in water supplies. Since 1989, the government has introduced regulations dealing with the risk: the Water Supply (Water Quality) Regulations, introduced in 2000¹ to implement the European Drinking Water Directive,² set out detailed requirements for monitoring, treatment, and analysis of water supplied to consumers, and contain instructions on the sampling and continuous monitoring of cryptosporidium in drinking water. If water suppliers provide water that is unfit for human consumption they are liable to prosecution.

UK regulations go further than the EU directive in requiring water companies to adopt a formal risk-based approach to assessing and managing cryptosporidium. Where there is a risk, water companies must use a process for treating the water to ensure that the average number of oocysts (the spore phase of the parasite) is fewer than one per 10 litres of water. Water companies must use a regulatory method for sampling and analysis to check that they are complying with the standard.

The regulations state that samples of treated water are to be monitored for cryptosporidium on a continuous basis and checked against specified limits. Thus it is to be expected that any excess levels of cryptosporidium in the water supply will be detected almost immediately and appropriate action taken. In 2005, the DWI introduced standard operating protocols for the monitoring of cryptosporidium to satisfy the regulations. The DWI has also approved certain membrane and other filtration systems for the removal of cryptosporidium.

While there have been outbreaks of cryptosporidium since the regulations came into force, they have had less dramatic consequences. In March 2000, there was an outbreak in Clitheroe, Lancashire and 58 cases of diarrhoea were reported. In Glasgow, following extensive flooding in August 2002, cryptosporidium was detected in Mugdock reservoir at Milngavie water treatment works, and 140,000 residents were advised to boil tap water. This later led to a major redevelopment of the Milngavie water treatment works. In October/November 2005 in North West Wales, 1000 residents contracted cryptosporidiosis, possibly due to a delay in advising that mains tap water should be boiled. Several claims were brought against the water authority; one from a 12-year-old boy from Anglesey was settled out of court. More recently, there have been episodes of contamination in Galway in March 2007, and Catterick Garrison in North Yorkshire in December 2007, where thousands of army staff and civilians were told to boil their water.

Why does cryptosporidium keep appearing in our drinking water? In its spore phase the parasite can survive for lengthy periods outside a host. It is particularly difficult to treat because it is small and resistant to disinfection processes. Water purification to eliminate cryptosporidium generally relies upon

coagulation followed by filtration or boiling rather than UV treatment, which is a more effective method. There appears to be a strong correlation between the majority of outbreaks and inadequacy in the treatment, the (poor) operation of the treatment process, or the overloading of the treatment system. According to the DWI, most outbreaks are normally related to inadequate provision or poor operation of water treatment. In particular, there appears to be a link with water treatment plants which have no filtration systems or filtration systems which are inadequate. The answer would seem to be to introduce UV treatment in all plants in high risk areas. However, both installation and maintenance costs are high. In addition, UV requires clear water (absence of particulate) for it to function properly.

Following the incident in June 2008, Anglian Water has installed a UV treatment plant at Pitsford, which successfully eliminated the parasite within 24 hours, according to the company. Anglian Water has confirmed that the UV treatment plant will stay for the foreseeable future. The draft business plan for 2010–2015, which the company submitted to Ofwat in August, cites a need to protect water treatment works from emerging risks associated with turbidity and cryptosporidium. The plan suggests this should be done by the introduction of physical barriers at the most vulnerable sites, at a significant predicted capital investment of £33 million.

Of course, the best way to avoid the problem is to prevent contamination at source. Contamination is a higher risk when the source water, such as a reservoir or river, is surface breaking and close to livestock, sewage works, wastewater plants and drainage systems. Intense rainfall events, which are predicted to be more frequent as a result of climate change, can cause sewage to escape into source water. In Glasgow, for example, in 2002 antiquated drainage systems could not cope with the floods, resulting in sewage escaping into the water source. In that case problems with one part of the infrastructure caused another part to fail. If ageing drainage systems are not improved, there will be more problems of this kind. However, it is notoriously hard to prevent contamination at source, hence the need to focus on the treatment.

To date, claims for cryptosporidiosis in the United Kingdom have been limited, but a look at the United States reveals class actions, most of which arise from contaminated swimming pools. One lawsuit filed against the New York Office of State Parks was on behalf of 3200 people who contracted the disease after visiting the water park at Seneca Lake State Park in July and August 2005.³

Even if individuals with the disease make claims following the recent contamination events, under the supplier's obligations under the regulations extend only to the treatment of the water and analysis of the water 'on site'. Thus if the water leaves the plant pipes in good condition and is contaminated thereafter by some other means, the supplier will not be liable

1 SI 2000/3184 <http://www.opsi.gov.uk/si/si2000/20003184.htm>.

2 Council Directive 98/83/EC.

3 *Springer v. State of New York*, Claim No 111361.

under statute. If the supplier can show that cryptosporidiosis was contracted from a different source of cryptosporidium, that would also provide a defence. This may well be possible in some cases, since the disease is more commonly contracted through person to person or animal to person contact, and via recreational waters.

Farmers, local authorities, anyone else associated with the cause of the outbreak, and relevant insurers may be vulnerable to a claim by the water authority for losses incurred in sorting out the problem. In the Northamptonshire outbreak, Anglian has alluded to the cleaning of 12 reservoirs and towers and an

extensive flushing of 1000 miles of pipe by 500 workers. It also provided mobile support units for customers. Add to that goodwill payments of £3 million to customers, and the losses are significant.

During wet weather there is a higher risk of cryptosporidium, particularly where the treatment process is inadequate. However, because of the requirement for regular monitoring in high risk areas, if the water supplier's response is prompt and effective, the risk to human health should be low. If this were to be coupled with universal introduction of UV treatment, the risk would be minimal, even allowing for errant rabbits!

CASE COMMENTARY

'Global Precedent' or 'Reasonable No More?': the *Mazibuko* case¹

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Mazibuko et al v City of Johannesburg et al
High Court of South Africa (Witwatersrand Local Division)
30 April 2008 Case No 06/13865

THE FACTS

The applicants in this case challenged the introduction and use of prepaid water meters and the set amount of free water provided to each household per month. At the time of the application, all five applicants were residents of the township of Phiri, a historically black and poor area which forms part of Soweto, within the City of Johannesburg.² Prior to 2001, the applicants received an unlimited supply of water at a flat rate, but despite this, many account holders, including the applicants at that time, were in arrears with their payment. Other residents of the city received an unlimited water supply on credit.³

In 2001, the City of Johannesburg and Johannesburg Water,⁴ (the respondents), agreed to provide every household with 6 kL of free water per month. This is commonly referred to as free basic water or FBW. Within Phiri, the FBW was to be dispensed through the use of a prepaid meter system.⁵ The meters operate on the basis that, once the FBW has been consumed, any further water must be purchased in advance, rather than on credit. If consumers are not able to purchase water in advance, the meter will not dispense any further water.

In 2004, the prepaid meter system was implemented as a credit control measure and as a means of reducing

water wastage. The entire water piping system of the township was in significant need of rehabilitation. The residents were advised by notice to opt for the installation of prepaid meters. If they did this, their accumulated arrears would be written off. If they did not, they would be without water services.⁶ The first applicant, Lindiwe Mazibuko, initially refused to have a prepaid meter installed and walked to a reservoir three km away. The reservoir was closed to her seven months later, at which time she relented and accepted the installation of a prepaid meter.⁷ According to the judgment, the applicants typically consumed one month's allocation of FBW within about the first two weeks. This meant that they would not have access to water services for the next two weeks before the release of the subsequent allocation of FBW in the following month.⁸

Section 27(1)(b) of the South African Constitution states that '[e]veryone has the right to have access to sufficient food and water.'⁹ The state is required to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.¹⁰ The Water Services Act defines 'basic water supply' as 'the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene'.¹¹ The corresponding government regulation, issued by the third respondent, the Department of Water Affairs and Forestry (DWAf), s 3, states:

- 3 The minimum standard for basic water supply services is –
 - (a) the provision of appropriate education in respect of effective water use; and

1 The title is taken in part from two contrasting news articles: (i) South Africa: 'Court Ruling on Water Sets "Global Precedents"' *UN Office for the Coordination of Humanitarian Affairs: Humanitarian News and Analysis* <http://www.irinnews.org/report.aspx?ReportId=78076>; (ii) 'Water Case: 'Reasonable' No More?' *Mail and Guardian Online: Opinion – Comment and Analysis* (<http://www.mg.co.za/article/2008-05-14-water-case-reasonable-no-more>).

2 *Mazibuko et al v City of Johannesburg et al (Mazibuko)* High Court of South Africa (Witwatersrand Local Division) 30 April 2008 Case No 06/13865 Judgment [5]. One of the applicants has since left Phiri. However, she still pursued the application on behalf of her household.

3 Judgment [3], [101].

4 Johannesburg Water's sole shareholder is the City of Johannesburg. As allowed for in the Water Services Act 1997, Johannesburg Water is delegated to act as a water service provider for the City. Judgment [6].

5 Judgment [3].

6 *ibid* [19].

7 *ibid*.

8 *ibid* [84]. The applicants are unemployed, and other than the state pension or grant, which they receive monthly, they have no other source of income. [92].

9 Constitution of the Republic of South Africa 1996.

10 *ibid* s 7(2).

11 Water Services Act 1997 s 1(iii). Section 9(1)(a) of the same Act empowers the Minister of Water Affairs and Forestry to prescribe compulsory national standards relating to the provision of water services.

- (b) a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month –
- (i) at a minimum flow rate of not less than 10 litres per minute;
 - (ii) within 200 metres of a household; and
 - (iii) with an effectiveness such that no consumer is without a supply for more than seven full days in any year.¹²

The applicants' claim contained two key challenges. First, they disputed the validity of s 3(b) of the above regulation on the grounds that it is based on misconception, does not provide for 'sufficient' water as provided for in the Constitution, is irrationally determined, does not relate to the needs of the poorest people, is arbitrary, inefficient and inequitable, does not distinguish between those with waterborne sanitation and those without and is inflexible.¹³ They sought an order declaring that Regulation 3(b) is unconstitutional and invalid.¹⁴

Secondly, they challenged the respondents' decision to disconnect their unlimited water supply at a fixed rate, introducing and continuing to use prepaid meters, and setting the amount of FBW at 25 L/person/month or 6 kL/household/month, as unconstitutional and unlawful.¹⁵ The applicants argued that the decision introducing the prepaid meters should be reviewed and set aside on the grounds that it violates the principle of legality, the state's duty to take reasonable measures to realise progressively the right to water, the state's duty to respect the right to water, the prohibition of discrimination and the right to equality and procedural fairness.¹⁶ In addition, they sought a further order declaring that each applicant, and any other similarly situated resident of Phiri, is entitled to 50 L/person/day, and that an option of a metered supply of water be installed at the cost of the respondents.¹⁷

THE DECISION

Locus standi and non-joinder of the National Treasury

By way of preliminary matters, Justice Tsoka found that the applicants had standing and were entitled to act on behalf of members of their household, as well as other similarly affected residents of Phiri.¹⁸ The argument that all water services authorities and all residents of Phiri should be joined was rejected as this would be cumbersome, impractical, and unnecessary.¹⁹ The judge also refused to accept the submission by the third respondent that the National Treasury should be joined in the action in addition to the Minister of Water Affairs and Forestry. The Minister argued that an

increase in the amount of FBW would increase the equitable share funding allocated to the water services authority by the National Treasury under the Division of Revenue Act. The judge found that there was no evidence that the respondents use the equitable share to provide FBW in Johannesburg, nor that they cannot use the municipal tax base to provide it. He was not persuaded that it had a material or substantial interest in the orders sought by the applicants.²⁰

The constitutionality and validity of Regulation 3(b) – 25 L/person/day or 6 kL/household/month

In assessing the applicant's argument that Regulation 3(b) is based on misconception, the judge recognised that it was necessary to consider international law concerning the right to water as this may guide interpretation of the South African right. This review included the General Comment No 15 on the Right to Water, which was issued by the UN Committee on Economic, Social and Cultural Rights in 2002.²¹ Among other aspects, the General Comment provides that the water services and supply required to meet the right to water must be available, physically and economically accessible, and of acceptable quality. The state has a legal obligation to realise progressively the right and, specifically, must respect, protect and fulfil the right to water. If retrogressive measures are taken, the state bears the burden of proving that they are justified by reference to the totality of the rights provided for in the International Covenant on Economic, Social and Cultural Rights. Citing other international treaties which either explicitly or implicitly reference water, the judge briefly concluded that the state is obliged to provide free basic water to the poor.²²

In determining whether Regulation 3(b) falls short of providing 'sufficient' water as provided for in s 27(1)(b) of the Constitution, as well as whether it is irrational, inefficient, inequitable, and inflexible, as argued by the applicants, the judge also looked towards the international legal arena.²³ According to General Comment No 15, the quantity of water available for each person should correspond to World Health Organisation Guidelines.²⁴ The judge stated that the WHO Guidelines quantify basic access to water as 25 L/person/day, which is the lowest level to maintain life over the short

12 Regulations Relating to Compulsory National Standards and Measures to Conserve Water (8 June 2001) No R 509.

13 Judgment [27].

14 *ibid* [11].

15 *ibid* [9].

16 *ibid* [71].

17 *ibid* [11].

18 *ibid* [16]–[20].

19 *ibid* [23].

20 *ibid* [22].

21 General Comment No 15 (2002) – The Right to Water (26 November 2002) UN Doc E/C 12/2002/11. The General Comment provides that the right to water falls within the category of guarantees necessary to secure an adequate standard of living (art 11) and is inextricably related to the right to health (art 12) of the International Covenant on Economic, Social and Cultural Rights.

22 Judgment [29]–[40]. The judge referenced the Convention on the Rights of the Child (art 24), the African Convention on the Rights of the Child (art 14), and the African Charter on Human and Peoples' Rights (art 16). The respondents had argued that they are not obliged to provide free basic water to the poor, but that their obligation is to provide water at a fee as stipulated in the Norms and Standards for Water Services Tariffs.

23 Judgment [43]–[46].

24 General Comment No 15 [12] references G Howard, J Bartram 'Domestic Water Quantity, Service Level and Health' (2003) WHO WHO/SDE/WSH/03.02. It also references P Gleick 'Basic Water Requirements for Human Activities: Meeting Basic Needs' (1996) 21 *Water Intl* 83.

term – assuring consumption, although not necessarily personal or food hygiene.²⁵ The judge also referred to the Human Development Report 2006 as stating that 20 L/person/day constitutes sufficient water.²⁶ Commenting on both the hydrological and political reality of South Africa, and stressing that the regulations provide for a *minimum* standard for basic water supply services, the judge stated that it was understandable why DWAF had set the minimum standard as it did, as it would allow every water services authority to assure basic provision of water. Depending on its resources and the residents' needs, the water services authorities may increase this minimum standard, as has already occurred in certain localities. As organs of the state, water services authorities are obliged to realise progressively the right to water. However, in short, the judge found that there was no basis for reviewing and setting aside Regulation 3(b).²⁷

The unconstitutionality and unlawfulness of the introduction of prepaid meters

The judge declared that the installation of prepaid meters in Phiri was unconstitutional and unlawful. He started by dismissing the respondents' argument that the introduction of prepaid meters was executive (as opposed to administrative) action, and thus not reviewable by the court. After an exhaustive review of the distinction between executive policy decisions and administrative implementation, he found that the case fell under the latter. The applicants were not challenging the political decision of introducing prepaid meters, but rather their actual introduction in Phiri. Noting that the residents of Phiri had been consulted to obtain their views regarding the introduction of prepaid meters, and that they had been sent notices to choose one of three levels of offered services, the judge found that this particular participation of the residents was indicative that the introduction of the prepaid meters was administrative action.²⁸

In assessing whether the disconnection of the applicants' unlimited access to water at a flat rate and the introduction of prepaid meters was in violation of the state's obligation to respect the right to water, the judge found that the respondents' interference with the applicants' access to unlimited water at a flat rate was understandable, as such an approach was unsustainable. In fact, he stated that it would be unconscionable to expect the respondents, faced with water scarcity, huge water losses, and continuous unrecoverable financial losses, to perpetuate such a practice while faced with the constitutional task of meeting the various needs of the residents.²⁹

In assessing the applicants' argument that the introduction of prepaid meters violates the principle of legality, the judge noted that water services authorities may only limit or discontinue the supply of water if authorised by law. Section 21 of the Water Services Act provides that every water services authority must make bylaws which contain conditions for the provision of water services. The bylaws must provide for the circumstances under which water services may be limited or discontinued, as well as the procedures for doing so.³⁰ After reviewing the city's bylaws, the judge found that they authorise the installation of prepaid meters only as a penalty for contravening the conditions of the supply of water services. They have no other source in law. Their installation was thus found to be unlawful. In addition, the judge found that the prepaid meters violated Regulation 3(b)(ii), quoted above, which provides that no consumer is to be without a minimum quantity of potable water for more than seven full days in any year. It was explained that the applicants spent about two weeks each month without access to water once the FBW had been consumed, and such a limitation was not authorised by the bylaws.³¹

Referencing a number of foreign cases on the issue of limitation or discontinuation of water supply provided by the *amicus curiae*, the Centre on Housing Rights and Evictions, the judge went on to state that '[i]t is apparent that in the established democracies, prepayment meters are illegal as they violate the procedural requirement of fairness by cutting off or discontinuing the supply of water without notice or representation'.³² In this case, he found that prepaid meters cut off water supply without reasonable notice to the applicants and denied them an opportunity to make representations, for example, regarding inability to pay. The signal warning that the meters emit when there is insufficient credit for the supply of water was found to be artificial and unhelpful.³³

Later in the judgment, when addressing directly the argument that the introduction of prepaid meters was procedurally unfair, the judge agreed with the applicants, finding that there had been inadequate consultation and notice.³⁴ The judge found that the notice was misleading as it suggested that different levels of water service were required to be offered by the Water Services Act and that the only level of service suitable to the applicants involved the installation of prepaid meters. He found that it was unfair to indicate that the applicants have no election to choose another level of service and simply to impose an election on the basis

25 Judgment [46].

26 *ibid* referring to *UNDP Human Development Report 2006: Beyond Scarcity: Power, Poverty and the Global Water Crisis* (OUP New York 2006).

27 Judgment [47]–[54].

28 *ibid* [56]–[70]. The action was reviewable under s 33 of the Constitution. It was not found to come within the exemptions provided for within the Promotion of Administrative Justice Act 2000.

29 *ibid* [96]–[103].

30 Water Services Act s 21(f).

31 Judgment [73]–[84].

32 *ibid* [91], [85]–[91]. Under s 39(1)(c) of the Constitution, a court may consider foreign law when interpreting the Bill of Rights.

33 *ibid* [93].

34 *ibid* [104]–[107]. For example, there was no consultation with the first application and no proper notice was given to her (eg her right to object to the introduction of the prepaid meter, request reasons for the decision etc). The judge dismissed supplementary affidavit evidence filed by the respondents that there had been suitable consultations on the basis that the majority of the deponents were either employees or councillors of the city and thus not in a position to be objective or act contrary to the interests of the city.

of failure to respond to the notice.³⁵ The purpose of the subsequent visit by Johannesburg Water's community facilitators to provide further information was questioned, and appeared to be simply an attempt on their part to make the process appear reasonable and fair.³⁶ The respondents' actions were viewed as a publicity drive for prepaid meters, rather than as consultative.³⁷ As noted above, the judge also found that prepaid meters meant that consumers were not given reasonable notice regarding the termination of water services, or an opportunity to make representations to prove that they were unable to pay for basic services prior to disconnection, as required by s 4(3) of the Water Services Act.³⁸

The installation of the prepaid meters was also found to constitute indirect and direct discrimination. While prepaid meters were introduced in Phiri, historically a black and poor area, wealthier and formerly white areas were not pressured to adopt prepaid meters. Instead, the latter have the option to obtain water on credit, and if they fall into arrears, receive notification before their water supply is cut off. They have the opportunity to make representations and arrangements to settle their arrears. The denial of this right to the residents of Phiri was found to be unreasonable, inequitable, and discriminatory on the basis of colour.³⁹ Later the judge found that this differentiation violated the right to equality and rejected the respondents' argument that the applicants do not qualify for water on credit under the National Credit Act 2005. Finding the underlying basis for the introduction of prepaid meters to be credit control, he stated that he was 'unable to understand why this credit control measure is only suitable in the historically black areas and not the historically rich white areas. Bad payers cannot be described in terms of colour or geographical areas'.⁴⁰

Furthermore, as many domestic chores in South Africa are performed by women, and many households in poor black areas, such as Phiri, are headed by women, the judge indicated that the prepaid meters discriminate against women unfairly and thus also constitute discrimination on the basis of sex.⁴¹

35 *ibid* [108]–[110].

36 *ibid* [111]–[112]. The judge found that there was no evidence that subsequent notices (which again indicated that the applicants only have one available choice) were received by the applicants.

37 *ibid* [122].

38 *ibid* [119]. Section 4 of the Water Services Act states that '[w]ater services must be provided in terms of conditions set by the water services providers'. Section 4(3) provides that the procedures for limitation or discontinuation of water services must be fair and equitable, provide for reasonable notice and an opportunity to make representation, and not result in a person being denied access to basic water services for non-payment where that person proves to the satisfaction of the relevant water services authority that he or she is unable to pay for basic services. The judge also found that the terms and conditions which were part of the first applicant's application for a prepaid meter were contrary to the Water Services Act and have no source in law. Thus the termination of her water services was illegal.

39 *ibid* [94].

40 *ibid* [154]; [151]–[155].

41 *ibid* [159].

Entitlement to 50 L/person/day and the option of a metered supply of water

The judge agreed with the applicants that in this particular case the amount of free water of 25 L/person/day or 6 kL/household/month was insufficient and unreasonable. The judge stated that '[t]he respondents are, in terms of section 27(2) [of the Constitution], obliged to provide more than the minimum if its residents' needs so demand and they are able, within their available resources, to do so'.⁴²

The judge evaluated the respondents' special cases policies introduced in 2002 and targeted at pensioners, disabled persons, unemployed persons or persons with low income, and individuals with HIV/AIDS.⁴³ In 2004, the policy was amended to encourage more households to register as indigent. The incentive for doing so was the writing off of accrued arrears if the account holder agreed to the installation of a prepaid meter.⁴⁴ After various other amendments, the city decided on a new social package with a targeted date of implementation as July 2008. Other interim measures were adopted, but these had not yet been implemented at the time of the hearing. In tandem with the court decision, the city introduced a process whereby residents with special needs could make representations for an additional allocation of water of 4 kL/month FBW, as well as an additional 4 kL/year for emergencies. The judge found, however, that the social policies were irrational and unreasonable; the underlying objective was to encourage the installation of prepaid meters, which had no source in law.⁴⁵

Given that many of the residents of Phiri are poor, elderly people, surviving on state pension grants and/or sick with HIV/AIDS, the judge found, relying on expert affidavit evidence, that 25 L/person/day was insufficient. He noted that the 6 kL/household/month is based on a household of eight persons, and that in Phiri the average household contains a minimum of 16 persons. The number of residents per yard or account holder is even greater due to the presence of informal settlers.⁴⁶

The judge stated that it was 'uncontested that the respondents have the financial resources to increase the amount required by the applicants per person per day'. The judge found that they had decided to re-channel the 25 L/person/day free to households that cannot afford to pay, and that the equitable share that the respondents are allocated by the treasury had not been utilised. Furthermore, the judge found that the various special cases policies adopted by the respondents indicate that they have the ability to provide more water than the 25 L/person/day. He concluded that the respondents would be able to provide 50L/person/day without straining water supplies or financial resources.⁴⁷

42 *ibid* [126].

43 *ibid* [138]–[139]. Any person who wished to benefit from the policy had first to register as indigent.

44 *ibid* [140].

45 *ibid* [141]–[150].

46 *ibid* [168]–[179].

47 *ibid* [181].

Setting aside the respondents' decision to limit FBW supply to 25 L/person/day or 6 kL/household/month, the judge ordered the respondents to provide each applicant and other similarly placed resident of Phiri with a FBW supply of 50 L/person/day and the option of a metered supply installed at the cost of the city.⁴⁸

COMMENTARY

The judge's statement that 'To deny the applicants the right to water is to deny them the right to lead a dignified human existence'⁴⁹ sets the tone of the judgment. Justice Tsoka links basic access to water with the principles of democracy, equality and freedom. The judgment deals with a number of key issues in the global debate on water services, including the move toward prepaid meters as a form of improved cost-recovery, stark geographical inequalities in levels of urban water services in many countries, and quantifying the minimum level of water needed for personal and domestic uses. It is perhaps not unexpected that the judgment has now been appealed to the Supreme Court of Appeal.

The judge's finding that there is an international human rights obligation to provide FBW to the poor is certainly surprising, but ultimately misleading. The international standards to which he refers only indicate that water costs should be affordable and that 'free water or low-cost' may be one policy option to achieve this end. Indeed, the expert evidence of Peter Gleick, which the judge quotes approvingly later in the judgment, also makes this point.⁵⁰ Whatever meaning the judge had in mind, this initial statement on free basic water has little influence on the rest of the reasoning in the judgment, although he obviously endorses the free basic water policy as a means to realise the right to water.

One issue that might arise on appeal is whether the ordering of an additional free 25 L/person/day constitutes illegitimate judicial interference in the policy-making process as it prescribes one option of providing additional affordable water instead of leaving it to the discretion of the government. Sandra Liebenberg points out, however, that the Constitutional Court of South Africa was prepared in the *Treatment Action Campaign* case,⁵¹ which concerned provision of neviraprine to prevent mother-to-child-transmission of HIV, to be quite specific regarding the nature of services to be provided.⁵² This was due to the circumstances of the case. The Constitutional Court found there was a lack of other medical options, it was supported by expert evidence, and the government had also chosen the drug in its pilot projects. Similarly, in the present case, it is possible to argue that the order was merely a

mandatory enforcement of the free basic water policy, which according to the government's own evidence constituted a floor for progressive improvement.

The decision that prepaid meters are substantively and procedurally unlawful follows a clear international trend in the jurisprudence, and the reasoning of the judge is solid in this regard. Indeed, as the case is likely to be heard eventually by the Constitutional Court, a similar order would possess considerable international influence, given that most comparative case law has emanated from lower courts. Leaving aside the procedural issue regarding the actual introduction of the prepaid meters, the case forcefully raises the broader question of whether the operation of prepaid meters can be procedurally fair – how can reasonable notice of termination of water services be given and how can residents be assured an opportunity to be heard prior to being cut off?

The finding that different policies for different geographical areas (in this case, prepaid meters for poor areas and meters with credit for wealthier areas) constitutes discrimination is both novel and significant in the global context. Geographical distribution of water services resources is highly skewed on the basis of wealth (within urban and rural areas and between urban and rural areas) even in a number of developed countries. Policies which unfairly differentiate between wealthier and poorer areas could increasingly come under attack on grounds of racial discrimination or nationality (for example, if the locality is dominated by minorities or migrants), other prohibited grounds of discrimination such as property status (particularly for informal settlements) or emerging attributes such as poverty and place of residence. Equally, women and girls in these poorer areas shoulder the burden of poor water access, and Justice Tsoka's decision that geographical differentiation constitutes indirect sexual discrimination is significant.

The aspects of the judgment that concern the quantity of water have been legally questioned in the South African context and the empirical evidence is likely to come under careful scrutiny in the appeal.⁵³ In an interesting section of the judgment, Justice Tsoka queries whether the Constitutional Court had in fact rejected the minimum core obligation for socio-economic rights. This principle has been propagated by the UN Committee on Economic, Social and Cultural Rights.⁵⁴ Justice Tsoka noted that the Constitutional Court had only indicated the difficulties for a court in construing the content of a minimum core obligation, not that it was out of the question.⁵⁵ He went on to indicate that a minimum core obligation could be developed for the right to water.

However, the critical parts of the judgment actually rely on the traditional reasonable review test of the

48 *ibid* [183]. He also ordered the respondents to pay costs of the applicants' three counsel.

49 *ibid* [160].

50 *ibid* [170].

51 *Minister of Health v Treatment Action Campaign* (2002) 5 SA 721 (CC).

52 S Liebenberg 'South Africa: Adjudicating Social Rights Under a Transformative Constitution' in M Langford *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press New York 2008) 85–86.

53 See *Mail and Guardian Online: Opinion – Comment and Analysis* (<http://www.mg.co.za/article/2008-05-14-water-case-reasonable-no-more>).

54 In the case of the right to water, the Committee noted that there was a core obligation to ensure access to a minimum essential amount of water (General Comment No 15 [37(a)]).

55 Judgment [131].

Constitutional Court and make no reference to the minimum core obligation. The judge's disinclination to strike down Regulation 3(b) for setting too low a minimum amount was based on his finding that 25 L/person/day constituted a reasonable floor in the South African context of water scarcity and strained financial resources, particularly in some municipalities. Equally, the order for 50 L/person/day to be provided to Phiri residents in Johannesburg was made on the basis

that 25 L/per person/day for the Phiri residents was 'unreasonable' when the city possessed available financial resources, and that the formula for calculating the amount did not take into account the specific needs of Phiri residents or the large size of households.⁵⁶ Therefore, it is likely that the appeal will turn more on the question of whether 50 L/person/day is reasonable in the particular circumstances of this case.

56 *ibid* [181].

STRATEGIC ISSUES – ENGLAND AND WALES

Judith Davies *Solicitor, Oxford*

Headline Issues

- **Pitt Review – ‘Learning lessons from the 2007 floods’ – a summary**
- **The Draft Marine Bill – Defra’s Response – Government Response**
- **Water companies propose big price rise**
- **WaterSure helping with water bills**
- **Company fined for toxic discharge**
- **Thames Water investing £4m in new mains**

Pitt Review – ‘Learning lessons from the 2007 floods’ – a summary

The floods of 2007 were the result of the wettest summer since records began. Overall 55,000 properties were flooded, 7,000 people rescued by the emergency services and 13 people died. Nearly half a million people were left without mains water and electricity. The insurance industry expects a final bill in excess of £3 billion.

The Pitt Review into the floods, ‘Learning lessons from the 2007 floods’ was published in June 2008.¹ Led by Sir Michael Pitt, the review process focused on four guiding principles:

- change must start with the needs of individuals and communities who have suffered flooding or are at risk of flooding
- strong and effective leadership across the board is essential for change to happen
- clarification – it must be much clearer who does what
- cooperation – there must be a willingness to work together and share information.

These principles are the foundation for the report’s recommendations. The Review is divided into eight sections, starting with the introduction and background to the floods (Section 1). Each section includes recommendations – 92 in total – the most important of which are included in the section summary below.

Section 2 – knowing when and where it will flood

This section looks at the process of taking an overview of risk and the process of forecasting, modelling and

mapping with particular emphasis on the role of the Environment Agency.

Recommendation 1 – The predicted climate change means that there is the potential for even worse floods than those seen in 2007; the government must give priority to adaptation and mitigation in its programmes to help society cope with climate change.

Recommendation 2 – The Environment Agency should be the body with a national overview of all flood risk, including surface and groundwater flood risk, with immediate effect.

Recommendation 6 – The Environment Agency and the Met Office should work together to improve their technical capability to forecast, model and warn against all sources of flooding.

Section 3 – Improved planning and reducing the risk of flooding and its impact

Building and planning – many submissions were concerned with putting a stop to building on the flood plain. The Review concluded that this would not be realistic, but that more can be done to reduce the risks. The government announced in February that householders will no longer be able to lay impermeable surfaces in front gardens as of right and the Review welcomes this, although it calls for this prohibition to be extended to include back gardens and business premises (Recommendation 9). Local flooding and drainage and flood defence was considered in this section, which highlighted the lack of coordination and structure in the response to the floods. The section also looked at modernising flood legislation and insurance, with uninsured families being of particular concern.

The recommendations include the following.

- There should be a presumption against building in high flood risk areas.
- The operation and effectiveness of PPS25 and the Environment Agency’s powers to challenge development should be kept under review and strengthened if necessary.²
- Building regulations should be revised to ensure that all new or refurbished buildings in high flood-risk areas are flood resistant or resilient.
- Local authorities, when discharging their duties under the Civil Contingencies Act 2004 to promote business continuity should encourage the take-up of property flood resistance and resilience by businesses.

¹ ‘Learning lessons from the 2007 floods’ can be viewed at: www.cabinetoffice.gov.uk/~media/assets/www.cabinetoffice.gov.uk/flooding_review/pitt_review_full.pdf.

² Local Planning Authorities in England have to consult us on most development proposals at risk from flooding. Planning Policy Statement 25 ‘Development and Flood Risk’ and its associated Practice Guide set out government policy and advice on the subject.

- Local authorities must take responsibility and work with all relevant parties, establishing ownership and legal responsibility.
- All relevant organisations should have a duty to cooperate and share information with the local authority and the Environment Agency.
- Defra and Ofwat should work with the water industry to establish risk-based standards for public sewerage systems.
- In the price reviews, Ofwat should prioritise proposals for investment in the existing sewerage network to deal with the increasing flood risk.
- The government should develop a scheme to encourage local communities to invest in flood risk management measures.
- Defra, the Environment Agency and Natural England should work with partners to establish a programme through Catchment Flood Management Plans and Shoreline Management Plans to achieve greater working with natural processes.
- The forthcoming flooding legislation should be a single unifying act to address all sources of flooding, clarify responsibilities and facilitate flood risk management.
- The government should review and update the guidance *Insurance for all: A good practice guide* for providers of social housing and disseminate it effectively to support the creation of insurance policies and include rent schemes for low-income households.

Section 4 – Being rescued and cared for in an emergency

This section looked at information provision and response frameworks, both locally and nationally.

- The Environment Agency should provide a specialised site-specific flood warning service for infrastructure operators, offering longer lead times and greater level of detail.
- Local authorities should establish mutual aid agreements in accordance with the guidance being prepared by the Local Government Association and the Cabinet Office.
- The government should put in place a fully funded national capability for flood rescue underpinned by a statutory duty.
- Defra should amend emergency regulations to increase the minimum amount of water to be provided in an emergency in order to reflect reasonable needs during a longer-term loss of mains supply.
- Upper tier local authorities should be the lead responders in relation to multi-agency planning for severe weather emergencies at the local level and for triggering multi-agency arrangements in response to severe weather warnings and local impact assessments.
- Where a Gold Command is established for severe weather events, the police, unless agreed otherwise, should convene and lead the multi-agency response.
- The Ministry of Defence should identify a small number of trained Armed Forces Personnel who can be deployed to advise Gold Commands on

logistics during wide-area civil emergencies and, working with the Cabinet Office identify a suitable mechanism for deployment.

- A national flooding exercise should take place to test the effectiveness of the new measures.

Section 5 – Maintaining power and water supplies and protecting essential services

This section looked at taking a systematic approach to preventing disruption, better planning through information sharing and the effective management of dams and reservoirs. It criticised the government's response as uncoordinated and reactive.

- Relevant government departments and the Environment Agency should work with infrastructure operators to identify the vulnerability of assets to flooding and a summary of the analysis should be published in the sector resilience plans.
- A specific duty should be placed on economic regulators to build resilience into the critical infrastructure.
- The government should implement the legislative changes proposed in the Environment Agency's biennial report on dam and reservoir safety through the forthcoming flooding legislation.

Section 6 – Better advice and helping people to protect their families and homes

This section looked at raising awareness before the emergency, at the level of warnings and advice and the roles of communities and individuals. The Review found that even people who knew they were at risk had done little or nothing to prepare for it.

- The Risk and Regulation Advisory Council should explore how the public can improve their understanding of community risks, including those associated with flooding.
- The Environment Agency should work with telecommunication companies to develop a roll-out of opt-out telephone flood warning schemes to all homes and businesses at risk of flooding.
- Flood risk should be made part of the mandatory search requirements for property buyers and form part of the Home Information Packs.
- The Cabinet Office should ensure that all Local Resilience Forums have effective and linked websites providing public information before, during and after an emergency.
- The government should establish a programme to support and encourage communities and individuals to be more self-reliant, allowing the authorities to focus on those in greatest need.

Section 7 – Recovery

This section considered health and wellbeing and roles and responsibilities during a crisis. During the floods many people suffered from illnesses, ranging from minor colds to heart attacks. A lack of coordination between the authorities and inconsistent advice were identified as contributing factors.

- The Department of Health and other relevant bodies should develop advice which should be used by all organisations nationally and locally.

- For emergencies spanning more than a single local government area, the Government office should ensure coherence and coordination between recovery operations.
- Central government should have pre-planned, not ad hoc, arrangements for contributing to the cost of recovery from the most exceptional emergencies, on a formula basis.

Section 8 – Oversight, delivery and next steps

The Review states that a positive approach and administrative structures are not enough and that the programme of work ‘must have teeth’ with Defra playing a lead role. However, Defra cannot take all the responsibility and should have support from a Cabinet Committee formed to deal with flooding.

- The government should publish an action plan to implement the Review, with a director in Defra overseeing the implementation process and reporting on it.
- The government should establish a Cabinet Committee with a remit to improve the country’s ability to cope with flooding and to implement the recommendations of the Review.
- The EFRA Select Committee should review the country’s readiness for dealing with flooding emergencies and produce an assessment of progress in implementation of the Review’s recommendations after 12 months.
- All upper-tier local authorities should establish Oversight and Scrutiny Committees to review work by public sector bodies and essential service providers in order to manage flood risk, underpinned by a legal requirement to cooperate and share information.
- Each of these committees should prepare an annual report of action taken locally to manage floods and implement the Review. The reports should be public documents reviewed by government offices and the Environment Agency.
- Local Resilience Forums should evaluate and share lessons from both response and recovery phases to inform their planning for future emergencies.

The government is considering the recommendations of the Review and will issue a considered response in due course.

Defra – Summary of Responses to the Draft Marine Bill

Defra’s document ‘Summary of Responses to the Public Consultation on the Draft Marine Bill from 3 April–26 June 2008’³ concluded that respondents were generally supportive of the draft bill.

A number of overarching themes were identified:

- *Clarity* – respondents asked for clarification on proposals and approaches in several areas, including clarification of terminology and definitions used within the legislation. Further details were requested in respect of timescales and transitional

arrangements, particularly regarding the MMO and the new licensing schemes. Clarification of how the new bill will fit in with existing domestic and European legislation was also sought.

- *Co-ordination across the land-sea interface* – respondents emphasised the importance of the new legislation being consistent with terrestrial legislation and again clarity in this area was requested, including the relationship between marine plans and national policy statements and the bodies and mechanisms to be used. Respondents were particularly concerned about coastal areas, where the overlap between marine and terrestrial legislation will be most concentrated.
- *Devolution* – respondents requested clarification of how devolved administrations and the UK Government would ensure efficacy across the whole of the UK. They placed an emphasis on planning areas being defined by ecological limits not political ones and suggested that the MMO should be a data management centre for the whole of the UK.
- *Duties* – suggestions were made that in some areas powers should be replaced by duties (the government acted positively to some of these suggestions, as with the duty on ministers to designate MCZs). The duty to consult was also raised particularly in relation to marine licensing where statutory consultees were called for. It was also proposed that the duty to consult Statutory Nature Consultation Bodies (SNCB) should be strengthened, particularly in areas affecting MCZs. It was also proposed that the Infrastructure Planning Commission (IPC) and the MMO should be under a duty to co-operate with each other. Respondents wanted the Environment Agency’s duty in relation to migratory and freshwater fish to be extended to include maintaining biodiversity and promoting the socio-economic value of fishing.
- *Roles and responsibilities* – further clarification of the roles and responsibilities of the MMO, the IPC, the Environment Agency, local government and SCNBs was requested. It was also noted that no one body has been given the responsibility of the everyday management of the MCZs.
- *Stakeholder engagement* – this was identified as essential to the success of the bill. Engagement and communication, including direct involvement and partnerships, consultation procedures and communication with stakeholders emerged as the favoured way of ensuring the successful implementation of the bill.
- *Accountability* – respondents wanted assurance that mechanisms will be in place to ensure that the new bodies are fully accountable to stakeholders and the general public, not only for engagement but also for scrutiny.

The Draft Marine Bill – Government Response

‘Taking forward the Marine Bill: the Government Response to pre-legislative scrutiny and public consultation’,⁴ was published in September in response to

³ The Defra publication: www.defra.gov.uk/corporate/consult/marine_bill/summary-responses.pdf.

⁴ www.official-documents.gov.uk/document/cm74/7422/7422.pdf.

the draft bill published in April 2008. The pre-legislative scrutiny was carried out by a Joint Committee of the House of Lords and House of Commons and the Environment Food and Rural Affairs (EFRA) Select Committee. They considered evidence from over 100 witnesses and made 119 recommendations in their two reports. In addition, Defra had launched a public consultation on its website. This generated 399 'non-campaign' responses and 3,500 responses connected to campaigns organised by the RSPB, the International Fund for Animal Welfare and Friends of the Earth; 11,000 responses were received from the Ramblers' Association.

After considering the responses, the government intends to move forward as follows.

- The Marine Management Organisation (MMO) will be established to deliver marine functions in waters around England and the UK (where these matters have not been devolved).
- Proceed with the new marine planning system, amending the draft bill to include a requirement that policy authorities periodically review their Marine Policy Statement (MPS); make the MPS subject to the same parliamentary scrutiny as National Policy Statements and ensure that the marine plan authorities are compelled to make the marine plans compatible with terrestrial plans.
- Improve the licensing process by requiring each licensing authority to set up an appeals mechanism and set out its transitional arrangements.
- Amend the draft bill's nature conservation provisions to improve clarity, and confer a statutory duty on ministers to designate Marine Conservation Zones (MCZ) rather than merely empowering them to do so.
- Replace Sea Fisheries Committees with Inshore Fisheries and Conservation Authorities and to modernise existing powers for the licensing and management of migratory and freshwater fisheries.
- Modernise enforcement powers to ensure correct training for enforcement officers, establish an appeals process for statutory notices under the licensing provisions and cap the maximum monetary penalty at £5,000.
- Place the Secretary of State and Natural England under a duty to establish a long-distance route for recreation and require Natural England to review its implementation.

The draft bill was included in the draft legislative programme for the 2008–09 session. The onus is now on the government to include the draft bill in the Queen's speech this autumn and ensure it is given an appropriate amount of time.

Water companies propose big price rise

Water companies in England and Wales have proposed increasing the average customer bill by around nine per cent more than inflation, for the period 2010–2015.⁵

5 The Ofwat publication 'Setting Price Limits for 2010–2015' can be viewed at: [www.ofwat.gov.uk/aptrix/ofwat/publish.nsf/AttachmentsByTitle/sub_bpd_pr09summary.pdf/\\$FILE/sub_bpd_pr09summary.pdf](http://www.ofwat.gov.uk/aptrix/ofwat/publish.nsf/AttachmentsByTitle/sub_bpd_pr09summary.pdf/$FILE/sub_bpd_pr09summary.pdf).

The companies claim that the increases are necessary to fund a capital investment of £27 billion in the industry over the five-year period. The capital investment for the period 2005–2010 was £20 billion. The investment includes the maintenance of assets, development of conservation projects, protection against flooding and long-term sustainable water and sewerage services. None of the water companies has kept its proposed increases below inflation but there is a marked difference between regions, the companies in the south of England proposing the greatest percentage increases.

Ofwat's role is now to analyse the proposals and challenge the companies to justify their proposals. Ofwat will publish the final price limits for 2010–2015 in November 2009.

WaterSure helping with water bills

The WaterSure scheme, which provides assistance for low-income families with their metered water bills is proving to be a success. The number of successful applications made under the scheme rose by over 50 per cent last year according to figures published by Ofwat.⁶ The scheme allows families that meet certain criteria to apply to pay no more than the average water bill for their region.

Details of the WaterSure scheme, together with other schemes aimed to assist consumers, are available through the water companies. However, Ofwat and the Consumer Council for Water (CCWater) believes the companies can and should be doing more to alert their customers to the existence of these schemes. CCWater's research showed that 70 per cent of customers were not aware of services available for elderly and disabled customers.

Company fined for toxic discharge

John Knights Ltd, a Stratford company that processes animal by-products has been fined £4,000 and ordered to pay costs of £8,000 by Stratford magistrates.

Thames Water brought the prosecution, after tests at the company's Silvertown plant revealed discharges of sulphide in excess of four times the legal levels. Sulphide develops into hydrogen sulphide during decomposition and this can be lethal to humans. Thames Water stressed that prosecutions of this nature are rare but necessary if the company refuses to respond to repeated warnings.

Thames Water investing £4m in new mains

Victorian water mains in Kennington and Camberwell in London are to be replaced at a cost of £4 million. The 6.2 mile network of cast-iron pipes is 150 years old and often subject to leaks and bursts. The work is expected to take a year to complete. Thames Water aims to replace 1,000 miles of water mains by 2010.

6 See table of figures at: [www.ofwat.gov.uk/aptrix/ofwat/publish.nsf/AttachmentsByTitle/gud_pro_watersure2008.pdf/\\$FILE/gud_pro_watersure2008.pdf](http://www.ofwat.gov.uk/aptrix/ofwat/publish.nsf/AttachmentsByTitle/gud_pro_watersure2008.pdf/$FILE/gud_pro_watersure2008.pdf).

STRATEGIC ISSUES – SCOTLAND

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Headline Issues

- **Flood Risk Management (Scotland) Bill published**
- **Classifying Scotland's waters**

Flood Risk Management (Scotland) Bill published

The Scottish Government has now published the Flooding Bill – the Flood Risk Management (Scotland) Bill – and accompanying documents for its stage 1 process, implementing the Floods Directive¹ and making certain other reforms, as set out in the government consultations (see (2008) 19 Water Law 146). It does not include all the matters raised in the wider Parliamentary inquiry.

The Bill begins with a general duty (section 1(1)), on the Ministers, SEPA and the responsible authorities, to 'exercise their flood risk functions with a view to reducing overall flood risk, and in particular, must exercise their functions under Part 3 so as to secure compliance with the Directive'. There are then three further specifications (section 1(2)): First, to 'have regard to the social and economic impact' of those functions; secondly, 'so far as is consistent with the purposes of the flood risk related function', to 'promote sustainable flood management', 'act with a view to raising public awareness of flood risk', and 'act in the way best calculated to contribute to the achievement of sustainable development'. Thirdly, 'so far as practicable, to cooperate with each other as to coordinate the exercise of their respective functions'. These provisions are very familiar, based on those from the Water Environment and Water Services (Scotland) Act 2003 (WEWS).

There is a power of direction, by Ministers against SEPA and responsible authorities. Definitions of flood and flood risk are taken from the Directive, and there is a definition of 'flood solely from a sewerage system' which excludes sewer flooding 'not connected with any loading on the system by external hydraulic factors'. This is significant, as it will mean that sewer flooding which is so affected should be covered by the planning processes implemented by the Bill. The Directive itself allows sewer flooding to be exempted, but given the significant concerns in Scotland over both sewers and flooding from surface water drainage, a blanket exemption would be most undesirable.

¹ Directive 2007/60/EC on the assessment and management of flood risks OJ L 288/27, 6.11.2007.

Given the recommendations of the Parliamentary inquiry this is something likely to be of interest to the Parliamentary Committee (Rural Affairs and the Environment) as the Bill progresses. 'Sustainable flood management' is not defined in the Bill, as was expected since the government's intention is to have a supplementary document of policy definition, but this may also be of interest to the Committee. Local authorities and Scottish Water are specified as responsible authorities, with others to follow by order.

Part 3 of the Bill implements the Directive requirements – flood risk assessments, flood hazard maps and flood risk maps and flood risk management plans – but with much more detail on the plans and the processes and with some additional measures. Readers will be aware that the Floods Directive expects the river basin districts (RBDs) to be used for flood management as well, but there is also an option for Member States to use different 'units of management' for individual basins or coastal areas. The Bill leaves this open – 'flood risk management districts' may be an RBD or a different area assigned by ministerial order. It is likely that the RBDs will be used, perhaps with some adjustments for coastal waters.

SEPA will prepare the initial risk assessment as required by the Directive, and from this will identify 'potentially vulnerable areas [within the flood districts] and local plan districts' (section 13). This will be approved by ministers. Vulnerable areas will then be placed within geographic local plan areas (the use of 'districts' again in the Bill is confusing), and for each of these there will be a local flood plan, led by local authorities. There is a specific provision (section 16) requiring SEPA to assess the potential for natural flood management (a recommendation from the Parliamentary inquiry) – in other words the potential for the use of flood plains, wetlands or woodlands as they stand or as they might be restored or enhanced, to contribute to the management of flood risk.

SEPA then has duties to prepare flood hazard maps and flood risk maps, as under the Directive. There are exemptions, for example, for some coastal flood areas which are 'adequately protected'; for high and medium probability groundwater flooding; and for sewerage flooding where this mapping is 'not practicable'. In each case SEPA may include these factors, and any opt-outs must be identified and explained; there is a power for the ministers to insist. 'Medium probability' events are partly defined as a return period of 100 years or more but also as may be specified by order, but low and high probabilities are not defined as yet. The definition of low probability ('extreme events') will be very important for the implementation of the Directive generally in many Member States of the European

Community; it is feasible that hundreds of thousands of people may live on land to which this category might apply.

Finally, SEPA will prepare the management plans, including both objectives and measures applicable to the vulnerable areas. There is some detail on the factors to be considered, including costs and benefits, development planning, conservation, infrastructure safety and some detail on the consultation process. Indeed there is specification of the factors to be considered, developed from the Directive requirements, for all the plans in this part of the Bill (part 3) but it is only for the management plans that there specific consultation requirements; for the others there is only a requirement to make the finished documents available. Doubtless this is because the risk mapping is a technical process, but nonetheless the Parliament may have a view on whether this is adequate. The plans will be prepared on six year cycles; the policy memorandum says that cumulatively these plans will amount to the long term 'road maps' that the Parliamentary inquiry wanted to see, but the Committee may disagree.

Local flood risk management plans are then prepared by the 'lead authority' for every 'local plan district'. The lead authority will be selected from amongst the relevant local authorities if the local plan district falls across administrative boundaries (by agreement, or by the ministers). These local plans will summarise the objectives, measures etc from the district plans and then set out in detail how the measures are to be implemented in that area; there is specification as to consultation requirements. Local plans are finalised when all the relevant local authorities and SEPA agree. Only if agreement is not forthcoming will ministers determine local plans and they will not otherwise have an approval role. So, returning to a debate that has simmered since WEWS went through Parliament, SEPA will set the strategic objectives, but the implementation will take place through the local authorities.

It is a matter of concern therefore that although the local plans must be consistent with the district plans, SEPA has no power to compel the local authorities to carry out works or take any steps (although the ministers have a general power of direction). Further, the section 34 duty on joint working requires cooperation between authorities only as far as is 'practicable'; it would be disappointing if cooperation was not practicable. The local authorities are bound by the general duties in part 1, but there is no specific duty to carry out the requirements of the district plans. The policy memorandum says this would conflict with the concordat on local government, whereby it is for councils themselves to determine how to fulfil their broad duties to provide services, but the lack of specific duties, combined with the removal of ring-fenced funding for flood works, means there is a potential problem with setting priorities, especially across different authorities.

District flood risk advisory groups (or district advisory groups) are to be established to have input into all of SEPA's mapping and planning functions, and their 'number, remits, membership and procedures' are to

be as SEPA determines (section 42(5)). Then, SEPA must divide each district into geographical sub-districts, and establish sub-district advisory groups – again 'as [SEPA] considers appropriate'. These groups will advise on those parts of SEPA's work as apply to their sub-district. They will also advise relevant lead authorities, and both those authorities and SEPA must have regard to their advice. This is all a little confusing, as it is not clear how these 'sub-districts' will relate to the 'local plan areas' or to the Area Advisory Groups for the sub-basins set up under WEWS. It is likely that they will relate to the latter, but all the consultations have identified resourcing problems here, and the functions of the flood advisory groups are extensive.

There is a broad duty on the ministers and 'every public body and office holder' to take account of relevant management plans at both levels, and SEPA and the lead authorities have powers to obtain information. SEPA has a duty to ensure consistency between flood planning and river basin planning. The ministers are to report annually to Parliament, which may be combined with their report on WEWS (itself something the Parliament insisted upon when that Bill went through committee).

Local authority functions are set out in part 4. They have a general power to do anything which they consider 'will contribute to the implementation' of measures in the local plan; and anything that is necessary to reduce an imminent risk of flood with potentially 'serious adverse consequences'; or 'will otherwise manage flood risk in its area without affecting the implementation of the measures [in the local plan]'(section 49(1) (b), (c)). This is a rather strange provision which seems to hint at disputes within local area groups of authorities, or between these and SEPA, and if so is surely better addressed by a conventional provision making the approved plans paramount in the event of any conflicting proposals. There is then some specification for flood protection schemes, the approval processes for which have been a major domestic driver for the legislation. The detail is in Schedule 2, and is both complex and controversial; it is discussed further below.

It is still for the local authority to propose such schemes, and any proposal must show how the scheme will contribute to the measures in any relevant local plan, or if it will not, why the authority considers that they 'will not affect the implementation of those measures'. Again this is curious; it might be reasonable to propose a scheme to tackle a matter not addressed in the plan at all, but not to propose something that will act contrary to that plan. If the plan was made binding (that is, not merely a requirement to 'have regard' to it), then such a conflict would not occur.

Approved protection schemes will now be deemed to have planning permission, which will be an important contribution to streamlining the processes. If, however, the authority takes forward works by agreement, then planning permission will still be required, ensuring some public scrutiny. There is provision to amend the Land Drainage (Scotland) Act 1958, to allow improvement orders to be varied under a flood protection scheme, as long as no new obligations are created.

Local authorities are given a power to buy land by agreement to exercise functions under this Bill, as well as having compulsory purchase powers. As noted they can also carry out works by agreement, and the scheme provisions enable works, including compensation, once a scheme is approved. However, there is little to address the questions raised in the Parliamentary inquiry about powers to compel landowners to act, or financial measures to encourage them to do so.

There is a new duty to assess all watercourses (not just urban water courses) and to consider how to reduce any flooding risk; it replaces that in the Flood Prevention and Land Drainage (Scotland) Act 1997, which is repealed entirely (as is the Flood Prevention (Scotland) Act 1961). The requirement to produce a biennial report has gone, but instead there will be a three yearly report on implementation of the local plans. The maintenance obligation for urban watercourses also disappears, superseded by the more general flood protection duties with which one specific requirement might conflict.

SEPA is given certain other functions and powers, beginning with a duty to give advice when requested by a planning authority. As noted above, SEPA has no powers to enforce such advice. SEPA may also carry out any additional assessment and mapping exercises it sees fit, taking account of the processes already required under the Bill, and may integrate such as appropriate. There is no mention as such of urban drainage plans, which could feasibly be developed under this provision or as part of the local plans. Scottish Water is a responsible authority and has general duties but Parliament may well look for a more specific provision.

Current provision for flood warnings, in the Agriculture Act 1970 and the Environment Act 1995, has been repealed and replaced with a more comprehensive framework, supported by the general duty in section 1 on all authorities to raise public awareness. However, there is no reflection of the discussion at the Parliamentary Committee about the relationship between SEPA and the Met Office and the lack of radar coverage in parts of Scotland. The government has made it clear that emergency responses are outwith the scope of the Bill, so there is nothing on the coordination of emergency responses or on responsibilities for rescue etc; although there is a duty to consult the police as well as local authorities over flood warning systems.

Both SEPA and the local authorities have powers to obtain information about land and landownership. Part 7 of the Bill relates to reservoirs and transfers powers of inspection and enforcement to SEPA.

As noted above, the approval process for flood protection works in Schedule 2 is complex and may be controversial. The length of time and multiplicity of consents required for these schemes was a focus of many consultation responses this year; the grant of deemed planning permission will help, but the actual scheme approval is also relevant particularly where inquiries are needed. Local authorities must publish proposed schemes, and give notice to SEPA, Scottish Natural Heritage, and various other specified authorities, as well as those whose interests in land may be

affected, and invite comments. Objections made in writing within 28 days are valid objections; previously the period was three months. If none is received, nor any late objections with good cause (together, 'relevant objections') the authority may confirm or reject the scheme. If objections are made, then the consequences depend on the class of objectors.

If objections are made by other public authorities or statutory undertakers (as specified in the Bill or by order) or by persons whose interests in land are affected, then the local authority must notify the ministers. If the objection is from a local authority or a National Park authority, the ministers must consider the proposed scheme, and if the objections remain unresolved, they must hold an inquiry and will then either confirm, modify or reject the scheme; any proposed modifications must be notified (to relevant objectors and others who may be affected) for comment.

If however the objectors come not from the specified groups, but from what we might term 'the ordinary public', the authority considers relevant objections and makes a preliminary decision, which may modify the proposal. It may then hold an inquiry and if so, relevant objectors must be heard; but there is no requirement to do so. The local authority then makes a decision. Any proposed modifications at preliminary or decision stage must be notified to objectors and anyone who may be affected. The final decision must also be notified and then the scheme becomes operational after six weeks.

Under Schedule 2 therefore, the timescales are reduced and the need for inquiries is substantially lessened; the inevitable correlation is less power for objectors, unless they are either some form of authority, or someone with an interest in land. This is at the heart of so many planning and planning-type issues at present; we can note the controversy over the inquiries into nuclear power and airports 'down south', and the focus under the new Planning Act here on participation at the planning stage but less so at the stage of individual consents. We can also see the same conflict arising in other jurisdictions, for example new state powers to progress water works in Queensland. There is a real tension between the ideal of public participation and the many costs, financial and in other resources that need to be contained.

Overall, the Flood Management Bill provides for the transposition of the Directive, as well as addressing some other problems. There is of course nothing on insurance, which took up much time in the Parliamentary inquiry but is a reserved matter, and although the policy memorandum talks about the 25 year 'roadmap' suggested by the Parliament that is not the same as a rolling programme of six year plans. Whilst there are broad powers and duties, a great deal is left to policy, to SEPA and to future regulation. The absence of any power of compulsion other than ministerial direction or the Schedule 2 process, combined with the decision already made to remove ring-fenced funding, may mean in reality that there will be no improvement in providing hard flood defences. Nor is there any express provision for urban drainage plans. There is

plenty of scope for the Parliament to take a view on several of these matters.

The Flood Risk Management (Scotland) Bill 2008, SP Bill 15 Session 3 (2008), and accompanying documents, are all available at <http://www.scottish.parliament.uk/s3/bills/15-FloodRisk/index.htm>.

Classifying Scotland's waters

As the river basin planning process continues, the Scottish Government has issued a consultation on the classification process for waterbodies. It builds on the consultations, and subsequent Directions, on the UK technical standards devised by the UK Technical Advisory Group (UKTAG, see (2008) 19 Water Law 145) and will apply to the classification of artificial and heavily modified waterbodies and protected areas, as well as surface and groundwaters. It includes an assessment of how spatial considerations should be tackled and how SEPA should assess confidence levels for its assessment. In some respects, having delved deep into the detail, we are now resurfacing into what will be the broad results of the first classification.

As we know, the key determinant of status under the Water Framework Directive (2000/60/EC, WFD) is ecological status, and this in turn comprises biological quality (the range and health of aquatic life), chemical and physicochemical quality (eg salinity, acidity, the presence of listed contaminants) and hydromorphological quality (eg flow, or the extent of canalisation).

Whilst chemical status is relatively straightforward, and can be measured by a pass/fail approach (with the relevant standards set for the most part in EC law), the other elements are more complex and may utilise all five of the WFD classifications. Essentially, overall, the system will use what is described as the 'one out all out' principle, whereby the lowest-ranking parameter will determine the ultimate classification.

There is a schematic representation (p 7) of the various classification options available and how they will be combined. For example, it shows that the ecological class is determined by 'aggregating' the biological, physicochemical, and hydromorphological elements, which in turn are then combined with the chemical status as referenced against the priority substances and other substances controlled at EC level. The 'specific pollutants' determined within national law are incorporated within the more general chemical elements that are part of ecological status. This representation also shows the classification bands currently available for the different elements of the scheme – for example, EC chemical classification is either Good (pass) or Fail – but this will translate into either Good/High or Moderate (which is of course a WFD Fail) for aggregation for the final five-band classification. Similarly, hydromorphological status will be either Good or High in itself. The diagram is helpful in showing how the system may work, but what is not clear is the extent to which this scheme is actually open to consultation. Obviously the broad approach is

constrained by the WFD itself, and elements of that whole process are still developing and indeed will be throughout the life of the first river basin plans. It is not always apparent – even from the whole suite of associated policies and directions – which elements of the national scheme are constrained by the WFD and which can be treated with some discretion and are therefore susceptible to constructive consultation. Meanwhile, at the level of detailed assessment, the government states in several places that it will expect SEPA to use the methodologies and standards developed by UKTAG. That gives very little flexibility and very little likelihood of the technical elements of the scheme being variable whatever consultation responses might be received.

That aside, the document contains some useful discussion of the way the whole process is to be managed. There is guidance for SEPA on risk-based monitoring and the scope of spatial management – polluting incidents affecting only a small area of a waterbody are unlikely to affect its overall classification – and SEPA is referred to the detailed UKTAG guidance. In terms of risk-based monitoring, this is particularly relevant in relation to classifying groundwater, as here there are only two sets of parameters, quantity and quality. Where there are no risks identified, the presumption will be that the groundwater is of good quality and no further investigation will be required. For artificial and heavily modified waterbodies, there will inevitably be hydromorphological alterations. The approach to be taken is to identify whether the other sets of parameters would indicate a classification other than 'Good'. If not, it will be possible to classify the waterbody as of either Good or maximum ecological potential. There is also guidance on protected areas, especially for drinking water sources where the WFD specifies certain requirements, and there is a requirement for SEPA to assess the confidence ratings of its classifications, again using UKTAG guidance.

The annexes at the end provide a very clear and helpful summary of the state of play for the various quality elements that will make up the final classification, and show clearly where there are already five categories defined, and alternatively where there are fewer classes for particular elements, and/or for particular types of water bodies. This is in effect an overview of the two sets of classification directions.

Whilst there are still some concerns – the prescriptive nature, as well as the ongoing intercalibration exercise, and other still-evolving elements – the process as a whole is now much clearer. The consultation is open till 17 October, and after that we will eagerly await the first draft plan, which should already be with the ministers and to be publicly released in December.

Scottish Government 2008 *Implementing the Water Environment and Water Services (Scotland) Act 2003: Proposals for Assessing the Status of Scotland's Water Environment – A Consultation* available at <http://www.scotland.gov.uk/Publications/2008/09/04113207/0>.

LEGAL UPDATE

WATER LAW AT A GLANCE

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This Legal Update covers developments between 1 April 2008 to 31 July 2008 as published in the House of Commons' Weekly Bulletin, the Scottish Parliament's Business Bulletin, Northern Ireland Assembly Research Papers, Stationery Office's Daily List and the Official Journal of the European Union, L and C.

Royal Assent

Regulatory Enforcement and Sanctions Act 2008 (Ch 13).
Royal Assent, 21 July 2008.

Progress of Bills

UK legislation

Energy Bill

House of Commons, first reading, 10 January 2008; second reading, 22 January 2008; Committee Stage, February and March 2008; third reading, 31 March 2008.
House of Lords, first reading, 1 May 2008; second reading, 21 May 2008; committee stage, June and July 2008.

Environmental Protection (Transfers at Sea) Bill

House of Commons, first reading, 5 December 2007; second reading, 25 January 2008 (withdrawn).

Protection of Bats and Newts Bill

House of Commons, first reading, 24 June 2008 (not printed).

Sustainable Energy (Local Plans) Bill

House of Commons, first reading, 25 March 2008 (not printed).

Statutory Instruments

2008/663 (W.71)

Environmental Offences (Fixed Penalties) (Miscellaneous Provisions) (Wales) Regulations 2008

With effect from 7 April 2008.
Made under Refuse Disposal (Amenity) Act 1978, s 11, Control of Pollution (Amendment) Act 1989; s 9, Environmental Protection Act 1990, ss 29, 98, Noise Act 1996, s 11, Anti-social Behaviour Act 2003, s 47, Clean Neighbourhoods and Environment Act 2005, ss 9, 66, 67, 81.

2008/969

River Humber (Upper Burcom Tidal Stream Generator) Order 2008

Coming into effect in accordance with art 1.
Made under Transport and Works Act 1992, ss 3, 5, sched 1.

2008/984

Sea Fishing (Enforcement of Community Measures) (Penalty Notices) Order 2008

With effect from 28 April 2008.
Made under Fisheries Act 1981, s 30.

2008/1087

Control of Major Accident Hazard (Amendment) Regulations 2008

With effect from 18 April 2008.
Made under Health and Safety at Work etc Act 1974, ss 43, 82.

2008/1097

Bathing Water Regulations 2008

With effect from 14 May 2008 (regs 2–7, 8 (part), 14 (part), 17, sched3 (part)), 24 March 2012 (regs 8 (part), 9, 12, 14 (part), 16, 18), 24 March 2015 (all remaining regs).
Made under European Communities Act 1972, s 2.

2008/1160

Teesport Harbour Revision Order 2008

With effect from 8 May 2008.
Made under Harbours Act 1964, s 14.

2008/1261

London Gateway Port Harbour Empowerment Order 2008

With effect from 16 May 2008.
Made under Harbours Act 1964, s 16.

2008/1261 COR

London Gateway Port Harbour Empowerment Order 2008

Correction slip dated June 2008.

2008/1322

Fisheries and Aquaculture Structures (Grants) (England) (Amendment) Regulations 2008

With effect from 20 June 2008.
Made under European Communities Act 1972, s 2.

2008/1438 (W.150)

Tope (Prohibition of Fishing) (Wales) Order 2008

With effect from 1 July 2008.
Made under Sea Fish (Conservation) Act 1967, ss 5, 6, 15.

2008/1472

Dee Estuary Cockle Fishery Order 2008

With effect from 1 July 2008.
Made under Sea Fisheries (Shellfish) Act 1967, s 1, 3, 4, sched 1.

2008/1522

Offshore Installations (Safety Zones) Order 2008

With effect from 1 July 2008.
Made under Petroleum Act 1987, s 22.

2008/1584

Lyme Bay Designated Area (Fishing Restrictions) Order 2008

With effect from 11 July 2008.
Made under Sea Fish (Conservation) Act 1967, ss 5, 5A, 15.

2008/1811 (W.175)

Shrimp Fishing Nets (Wales) Order 2008

With effect from 30 July 2008.
Made under Sea Fish (Conservation) Act 1967, ss 3, 15, European Communities Act 1972, s 2, sched 2.

2008/1817

Port of Tyne Harbour Revision Order 2008

With effect from 14 July 2008.
Made under Harbours Act 1964, s 14.

2008/1922 (C.87)

Water Act 2003 (Commencement No 8) Order 2008

With effect from 1 August 2008 (various provisions).
Made under Water Act 2003, s 105.

2008/2554 COR

Sea Fishing (Prohibition on the Removal of Shark Fins) Order 2007 (Correction Slip)

Correction slip dated June 2008.

Scottish Statutory Instruments

2008/151

Sea Fishing (Enforcement of Community Quota and Third Country Fishing Measures and Restriction on Days at Sea) (Scotland) Order 2008

With effect from 16 April 2008.
Made under Fisheries Act 1981, s 30, Aquaculture and Fisheries (Scotland) Act 2007, s 25.

2008/156

Sea Fishing (Control Procedures for Herring, Mackerel and Horse Mackerel) (Scotland) Amendment Order 2008

With effect from 9 May 2008.
Made under Fisheries Act 1981, s 30, European Communities Act 1972, sched 2.

2008/170

Bathing Waters (Scotland) Regulations 2008

With effect from 23 May 2008 (except for regs 8, 12–16, 20 (part), 21 (part), 22); 24 March 2011 (regs 12–16); 24 March 2012 (regs 8, 21 (part)); 1 January 2015 (regs 20 (part), 22).
Made under European Communities Act 1972, s 2.

2008/188

Dumfries and Galloway Council (Port William) Harbour Empowerment Order 2008

With effect from 23 May 2008.
Made under Harbours Act 1964, s 16.

2008/189

Dumfries and Galloway Council (Isle of Whithorn) Harbour Empowerment Order 2008.

With effect from 23 May 2008.
Made under Harbours Act 1964, s 16.

2008/190

Dumfries and Galloway Council (Garieston) Harbour Empowerment Order 2008

With effect from 23 May 2008.
Made under Harbours Act 1964, s 16.

2008/193 (C.20)

Nature Conservation (Scotland) Act 2004 (Commencement No 3) Order 2008

With effect from 2 June 2008 and 20 June 2008 (various provisions).
Made under Nature Conservation (Scotland) Act 2004, ss 53, 59.

2008/219 COR

Water Environment (Controlled Activities) (Scotland) Amendment Regulations 2007 (Correction slip)

Correction slip dated May 2008.

2008/263

Water Environment (Relevant Enactments and Designation of Responsible Authorities and Functions) Order 2008

With effect from 22 September 2008.
Made under Water Environment and Water Services (Scotland) Act 2003, s 2.

2008/269 (C.22)

Water Environment and Water Services (Scotland) Act 2003 (Commencement No 8) Order 2008

With effect from 10 July 2008 (various provisions).
Made under Water Environment and Water Services (Scotland) Act 2003, s 38.

Statutory Rules of Northern Ireland

2008/138 (C.6)

Waste and Contaminated Land (1997 Order) (Commencement No 8) Order (Northern Ireland) 2008

With effect from 3 April 2008 (various provisions).
Made under SI 1997/2778 (NI 19), art 1.

2008/143

Donaghadee (Harbour Area) Order (Northern Ireland) 2008

With effect from 18 June 2008.
Made under Harbours Act (Northern Ireland) 1970, s 1, sched 1.

2008/160

Waste Management Licences (Consultation and Compensation) Regulations (Northern Ireland) 2008

With effect from 19 May 2008.
Made under SI 1997/2778 (NI 19), arts 7, 9, 11.

2008/196

Nitrates Action Programme (Amendment) Regulations (Northern Ireland) 2008

With effect from 9 June 2008.
Made under European Communities Act 1972, s 2.

2008/226

Valuation (Water Undertaking) Regulations (Northern Ireland) 2008

With effect from 7 July 2008.
Made under SI 1977/2157 (NI 28), art 37.

2008/231

Quality of Bathing Water Regulations (Northern Ireland) 2008

Coming into effect in accordance with reg 1.
Made under European Communities Act 1972, s 2.

2008/232 (C.10)

Foyle and Carlingford Fisheries (2007 Order) (Commencement No 1) Order (Northern Ireland) 2008

With effect from 1 June 2008 (various provisions).
Made under Foyle and Carlingford Fisheries (Northern Ireland) Order 2007, art 1.

2008/298

Foyle Area (Control of Oyster Fishing) Regulations 2008

With effect from 31 July 2008.
Made under Foyle Fisheries Act 1952, s 13, Foyle Fisheries Act (Northern Ireland) 1952, s 13.

2008/299

Foyle Area (Landing Areas for Oysters) Regulations 2008

With effect from 31 July 2008.
Made under Foyle Fisheries Act 1952, s 13, Foyle Fisheries Act (Northern Ireland) 1952, s 13.

2008/300

Foyle Area (Licensing of Oyster Fishing) Regulations 2008

With effect from 31 July 2008.
Made under Foyle Fisheries Act 1952, s 13, Foyle Fisheries Act (Northern Ireland) 1952, s 13.

2008/301

Foyle Area (Oyster Logbook and Identification Tagging) Regulations 2008

With effect from 31 July 2008.
Made under Foyle Fisheries Act 1952, s 13, Foyle Fisheries Act (Northern Ireland) 1952, s 13.

2008/302

Foyle Area and Carlingford Area (Prohibition of Sale of Salmon and Sea Trout Caught by Rod and Line) Regulations 2008

With effect from 31 July 2008.
Made under Foyle Fisheries Act 1952, s 13, Foyle Fisheries Act (Northern Ireland) 1952, s 13.

2008/304

Inshore Fishing (Prohibition of Fishing and Fishing Methods) (Amendment) Regulations (Northern Ireland) 2008

With effect from 11 July 2008.
Made under Fisheries Act (Northern Ireland) 1966, ss 19, 124.

European Union**Legislation****Commission Regulations (EC)**

No 318/2008 of 31 March 2008
Amending Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein.
OJ 2008 L 95/3

No 324/2008 of 9 April 2008
Laying down revised procedures for conducting Commission inspections in the field of maritime security.
OJ 2008 L 98/5

No 372/2008 of 24 April 2008
Establishing a prohibition of fishing for tusk in EC and international waters of V, VI and VII by vessels flying the flag of Spain.
OJ 2008 L 113/11

No 373/2008 of 24 April 2008
Establishing a prohibition of fishing for cod in ICES zones IV; EC waters of IIa; that part of IIIa not covered by the Skagerrak and Kattegat by vessels flying the flag of Sweden.
OJ 2008 L 113/13

No 446/2008 of 22 May 2008
Adapting certain bluefin tuna quotas in 2008 pursuant to Article 21(4) of Council Regulation (EEC) No 2847/93 establishing a control system applicable to the Common Fisheries Policy.
OJ 2008 L 134/11

No 493/2008 of 2 June 2008
Establishing a prohibition of fishing for cod in Norwegian waters of I and II by vessels flying the flag of Portugal.
OJ 2008 L 144/31

No 494/2008 of 2 June 2008
Establishing a prohibition of fishing for cod in VI; EC waters of Vb; EC and international waters of XII and XIV by vessels flying the flag of France.
OJ 2008 L 144/33

No 495/2008 of 2 June 2008
Establishing a prohibition of fishing for blue whiting in EC and international waters of I, II, III, IV, V, VI, VII, VIIIa, VIIIb, VIIIc, VIIIe, XII and XIV by vessels flying the flag of Spain.
OJ 2008 L 144/35

No 513/2008 of 5 June 2008
Establishing a prohibition of fishing for haddock in Norwegian waters of I and II by vessels flying the flag of Portugal.
OJ 2008 L 150/5

No 517/2008 of 10 June 2008
Laying down detailed rules for the implementation of Council Regulation (EC) No 850/98 as regards the determination of the mesh size and assessing the thickness of twine of fishing nets.
OJ 2008 L 151/5

No 520/2008 of 9 June 2008
Prohibiting fishing for roundnose grenadier in ICES zones Vb, VI and VII (Community waters and waters not under the sovereignty or jurisdiction of third countries) by vessels flying the flag of Spain.
OJ 2008 L 151/31

No 530/2008 of 12 June 2008
Establishing emergency measures as regards purse seiners fishing for bluefin tuna in the Atlantic Ocean, east of longitude 45°W, and in the Mediterranean Sea.
OJ 2008 L 155/9

No 535/2008 of 13 June 2008
Laying down detailed rules for the implementation of Council Regulation (EC) No 708/2007 concerning use of alien and locally absent species in aquaculture.
OJ 2008 L 156/6

No 536/2008 of 13 June 2008
Giving effect to Article 6(3) and Article 7 of Regulation (EC) No 782/2003 of the European Parliament and of the Council on the prohibition of organotin compounds on ships and amending that Regulation.
OJ 2008 L 156/10

No 537/2008 of 13 June 2008
Establishing a prohibition of fishing for saithe in Norwegian waters of I and II by vessels flying the flag of Portugal.
OJ 2008 L 156/12

No 544/2008 of 13 June 2008
Establishing a prohibition of fishing for Greenland halibut in EC waters of IIa and IV; EC and international waters of VI by vessels flying the flag of Spain.
OJ 2008 L 157/88

No 567/2008 of 17 June 2008
Establishing a prohibition of fishing for saithe in ICES zones IIIa and IV; EC waters of IIa, IIb, IIc and IIId by vessels flying the flag of Sweden.
OJ 2008 L 160/26

No 579/2008 of 18 June 2008
Establishing a prohibition of fishing for cod in Skagerrak by vessels flying the flag of Sweden.
OJ 2008 L 161/23

No 585/2008 of 19 June 2008
Establishing a prohibition of fishing for cod in Kattegat by vessels flying the flag of Sweden.
OJ 2008 L 161/9

No 614/2008 of 26 June 2008
Establishing a prohibition of fishing for tusk in Norwegian waters of IV by vessels flying the flag of the United Kingdom.
OJ 2008 L 166/29

No 635/2008 of 3 July 2008
Adapting the cod fishing quotas to be allocated to Poland in the Baltic Sea (Subdivisions 25–32, EC Waters) from 2008 to 2011 pursuant to Council Regulation (EC) No 338/2008.
OJ 2008 L 176/8

No 641/2008 of 4 July 2008
Amending Council Regulation (EC) No 40/2008 as regards the list of vessels engaged in illegal, unreported and unregulated fisheries in the North Atlantic.
OJ 2008 L 178/17

No 648/2008 of 4 July 2008
Establishing a prohibition of fishing for plaice in ICES zones of VIIIh, VIIj and VIIk by vessels flying the flag of Belgium.
OJ 2008 L 180/11

No 665/2008 of 14 July 2008
Laying down detailed rules for the application of Council Regulation (EC) No 199/2008 concerning the establishment of a Community framework for the collection, management and use of data in the fisheries sector and support for scientific advice regarding the Common Fisheries Policy.
OJ 2008 L 186/3

No 669/2008 of 15 July 2008
On completing Annex IC of Regulation (EC) No 1013/2006 of the European Parliament and of the Council on shipments of waste.
OJ 2008 L 188/7

No 697/2008 of 23 July 2008
Amending Council Regulation (EC) No 40/2008 as regards catch limits for the fisheries on sandeel in ICES zone IIIa and in EC waters of ICES zones IIa and IV.
OJ 2008 L 196/9

No 698/2008 of 23 July 2008
Establishing a prohibition of fishing for blue whiting in EC and international waters of I, II, III, IV, V, VI, VII, VIIIa, VIIIb, VIIIc, VIIIe, XII and XIV by vessels flying the flag of Lithuania.
OJ 2008 L 196/11

No 699/2008 of 23 July 2008
Establishing a prohibition of fishing for whiting in ICES zones VIIb, VIIc, VIId, VIIe, VIIf, VIIg, VIIh and VIIk by vessels flying the flag of the Netherlands.
OJ 2008 L 196/13

No 700/2008 of 23 July 2008
Establishing a prohibition of fishing for cod in VIIb–k, VIII, IX, X; EC waters of CECAF 34.1.1 by vessels flying the flag of the Netherlands.
OJ 2008 L 196/15

No 701/2008 of 23 July 2008
Establishing a prohibition of fishing for cod in Norwegian waters of I and II by vessels flying the flag of Poland.
OJ L 196/17

No 739/2008 of 28 July 2008
Prohibiting fishing for red seabream in ICES zones VI, VII and VIII (Community waters and waters not under the sovereignty or jurisdiction of third countries) by vessels flying the flag of a Member State except Spain, France, Ireland and the United Kingdom.
OJ 2008 L 201/34

No 751/2008 of 30 July 2008
Establishing a prohibition of fishing for saithe in Norwegian waters south of 62°N by vessels flying the flag of Sweden.
OJ 2008 L 202/46

Council Regulations (EC)

No 338/2008 of 14 April 2008
Providing for the adaptation of cod fishing quotas to be allocated to Poland in the Baltic Sea (Subdivisions 25–32, EC Waters) from 2008 to 2011.
OJ 2008 L 107/1

No 538/2008 of 29 May 2008
Amending Regulation (EC) No 1386/2007 laying down conservation and enforcement measures applicable in the Regulatory Area of the Northwest Atlantic Fisheries Organisation.
OJ 2008 L 157/1

No 718/2008 of 24 July 2008
Amending Regulations (EC) No 2015/2006 and (EC) No 40/2008, as regards fishing opportunities and associated conditions for certain fish stocks.
OJ 2008 L 198/8

No 734/2008 of 15 July 2008
On the protection of vulnerable marine ecosystems in the high seas from the adverse impacts of bottom fishing gears.
OJ 2008 L 201/8

No 744/2008 of 24 July 2008
Instituting a temporary specific action aiming to promote the restructuring of the European Community fishing fleets affected by the economic crisis.
OJ 2008 L 202/1

Corrigendum to Council Regulation (EC) No 40/2008 of 16 January 2008 fixing for 2008 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required.
OJ 2008 L 176/25

Council Directive

2008/59/EC of 12 June 2008
Adapting Directive 2006/87/EC of the European Parliament and of the Council laying down technical requirements for inland waterway vessels, by reason of the accession of the Republic of Bulgaria and Romania.
OJ 2008 L 166/31

European Parliament and Council Directive

2008/56/EC of 17 June 2008
Establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive).
OJ 2008 L 164/19

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