

Maintenance of Uneconomic Sea Flood Defences: A Way Forward

From the Head of Flood Management Division

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To: Flood Management Stakeholders Forum

Dear colleague

I am writing to advise you that we have recently clarified our policy on uneconomic flood defences to assist the Environment Agency in preparing their strategies.

Over the last few years, in recognition of the need to do more to protect people from flooding, there have been real increases in flood management budgets. However, it remains the case that resources will never be sufficient to defend all property everywhere. Keeping the sea at bay and maintaining river banks and walls is a never ending and expensive process. Indeed, with sea level rise and other changes induced by climate change in prospect, together with greater development and wealth, the risks from flooding will increase in future. This means that we have to get as much benefit from available funds as we can, targeting them where they can best reduce flood risk, and this in turn means making hard choices about where we can and cannot continue to maintain defences.

The attached paper sets out a rationale for abandoning those sea walls which are unsustainable. In reaching decisions on which sea walls are sustainable, we will seek to take fair account of social and environmental considerations as well as economic criteria. These matters are also currently being reconsidered through development of Defra's new flood risk management strategy which will go out to consultation over the summer. The attached paper is consistent with the direction we expect to see established in the strategy.

The Environment Agency has agreed the attached position paper, and will, over the coming years, be categorising its defences accordingly. For the coast it will do this through the Shoreline Management Plan and strategy development processes. In this way the Environment Agency envisages that this policy paper will be used to inform existing planning and review programmes. It is not likely that the policy will lead, in the short term, to major proposals for set back and/or abandonment, but, in the longer term, significant changes may be proposed. The Agency will be engaging with key stakeholders locally as appropriate in developing its plans. If members of the Forum would like to respond at national level on the overall approach which can also feed into the strategy development process I should be very glad to hear from you.

Yours faithfully

Sarah Nason
Head of Flood Management

Purpose and scope of this paper

1. The purpose of this paper is to establish a clear understanding of the approach to be taken where there is insufficient economic justification for continuing to maintain seawalls. The paper clarifies and elaborates existing policy that has already been described and published . Further guidance on the matter was requested by the Environment Agency in the light of concerns that any decision to withdraw maintenance from sea walls could be challenged and may put the Agency in breach of the requirements of the Conservation (Natural Habitats, &c.) Regulations 1994, (the Habitats Regulations).

2. The paper has been worked up in reference to Essex where the combination of rising sea levels and foreshore erosion, which threatens the sustainability of defences and gives rise to loss of intertidal habitat, together with many uneconomic seawalls mean that action is urgently required. However, in other areas where similar circumstances pertain the approach will be equally applicable.

Policy background

3. Since flood and coastal defence legislation in England and Wales is permissive, it does not confer a right to protection, except in very limited circumstances . For flood defence works funded by the taxpayer, decisions on where to invest, or continue to invest, should be made in the light of the dangers to life, potential damage to assets measured in national economic terms and legal requirements; the aim being to maximise the public benefits within the available budget.

4. Defra's appraisal guidance provides a framework for considering investment decisions taking account of economic, environmental and social benefits, as well as legal requirements. It also provides a means of ensuring that the advantages and disadvantages of alternative defence options are fully considered in the light of a wide range of issues, such as landscape, conservation and recreation together with more easily measurable benefits like agricultural outputs and property values. Doing nothing, maintaining the current line of defence and managed realignment are among the options that Defra's guidance indicates should be considered before establishing a preferred flood management policy for any particular length of defence.

The issue

5. If Government is to maximise the benefits of its investment in flood and coastal defence it is to be expected that investment decisions will need to change from time to time to reflect the current circumstance and priorities. Some areas that once warranted investment may no longer do so. It is now the case that the cost of maintenance of many existing defences along stretches of the Essex coast and estuaries exceeds the benefits . Further expenditure on the renewal of these structures as they reach the end of their useful life will be even less economically viable. This situation is exacerbated in Essex and other parts of the south and east of England by the ongoing loss of saltmarsh, which previously formed an important first line of defence in front of many seawalls.

6. The Environment Agency, which is responsible for most sea defences, has no tradition, and little experience, of discontinuing the maintenance of defences. Furthermore, in areas where defences have been maintained for a significant period people have come to assume that if they have enjoyed protection at the taxpayers' expense in the past they will continue to do so. However, where investment in defences is no longer economically viable the case for continued maintenance needs to be considered and fully appraised. It is against this background that the Agency now needs to develop a strategic approach to its future investment in the maintenance and improvement of defences.

7. Any decision to cease maintenance needs careful consideration in the light of the possible impacts on flood risk and legal obligations. For example, there may be reasonable concerns that if a seawall fails flood risks could increase in other places. On the other hand, there is evidence that if some areas of currently protected land become intertidal, flood risks could be reduced elsewhere. In some circumstances the abandonment of defences could lead to a triple benefit, allowing a more efficient allocation of flood defence resources, reducing flood risks and creating or restoring much needed intertidal habitat. All such consequences need to be taken into account.

The way forward

8. The Environment Agency, with Defra's backing, is now promoting a comprehensive series of Essex estuary strategies that will provide a better understanding of how future flood risk can be reduced in the face of pressures such as sea level rise. The full programme of strategy development in Essex is timetabled to be complete by 2007.

9. On completion, the Essex estuary strategies, and in due course the revision of the Shoreline Management Plan, will provide the information and framework necessary for making the best medium to long-term decisions. The strategies will include a detailed plan of the coastal management works necessary to improve the sustainability of defences and, drawing on the information already developed in the Essex Coastal Habitat Management Plan (CHaMP), meet the UK's requirements under the European Birds and Habitats Directives. In the meantime, there is a need to continue to reduce the risk of flooding to people, property and environmental assets where it is economically justified or legally required whilst ensuring that money is not wasted on clearly unjustified operations.

10. The interim measures detailed in this paper will evolve into a truly strategic approach as the estuary strategies are completed. Prior to that time the Environment Agency has agreed to ensure that its programmes of capital and maintenance works are economically efficient and legally compliant by following the approach described below.

11. The Agency will assign each length of sea defence to one of the four following categories:

1. Defences for which there is a clear economic case to continue maintenance to reduce the risk to people and property.
2. Defences that are required to protect internationally designated environmental features from the damaging effect of tidal flooding.
3. Defences which do not fit in categories 1 or 2 above but where work is justified because withdrawal of maintenance would cause an uncertain and unacceptable risk (due to either the possible impacts of any unpredictable hydrological effects on flood risk of potential breaches, or where there would be other unacceptable effects that justify continued expenditure on maintenance e.g. possible damage to fisheries).
4. Defences that do not fit the above categories.

12. The usual economic appraisal guidance should be used to establish whether there is a clear economic case for continued maintenance. English Nature will advise on the effects on conservation features and the Environment Agency will need to establish a view on flood risk to people and property. English Nature will, for example, be responsible for advising on the assignment of defences to category 2 drawing on the CHaMP and other studies.

13. Since the hydrological effects of breaches are dependent on location and size, expert opinion should be sought in assigning defences to category 3 prior to the completion of the estuary strategies. Relevant organisations will need to consider whether they have the information necessary to advise that a change of defence policy is acceptable now or whether a precautionary approach is justified in lieu of the strategy studies. However, English Nature has already advised that the geomorphological and hydrological effects of unplanned seawall breaches will not normally be considered to have an adverse effect on the integrity of intertidal and supra-tidal conservation features within Natura 2000 sites, i.e. they would prefer on balance to ensure the creation of further intertidal areas through the move to a more sustainable and dynamic coastline and are prepared, in normal circumstances (where category 2 does not apply) to accept the effects. Defences that are assigned to category 3 for precautionary reasons will be reassigned as one of the key tasks of the studies needed to produce estuary strategies.

14. The Environment Agency should begin the process of withdrawing maintenance from defences that fall into category 4 as soon as possible.

An Exit Strategy

15. The assignment of defences to category 3 may provide an acceptable reason for the Agency continuing to invest in the maintenance of a limited number of defences in the short term for which there is no apparent economic or legal justification. However, there will be places where it is immediately clear that abandonment is the only justifiable option, i.e. defences in category 4. The Agency, in consultation with key stakeholders, will therefore need, as a matter of urgency, to develop an Exit Strategy for withdrawing from the maintenance of such uneconomic seawalls.

16. The Exit Strategy will involve informing affected landowners, occupiers of the land and the Highways Authority of the Agency's plans, providing interested parties an opportunity to make representations, advising landowners of the condition of the seawall and informing them of their options. In many cases, seawalls for which there is no maintenance justification may have a substantial residual life. The Environment Agency should inform landowner/occupiers of the anticipated residual life, existing standard of defence and the condition of the structures at the earliest opportunity, together with any other relevant information such as their rights, responsibilities and options after the Agency stops maintenance. This information will help affected parties to deal with the change in circumstances in the most beneficial way. Consultation with the Highways Authority will be important to ensure that any issues associated with public rights of way are fully considered.

Options for Landowners

17. Where the Agency withdraws from the maintenance, landowners will be entitled to apply for permission to maintain defences on their land at their own expense. Consent would of course be subject to the consenting authority satisfying itself that the application was acceptable. However, where the proposal was to continue with the current maintenance regime, it is unlikely that there would be grounds for refusal. Nevertheless, landowners should be advised that consent would be needed under the Environment Agency's byelaws and in certain circumstance, depending on the proposal and its possible impacts, planning permission and other consents such as assent from English Nature under the Wildlife and Countryside Act may be required.

18. If the landowner gains consent to maintain their own seawall, the Environment Agency may offer to continue to maintain the wall on the landowner's behalf subject to the Agency's own priorities and payment of the full costs of doing so. If the landowner does not wish to maintain his or her own seawall or fails to gain consent to do so other options may include applying for Countryside Stewardship Intertidal Habitat creation payments, and selling or leasing the property, e.g. for habitat creation.

19. Landowners who are minded to sell or lease their land should be informed of organisations that may be interested in purchasing or renting it. The Environment Agency itself may be interested in buying land to either meet habitat creation requirements or, where such land purchase is justified, for flood defence reasons. Developers, like ports, may also be interested in land purchase to create habitat as compensation for impacts on protected sites and wildlife NGOs may be interested in land acquisition to enhance biodiversity. Wildfowling groups and others may also have an interest.

Compensation

20. Where there is no legal requirement to provide flood defence there is similarly no provision for compensation to offset the disadvantage suffered by any landowners that may be flooded as a result of a change in flood management practices. However, if a landowner were refused consent to maintain their own defence on the grounds that allowing them to protect their land would be contrary to the public

interest, for example for nature conservation reasons, a case for compensation may arise.

21. While there is no general provision for compensation to landowners in cases where an operating authority stops maintaining a seawall, the Environment Agency's Exit Strategy should ensure that interested parties are fully aware of their options, thus allowing them to make the best business decisions.

The Birds and Habitats Directives and the Habitat Regulations

22. The categorization above will ensure that any decision the Environment Agency makes to stop maintaining a seawall is consistent with the requirements of the European Birds and Habitats Directives and Habitats Regulations. Seawalls that require maintenance to avoid the deterioration of European sites will fall into categories 1, 2 or 3. Any decision not to maintain a sea wall that protects a European site from the adverse effects of tidal flooding would need to be subject to the provision of Regulation 48 and 49 of the Habitats Regulations. If it is not sustainable to maintain such a defence, compensatory measures will need to be taken by the Agency to maintain the coherence of Natura 2000.

23. Where a decision is taken to continue to maintain a seawall, consideration will need to be given to any effects that the proposed maintenance is likely to have on a European site, as is currently the case. This is particularly relevant to European sites on the seaward side of the wall which will be affected by coastal squeeze. Guidance on the assessment of potential impacts of seawall maintenance and the provision of any compensation requirements that may arise will be issued shortly, once English Nature and Defra have agreed an approach based on latest legal advice.

Human Rights

24. In this matter, as in all others, it will be important for the Environment Agency to act reasonably, having due regard to the Human Rights Act. Landowners must be allowed an opportunity to make representations before a decision to stop maintaining a seawall is taken. They should also be given a reasonable period of notice when a decision is made that may affect their property. Adherence to Defra policy guidance and the Environment Agency's Exit Strategy will be necessary as evidence that the Agency has acted reasonably, but advice should also be sought from local planning and legal teams on a case-by-case basis.

25. The Human Rights Act provides, amongst other things, for the right to peaceful enjoyment of possessions (Article 1 of Protocol 1), and the right to respect for private and family life (Article 8). Any removal of rights must be challengeable in public proceedings under Article 6 (the right to a fair trial). Essentially, no one can be deprived of the unimpeded use of his or her land except in the public interest. The Act recognizes the need for a balance between public interests and private rights, with measures taken to further the former at the expense of the latter required to be proportionate.

26. A reasoned decision to abandon the public maintenance of a seawall on the grounds that it is not cost-effective is unlikely to be construed as a deprivation of a

human right. However, a decision to refuse private landowners consent to maintain their own defences is likely to amount to a control of use of the landowner's property and this would need very careful consideration of the balance between public interests and private rights.

27. There could be grounds for a challenge if people suffer from flooding or coastal erosion resulting from a decision not to undertake works where that decision was one that no reasonable Minister (or other person in authority) could possibly have made. As with all flood and coastal management choices, such decisions must be rational, proportionate and take account of the general interest (including the economic interests) of the country. It is therefore important that decisions are fully supported by appropriate documentation.

The implications

28. The measures described in this paper are unlikely to lead to substantial changes on the ground, certainly in the short term. The Environment Agency will not withdraw maintenance from those sea walls which could lead to an increase in wider flood risks to people or property, and nature conservation requirements will be met. Even where the Agency does stop maintenance, many seawalls have a substantial residual life and in all probability the landowner will be granted consent to maintain their own defences. The money saved on the maintenance programme will be redirected to higher priority areas where the benefits of investment exceed the costs, thus increasing the benefits of the Agency's flood management works.

29. Any land affected by this approach will be in rural agricultural areas where the economic damages arising from flooding are low and continued public investment cannot be justified. Indeed there are likely to be environmental benefits from allowing flooding in many situations that are currently not being realised. Nevertheless, it can be anticipated that the individuals that will no longer benefit from the public investment will resist the approach. The Agency will therefore need to proactively explain its rationale in the wider community to ensure that it is understood to be just and well founded. It is not possible now to give precise figures for the areas of land affected until the Agency has completed its studies. However, through consultation within the Department on this and on our new flood management strategy, we have established that there are no policy constraints to the approach in respect of the extent of land likely to be lost in the longer term to particular types of agriculture whereas there are strong policy drivers for the recreation of intertidal habitat that is currently being lost. An indication of the amount of land involved has been provided on the Crouch/Roach estuary system, where the Environment Agency has piloted the approach. In this case, the Agency's studies have indicated that 389 ha would be affected. While this figure is not necessarily indicative of the outcome of other studies, it must be emphasised that as landowners would be entitled to apply for consent to maintain their own defences, it cannot be assumed that all, or any, of this land will be abandoned to the sea .

Conclusions

30. The way forward described in this paper will ensure sound investment in the maintenance of seawalls and compliance with legal requirements. It allows for

precautionary interim maintenance measures where justified until estuary strategies are complete. Whilst the Environment Agency will stop maintaining some stretches of seawall soon, subject to a reasonable notice period, others will be dropped from the maintenance programme only following completion of necessary studies. The measures described would help deliver Defra's flood management policies including the need to have regard to other interests and objectives, particularly to reverse the current loss of intertidal habitat. However, there is clearly a need for the Agency to engage proactively with stakeholders, such as local authorities, the Country Land and Business Association and National Farmers Union, in formulating its exit strategy and to explain its approach to the wider community as soon as possible.

31. Adoption of this approach will enable EA to develop estuary management strategies and a revised Shoreline Management Plan in Essex which will facilitate changes in flood management practice to be made, such as further managed realignment, so better integrating flood defence with other Defra policies, whilst taking account of individual and community concerns.