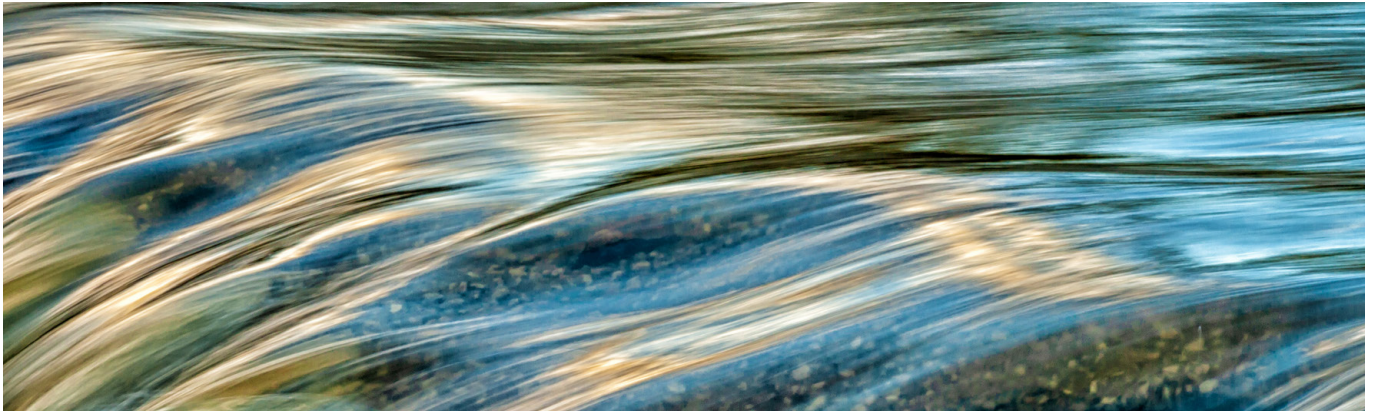


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CLIMATE CHANGE LAW.  
CURRENT PERSPECTIVES.

**Farmers, Flooding, and Climate Change:  
The Legal Risks**

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## Farmers, Flooding, and Climate Change: The Legal Risks

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Agriculture is one of the areas of human activity that is likely to be most profoundly affected by climate change and its regulatory responses. These are likely to include (i) crop yields being affected by rising temperatures, drought, extreme weather events and increased pests; (ii) regulatory pressure to reduce carbon dioxide emissions from agriculture (which currently accounts for approx. 25%-30% of global CO<sub>2</sub> emissions); and (iii) governmental land-management initiatives designed to achieve climate change mitigation and adaptation outcomes (including reforestation and flood mitigation projects). It can be anticipated that the governmental initiatives implied by points (ii) and (iii) will lead to judicial review challenges in the courts.

This article focuses specifically on one physical impact of climate change on farmers in the UK, namely flooding risks. This topic has been chosen both as a particularly visible impact of climate change, and because it is an area where litigation may be particularly likely (as evidenced by the recent decisions commented on below).

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### A. What are the legal/financial risks to farmers whose land becomes flooded?

There are four key risks to farmers when their land becomes flooded.

**First**, the main risk is, of course, physical loss and damage - to crops, livestock, buildings and/or equipment. There may also be damage to the land itself, for example compaction caused by long periods under water.

A **second** risk is that farmers could lose the right to receive subsidies from the Government under the Basic Payment Scheme (“**BPS**”), Countryside Stewardship (“**CS**”), Environmental Stewardship (“**ES**”) and other existing schemes. The payments which farmers and landowners receive under these schemes is dependent upon them complying with the conditions of individual agreements and with “*cross compliance*” rules.

Under both the CS and the ES schemes, if a farmer’s land is flooded, there is a risk that they will no longer be able

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to manage their agreement in accordance with the option requirements or to keep within the cross compliance requirements. For example, farmers are required to “protect soil by having a minimum soil cover” and to “minimise soil erosion”. These conditions, and others, may not be met in the event of flooding. The problem may be temporary or permanent.

Farmers must notify the Rural Payments Agency (“RPA”) if this the case. And there may be a possibility of claiming “force majeure”. This must be done within 8 weeks from the time the farmer realises that he or she cannot meet a scheme requirement.

The Agricultural Transition will replace and expand the existing schemes with the Environmental Land Management (“ELM”) scheme, which will incentivise farmers to improve the natural environment alongside food production – including natural flood management. **Third**, the flooding may build up on a farmer’s land and then cause harm to another person’s land. The farmer could then potentially be liable in nuisance or negligence. We address this further below.

**Fourth**, theoretically, farmers could also face enforcement action from the Environment Agency, if the floodwaters pose a risk to the environment. But this seems to be a relatively minor risk, especially given the “advice-led” approach that the Environment Agency takes towards other environmental risks.

## B. What forms of redress are available?

The forms of redress available to farmers are unlikely to compensate them for all the losses they have suffered. We have identified five forms of redress.

The **first** port of call may be an insurance claim. But, as has become clear with the multitude of Covid-19 business interruption insurance cases going through the Courts now, insurers may be reluctant to pay out. There will be an excess and a limit of liability. There may be relevant exclusions. Policies may cover certain losses (such as damage to farm buildings), but not others (such as loss of payments under the Basic Payments/Stewardship schemes).

**Secondly**, there may be ad hoc schemes introduced by the Government, such as the [Farming Recovery Fund](#) that was introduced to provide compensation to farmers whose land had been damaged by floods in 2019. One-off funds like this can provide a lifeline, but there may be strict eligibility requirements – for example, the Farming Recovery Fund did not cover “items that insurance should normally cover”. Moreover, the sums payable will be limited – the Farming Recovery Fund was limited to £25,000 – and these schemes will only be set up in response to large-scale events.

**Thirdly**, it may be possible to sue a neighbouring landowner if they are responsible for the flooding. The likely causes of action would be in nuisance and negligence, but it may be difficult to establish these causes of action. As stated by the High Court in a flooding nuisance case decided last year (*Partakis-Stevens v Sihan* [2022] EWHC 3249 (TCC), [154]), “a landowner will not be liable in nuisance for the consequences of what would be recognised as a natural use of his land by him, unless the quality or extent of that use by him was unreasonable”. It would also be costly to pursue such litigation. Expert evidence is likely to be required – both in relation to causation (i.e. did the defendant’s actions/ omissions cause the floodwater to enter the claimant’s land) and quantum (i.e. what is the claimant’s loss as a result).

**Fourthly**, one could apply for compensation from the Environment Agency (the organisation responsible for managing flood risks from main rivers and the coast) under Schedule 21, paragraph 5(1) of the Water Resources Act 1991 (“**the WRA 1991**”). However, this route is unlikely to be available to most farmers. This is because compensation may be due for injury sustained “by reason of the **exercise**” of the Environment Agency’s powers; but it will not be due by reason of the **failure to exercise** those powers. In other words, if the Environment Agency undertakes some works which then cause flooding to a farm, compensation may be due. But if the Environment Agency simply fails to prevent flooding by reason of its omissions then no compensation is due – even if those omissions were unreasonable.

As accepted by the claimants (farmers suing the Environment Agency in a flooding case) in *King v Environment Agency* [2018] EWHC 65 (QB); [2018] Env.

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L. R. 19 477, [21]: “[t]here is no legal right to be protected from flooding and its effect, and... at common law landowners are responsible for safeguarding their land and property when flooding occurs”.

**Fifthly**, theoretically at least a cause of action may lie against the Environment Agency or a local authority in nuisance or negligence. In *Anchor Hanover Group v Arcadis Consulting (UK Ltd)* [2021] EWHC 543 (TCC), the High Court rejected the application by the Environment Agency to strike out a claim in negligence against it by a group of landowners claiming compensation for flooding. Of course, the bar for obtaining a strike out is high, and we do not know what would have happened if the case had proceeded to a full trial. In any event, the import of this case is limited to its specific facts – the allegation was that the Environment Agency had been negligent in granting consent for the placement of a culvert to divert a river.

The Court, at paragraph 59, reiterated the general statement of principle that “*public authorities do not owe a duty of care at common law to private individuals or bodies simply by exercising their statutory powers or duties*”. A public authority would only be under a duty of care “*where the principles applicable to private individuals or bodies would impose such a duty, as for example where the authority has created the source of danger or has assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation*” (paragraph 50). Thus, it would be difficult to establish that the Environment Agency owed one a duty of care. There is also a risk that the right to sue in nuisance/negligence would be ousted by the compensation scheme provided for in the WRA 1991: see *Hall v Environment Agency* [2017] EWHC 1309 (TCC); [2018] 1 WLR 1433.

It is thus only in narrow and fairly unlikely circumstances that a farmer would be able to successfully sue the Environment Agency for their losses arising from flooding. The same would be true of claims against local authorities.

As stated in *King v Environment Agency*, at paragraph 156: “*Where a delicate balancing of interests is required, where Parliament has charged the Environment Agency with supervising flood risk management in England, and*

*where the agency has considerable expertise, the court is in no position to second guess its expert judgment and cost/benefit analyses.*”

### C. Conclusions

The risks to land and agriculture from flooding will only increase as climate change continues. Landowners and farmers at risk from flooding have only limited forms of redress available to them - but they are also part of the solution. The new ELM Schemes recognise that the use of land will have to adapt to the changing climate, including the increasing risk of floods. Amongst other climate and environmental objectives, farmers will be paid for various flood-prevention and mitigation actions, including “*enhancing floodplain floodwater storage*”, “*managing grassland for water quality, flood and drought resilience*”, and “*[f]lood mitigation on permanent grassland*”.

The Environment Agency, in its *Flood recovery advice for the agricultural sector*, recommends various works that can be done to prevent and mitigate flood risks, the most important of which is to prepare a flood plan. It also recommends signing up for flood warnings. Farmers may also wish to consult experts as to how to manage and mitigate these risks. In the event that a flood occurs, these actions would provide helpful evidence if the farmer wishes to pursue any legal action.

#### The most important takeaways from this article then are these:

- (a) Prevention is better than cure: if you are concerned that your land is at risk from flooding, it may be helpful to engage proactively with the Environment Agency. Although it doesn't have a duty to take action to protect your land, it may nevertheless be a good source of information and advice;
- (b) Look for the positives: as the ELM schemes are rolled out, you may find that you are eligible for payments for using your land for natural flood management;
- (c) Ask for help: if you are a member of an existing scheme and you are concerned that a flood event will affect your ability to meet the conditions of your agreement – whether on a temporary or permanent basis – contact the RPA as soon as possible;

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- (d) Keep detailed records: photographs showing the extent and location of flooding and any damage caused can be particularly helpful. Keep a file of any communications you have with the Environment Agency, RPA or other bodies/advisers;
  - (e) Spread the risk: read your insurance policies carefully.

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