



**First-tier Tribunal
(General Regulatory Chamber)
(Nitrate Vulnerable Zones)**

NCN: [2022] UKFTT 00474 (GRC)
Appeal Number: NVZ/2021/0011

Heard on 22 September 2022

Before

**JUDGE OF THE FIRST-TIER TRIBUNAL SWANEY
TRIBUNAL MEMBER FOLEY**

Between

LADY TESSA WALKER

Appellant

and

THE SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS

Respondent

DECISION

The appeal is struck out pursuant to rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

REASONS

Background

1. This appeal relates to land forming part of Slade Farm, Abbots Morton Manor, Gooms Hill, Abbots Morton, Worcester.
2. Regulation 4 of the Nitrate Pollution Prevention Regulations 2015 (the regulations) requires the Secretary of State to keep under review the eutrophic state of fresh surface waters, estuarial waters and coastal waters. ‘Eutrophic’, in relation to water and as defined at regulation 2(1), means enriched by nitrogen compounds causing an accelerated growth of algae and higher forms of plant life. In excess, this produces an undesirable disturbance to the water’s quality and its balance of organisms.
3. The regulations provide that every four years the Secretary of State must, where necessary, revise or add to the designation of ‘nitrate vulnerable zones’ (NVZs). This is done by monitoring nitrate concentrates in order to identify water that is affected by pollution (or could be if the controls provided by the regulations are not applied), identifying land which

drains into those waters and that contributes to its pollution, and taking into account changes and factors unforeseen at the time of any previous designation.

4. The regulations define ‘a relevant holding’ as land and any associated buildings used for growing crops in soil, or rearing livestock for agricultural purposes, that fall wholly or partly in an NVZ. The occupier of a relevant holding must comply with rules concerning the use of nitrogen fertilisers and the storage of organic manure. Before the Secretary of State revises or adds to the designation of NVZs, regulation 5 requires him to publicise his proposals and send written notice to anyone appearing to be the owner or occupier of a relevant holding. Regulation 6 then affords such an owner or occupier a right of appeal to the Tribunal. So far as still applicable, the only permitted grounds of appeal are that the relevant holding (or any part of it):

- (a) does not drain into water which the Secretary of State proposes to identify, or to continue to identify, as polluted or which has been similarly identified in Wales or Scotland, [or]

- (b) drains into water which the Secretary of State should not identify, or should not continue to identify, as polluted.

5. On 21 October 2021 the respondent issued a notice under regulation 5(3)(b) of the regulations. The appellant lodged an appeal against that notice on 12 November 2021. In her notice of appeal the appellant states that the land is a field in which there is a pond. She states that the pond is not polluted and has plenty of wildlife. She states that very little nitrogen has been used on the land. In addition, she states that the increased cost of nitrogen fertiliser makes its future use even less likely.
6. The appellant did not provide a copy of the respondent’s notice with her appeal and on 17 November 2021 was directed to do so by 24 November 2021. The appellant was warned that if she failed to comply with the request, the tribunal may close the file or strike her appeal out under rules 8(3)(a) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (the procedure rules). The appellant did not provide a copy of the respondent’s notice. It appears that a further direction was issued requiring the appellant to provide a copy of the notice by 4 February 2022.
7. On 17 March 2022 a tribunal registrar considered that it would be disproportionate to strike out the appellant’s appeal at that stage. The respondent was directed to respond to the appeal by no later than 8 April 2022.
8. A copy of the respondent’s notice was not before us, however, it is apparent that the appellant’s land was designated because it drains into polluted water.
9. On 25 March 2022 in the course of preparing a response to the appeal, the respondent asked the appellant to provide additional information in the following terms:

I am writing to request that you send us some further information to support your Nitrate Vulnerable Zone (NVZ) appeal. In your notice of appeal you should set out the evidence to support the grounds of your appeal. We need this information so that we can continue to process your appeal.

A relevant holding is defined in the Regulations as land and any buildings used for growing crops in soil or rearing livestock for agricultural purposes. "Agricultural" includes horticulture, fruit growing, seed growing, dairy farming and livestock breeding and keeping, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where the use is ancillary to the farming of land for other agricultural purposes. The rules apply to all relevant holdings in a NVZ, even if they are not using fertiliser/manure and are unlikely to be causing nitrate pollution. Land can change hands and activities can change, therefore the land is designated as a NVZ where land drains into waters affected by agricultural nitrate pollution. If based on this information you would like to withdraw your appeal, you can just reply to this email to confirm that you withdraw your appeal and also send the email to the Tribunal (grc@Justice.gov.uk).

If you wish to continue with your appeal, could you please confirm your ground of appeal:

- a) My land does not drain into the water identified by Defra as polluted
- b) My land drains to water Defra should not identify as polluted
- c) My land drains to water Defra should not identify as at risk of pollution

Your land is located well within surface water NVZ S590, meaning that water on your land ultimately drains to the River Avon, which is identified by Defra as polluted. Please provide evidence to support the grounds of your appeal such as information about and a map showing the drainage direction of the land, a topographical map or description to show that our own understanding of the local drainage is incorrect, water quality sampling data, etc.

Please also provide a map which clearly outlines the fields on your farm which you think should be removed from the NVZ.

Without this further evidence, we would be minded to request that the case is struck out due to no grounds of appeal/no new substantive evidence.

Please either confirm that you withdraw your appeal or provide this further evidence by **Friday 1st April 2022**.

10. The appellant responded to that request on 31 March 2022 in the following terms:

I have read and reread the original communication and there is no mention of the River Avon. I assumed that the water referred to was the large pond 4429 which is unpolluted. I was therefore responding to that when I argued that the field drained into water which should not be identified as polluted.

I see that my answers were returned on 9th November 2021 yet my response is given a week.

This farm is a long way from the River Avon and there are hills in between.

I do wish to continue with my appeal and realise that as it is apparently about the Avon and not the pond the reason is different. I do not think we are polluting at all. As you know the price of nitrogen has increased tremendously because of this dreadful war and is now around £1000 per ton and was already unsustainable at last year's £595. It was scarcely used here anyway as we try to manage the land as cleanly as possible.

In view of the fact that we are talking about the river Avon I change my plea to (a) as I cannot see how the water from here could get there. I am sorry that the previous answer wasted time but as you can understand I had no idea that it was about the Avon.

After much discussion and searching my neighbour found the map I am sending which does show the ditches and what we know of the waterflow. I had none despite having been here since 1985. I am going to send you the map by email and will of course send it by post if that is easier. But that would miss the deadline. Please let me know if you need the paper copy and anything else.

11. It can therefore be seen that the appellant's ground of appeal is that her land does not drain into the water identified by Defra as polluted. The appellant's email refers to a map, but she did not provide any additional evidence in support of her appeal.
12. Having reviewed the appellant's response, on 8 April 2022 the respondent made an application to the tribunal to have her appeal struck out pursuant to rule 8(3)(a) of the procedure rules because it has no realistic prospect of success. The respondent relied on NVZ ID S509 data sheet for the relevant NVZ, a copy of the relevant designation methodology applied, and a drainage map. The respondent accepted that the appellant's land is some way from the Avon River. However, the appellant's land drains into Piddle Brook, which ultimately drains into the Avon River, which is identified as polluted. The respondent maintained the position that the appellant's land contributes to the Avon River catchment and that the land should therefore remain within surface water NVZ S590.
13. The appellant was put on notice that her appeal could be struck out because it had no realistic prospect of success and was given an opportunity to respond. She did not provide any evidence to demonstrate that her land does not drain into Piddle Brook and ultimately into the Avon River. She has not provided any evidence which would tend to show that the respondent's evidence is unreliable and we therefore find that her appeal has no realistic prospect of success.
14. We strike the appeal out under rule 8(3)(c) of the procedure rules.

Signed

Date 9 December 2022

Judge J K Swaney
Judge of the First-tier Tribunal