



**First-tier Tribunal  
General Regulatory Chamber**

**Appeal reference: NVZ/2021/0032  
NCN: [2023] UKFTT 00787 (GRC)**

**Dealt with on Papers**

**Before**

**FIRST-TIER TRIBUNAL JUDGE MATHEWS  
TRIBUNAL MEMBER ZHAO**

**Between**

**MARTIN DAVID BOYNTON**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE ENVIRONMENT,  
FOOD AND RURAL AFFAIRS**

Respondent

**Representation:**

This appeal, with the consent of the parties, was dealt with on the papers.

Decision – The appeal is dismissed.

NVZ notice dated 26<sup>th</sup> November 2021 (NVZ ID number S605/S606/G4) is confirmed.

**Background**

1. The appellant owns and farms Hildersley Farm, Ross-on-Wye, Herefordshire. The property is considered by the respondent to be a relevant holding within the meaning of regulation 5 (5) of the **Nitrate Pollution Prevention Regulations 2015**.
2. In November 2021 the respondent gave notice to the appellant as required by the 2015 regulations. That notice set out the respondent's intention to continue to designate the appellant's land as falling within a nitrate vulnerable zone. The

designation followed a review in 2020 of pollution in the relevant geographical area. Such reviews occur on a four year cycle. The notice concerned nitrate vulnerable zones :-

(a) S605;

(b) S606;

(c) G4.

3. The appellant exercised his right of appeal following that designation, he appeals pursuant to regulation 6 of the 2015 regulations and his appeal notice was dated the 30<sup>th</sup> of November 2021. That process led to the present appeal.
4. May I note that through my administrative error there has been a delay in the promulgation of this decision for which I apologise to all concerned without reservation.

#### The Law

5. Council Directive 91/676/EEC which is retained EU law, creates obligations in relation to the protection of water against pollution caused by nitrates from agricultural sources. It requires Member States to create a scheme whereby areas of land which drain into waters affected by pollution, or into waters that could be so affected, must be designated as vulnerable zones.
6. Annex 1 of the Nitrates Directive sets out the criteria for identifying waters that are or could be affected by pollution. This varies according to whether the water is surface water ('particularly if intended for the abstraction of drinking water'); ground water; or water that has been found to be 'eutrophic' ("enriched by nitrogen compounds, causing an accelerated growth of algae and higher forms of plant life that produces an undesirable disturbance to the balance of organisms present in the water and to the quality of the water").
7. Article 5 requires Member States to create an action programme designed to reduce and prevent pollution and to sample and monitor the nitrate content of surface water

and ground water in designated zones both initially and then on a recurring 4-year cycle.

8. The **UK Nitrate Pollution Prevention Regulations 2015** implement the UK's obligations under the Nitrates Directive in respect of land in England. Similar regulations apply to other parts of the UK. Parts 3 to 8 of the Regulations place limits on the total amount of nitrogen applied to an agricultural holding in an NVZ and makes other provisions relating to livestock manure and spreading fertilizer. The overall effect is to limit the number of animals that can be kept per unit area inside an NVZ and/or restrict the amount of fertilizer that can be applied. Designation is therefore capable of having a significant economic impact on agricultural holdings, giving rise to a strong incentive to appeal.
9. Regulation 5 requires the Environment Agency to make recommendations to the Secretary of State ('S of S') every 4 years as to which areas of land should be, or should continue to be, designated as an NVZ under the Regulations. The S of S must publish the proposals and send written notice to anyone who appears to be an owner or occupier of a relevant holding (regulation 5(3)(a)&(b)).
10. Regulation 6 creates a right of appeal as follows:

*6.—(1) An owner or occupier of a relevant holding who is sent a notice under regulation 5(3)(b) may appeal to the First-tier Tribunal(a) against the proposals referred to in the notice.*

*(2) For the purposes of rule 22(2)(g) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009(b) (notice of appeal: grounds), the only grounds of an appeal under this regulation 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.*

*(3) If the First-tier Tribunal upholds an appeal under paragraph (2)(a), the Secretary of State, when acting under regulation 4(5), must treat the relevant holding (or the part of it in respect of which the appeal was upheld) as not draining into the water concerned.*

*(4) If the First-tier Tribunal upholds an appeal under paragraph (2)(b), the Secretary of State, when acting under regulation 4(5), must—*

*(a) treat the water concerned as water which should not be identified, or should not continue to be identified, as polluted, and*

*(b) treat any holding (or part of any holding) which drains into that water accordingly (regardless of whether the owner or occupier of the relevant holding appealed under this regulation).*

11. There are therefore two basic grounds of appeal – that the holding in question does not drain into water identified as polluted, or that the water is not polluted. The first type – drainage appeals, only affect the specific holding, however the second type – polluted water appeals, leads to the removal of the designation with respect to the water body.
12. The ECJ considered proportionality issues in **R v Secretary of State for the Environment and Another, ex parte Standley and Others**: European Court of Justice C-293/97 29 April 1999 and in **EC v Belgium** CJEU C-221/03 22 September 2005. In the former the Court rejected the proposition that the limits set out in Annex 1 of the Nitrates Directive only applied to nitrates from agricultural sources. In the latter the Court upheld a decision in relation to restrictions imposed on an agricultural holding that only contributed 17% of the nitrate pollution.
13. When a notice is served, the recipient has a right of appeal to this tribunal. The tribunal's role in considering an appeal is to make the disputed decision fresh taking into account all the evidence before it. Applying the standard of proof "the balance of probabilities" the tribunal must decide whether it has been shown to be more likely than not that the criteria relied on by the Secretary of State to serve the notice are met.
14. The burden of proof to show that the Secretary of State's decision to serve the notice was wrong lies with the appellant the appellant must persuade the tribunal on the

basis of evidence or submission that either the methodology was not applied correctly or that in the particular circumstances its strict application results in an outcome that is not in line with the objective of the directive. If he does not then the status quo must prevail.

15. The **2015 regulations** provide for an appeal on two possible grounds only, as set out in paragraph 14 above. The tribunal does not have power to consider any grounds of appeal other than those specified in regulation 6 (2).

#### Issue

16. In the present appeal Mr Boynton advanced his appeal on the basis that his land did not drain into the water identified by the respondent as representing a Nitrate Vulnerable Zone (NVZ). His appeal was therefore pursuant to section 6 (2) a of the 2015 regulations.
17. Mr Boynton indicates that his farm contains no watercourses or waterways within its boundaries and submits maps in support of that contention. He further indicates that he has implemented adaptations from catchment sensitive farming officers to improve the farms impact on the environment. The farm is Red Tractor certified and accordingly there is regular soil analysis and water testing carried out. Furthermore soil erosion plans are in place to avoid run-off to adjoining main roads.
18. The farm is predominantly a fruit growing establishment, fruit rows have grass in between to reduce run-off and any wash away from soil. Fertiliser applications are calibrated and plant targeted, the farm needs to fertilise as soon as possible after cider harvests and that period corresponds with the NVZ compliance period, impacting upon their ability to apply fertiliser.
19. Mr Boynton does not accept that his land drains into waters identified by the respondent as having been polluted and therefore his land should not be included within a NVZ.

#### Evidence

20. I have considered all documents provided by the appellant and also the respondent's bundle.

21. The respondent served and relied upon an extensive bundle of hydrographic evidence and supporting maps set out in the respondent's bundle. The evidence included datasheets relied upon for the NVZs in issue in this case, maps showing the asserted areas of land and water courses together with text addressing the specific assertions of the appellant.

### Findings

22. There was no dispute in this case as to the ownership of the land concerned, or as to the geographical accuracy of any of the charts and documents submitted.
23. I note the appellant's photographic evidence and plans. I accept and find that the appellant's farmland does not contain any waterways or watercourses, that fruit crops have grassed areas in between to reduce soil erosions and run off, that Red Tractor status and testing has been obtained and maintained, and that soil erosion plans are in place.
24. The documents, supporting maps and annexed calculations together with data that are contained in full in the respondent's bundle have been considered.
25. The respondent's evidence has been considered in full. The reports served set out the process, methodology and systems used in the process of designation and consideration of NVZs.
26. The respondent sets out how assessment is made of whether or not area of land drains into an area of polluted water. The evidence addresses not only obvious watercourses but also flows of water through, over and beneath the land.
27. The respondent has set out in annexes 2-4 the evidence as to the land type in relation to the appellant's land. It shows that the land is found to include well drained loamy soils that sit above sandstone. The nature of the land is such that a significant proportion of rainwater that lands on such land will drain into the ground, becoming designated as groundwater. During high rainfall events rainwater will travel over surface water flow paths because subsurface systems will be unable to absorb excess rainfall. Such rainfall and flows during periods of significant rainfall, contributes to the River Wye catchment area and as a consequence NVZ designation

has been maintained. I have attempted to summarise what is set out at length in the respondent served evidence. The hydrographic data supports the asserted patterns of water flow.

28. I have noted the appellant's denial that any water from his land impacts upon a relevant polluted zone. I note all that is said as to steps taken to avoid run-off however I do not have from the appellant clear evidence to establish that no rainfall upon his land can enter the river Wye catchment area by the process demonstrated in the respondent's evidence. I am willing to accept all that is said in relation to steps taken by the appellant to mitigate land drainage however there is no evidence capable of sustaining the submission that during periods of significant rainfall, water from his land would not run off into the relevant catchment area.
29. I found the respondent's evidence to be cogent, coherent, properly argued and referenced and note that it was not substantially reduced in credibility by any assertions or submissions advanced by the appellant. I accept in full the evidence set out in the respondent's bundle and advanced before us. I do find that the appellant's land drains into a polluted area as asserted by the respondent, the appellant has not adduced sufficient evidence to contradict the respondent's hydrographic analysis and evidence.

#### Summary

30. This appeal concerns separate NVZs. The respondent's data before us shows relevant levels of nitrate pollution in all of the relevant protected bodies of water. The hydrological evidence goes on to establish that water from the appellant's land contributes to the NVZs after passage over or through his land. It is not of course suggested that the appellant is responsible for the ultimate pollution levels. We find that in view of the approach taken by the regulations, the designation of the NVZs in question by the Secretary of State is in accordance with the regulations. The appellant's land does drain into the designated NVZs, the regulations are satisfied.
31. For the reasons set out above the appeal is dismissed and the respondent's notice is confirmed.

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Signed:-

Deni Mathews

20<sup>th</sup> September 2023

Judge of the First-Tier Tribunal