



**First-tier Tribunal
General Regulatory Chamber**

**Appeal reference: NVZ/2022/0022
NCN: [2023] UKFTT 00789 (GRC)**

Dealt with on Papers

Before

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

Between

D E SMITH

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 4th January 2022 (NVZ ID number S261) is confirmed.

Background

1. The appellant owns Crown Inn Farm, Sheffield Road, Sheffield. 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 January 2022 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 zone :-

(a) S261.

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 31st of January 2022. That process led to the present appeal. The appellant advanced expert evidence that has been considered by the respondent and a further response was filed by the respondent after receipt of the appellant's expert evidence.
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 Smith, through a representative, advanced his appeal on the basis that his land drains to water which the secretary of state should not identify, or continue to identify as being polluted. His appeal was therefore pursuant to section 6 (2) b of the 2015 regulations.
17. Mr Smith relies upon a report from Hafren Water submitted in support of his appeal. This suggests that the NVZ in question was initially incorrectly designated, that monitored levels have improved and that the present designation is incorrect, parameters for the de-designation having been met regardless of the initial error in designation.

Evidence

18. I have considered all documents provided by the appellant and also the respondent's bundle.
19. 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 NVZ 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. A second response addressed the Hafren Water report provided by the appellant.

Findings

20. 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.
21. I note the appellant's report and assertions.

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22. The respondent's documents, supporting maps and annexed calculations together with data that are contained in full in the respondent's bundle have been considered.
23. 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.
24. The respondent sets out how assessment is made of whether or not area of land drains into an area of polluted water. Defines pollution and sets out methodology for assessment of nitrate levels.
25. The respondent has set out in the second response a concession that in 2008, applying the methodology enforced at that time, only land upstream of monitoring point 49302167 (Sickley Brook) should have been designated as an NVZ. That point is made by the appellant in his report and is conceded.
26. However the respondent then brings to my attention that the more recent designation of the NVZ follows the adoption of new methodology in 2012. That methodology, applied to achieve the legislative aims set out above, introduced the concept of WFD waterbodies.
27. The methodology is set out in detail in the respondent's evidence, I seek to summarise it, it is set out in full in the documents before all parties. Under the new methodology a particular water body could be designated by the respondent on the basis of results from the worst performing tributary of the main body of water. That change of methodology means that regardless of any error in 2008, the recorded levels of pollution at the Sickly Brooke monitoring point do now justify the present designation, that change of methodology means that regardless of any error in 2008, the recorded levels of pollution at the Sickly Brooke monitoring point do now justify the present designation asserted by the respondent because the appellant's landforms part of the main water body in question. In short pollution in a tributary of a main river leads to the designation of the whole main river water body as a NVZ.
28. The appellant's evidence does not undermine that assertion on the basis of the new methodology, it fails to properly address that new methodology in my judgment.

29. The appellant does go on further to suggest that his land meets exceptional criteria outlined in 2012 methodology to prevent its designation as part of a water body subject to control. That exception is advanced on the basis that the Sickly Brooke monitoring data was impacted by historical landfill. The appellants evidence does not go on to set out any impact of such a landfill site on nitrate concentrations at the present time, there is in adequate evidence of any effluent discharge pertinent to the appellant's land such that the exceptional criteria requiring that the land not be designated, are met. The criteria in question are set out by the respondent in a response document. One criteria to justify designation of only a part of the water body, as sought by the appellant in this case, is, "where at the flu and discharge has led to a clear localised increase in nitrate concentrations". The appellant has not adduced sufficient evidence of any such localised increase or the time period during which such a localised increase was effective, and I am not persuaded that the exceptional criteria are met.
30. 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, expert report or submissions advance by the appellant. I accept in full the evidence set out in the respondent's bundle and advanced before us. I do not find that the appellant's land drains to water which the secretary of state should not identify, or continue to identify as being polluted.

Summary

31. The respondent's data demonstrates that the appellant's land does drain to water that is properly identified as being polluted by the respondent.
32. The regulations are satisfied.
33. For the reasons set out above the appeal is dismissed and the respondent's notice is confirmed.

Signed:-

Deni Mathews

20th September 2023

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Judge of the First-Tier Tribunal