



Neutral citation number: [2024] UKFTT 172 (GRC)

Case Reference: NVZ/2021/0035

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

**Decided without a hearing
Decision given on: 05 March 2024**

Before

**JUDGE NEVILLE
DR K AKANDE**

Between

MR CHRISTOPHER GODDING

Appellant

and

THE SECRETARY OF STATE FOR ENVIRONMENT, FOOD & RURAL AFFAIRS

Respondent

Decision: The appeal is allowed.

REASONS

1. This appeal concerns Lower Battlescombe Farm, situated in the Cotswolds near Stroud.
2. Regulation 4(2) of the Nitrate Pollution Prevention Regulations 2015 (“the regulations”) requires the Secretary of State to monitor the nitrate concentration in freshwaters to identify whether it may be affected by pollution (or could be if the controls provided by the regulations are not applied), and then to identify land which drains into those waters and that contributes to its pollution. Such land may then be designated as a “nitrate vulnerable zone” (“NVZ”).
3. 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.

The Secretary of State refers to these as Type A and Type B appeals, respectively.

4. Mr Godding appeals a notice served upon him by the Secretary of State, proposing to include Lower Battlescombe Farm as a relevant holding that falls within NVZ no. G83. It should be noted that the prefix 'G' stands for groundwater.
5. The grounds of appeal read as follows:

I have data from the Wildfowl and Wetlands Trust that the holding does not drain into water that the Secretary of State should continue to identify as polluted.

6. This uses the language of Type A and Type B appeals, and we accordingly treat it as raising both statutory grounds of appeal. The data to which it refers was provided, in the form of analysis of water samples regularly taken from a stream on the farm. The Secretary of State requested further details about how and where the samples were taken and analysed, which Mr Godding provided.
7. The Secretary of State has filed a response to the appeal, pursuant to rule 23 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. It confirms that NVZ No. G83 covers vulnerable groundwater within the Jurassic bedrock Great Oolite and Bridport aquifers. A helpful map is provided showing the boundaries of the NVZ, which is annexed to these reasons.
8. The case it puts forward appears to be principally concerned with the ground of appeal at regulation 6(2)(b), that is to say a Type B appeal as explained above. This is explicitly confirmed at Appendix 4, being a response to this specific appeal by the Environment Agency's technical team. Yet it concludes as follows:

The appellant provides surface water quality data from a local surface water feature (Lower Battlescombe) within close proximity to the farm as supportive evidence. We need to point out that NVZ G83 is not based on a surface water designation, but on a groundwater designation. No evidence has been provided by the appellant to support the case that the SoS should not identify, or continue to identify, the groundwater within the bedrock aquifer as being polluted (Type B appeal). In addition, no evidence has been

provided that the appellant's land holding 'does not drain' (Type A appeal) through infiltration into the vulnerable groundwater within the bedrock (Great Oolite).

9. A rule 24 Reply was provided by Mr Godding, as follows:

I would like to point out a fairly major oversight regarding the conclusion here.

The waterway concerned is principally fed from two springs less than 500 meters from the testing area. These springs are fed from deep aquifers which, in my opinion, overcomes the reasons for denying the appeal.

10. This, in turn, prompted the Secretary of State to provide a further response from its technical team. It accepted the existence of a spring that feeds the Lower Battlescombe, but observed that the water samples had been taken 600 metres downstream. The water tested was therefore representative of spring base flow combined with surface water runoff. In any event, it argued, the water at one monitoring point is not representative of the groundwater in the NVZ as a whole. Designation as an NVZ arose from the data gathered at multiple monitoring sites applied according to a published methodology.
11. Each party has consented to the appeal being decided without a hearing. We have carefully taken into account all the documents that have been provided and applied the specialist expertise arising from our composition.
12. Mr Godding's arguments could perhaps have been clearer, but his grounds of appeal clearly raise both types of appeal. Bearing in mind that it was written in reply to the detailed rule 23 response, his rule 24 reply can be fairly read as arguing that the springs were relevant to drainage. It was for the Secretary of State to seek any necessary clarification, especially in circumstances where a decision without a hearing was requested. Realistically, either water from the farm drains through infiltration into the vulnerable groundwater, or it drains into surface water. That is what we must decide.
13. We consider that several evidential factors are relevant to the issue. First, the Secretary of State accepts the existence of at least one spring on the land, that it feeds the Lower Battlescombe, and that it is upstream from the sample point. The flow of such emerging water would drive other water (such as rainfall) with it towards the stream. Second, the sample point was 'mid-stream' of what is evidently a stream in full flow, well-aerated with low nitrate and ammonia concentrations. It obviously conveys water away from the land. While the test result were not accompanied by the certification and calibration evidence requested by the Secretary of State, he took no issue with the explanation that was given by the Wildfowl & Wetlands Trust. Third, the maps and data provided show that the land in question is sandwiched between the Severn and Thames river valleys, which each contain surface water NVZs proximate to the NVZ No. G83.

14. The burden of proof falls on Mr Godding, as observed by the Secretary of State. We nonetheless bear in mind what was said by Lord Hoffman in Re. B (Children) [2008] UKHL 35:

2. If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.

15. Baroness Hale likewise held as follows:

32. In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other. Sometimes the burden of proof will come to his rescue: the party with the burden of showing that something took place will not have satisfied him that it did. But generally speaking a judge is able to make up his mind where the truth lies without needing to rely upon the burden of proof.

16. While no expert evidence has been adduced by Mr Godding such that directly opines on where the land drains, the scale and expense of the task of obtaining such evidence renders it unlikely and impracticable in relation to the land in question. On considering the overall evidence it is sufficiently likely that the farm drains into surface water rather than the vulnerable groundwater, without expert evidence being needed to discharge the burden of proof. We have considered that a tiny amount of water may still eventually find its way into the vulnerable groundwater but, given the clear evidence of surface water drainage, it would be such a *de minimis* amount such that the land could not realistically be said to 'drain' into it within the meaning of the regulations. For the above reasons, we find that the Type A appeal is well-founded and we uphold it on that basis.
17. We would also observe that the placement of the farm in the groundwater NVZ may arise from a flawed application of the final mapping process described at para 2.8 of Appendix C of the methodology statement. It is surprising that the land was not instead placed within one of the nearby surface water NVZs. We need make no definitive finding on those points however, and any future designation is a matter for the Secretary of State.
18. As to the Type B appeal, the Secretary of State has provided cogent and detailed evidence justifying why this groundwater should be considered at high risk of nitrate pollution and has been designated appropriately. Insofar as the appellant argues that the water on his land is not polluted, this is entirely answered by the Secretary of State's technical analysis. The designation was based on analysing the results from a large number of monitoring sites according to the robustly explained methodologies

in the evidence filed by the Secretary of State. We agree that the addition of Mr Godding’s results as an another outlier can make no material difference. For those reasons we would dismiss the Type B appeal.

Signed

Date:

Judge Neville

4 March 2024

Annex

Designated area (NVZ ID G83) outlined in yellow

