



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL
GENERAL REGULATORY CHAMBER (ENVIRONMENT)**

Appeal No. ENV/2015/0001

ON APPEAL FROM:

Natural England's Stop Notice dated: 27 April 2015

Appellant: Tim Evans

Respondent: Natural England

Heard at: York Magistrates' Court

Hearing date: 2 July 2015

Before

Christopher Hughes OBE

Judge

Date of Decision: 21 July 2015

Attendances:

For the Appellant: In person, assisted by Mr Pickard

For the Respondent: Miss Coates

Subject matter:

Regulatory Enforcement and Sanctions Act 2008, Section 46
Environmental Civil Sanctions (England) Order 2010
Wildlife and Countryside Act 1981

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the stop notice dated 27 April 2015 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. The Appellant in these proceedings (“Mr Evans”) has for many years been an enthusiastic user of jet skis. One place where he uses his jet ski is in the waters around Flamborough Head and Bempton Cliffs, a Site of Special Scientific Interest (“SSSI”) by reason (primarily) of the extensive colonies of sea birds which nest on the chalk cliffs and use the sea at the foot of the cliffs as a nursery. He was observed using a jet ski on two specific occasions in 2014; June 8 and 28 September.
2. As a result of the first observation Natural England (the statutory body charged with protection of SSSIs) the Respondent in these proceedings, wrote to him on 22 August by special delivery mail (which requires a signature). The letter drew Mr Evans’ attention to certain criminal offences under section 28P of the Wildlife and Countryside Act 1981 relating to the damage, destruction or disturbance of the fauna of the SSSI. It was of the view that this had occurred by reason of Mr Evans use of his jet ski:-

“Natural England is of the opinion that your activities may have brought about unnecessary distress and injury which could have been avoided if proper consideration had been given. Natural England considers that any damage to a SSSI, or disturbance to those species that depend on those sites, to be a serious matter and is now considering the enforcement options that it and other partner agencies, including the Police, may wish to pursue in relation to this incident.”

The letter warned him that Natural England could rely on the letter as evidence in any future enforcement action. The front of the letter clearly showed that it came from Natural England; Mr Evans declined to accept the letter.

3. On 17 December Natural England wrote again in broadly similar terms stating:-

“,.. As we explained to you in our earlier letter, the site is of importance for supporting internationally important colonies of breeding seabirds and the use of jet skis has the potential to have a damaging effect on such features of the SSSI. Natural England believes that the conduct of users of water craft should demonstrate behaviours that pay due regard to the welfare of seabirds.

Natural England is disappointed that your repeated activities may have brought about further unnecessary distress which could have been avoided if proper consideration had been given.....Natural England is now considering the most appropriate course of action that it may pursue with you and what is necessary to protect the site from future disturbance”,

Again Mr Evans refused to accept delivery of the letter.

4. On 27 April 2015 Natural England issued a Stop Notice against Mr Evans stating that it reasonably believed that:-

“an activity carried on by you:

- Will cause, or will present a significant risk of causing, serious harm to the environment, and*
- Will involve or is likely to involve the commission of a relevant offence*

In that your use of mechanically propelled personal watercraft including Jet Skis, within the vicinity of Flamborough Head Site of Special Scientific Interest, presents a risk of serious harm to internationally important colonies of breeding sea birds for which the Site is of special interest, and is likely to involve the commission of an offence under S28P Wildlife and Countryside Act 1981.

Natural England has decided to stop you from carrying out these activities in certain areas and at certain times of the year with immediate effect.

5. The Stop Notice was accompanied by a plan designating the area to which it applied and also by a copy of the Flamborough Headlands Code of Conduct which, in its guidance to users of leisure craft users drew attention to the local authority's speed limit of 8 knots within 300m of the tide edge on beaches, the need to keep away from bird nesting sites and from birds rafting on the sea between January and August, and noted that "*Noise from powered crafts can disturb both wildlife and people – be considerate and keep well away.*" The Stop Notice informed Mr Evans of his right of appeal and that the Stop Notice would be reviewed after two years.
6. Mr Evans appealed arguing that no evidence had been sent to him, that he had been in contact with the Flamborough Head Management Scheme (of which Natural England was a member) but the scheme and Natural England had not provided him any information and that he had been anxious to communicate with them. He argued that the notice was too imprecise. In the light of the content of the DEFRA code of guidance relating to SSSIs he argued that stop notices could only apply to land and occupiers of land and therefore could not be used against him.
7. In its response Natural England explained that the notice had been served because of Mr Evans failure to engage and his repeated behaviour gave grounds for Natural England to apprehend that there was a significant risk of a repetition of such behaviour which was a threat of serious harm to the breeding colonies of birds. Natural England had tried to advise Mr Evans about the reckless use of his jet ski but he had refused to accept the letters. The Stop Notice was clear about the conditions under which the use of jet skis was allowed. Mr Evans had not contacted Natural England and there was guidance available to users of jet skis in the Flamborough Headlands Code of Conduct. The restrictions were reasonable in extent covering two kilometres off-shore to protect seabirds rafting on the water.

The question for the Tribunal

8. The issue for the Tribunal is whether the statutory grounds for issuing a Stop Notice have been established and whether in all the circumstances of the case the notice is necessary. Natural England has the power to issue a Stop Notice

under the Environmental Civil Sanctions (England) Order 2010 Schedule 3 paragraph (1) where:-

“(5) A case falling within this sub-paragraph is a case where the regulator reasonably believes that—

(a) the person is likely to carry on the activity,

(b) the activity as likely to be carried on by that person will cause, or will present a significant risk of causing, serious harm to any of the matters referred to in sub-paragraph (6), and

(c) the activity as likely to be carried on by that person will involve or will be likely to involve the commission of an offence under a provision specified in Schedule 5 by that person.

(6) The matters referred to in sub-paragraphs (4)(b) and (5)(b) are—

(a) human health,

(b) the environment (including the health of animals and plants).”

9. The offences listed in Schedule 5 include the offences under the Wildlife and Countryside Act 1981 drawn to Mr Evans attention in the letters of 22 August and 17 December 2014 and created by section 28P(6) and (6A):-

(6)A person who without reasonable excuse—

(a)intentionally or recklessly destroys or damages any of the flora, fauna, or geological or physiographical features by reason of which land is of special interest, or intentionally or recklessly disturbs any of those fauna, and

(b)knew that what he destroyed, damaged or disturbed was within a site of special scientific interest,

is guilty of an offence and is liable on summary conviction to a fine not exceeding £20,000 or on conviction on indictment to a fine.

(6A)A personwho without reasonable excuse—

(a)intentionally or recklessly destroys or damages any of the flora, fauna, or geological or physiographical features by reason of which a site of special scientific interest is of special interest, or

(b)intentionally or recklessly disturbs any of those fauna,

is guilty of an offence and is liable on summary conviction to a fine not exceeding level 4 on the standard scale.

10. The tribunal therefore has to determine whether Natural England was right to conclude that without the Stop Notice Mr Evans was likely to use a jet ski near Flamborough Head in a way which presented a serious risk of harm to the environment in a way which would amount to a breach of section 28P (6) or (6A) in that he would intentionally or recklessly destroy or damage or disturb the fauna which creates the special interest in the site.

Evidence

11. It is undisputed that on 8 June three jet skis, two ridden by Mr Evans and Mr Pickard approached Flamborough. Tim Birch is a Conservation Manager with the Derbyshire Wildlife Trust. He stated that on 8 June he was on a slow moving boat used to enable bird watchers to approach and observe the bird colonies at Flamborough. The boat was close to the cliffs, perhaps 150 metres away. There were hundreds of birds in the water round the boat. The sea was very calm. He stated that the three jet skis approached “far too fast” and he estimated their speed at about 20 -25 mph. The birds started diving under the boat, scattering everywhere in a mad panic. The jet skis passed within 30/40 metres of the boat. He took photographs of the riders and their machines for identification.
12. On 28 September 2014 Mark Thomas, a Senior Investigation Officer for RSPB was on the clifftop on Buckton Cliffs adjacent to Bempton Cliffs intending to observe a species of bird called *Hydrocoloeus minuta*. He is an expert in ornithology having observed and handled wild-birds for many years

in a range of roles for conservation organisations. He observed about 10 juvenile gannets (which are unable to fly) on the water about 175-200 metres away. Shortly before 9am he heard a loud noise of several engines of variable pitch and interspersed with a crashing noise. This caused panic behaviour in about 500 gannets which formed a “dread” and left the cliff nest sites and headed out to sea. Two jet skis appeared about 200m from the cliff. He interpreted the movement of the gannets as a response to the noise of the jet skis. The jet skis moved very swiftly travelling approximately 150-175 metres from the cliff. He watched the jet skis move at high speed through the raft of juvenile gannets, he was unable to see whether any were hit. He took photographs which enabled the jet skis and their owners to be identified. At this stage of the season some gannets still had dependent young. In his view the incident caused significant disturbance to the gannets; if it had occurred during May or June it would have been catastrophic for the entire assemblage of breeding seabirds.

13. David Key evidence was as to the nature and extent of the SSSI, the reasons for its designation, its classification as a Special Protection Area (SPA) under the Birds Directive (EU 79/409/EU). A consultation is under way to extend into a marine SPA.
14. The tribunal heard expert evidence from Dr Melling an Ornithologist and Senior Conservation Officer of the RSPB. This set the context and spoke to the significance of the colonies of several species of seabirds at Flamborough Head and how they are at significant risk of serious environmental harm from jet skis. He concluded that:

“If jet skis were operated at speed in the vicinity of Flamborough head SSSI and Flamborough Head and Bempton Cliffs SPA between 1st March and 30th September it is my opinion that there would be a significant risk of serious environmental harm.

This is particularly so during the period mid May to the end of June when most of the seabirds have eggs or dependent young, which could be dislodged into the sea by the panicked behaviour of the incubating or brooding parents following disturbance by jet skis. Seabirds are prone to “dreads” where

seabirds take to the air en masse when some birds panic and others follow. This means that there is a significant risk that hundreds, perhaps thousands of seabirds could be panicked into dislodging their eggs or chicks by an incident of reckless behaviour along the length of the cliffs. There is clearly a real and significant risk that thousands of chicks and eggs, that would otherwise develop, would be killed.

The breeding season for some of the birds begins in March (gannet) and therefore the same applies between March and June for those.

Between July and September, when young birds are in the water, jet skis in this area could also result in the deaths of significant numbers of birds. Many of the chicks are still dependent on their parents, some may be prematurely removed from their nests, removed from their chaperoning parents and others (including parents) may be unable to move away from fast approaching jet skis.”

15. In his evidence Mr Pickard minimised the impact of jet skis on the SSSI, they were not a problem “providing people are educated”. He viewed the Stop Notice as a punishment and felt that education was stronger than punishment. He felt that if there had been a proper code of conduct the problem would not have arisen; when the existence of the code was drawn to his attention he was dismissive “*Who is out there promoting it?*” As result of receiving his letter after the first incident he had become involved in trying to produce a specific code of conduct for jet ski users.
16. In his evidence Mr Evans stated that on 28 September he was out in an empty sea and there was not a single bird in sight. He did not see any birds on the water. He denied causing birds to fly away from the cliff. He acknowledged that he had learned a lot in the past few days (there was a site inspection from the cliffs) but was critical of the various authorities and conservation bodies “no one has tried to communicate”. He had refused to accept the letters from the postman because he was not expecting anything. After a story about one of the incidents had appeared in the newspaper he had contacted the Council to sort things out and he had had a very helpful conversation with the police.

He had skied at Flamborough Head 60 times over the past 10 years “*I am a well-behaved jet-skier*”.

Consideration

17. There is a clear conflict of evidence as to what happened on the two days in question between Mr Evans and Mr Pickard who were on jet skis on the one hand and those bird watchers who witnessed the incidents from a slow moving boat or from the cliff top. Those on jet skis did not notice any birds or any change of behaviour of birds, other witnesses did. Leaving on one side any selective recollection of events, there is a very simple explanation for this disparity in perception of the events. Mr Evans (and on the first occasion) Mr Pickard were navigating and controlling fast-moving, noisy craft. Their primary focus would be controlling their craft and not on birds surrounding them. Leaving on one side the clear point that birds would be likely, if possible, to move away from their craft anyway, the jet ski riders primary interest is on their hobby, not on the birds.
18. In sharp contradiction to this the witnesses called by Natural England did not have their hands full with other matters and they were there to watch the birds. They have a significant knowledge and understanding of birds and their behaviour and were able to see that behaviour change as the birds took evasive action in response to the disturbance caused by the jet skis.
19. It is clear that Mr Evans approach to the issues set out in the Stop Notice is profoundly disingenuous. In his appeal he accused Natural England of not communicating with him, when he had refused to accept two letters from it which clearly set out its concerns. His explanation for not accepting registered post amounted to a deliberate shutting of his eyes to things he did not want to know. In reality, of course, from discussion with Mr Pickard who accompanied him to the hearing and who also received the first letter, he must have known the broad outline of that letter and he will have had a shrewd idea that the second letter also came from Natural England. He was wilfully blind to their contents.
20. A second issue of concern is that on the occasion of the second incident the number on his vessel was obscured. On his account there is no obligation to

display such a number and he had obscured it as an anti-theft precaution.

However he would have been aware that a number of jet ski users (including himself) had been identified and written to by Natural England in connection with their activities at Flamborough Head by use of the registration number. I am satisfied that on the second occasion, the number was deliberately obscured in an attempt to make identification of Mr Evans harder to achieve.

21. I am satisfied that Natural England has established a course of conduct by Mr Evans. His well-evidenced actions on two occasions had undoubtedly caused destruction, damage, or disturbance to the birds within the SSSI. Whether on the first occasion he was acting intentionally or recklessly, on the second occasion there can be no doubt that he was acting recklessly at least. He had avoided service of the letter but, on his own admission, he had discussed the contents with Mr Pickard and he had acted in response to newspaper reports of the first incident. He clearly knew that operating jet skis near the SSSI created a risk of (at least) disturbance to the birds. He was unwilling to accept his responsibilities and avoided receiving the first letter for no good reason. On the second occasion he recklessly brought his craft close to the cliff operating it in such a manner as to disturb the gannet colony on the cliffs. Whether or not he injured and killed any juvenile gannets is unknown, however there is a significant risk that he did. I am therefore satisfied that offences under s28P(6) and (6A) were committed.
22. His repetition of his conduct after the first incident is good ground for Natural England to conclude that Mr Evans is likely to carry on with this activity and in so doing he is likely to cause serious harm to the environment through the commission of the offences which (the evidence strongly demonstrates) he has committed at least once before. That repetition is associated with attempting to avoid responsibility by not accepting the letter and to avoid further identification by covering distinguishing details on his machine.
23. I am also satisfied that the Stop Notice is a necessary and proportionate response to the situation. It will work to protect birds within the existing SSSI from harm. Very serious harm could be caused by a repetition and the restriction simply prevents Mr Evans from approaching the cliffs. There are other places where he could use his jet ski. The restriction extends two kilometres to sea which reflects the distance over which rafts of immature and

moulted seabirds unable to fly may be found during the summer months. There is an obligation on the UK to ensure the adequate protection of these birds under the Birds Directive. I am satisfied that, given the bird behaviour of over time, this extent of protection is necessary to prevent an offence under section 28P(6A) of destroying, damaging or disturbing the fauna which justify the designation of the SSSI since the destruction of a large number of adult or juvenile birds on the water would have an impact in succeeding years on the breeding population on the SSSI. These birds would be highly vulnerable to a jet ski moving at the speeds that Mr Evans was observed to be moving close inshore.

24. While Mr Evans has claimed that he is anxious to help educate users of jet skis so that such risks to wildlife are not created in future; these protestations are inconsistent with his actions. The Stop Notice will be reviewed in two years, when he will have the opportunity to make representation to natural England, which may include demonstrating to them what steps he has taken in the intervening period.
25. The protection of these colonies of seabirds is a matter of substantial public importance and the existence of this Stop Notice may well deter others from indulging in reckless behaviour around this and other seabird breeding sites.
26. I dismiss the appeal.

Judge C Hughes 21 July 2015