



IAC-AH-CO-V1

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
ENVIRONMENT**

Appeal Reference: NV/2016/0009

Decided without a hearing at Field House

Before

JUDGE PETER LANE

Between

ROBERT NICKERSON & SON LTD

Appellant

and

THE ENVIRONMENT AGENCY

Respondent

DECISION AND REASONS

Introduction

1. The appellant, which is the undertaker in respect of Kiln Close Reservoir, Lincolnshire, appeals against the designation by the respondent on 10 May 2016 of the reservoir as a high-risk reservoir within the meaning of section 2C of the Reservoirs Act 1975. Both parties are content for the appeal to be decided without a hearing and, in all the circumstances, I have considered that it is appropriate for me to do so. In reaching a decision in this case I have had regard to the entirety of the written materials contained in the bundle prepared by the respondent. I have also had regard to the appellant's letter of 24 October 2016, attaching the panel engineer's report dated 7 June 2015 (which also appears in the main bundle).

Legislation

2. Section 2B of the 1975 Act enables the respondent to designate a large raised reservoir as a high-risk reservoir by giving notice confirming a provisional designation, previously made under section 2A. Section 2C provides that the respondent “may designate a large raised reservoir as a high-risk reservoir if –
 - (a) [it] thinks that, in the event of an uncontrolled release of water from the reservoir, human life could be endangered, and
 - (b) the reservoir does not satisfy the conditions (if any) specified in regulations made by the Minister.”
3. The effect of designation of a reservoir as a high-risk reservoir is that sections 10 to 12 of the 1975 Act apply to it. These contain provisions regarding requirements for inspection, monitoring and supervision.

Decision to designate

4. Kiln Close Reservoir is a large raised reservoir within the meaning of the 1975 Act. Reservoirs containing more than 25,000 m³ water above ground level are subject to the provisions of the Act. Kiln Close Reservoir contains a volume of 74,500 m³.
5. On 17 December 2015, the respondent provisionally designated Kiln Close Reservoir as a high-risk reservoir. The notice of provisional designation informed the appellant of its ability to make representations. No such representations were received by the respondent.
6. The confirmed designation notice states that the reason for designation is that the respondent thinks that human life could be endangered in the event of an uncontrolled release of water from the reservoir. Since no conditions have been specified in regulations made by the Minister for the purpose of section 2C(1)(b) of the 1975 Act, this meant that the reservoir fell within section 2C(1)(a) for designation.
7. Part of the evidence relied upon by the respondent for designating Kiln Close Reservoir are flood maps produced from computer models in 2009. These were originally produced for emergency planning purposes, in order to give an indication of where emergency resources should be directed in the event of a dam failure. The respondent accepts that the maps “do not give a bespoke or especially accurate indication of the dam break flood but are presently the best available information for making designations”.
8. In its letter of 24 October 2016, the appellant emphasises the respondent’s acceptance that the flood maps are not “bespoke or accurate indications of the dam break flood”. The letter says that “still no proof has been presented to show that a release would result in the loss of human life”. This chimes with the appellant’s grounds of appeal,

which contend that the reason for designation “is purely a matter of opinion which is not supported by any evidence or proof, hence my objection to this decision”.

Discussion

9. The effect of 2C(1)(a) is that the respondent, as the appropriate agency, is required to hypothesise what could happen in the event of a “worst-case scenario”, involving a fundamental failure of the water retention structure of the reservoir. The question for the respondent to answer is whether, in such a scenario, “human life could be endangered” (my emphasis). There is no requirement for the respondent to be satisfied on the balance of probabilities that such a danger would arise. By its use of language, Parliament has plainly specified a lower threshold. This is entirely understandable, given the potentially very serious consequences that could arise from the failure of a large raised reservoir.
10. Although the Minister may, by regulations, specify conditions which, if satisfied, would preclude designation on the basis that the likelihood of failure is, in reality, negligible, no such regulations have been made. The 1975 Act does not require the Minister to make such regulations.
11. I find that the evidence plainly shows that paragraph (a) subsection (1) is satisfied in the present case. Paragraphs 16 and 17 of the response are determinative:-

- “16. The statutory reservoir inspection report dated 7th June 2015 commissioned by the appellant as required by the Act contains an assessment by the independent inspecting engineer of flood hazards should the reservoir fail...:

‘In this particular case the basin has a small catchment and no permanent feeder stream. The main inflow during extreme flooding would be mainly limited to overland flow off the adjacent fields. A breach of this dam might endanger lives of persons in isolated properties but it seems unlikely that a community of more than 10 persons would be at significant risk. Therefore, in line with the latest guidance, I consider that the dam falls within Category B, i.e. a reservoir where ‘a breach of the embankment... could endanger lives not in a community or could result in extensive damage’. I note that this opinion concurs with the views that the original Construction Engineer and, more recently, those views held by DEFRA/EA designation committee on High Risk Reservoirs’.

17. The advice of our own Consultant Reservoir Engineer is summarised as follows:-

‘The likely loss of life in the event of failure is assessed to be more than one and this is supported by section 10 report and the RIM mapping [Reservoir Inundation Mapping]. The maximum unit discharge is significantly higher than the threshold value of 3m³/s/m. Properties within Rothwell and the main street itself could be significantly affected by inundation that could pose a risk to life. Further to the north, an industrial site could be partially flooded and some properties at Cuxwold lie in proximity to the flood extent. The provisional designation of this site is therefore “High Risk”.’

Decision

12. The respondent had power to designate the reservoir under section 2B of the 1975 Act. There is no basis for finding that the respondent ought not to have exercised the power. The respondent is entrusted by Parliament with statutory functions, which include the protection of human life. Its decision to exercise its power of designation under section 2B falls to be accorded significant weight (R (Hope & Glory Public House Ltd) v City of Westminster Magistrates' Court [2011] PTSR 868; Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60). It has not been shown that the respondent's decision to exercise its discretion to designate the reservoir was wrong.

Judge Peter Lane
7 April 2017