



IAC-AH-DP-V1

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

Appeal Reference: NV/2016/0010

Decided without a hearing at Field House

Before

JUDGE PETER LANE

Between

DAVID BINNS

and

ENVIRONMENT AGENCY

Appellant

Respondent

DECISION AND REASONS

1. The appellant, the undertaker in respect of Dene Lake in North Yorkshire, appeals against the designation under section 2B of the Reservoirs Act 1975 by the respondent of Dene Lake as a high-risk reservoir, within the meaning of section 2C of that Act. Both parties are content for the appeal to be determined without a hearing and in all the circumstances I consider that I can properly do so.
2. Section 2C(1) provides as follows:-
 - “(1) The appropriate agency may designate a large raised reservoir as a high-risk reservoir if –

- (a) the appropriate agency 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. There is no dispute that Dene Lake falls to be classified as a large raised reservoir, for the purposes of the 1975 Act. The effect of designation as a high-risk reservoir means Dene Lake is subject to the provisions in sections 10 to 12 of the 1975 Act regarding inspection, monitoring and supervision.
4. On 10 September 2014, the respondent notified the appellant of the provisional designation of Dene Lake as a high-risk reservoir, pursuant to section 2A of the 1975 Act. The provisional designation explained how to make representations in respect of the provisional designation.
5. No such representations were received by the respondent. On 9 May 2016, designation was confirmed under section 2B.
6. As stated in its response, in deciding whether to designate under section 2B, the respondent:-

"...used a variety of data sources in our considerations including reservoir flood maps which were produced from computer models in 2009. The maps were originally produced for emergency planning purposes, to give an indication of where emergency resources should be directed in the event of a dam failure. 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.

Given the intention and history of reservoir safety legislation, to protect human life, our interpretation of section 2C(1) is that the precautionary principle should be applied and the reservoir should be designated high-risk unless we have clear evidence that a dam failure would not present a hazard to human life. It is our view that assigning a designation of not high-risk consequentially increases the probability of a dam failing as professional oversight is removed. This can only be acceptable if a dam failure does not present a hazard to human life.

Where it is clearly demonstrated by good evidence that dam failure and uncontrolled release of water would be safe for people it is reasonable that an undertaker should be able to dispense with panel engineer services."

7. In his grounds of appeal, the appellant takes issue with the respondent's use of the 2009 flood maps. He contrasts these with the inspection in 2007 of Dene Lake by an engineer. The inspection concluded that the only property which could be affected by a breach of the embankment of the reservoir was a farmhouse and buildings two kilometres downstream at Watergate. These buildings could flood "to a shallow depth ... and cause localised flooding of the minor public roads. No other damage is foreseen apart from flooding of agricultural land".

8. The effect of section 2C(1)(a) of the 1975 Act is to require the respondent to hypothesise what might happen in the event of an uncontrolled release of water from the reservoir in question. If human life could be endangered in this scenario, then the power to designate arises, unless the reservoir satisfies certain conditions specified in regulations. To date, no such regulations have been made.
9. Although section 2C(1)(a) is expressed as a power, rather than a duty, the respondent has made plain, in its response to the grounds of appeal, that the application of the precautionary principle means that designation will, in practice, occur where paragraph (a) is met and that, furthermore, where evidence from the 2009 flood maps indicates that human life could be endangered, there needs to be particular confidence in any evidence to the contrary before it can properly be said that any risk to human life is so fanciful as not to meet the low threshold required by the wording of section 2C(1)(a).
10. I consider that this approach is correct. It accords with Parliament's intention in enacting the amendments to the 1975 Act, including sections 2A to 2C.
11. In his grounds of appeal, the appellant addresses the issue of whether section 2C(1)(a) requires the respondent to hypothesise a "worst-case" scenario. I consider that it does. The respondent must decide what would occur in the event of a sudden and total failure of the water-retention features of the reservoir.
12. Even on this basis, the appellant contends, by reference to the 2007 report, that human life would not be endangered. It is, however, noteworthy that (albeit) shallow flooding of a farmhouse and buildings is contemplated by that report. In such a scenario, it is not fanciful to envisage a child, on the ground floor of the residence, being endangered or, indeed, other persons, regardless of age, as a result of the interaction between water and the electricity supply of the farmhouse and buildings.
13. Importantly, the respondent, in its response, sets out the advice of the respondent's consultant reservoir engineer, who has taken into account the 2007 report, flood mapping, aerial imagery and OS mapping. The respondent's consultant concludes as follows:-

"There is a risk to life at a number of buildings, these include a number of what appears to be small agricultural buildings, residential buildings south of White Leas Farm, numerous residential buildings in Markington, two potential residential build[s] 4.6km from the reservoir, one residential building in Wormald Green, a section of residential building 5km from the reservoir and numerous residential and commercial buildings in South Stainley. There is a risk to life on a section of track within Markington, track north of Markington, footpath east of Markington, track/footpath 4km from the reservoir, tracks near Low Rakes and a footpath north of Copgrove. Thwaites Lane, Westerns Lane, a track to White Leas Farm, a footpath located south of Haddockstones Grange, Watergate Road and a footpath between Ashfield House and

Raventofts Farm are all bridges over water courses however [it] is thought likely that these bridges will not be able to accommodate all of the mapped flows. There is also a danger to passenger vehicles on a section of high street in Markington. On this basis we recommend that this reservoir be classified as HIGH-RISK.”

14. As far as I can see, the appellant has not replied to this statement of the respondent’s engineer. Whilst I have some doubt as to whether flooding of footpaths, apparently at some distance from the reservoir, would, in the circumstances, satisfy the test in section 2C(1)(a), it is plain that a number of residential buildings could be affected by an uncontrolled release of water from Dene Lake. I also agree that flooding of vehicular roads involves risks of a different order to those involving footpaths.
15. Having regard to all the documentary evidence submitted by the parties, I am satisfied that Dene Lake has been properly designated as a high-risk reservoir within the meaning of section 2C. The reservoir meets the requirement of paragraph (a) and asserts the respondent rightly exercised its discretion to designate.

Decision

This appeal is dismissed.

**Judge Peter Lane
7 April 2017**