



Case Reference: NVZ/2022/0017
Neutral Citation Number: [2023] UKFTT 00001 (GRC)

**First-tier Tribunal
General Regulatory Chamber
Environment**

**Determined on the Papers
On 18 October 2022**

Decision given on: 03 January 2023

Before

**TRIBUNAL JUDGE G WILSON
TRIBUNAL MEMBER PROFESSOR A JOHNSON**

Between

S & A MORLEY

and

SECRETARY OF STATE FOR THE ENVIRONMENT

Appellant

Respondent

Decision: The appeal is Dismissed

REASONS

Background to these Proceedings

1. Every four years the Secretary of State identifies those waters in England which are either polluted by the discharge of nitrogen compounds from sources which include agricultural sources or are at risk of being so polluted unless action is taken. He then designates as Nitrate Vulnerable Zones, (“NVZs”) all areas of land which drain into such waters and which contribute to the pollution. This has consequences for agricultural holdings within a NVZ; they must observe the restrictions prescribed in the Nitrate Pollution Prevention Regulations 2015 as amended (“the 2015 Regulations”).

2. The Environment Agency (EA) has made recommendations for NVZs to the Secretary of State and he has published those which he is inclined to accept. This includes NVZ ID G51.
3. The Appellant's assert that part of the Appellants land at Petteril Bank Southwaite Carlisle CA4 0JJ, as shown delineated in blue and numbered 3313 and 5606 on the plan attached to the Appellant's application for appeal (the holding) should not form part of NVZ ID G51; Penrith.
4. The EA has conduct of the Respondent's case in the tribunal.

Determination on the Papers and Documents

5. On 24 May 2022 the parties were informed that this appeal would be determined without a hearing. Neither party has raised an objection to this course of action. Indeed, the Respondent has indicated that his preferred course of action is for this appeal to be determined on the papers. Accordingly, this appeal is decided upon the papers and without a hearing.
6. The Tribunal has before it a bundle comprising 84 pages. The bundle was sent to the parties on 4 May 2022 together with a covering email which stated "*I will delay placing the papers before a Tribunal for 14 days in case either side wishes to add anything, e.g. final submissions.*" On 6 May 2022, the Appellant's representative emailed the Tribunal to indicate that a final submission would be made before the deadline. However, no further submission has been received nor was an extension requested. Indeed, on 8 May 2022, the Appellant's representative emailed the Respondent and Tribunal and confirmed "*No further evidence is being supplied on behalf of our client*". Accordingly, the Tribunal has treated the 84 page bundle as to the totality of the evidence and submissions upon which the parties wish to rely.

The Law

7. The source of the Secretary of State's obligation to designate NVZs is the Agricultural Nitrates Directive (91/676/EEC). The Directive has been considered by the European Court of Justice (ECJ) in enforcement proceedings brought against the UK in Case C-69/99; and also in R v Secretary of State for the Environment and Another, ex parte Standley and Others: National Farmers Union, intervener (29 April 1999) Case C-293/97 reported as R v Secretary of State for the Environment and MAFF [1999] Env LR 801. This emphasised the flexibility the Directive gives to enable member states to achieve the aims of the Directive and noted:-

"Community law cannot provide precise criteria for establishing in each case whether the discharge of nitrogen compounds of agricultural origin makes a significant contribution to the pollution."

8. The 2015 Regulations so far as relevant to this appeal provide as follows:

Regulation 2(2)

For the purposes of the Regulations, a reference to "polluted water" means "water which—

(a) is freshwater and contains a concentration of nitrates greater than 50 mg/l (or could do so if these Regulations were not to apply there), or

(b) is eutrophic (or may in the near future become so if these Regulations were not to apply there)

Regulation 4(5)

No later than the end of each four-year period provided for under paragraph (2), the Secretary of State must—

(a) identify water that is affected by pollution, or could be if the controls in these Regulations are not applied in the area concerned, using the criteria in Annex I to Council Directive 91/676/EEC”

Regulation 4(7))

Provides that following the UK’s departure from the European Union, Annex 1 to Council Directive 91/676/EEC should be read as follows:

“ANNEX I

CRITERIA FOR IDENTIFYING WATERS REFERRED TO IN ARTICLE 3 (1)

A. Waters referred to in Article 3 (1)7 shall be identified making use, inter alia, of the following criteria:

- 1 . whether surface freshwaters, in particular those used or intended for the abstraction of drinking water, contain or could contain, if action pursuant to Article 5 regulations 7 to 35 of the Regulations is not taken, a concentration of nitrates greater than 50 mg/l;*
- 2 . whether groundwaters contain more than 50 mg/l 1 nitrates or could contain more than 50 mg/l 1 nitrates if action pursuant to Article 5 is not taken;*
- 3 . whether natural freshwater lakes, other freshwater bodies, estuaries, coastal waters and marine waters are found to be eutrophic or in the near future may become eutrophic if action pursuant to Article 5 is not taken .*

B. In applying these criteria, Member States shall also take account of:

- 1 . the physical and environmental characteristics of the waters and land;*
- 2 . the current understanding of the behaviour of nitrogen compounds in the environment (water and soil);*
- 3 . the current understanding of the impact of the action taken pursuant to Article 5 .*

Regulation 6(2)

Provides that the owner or occupier of an affected holding can appeal to the tribunal against the proposed designation but only on very limited grounds. The grounds 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, . . .
 - (b) drains into water which the Secretary of State should not identify, or should not continue to identify, as polluted.
9. The burden of proof is on the Appellant and the standard of proof is on the balance of probabilities (i.e. more likely than not).

The Appeal

10. This appeal relates to ground water NVZ ID G51; Penrith.
11. The Appellant appeals against the Respondent's notice of decision, pursuant to Regulation 5(3)(b) of the 2015 Regulations, informing the Appellant that from 31 December 2020 the holding falls wholly or partly within an area the Respondent has designated as a Nitrate Vulnerable Zone (NVZ) for 2021 to 2024.
12. The Appellant appears to use the incorrect appeal form which is headed "Application for permission to appeal to the Upper Tribunal". We have nonetheless treated this as the Appellant's appeal application. Within this document and the "Cover Sheet for Nitrate Vulnerable Zone appeal" the Appellant claims that the holding, shown as two fields numbered 3313 and 5606, does not drain into water which the Respondent has identified as polluted. Accordingly, the Appeal is made pursuant to Regulation 6(2)(a).__
13. Whilst the Appellant indicated that expert evidence would be produced in support of the Appeal by 30 April 2022, no expert evidence has been produced by the Appellant. The Appellant has produced no evidence in support of his appeal. Nor has the Appellant particularised his grounds of appeal in any detail other than the bare assertion that "the holding does not drain into water which the Respondent has identified as polluted".

The Response

14. On 16 February 2022 the Respondent responded to the Appellant's notice of appeal pursuant to rule 23 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. The Respondent opposed the appeal.
15. The Respondent relied upon the original data report for NVZ ID G51 being the individual data sheet for the NVZ. The Respondent asserted that the data sheet for the NVZ provides the most accurate assessment that the holding does drain to a polluted water. The Respondent asserted that the holding has been correctly identified as draining to a polluted water by hard boundary mapping methodology as described in the Designation methodology. In addition, no new substantive evidence has been produced by the Appellant to demonstrate that the holding identified in the appeal did not drain to a polluted water.

Evidence, Findings of Fact and Discussion

16. The methodology used by the Respondent to derive and delineate NVZs for groundwaters in England is set out in the document titled “ Implementation of the Nitrate Pollution Prevention Regulations 2015 in England Method for designating Nitrate Vulnerable Zones for groundwaters December 2016”. Base maps from the Ordnance Survey and the geological mapping from the British Geological Survey (BGS) are utilised. Aquifer locations and designations are also taken from BGS information. Field boundaries for the final mapping of zones use data supplied by the Rural Payments Agency (RPA). The method uses these datasets (for example, geological and hydrological maps) combined with analysis of farm-derived nitrate loadings (from farm census returns) and monitored concentrations in groundwater together with a conceptual understanding of the behaviour of groundwater and nitrate both in general and in particular locations. A series of workshops with local Environment Agency (EA) staff provide for more detailed local knowledge to be obtained and area ground specialists consider factors affecting the path of water from the surface downwards into a groundwater body including, for example, the presence of impermeable layers and lateral flow through subsoil. Final mapping involves establishing boundaries that in general reflect geological or hydrological divides. This may include geological boundaries such as changes in rock type, faults and geological contacts; surface water catchment boundaries, groundwater level contours, high permeability drift outcrops; low permeability drift outcrops or rivers, acting as groundwater catchment divides. These boundaries are then applied to existing field boundaries based on map data provided by the Rural Payments Agency.
17. The evidence for the designation is set out in the relevant designation datasheet. The data sheet sets out that the western and south-eastern boundaries of the NVZ are defined by the bottom and top of the Penrith Sandstone outcrop locally. The eastern boundary is defined by the Eden River which acts as a local groundwater divide. The northern boundary is defined using a flow line from sandstone groundwater contours (2000). The southern boundary is defined by another flow line from sandstone groundwater contours.
18. The Appellant raises no express challenge to the data upon which the environment agency conclusions are based (for example the geological and hydrological mapping); the methodology adopted by the Environment Agency or the application of that methodology. The tribunal notes that the data relied upon by the Environment Agency is from reputable sources including the Ordnance Survey and geological mapping from the British Geological Survey. The methodology described above is based upon amongst other things geological and hydrological features to establish the path of the water from the surface to groundwater. In addition, the methodology has been tested against local knowledge at local workshop events such that local knowledge has been factored into the findings. In absence of any express challenge to the data and methodology adopted by the Respondent or their application, for the reasons set out above, we place weight upon the evidence produced by the Environment Agency.
19. On the basis of the evidence before us we are, on the balance of probabilities, satisfied that the boundaries of the NVZ are appropriately delineated by reference to the features set out within the data sheet and detailed above. A comparison of the map of the holding attached to the application [Bundle page 9] and the map of the relevant part of the NVZ shows that the holding falls within the boundaries of the NVZ. It follows that we find that the Appellant has failed to demonstrate that the holding does not drain into water which the Secretary of State proposes to identify, or to continue to identify, as polluted. It follows that we find that the Appellant has failed to satisfy the requirements of Regulation 6(2)(a) and the appeal is dismissed.

Conclusion

20. The Appellant has failed, on the balance of probabilities, to demonstrate that the requirements of Regulation 6(2)(a) are met. This being the only basis upon which the Appellant appeals the Respondent's decision, the Appeal is dismissed.

Signed

TRIBUNAL JUDGE G WILSON

Date: 22 December 2022