



Case Reference: NVZ/2022/0018

Neutral Citation Number: [2023] UKFTT 2 (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

GORDON WILSON

Appellant

and

SECRETARY OF STATE FOR THE ENVIRONMENT

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 S229; River Petteril d/s Blackrack Beck NVZ.
3. The Appellant’s assert that part of the Appellants land at Bankdale Farm, Wreay, Carlisle CA4 0RS, as shown delineated in blue and numbered 7702, 8727, 0732, 1434 and 1927 on the plan attached to the Appellant’s application for appeal (the disputed part of the holding) should not form part NVZ ID S229; River Petteril d/s Blackrack Beck NVZ.
4. The EA has conduct of the Respondent’s case in the tribunal.

Determination on the Papers and Documents

5. The Tribunal has not been made aware that either party has raised an objection to this appeal being determined on the papers without a hearing. 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 117 pages. The Tribunal has treated the 117 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 surface water NVZ ID S229; River Petteril d/s Blackrack Beck NVZ.
11. The appeal is limited to the disputed part of the holding which, for the avoidance of doubt, is the fields numbered 7702, 8727, 0732, 1434 and 1927 on the plan attached to the application.
12. The Appellant appeals against the Respondent's notice of decision dated 4 January 2022, 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 for 2021 to 2024.
13. 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 does not drain into water which the Respondent has identified as polluted. Accordingly, the Appeal is made pursuant to Regulation 6(2)(a).
14. 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

15. On 1 March 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.

16. The Respondent relied upon the original data report for NVZ ID S229 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

17. We have compared the map of the disputed part of the holding [Bundle page 9] to the NVZ plan [Bundle page 14]. As set out above, the appeal relates to the disputed part of the holding only which, for the avoidance of doubt, is limited to the fields numbered 7702, 8727, 0732, 1434 and 1927 on the plan attached to the application. When the maps are compared in this way we find that disputed part of the holding falls wholly outside the area designated as an NVZ and as shown in purple hatching on the NVZ plan.
18. Accordingly, we find that the appeal is misconceived as the disputed part of the holding to which the appeal relates is not included in area designated as an NVZ. The appeal is premised upon the mistaken belief that the disputed part of the holding to which the appeal relates is included in area designated as an NVZ. It is not.
19. The Respondent's response is also misconceived as it does not engage in a comparison with the map of the disputed part of the holding [Bundle page 9] and the NVZ [Bundle page 14] plan instead resisting the appeal on the basis of the Respondent's methodology and data sheet. It is unfortunate that the Environment Agency did not consider the boundaries of the areas of land edged blue and numbered 7702, 8727, 0732, 1434 and 1927 on the plan attached to the application when making their response. If the Environment Agency had conducted this exercise it would have been clear that the area shown edged blue and numbered 7702, 8727, 0732, 1434 and 1927 were indeed outside the boundaries of NVZ and as such there was no dispute between the parties in relation to these areas. This may have led to the appeal being withdrawn. Instead, the environment agency responded "*the land identified in the appeal has been identified correctly as draining to a polluted water*".
20. In essence there is no dispute between the parties the disputed the part of the holding to which this appeal relates is not designated as an NVZ as per the NVZ plan.
21. The right of appeal pursuant to Regulation 6 provides "*that the owner or occupier of an affected holding can appeal to the tribunal against the proposals or designation referred to in the notice*". On the basis of the NVZ plan the disputed part of holding to which this

appeal relates has not been designated as an NVZ. Accordingly, there is no right of appeal as the Appellant is not the owner of an affected holding and, separately, there has been no designation of the disputed part of the holding. It follows that the appeal is dismissed but as stated this is because the disputed part of the holding to which this appeal relates (the fields numbered 7702, 8727, 0732, 1434 and 1927) is not included in the NVZ designation.

Conclusion

22. The Appeal is dismissed because the disputed part of the holding to which this appeal relates (the fields numbered 7702, 8727, 0732, 1434 and 1927) is not included in the NVZ. Accordingly, for the reasons set out above, there is no right of appeal.

Signed

TRIBUNAL JUDGE G WILSON

Date: 22 December 2022