First-tier Tribunal
General Regulatory Chamber

Appeal reference: NVZ/2022/0025
NCN: [2023] UKFTT 00788 (GRC)

Dealt with on Papers

Before

FIRST-TIER TRIBUNAL JUDGE MATHEWS
TRIBUNAL MEMBER ZHAO

Between

A C ATKIN

Appellant

and

THE SECRETARY OF STATE FOR THE ENVIRONMENT, FOOD AND RURAL AFFAIRS

Respondent

Representation:

This appeal, with the consent of the parties, was dealt with on the papers.

Decision – The appeal is dismissed.

NVZ notice dated 4th January 2022 (NVZ ID number S316/EL149) is confirmed.

Background

1. The appellant owns Allandale Fam, Brinsley, Nottingham. The property is considered by the respondent to be a relevant holding within the meaning of regulation 5 (5) of the **Nitrate Pollution Prevention Regulations 2015.**

2. In January 2022 the respondent gave notice to the appellant as required by the 2015 regulations. That notice set out the respondent's intention to continue to designate the appellant's land as falling within a nitrate vulnerable zone. The designation

followed a review in 2020 of pollution in the relevant geographical area. Such reviews occur on a four year cycle. The notice concerned nitrate vulnerable zones :-

(a) S316

(b) EL149

3. The appellant exercised his right of appeal following that designation, he appeals pursuant to regulation 6 of the 2015 regulations and his appeal notice was dated the 31st of January 2022. That process led to the present appeal. The appellant advanced expert evidence that has been considered by the respondent and further response was filed by the respondent after receipt of the appellant's expert evidence. Finally a second short report from the appellant's instructed expert commented on the respondent's second review.

4. May I note that through my administrative error there has been a delay in the promulgation of this decision for which I apologise to all concerned without reservation.

The Law

5. Council Directive 91/676/EEC which is retained EU law, creates obligations in relation to the protection of water against pollution caused by nitrates from agricultural sources. It requires Member States to create a scheme whereby areas of land which drain into waters affected by pollution, or into waters that could be so affected, must be designated as vulnerable zones.

6. Annex 1 of the Nitrates Directive sets out the criteria for identifying waters that are or could be affected by pollution. This varies according to whether the water is surface water ('particularly if intended for the abstraction of drinking water'); ground water; or water that has been found to be 'eutrophic' ("enriched by nitrogen compounds, causing an accelerated growth of algae and higher forms of plant life that produces an undesirable disturbance to the balance of organisms present in the water and to the quality of the water").

7. Article 5 requires Member States to create an action programme designed to reduce and prevent pollution and to sample and monitor the nitrate content of surface water and ground water in designated zones both initially and then on a recurring 4-year cycle.

8. The **UK Nitrate Pollution Prevention Regulations 2015** implement the UK's obligations under the Nitrates Directive in respect of land in England. Similar regulations apply to other parts of the UK. Parts 3 to 8 of the Regulations place limits on the total amount of nitrogen applied to an agricultural holding in an NVZ and makes other provisions relating to livestock manure and spreading fertilizer. The overall effect is to limit the number of animals that can be kept per unit area inside an NVZ and/or restrict the amount of fertilizer that can be applied. Designation is therefore capable of having a significant economic impact on agricultural holdings, giving rise to a strong incentive to appeal.

9. Regulation 5 requires the Environment Agency to make recommendations to the Secretary of State ('S of S') every 4 years as to which areas of land should be, or should continue to be, designated as an NVZ under the Regulations. The S of S must publish the proposals and send written notice to anyone who appears to be an owner or occupier of a relevant holding (regulation 5(3)(a)&(b)).

10. Regulation 6 creates a right of appeal as follows:

> ***6.***—*(1) An owner or occupier of a relevant holding who is sent a notice under regulation 5(3)(b) may appeal to the First-tier Tribunal(a) against the proposals referred to in the notice.*
>
> *(2) For the purposes of rule 22(2)(g) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009(b) (notice of appeal: grounds), the only grounds of an appeal under this regulation 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, or*
>
> *(b) drains into water which the Secretary of State should not identify, or should not continue to identify, as polluted.*

> *(3) If the First-tier Tribunal upholds an appeal under paragraph (2)(a), the Secretary of State, when acting under regulation 4(5), must treat the relevant holding (or the part of it in respect of which the appeal was upheld) as not draining into the water concerned.*
>
> *(4) If the First-tier Tribunal upholds an appeal under paragraph (2)(b), the Secretary of State, when acting under regulation 4(5), must—*
>
> *(a) treat the water concerned as water which should not be identified, or should not continue to be identified, as polluted, and*
>
> *(b) treat any holding (or part of any holding) which drains into that water accordingly (regardless of whether the owner or occupier of the relevant holding appealed under this regulation).*

11. There are therefore two basic grounds of appeal – that the holding in question does not drain into water identified as polluted, or that the water is not polluted. The first type – drainage appeals, only affect the specific holding, however the second type – polluted water appeals, leads to the removal of the designation with respect to the water body.

12. The ECJ considered proportionality issues in **R v Secretary of State for the Environment and Another, ex parte Standley and Others**: European Court of Justice C-293/97 29 April 1999 and in **EC v Belgium** CJEU C-221/03 22 September 2005. In the former the Court rejected the proposition that the limits set out in Annex 1 of the Nitrates Directive only applied to nitrates from agricultural sources. In the latter the Court upheld a decision in relation to restrictions imposed on an agricultural holding that only contributed 17% of the nitrate pollution.

13. When a notice is served, the recipient has a right of appeal to this tribunal. The tribunal's role in considering an appeal is to make the disputed decision fresh taking into account all the evidence before it. Applying the standard of proof "the balance of probabilities" the tribunal must decide whether it has been shown to be more likely than not that the criteria relied on by the Secretary of State to serve the notice are met.

14. The burden of proof to show that the Secretary of State's decision to serve the notice was wrong lies with the appellant the appellant must persuade the tribunal on the basis of evidence or submission that either the methodology was not applied correctly or that in the particular circumstances its strict application results in an outcome that is not in line with the objective of the directive. If he does not then the status quo must prevail.

15. The **2015 regulations** provide for an appeal on two possible grounds only, as set out in paragraph 14 above. The tribunal does not have power to consider any grounds of appeal other than those specified in regulation 6 (2).

Issue

16. In the present appeal Mr Atkin, through a representative, advanced his appeal on the basis that his land drains to water which the secretary of state should not identify, or continue to identify as being polluted. His appeal was therefore pursuant to section 6 (2) b of the 2015 regulations.

17. The appellant assertions are that :-

> S316 – River Erewash from Gilt Brook to River Trent. Covers a catchment of 193.46 km^2
> Whilst elevated nitrates have been recorded in the River Erewash in the past, the Environment Agency have indicated in their Datasheet (2017) for this NVZ that the proportion
> of this derived from agriculture is between 8 and 10 % based on their Sectoral load apportionment (Pg 14) and 7% based in SIMCAT-SAGIS modelling (pg 17). As such the contribution from agriculture is not significant and the zone should not be designated under the Nitrates Directive which seeks to limit pollution caused by agriculture.
>
> EL149 – Attleborough Nature Reserve NVZ. Has a quoted catchment of 19920 Hectares (199.2 km^2) the vast majority of which is the same as the surface water NVZ S316 the River Erewash.
> The Local assessment in 2015 suggested that loading from agricultural sources to the lake were "Minor" and that "Principal Source = Point Source", (pg 9). Comment on pg 12, suggests work by ADAS indicates agricultural contribution is significant. However. no evidence was provided to support this assertion.
> As the vast majority of the catchment for the Attleborough lakes comprises the area covered by the River Erewash catchment, AND that is has been determined via detailed analysis and modelling by the Environment Agency that agricultural contribution to nitrates in the Erewash are 10% or less, EL149 should also not be designated an NVZ due to the absence of significant agricultural input to the nitrates in the waterbody.

18. Mr Atkin relies upon a report from Hafren Water submitted in support of his appeal submissions. I note the submissions contained in the expert report in which there are summaries of cases reflecting upon the interpretation of the word significant when

assessing whether or not there is significant agricultural inputs to nitrate levels in the present case. It is not the case that there is established given percentage that defines what is or is not significant. The threshold of significance must be viewed in the context of wider considerations of land use and all sources of potential pollution.

19. In summary the appellant accepts that the water bodies for the two zones concerned fail the criteria and are accurately identified as experiencing pollution from nitrates. He argues that monitoring points providing readings are unduly influenced by urban waste water discharges. It is also suggested that because the peaks in recorded pollution coincide with the growing season when nitrate leaching from agricultural land is reduced, the agricultural land contribution to the pollution is less significant than might otherwise be the case.

20. The appellant suggests that modelling results indicative of 7 to 10% of the nitrogen load stemming from agricultural land should not be considered significant because case law is interpreted as suggesting that contributions of 10% or 17 to 20% have been found to be “not insignificant”.

21. I note that the methodology employed by the respondent for water quality assessment is clearly set out in the reports, it is self-evident that when assessments are made concerning wider areas of land, there will be variation in contributions between different areas, and catchment areas will include both urban and rural land use areas.

22. The appellant is not suggesting that the respondent has applied the wrong methodology but simply that the methodology has produced an unfair result in the present case.

23. I have read the respondents evidence in full, it is cogent and coherent, properly argued, and reflects sound methodology, I have re-read it in the light of all the appellant’s assertions and for the reasons set out below I do not find that the respondent’s evidential matrix has been significantly undermined in any respect.

24. In relation to the assertion that pollution levels peak during peak growing areas, the respondent observes that the observed peaks can in fact be seen to correlate with periods of dry and wet weather. Agricultural nitrogen loads tending to increase during

wet weather conditions. The appellant has not produced to me adequate empirical data to establish that their assertion is correct. In other words, I consider both of these interpretations but there is inadequate data before me to allow me to conclude that nitrate level peaks that correspond with peak growing season are corroborative of reduced nitrate impact from agricultural land as opposed to a simple reduction in nitrate leaching from that land when and whilst rainfall is less heavy.

25. The reduced rainfall levels in summer may simply be delaying the leaching of nitrates from agricultural land rather than indicative of that land having less overall contribution to the nitrate pollution addressed by the imposition of the NVZs.

26. The respondent further asserts that NVZ designation methodology does not require agricultural contribution to be the only source of nitrate load. It is accepted that such modelling methodology require certain assumptions to be made.

27. The respondent's evidence goes on to establish that a significant proportion of the catchment area concerned (over 50%) represents agricultural land use and a map to demonstrate that is included in the second response of the respondent. The appellant accepts nitrate pollution in the area waters concerned and has not produced any adequate data to show any undue influence from individual point sources such that the significance of agricultural land use contribution to the observed pollution is reduced.

28. The appellant on the evidence before me has not adduced adequate evidence to demonstrate that the respondent's modelled results showing that a 7 to 10% nitrogen load from agriculture or diffuse nitrate loading, is an inaccurate figure for the nitrate contribution levels from the agricultural land in question in this appeal.

29. I have considered at length the submissions before me interpreting the relevant CJEU rulings, best summarised at page 402 of the combined bundle of evidence.

30. I note that is accepted by both parties that the question of what is or is not significant is not established by a simple agreed percentage threshold, but requires a wider assessment of all the circumstances. In the present case I have done that and in particular note to the respondent's evidence as to the sensitivity of the Attenborough nature reserve which includes within it an SSSI.

31. The so-called Sweden and Finland cases, Commission v Sweden 2009 C-438/07 and Commission v Finland C-335/07 2009, are helpful. Those cases concern directives relating to urban waste-water treatment and are not therefor binding but recognise that relatively small percentage contributions to a pollution load can be deemed significant when considering directives aimed at addressing pollution issues. In those cases contributions of 9.8% and 10% were found to be significant contributions.

32. I do conclude having considered all of the material above me and the nature of the land concerned, that contributions in the range of 7-10% are significant contributions to nitrate pollution.

33. The appellant has not adduced sufficient evidence to allow me to reject the respondent's modelling and methodology in the present case. The respondent evidence is cogent coherent, based on sound modelling and establishes a 7 to 10% nitrogen load from agriculture or diffuse nitrate loading in the present case. My analysis of the decisions above supports the contention that such a level is significant for the purposes of the Nitrate Directive (91/676/EEC) that is relevant to these proceedings.

Summary

34. The respondent's data demonstrates that the appellant's land does drain to water that is properly identified as being polluted by the respondent.

35. The regulations are satisfied.

36. For the reasons set out above the appeal is dismissed and the respondent's notice is confirmed.

Signed:-

Deni Mathews 20th September 2023

Judge of the First-Tier Tribunal