



First-tier Tribunal
General Regulatory Chamber

Appeal reference: NVZ/2021/0034

NCN: [2023] UKFTT 00712 (GRC)

Heard Remotely
On 08 December 2022
Date of promulgation 31 August 2023

Before

FIRST-TIER TRIBUNAL JUDGE MATHEWS
TRIBUNAL MEMBER ZHAO

Between

JAMES FANSHAWE

Appellant

and

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

Respondent

Representation:

For the Appellant: Mr Fanshawe appeared in person.

For the Respondent: The respondent was represented by counsel Ms Jones

Decision – The appeal is dismissed.

NVZ notice dated 21st October 2021 (NVZ ID number S382/S590/ EL146/EL148) is confirmed.

Background

1. The appellant owns and farms Oak Farm, Naseby, Northampton NN6 6BX. The property is a relevant holding within the meaning of regulation 5 (5) of the **Nitrate Pollution Prevention Regulations 2015**.

2. In 2002 nitrate vulnerable zone (NVZ) designation occurred in relation to the geographical areas S382 (River Nene) and S590 (Warwickshire Avon waterway). That designation has remained to date. The respondent asserts that the appellant's land drains into the headwaters of the two surface water designations set out above, S382 and S590.
3. The respondent indicates that the nitrate vulnerable zones are situated downstream of the appellant's land. Oak Farm falls within the catchment area of the two NVZs and watercourses into which the appellant's land drains go onto drain into the polluted waters responsible for the ultimate designation of NVZs.
4. The respondent also asserts that the appellant's land at Oak Farm also falls within two further NVZ designations, EL 146 (Stanford Reservoir) and EL 148 (Thrapston Lake and Pitsford Water).
5. In relation to all four designated NVZs the essence of the respondent's case is that water from the appellants land ultimately drains into the polluted areas and can't sequence the appellants land falls within the **Nitrate Pollution Prevention Regulations 2015** (the 2015 regulations).
6. In October 2021 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 appellants 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 four nitrate vulnerable zones:-
 - (a) S382 known as River Nene;
 - (b) S590 known as River Avon;
 - (c) EL146 known as Stanford Reservoir
 - (d) EL 148 known as Thapston Lake and Pitsford Water.
7. 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 28th of December 2021. That process led to the present appeal.

8. 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

9. 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.
10. 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").
11. 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.
12. 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.

13. 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)).

14. 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).

15. 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.
16. 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.
17. 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.
18. 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.
19. The **2015 regulations** provide for an appeal onto 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

20. In the present appeal Mr Fanshawe advanced his appeal on the basis that his land did not drain into the water identified by the respondent as representing a NVZ. His appeal was therefore pursuant to section 6 (2) a of the 2015 regulations.
21. Mr Fanshawe indicated that though he accepted that the majority of his land drained into Naseby reservoir, which in turn was used to top up the grand union canal, he stated that he could not obtain data relating to pollution levels within Naseby Reservoir Waters. He indicated that the data sent to him by the Secretary of State was not easily interpreted by him and did not appear to him to cover Naseby reservoir or the grand union canal.
22. He went on to add that his land does not in his view drain into waters identified by the respondent as having been polluted and therefore his land should not be included within a NVZ.

Evidence

23. Oral evidence was heard from the appellant, the respondent called expert hydrographic evidence from Ms Weissman. Submissions were heard from both parties.
24. The respondent served and relied upon an extensive bundle of hydrographic evidence and supporting maps set out in the respondent's bundle. The evidence included datasheets relied upon for the 4NVZs in issue in this case, maps showing the asserted areas of land and water courses together with text addressing the specific assertions of the appellant.

Findings

25. The Tribunal was very much assisted by the constructive and helpful approach adopted by all parties.
26. Mr Fanshawe indicated that there was no dispute in this case as to the ownership of the land concerned, as to the fact of any NVZ designation as asserted by the respondent or as to the geographical accuracy of any of the charts and documents submitted.

27. The respondent's expert witness confirmed and adopted the respondent's submitted hydrographic analysis. The documents, supporting maps and annexed calculations together with raw data are contained in full in the respondent's bundle and had been considered by all parties prior to the hearing the appellant put questions to the witness and in particular the suggestion that he was not responsible for any pollution and that he did not accept that his land drained into the areas identified by the respondent, that was of course his basis for appeal.
28. The respondent's expert was consistent in her account she methodically took the tribunal through the various maps indicating the site of the appellants farmland, the relevant water courses and the paths of drainage and water flow.
29. As set out above the designations of the respective NVZs was not subject to challenge by the appellant.
30. The respondent accepts, as the appellant asserts that there is no monitored evidence assessing nitrate levels in the water courses that the appellant farmland drains directly into. We note that that perhaps addresses the appellant's concern that he does not have data relating to the water quality of water as it leaves his land. However that is not a basis for appeal nor is it critical to the central issues in this appeal.
31. We note that under the nitrates directive and the 2015 regulations it is not necessary that all waters within a NVZ should be polluted, rather the regulations require that all land contributing to polluted water must be designated.
32. We found the respondent's evidence to be cogent, coherent, properly argued and referenced and note that it was not substantially reduced in credibility by any assertions or submissions advanced by the appellant. We accept in full the evidence set out in the respondent's bundle and advanced before us.

S382 and S590

33. The expert evidence before us concluded that the appellant's land drains onto the headwaters of two existing NVZs, S382 and S590. The charts before us properly establish that pattern of flow and we make findings to that effect. We find that land

from the appellant's farm is within the catchment area of the Warwickshire Avon S590 and the River Nene S382. Mr Fanshawe accepted that his land drains into the River Nene and Naseby reservoir.

34. We note the data relied upon by the respondent to demonstrate that in both cases areas of the respective NVZs downstream of the appellant's property are appropriately designated as polluted given the evidence before us of elevated nitrate levels in the water bodies. For the purposes of the 2015 regulations sections 2 and 3, NVZs are defined as including all land draining into water that is identified as polluted.
35. Given the expert evidence establishing the drainage of water from the appellant's land into the respective polluted bodies of water we find that the regulations are met. His land drains into the River Nene **S382** (accepted in any event by the appellant).
36. The appellant's land also drains into Naseby reservoir We make findings to that effect again on the basis of the expert evidence before us but also in light of the concession from the appellant in his own evidence to that effect. The respondent's evidence establishes from Naseby Reservoir there are feeder watercourses heading towards the area of Welford Village that are also used at times to top up the Grand Union Canal and River Avon **S590**.
37. We therefore find that water from the appellant's land drains into **S590** and **S382** as set out in the respondent's evidence. We noted the appellant's assertion that such water was not monitored on his land or in the immediate vicinity, we accept that assertion but for the reasons set out above it does not prevent NVZ categorisation as the relevant regulations are met for the reasons given. In short his land drains ultimately into polluted waters that require protection hence the basis for categorisation.

EL146 and EL 148

38. The appellant's land drains in large part into the Naseby reservoir. The respondent's evidence demonstrated that the water transfer to Welford Village referred to in paragraph 36 above discharges at times into the River Avon, that river in turn drains into Stanford reservoir EL146. As a consequence the water in question has an

impact upon water quality in EL 146, and for reasons set out above the regulations are met.

39. The respondent's charts also demonstrate that the River Nene receives water from the appellant's land via Cottesbrooke Brook, the River Nene in turn drains into EL148 (Thrapston Lake). Accordingly and in accordance with the same method of analysis set out above, water from the appellant's land does enter EL148.
40. The respondent's data sets out the recorded levels of pollution in both EL 146 and EL 148, and accordingly the regulations are met.

Summary

41. This appeal concerns four separate NVZs. The respondent's data before us shows relevant levels of nitrate pollution in all four of the protected bodies of water. The hydrological evidence goes on to establish that water from the appellant's land contributes to all four of the NVZs after passage through other waterways. It is not of course suggested that the appellant is responsible for the ultimate pollution levels. We find that in view of the approach taken by the regulations, the designation of the NVZs in question by the Secretary of State is in accordance with the regulations. The appellant's land does drain into the designated NVZs, the regulations are satisfied.
42. For the reasons set out above the appeal is dismissed and the respondent's notice is confirmed.

Signed:-

Deni Mathews

24th August 2023

Judge of the First-Tier Tribunal