



Neutral citation number: [2024] UKFTT 00584 (GRC)

Case Reference: NVZ/2021/0013

**First-tier Tribunal
(General Regulatory Chamber)
Nitrate Vulnerable Zones**

**Decided without a hearing
Decision given on: 05 July 24**

Before

**JUDGE NEVILLE
DR K AKANDE**

Between

**P NASH
(trading as R G NASH & SONS)**

Appellant

and

SECRETARY OF STATE FOR THE ENVIRONMENT, FOOD & RURAL AFFAIRS

Respondent

Decision: The appeal is allowed.

REASONS

1. This appeal concerns land at Brighthams Farm in West Sussex, that drains into the River Adur.
2. Regulation 4(2) of the Nitrate Pollution Prevention Regulations 2015 (“the regulations”) requires the Secretary of State to monitor the nitrate concentration in freshwaters to identify whether it may be affected by pollution (or could be if the controls provided by the regulations are not applied), and then to identify land which drains into those waters and that contributes to its pollution. Such land may then be designated as a “nitrate vulnerable zone” (“NVZ”).
3. Water is affected by pollution for the purposes of the Directive and the regulations if the 95th percentile concentration exceeds 50 mg/l as NO₃, or 11.3mg/l as Total Inorganic Nitrogen (TIN). For NVZ designation, this must be confidently calculated from either monitoring or modelling evidence, or a combination of the two.

4. The regulations define “a relevant holding” as land and any associated buildings used for growing crops in soil, or rearing livestock for agricultural purposes, that fall wholly or partly in an NVZ. The occupier of a relevant holding must comply with rules concerning the use of nitrogen fertilisers and the storage of organic manure. Before the Secretary of State revises or adds to the designation of NVZs, regulation 5 requires him to publicise his proposals and send written notice to anyone appearing to be the owner or occupier of a relevant holding.
5. Mr Nash appeals a notice served upon him by the Secretary of State, proposing to include the landing question as a relevant holding falling within NVZ number S522. While the Secretary of State is the formal decision maker, designation of NVZs and responding to appeals is done on his behalf by the Environment Agency. Mr Nash is represented by Hafren Water, an independent environmental consultancy.

The appeal

6. Regulation 6 affords a right of appeal to the Tribunal. So far as still applicable, the only permitted grounds of appeal 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.*

The Secretary of State refers to these as Type A and Type B appeals, respectively.

7. Mr Nash raises a Type B appeal. The initial grounds of appeal had simply asserted that the Secretary of State had erred in reaching his decision, and were accompanied by a notice that greater detail would be provided as soon as possible. The Environment Agency nonetheless provided a rule 23 Response maintaining its position on designation and annexing its designation methodologyⁱ (“the Methodology”) and the specific datasheet for NVZ S522ⁱⁱ. The parties subsequently exchanged a series of reports containing both evidence and submissions, until they both confirmed that their respective cases had been made sufficiently clear for the Tribunal to adjudicate. Applying the overriding objective, we consider it appropriate to approach the appeal on this basis, rather than by restricting the grounds argued or applying formal rules of evidence; the issues and the factual and expert evidence are sufficiently well-stated for our specialist constitution to fairly decide the appeal.
8. We can therefore summarise Mr Nash’s case as being that the failing monitoring points upon which designation was based had been unduly influenced by discharges from the Burgess Hill wastewater treatment works (“WWTW”), and the contribution from agriculture greatly overestimated. His discrete arguments include that data during low flow was wrongly taken into account, that contrary to the Methodology there was no land use modelling, and that confidence is further reduced by the failure to consider ammonia as a portion of TIN. The Secretary of State should have therefore excluded the relevant monitoring from consideration, and was wrong to identify the water as polluted.
9. Both parties consented to the appeal being decided without a hearing. We have had regard to the joint bundle and a single-page ‘Final Response’ document on behalf of Mr Nash.

Legal Framework and Issues

Our approach on appeal

10. Taking into account the legislative scheme and the context in which it came into being, we consider that our task is to decide whether the Secretary of State was wrong to identify the water into which the land drains as polluted. ‘Wrong’ in this sense has the meaning given in Cook v General Medical Council [2023] EWHC 1906 (Admin) at [20]-[21], citing Waltham Forest LBC v Hussain & Ors [2023] EWCA (Civ) 733 at [64]. While we are not confined to public law errors, to disturb the decision we must disagree with it *despite* having accorded the special weight appropriate to a judgment of the body given decision-making power by the statutory regime, as well as having the relevant institutional and technical expertise.
11. Notwithstanding the simplicity of Mr Nash’s case as summarised at paragraph 8., this is a particularly complex appeal. In formulating the reasons for our decision we have applied the well-established principles summarised in the Senior President’s Practice Direction ‘Reasons for decisions’ of 4 June 2024. We have not identified every piece of evidence relied upon, nor every step in our reasoning; what follows is our conclusions on the main issues in dispute and a sufficient explanation of how we reached them to enable the parties to understand why they won or lost. Nor will a lay reader find an explanation of the relevant science, methodology and terminology involved in designating an NVZ, and instead will need the Methodology and the NVZ S522 datasheet to hand.

‘Significant contribution’

12. The regulations implement Council Directive 91/676/EEC on the protection of waters against pollution caused by nitrates from agricultural sources. There are two relevant judgments of the Court of Justice concerning the *extent* to which pollution must come from agricultural sources to justify designation: R. (Standley) & Ors (Environment and consumers) [1999] EUECJ C-293/97, and Commission v Belgium (Environment & consumers) [2005] EUECJ C-221/03. We adopt the summary of those cases given by the Upper Tribunal in PJ v Secretary of State for Environment, Food and Rural Affairs [2015] UKUT 207 (AAC):
 20. *These two decisions of the CJEU are the only cases cited to us which relate to the designation of NVZs. In summary they show that when a water course is identified as polluted (i.e. has a nitrate level above 50mg/l) the test to be applied by the Secretary of State is whether agricultural sources make a significant contribution to that pollution. Whether the agricultural contribution is or is not significant in a given case will be a multifactorial question of fact and assessment. On the facts of the case in EC v Belgium, contributions of the order of 17%-19% were accepted by the court as significant.*
13. The Environment Agency has also referred to authorities where around 10% was ‘significant’, albeit in the context of the Directive on urban waste-water treatment rather than nitrate pollution.

Consideration

14. This catchment NVZ was expanded upon this designation to incorporate an additional river catchment at the outlet of the River Adur. The pre-existing NVZ was 71% of the size of the

new NVZ. Figure 4 to the datasheet shows the location of the monitoring points and the Burgess Hill wastewater treatment works (“WWTW”), which discharges at Goddards Green.

15. The lowest designating monitoring point is F0002492. It recorded a 95%ile concentration of 22.39 mg/l TIN, significantly above the threshold of 11.3mg/l. Under the Methodology this gives a monitoring confidence level of 6. A time series for F0002492 is provided showing that the figure has increased since 1990.
16. No land use modelling was performed to assess the contribution made by agriculture, according to the datasheet because “the proposed NVZ is smaller than the minimum size [where] we can apply the land use model with confidence”. Yet, as observed by Mr Nash, the Methodology sets that minimum size at 20 km². The 2017 designation is 131.55km² and historically was 102.34 km², with the catchment being approximately the same size.
17. The Environment Agency has not continued to argue that the NVZ is too small, nor provided any explanation for how this was ever its approach. Instead, it says that omission of the SEPARATE model (explained in the datasheet) outputs from the datasheet “was an oversight”. We find it difficult to understand how this can be reconciled with its statement that the Methodology was nonetheless properly applied, as designation was explicitly done on the basis that no modelling data was available. The result was that when monitoring and modelling results were combined according to section 6 of the Methodology, a zero was given for land use model results on the evidence matrix. This raised the stated need to exercise discretion in all cases, “but particularly where the decision is informed by only one strand of evidence”.
18. We nonetheless consider what the Environment Agency now says justifies designation. It refers to land cover data showing about 60% of the catchment to be agricultural as corroborating the SEPARATE source apportionment model that estimates the agricultural contribution to the annual nitrogen mass load at 51%. Applying the panel’s expertise, and based on the cogency of each party’s explanation, we entirely agree with Mr Nash’s criticisms of reliance on land use data and SEPARATE alone to draw meaningful conclusions in this specific case. We make the following assessment:
 - a. The land use data figure of 60% does not provide any meaningful corroboration of the SEPARATE figure of 51%. Land cover is not proportional to nitrogen mass load contribution in a catchment of both point and diffuse sources: both as a general proposition, and on the illustrative calculation at page 261 of the bundle.
 - b. In this case in particular, SEPARATE can be seen to have calculated the total nitrogen mass load from the WWTW as 87.9 tonnes per year, whereas the Environment Agency’s 2004-2008 figures at p.246 of the bundle never fall below 100 tonnes per year and average 132 tonnes per year. The Environment Agency’s initial explanation that SEPARATE took account of nutrient stripping processes cannot stand against the evidence that *this* WWTW does not use them.
 - c. The weight carried by the SEPARATE modelling is not increased by the historic findings on whether the waterbody is polluted. We have struggled to understand from the previous datasheets / summaries what role land use modelling has played, as they are inconsistent on the point. When taken with the surprising omission from

the present datasheet already described we can have no confidence that they accurately state the basis upon which they were reached.

- d. We agree with the conclusions drawn at paragraph 3.13 of Mr Nash's submission at page 138 of the bundle that the land use modelling now provided by the Environment Agency predicts concentrations 3 to 4 times lower than those actually observed.
 - e. As argued by Mr Nash, the Environment Agency's case on agricultural versus point source contribution cannot be reconciled with the reduction over time in nitrate leaching from agriculture (as acknowledged in the datasheet) set against the increasing TIN trend shown in the data (see, for example, page 150 of the bundle).
19. We further agree with Mr Nash's argument that SIMCAT modelling would have made a major contribution to the evidential picture. SIMCAT is described in the datasheet, as well as in more detail by the Upper Tribunal in PJ at [31] (although this refers to an earlier version). While NEAP-N does appear in the datasheet, for the reasons described in the Methodology at section 5.1 it cannot compensate for the lack of SIMCAT modelling.
 20. A workshop was apparently convened to consider local factors arising from designation, but we have no specific information to show that any of the criticisms made in these proceedings were taken into account. Given the confusing picture as to whether land use modelling has been conducted and applied, we are reluctant to accept that the workshop was compliant with the Methodology at section 8. Absence of records or minutes is surprising given that the extension of an existing NVZ ought to be "the highest priority for discussion", and it is likewise surprising that an effective workshop would have missed the lack of clarity on land use modelling.
 21. Also tending against confident identification of the water as polluted is the analysis conducted by Hafren Water that target exceedance generally occurred at low flows, and not under average conditions. The Environment Agency has first taken this as arguing that a monitoring point is in a mixing zone, which is to say that it may not be representative of the overall water quality downstream from the point source. We agree with Mr Nash that this misses the point being made, which was restricted to the contribution made by the point source to the overall water quality. Second, the Environment Agency argues that Mr Nash's suggested contribution of 80% by the point source is itself likely to leave room for a 'substantial contribution' by agriculture. We will address that point later.
 22. At page 245 of the bundle the Environment Agency claims to be satisfied that "the monitoring points pass the series of checks outlined within section 4.2". We have already set out our agreement with concerns raised by Mr Nash as to these, but we finally draw attention to the question "Does ammonia form a significant portion of total TIN as N concentration at the monitoring location?" If this data is available, we cannot see that any account has ever been taken of it.

Decision

23. We are acutely aware that the Environment Agency has the institutional and actual expertise to identify water as polluted, and that we must place weight on its assessment. This includes recognising that the assessment need not be perfect, and that the Environment Agency is entitled to use appropriate statistical methodologies to draw a reasonable conclusion: see our

decision in Towse v Secretary of State for Environment, Food & Rural Affairs [2024] UKFTT 174 (GRC).

24. In this case the Environment Agency has based its decision on monitoring data alone, without undertaking the checks suggested by the Methodology or, we conclude, required by the circumstances. There is force in Mr Nash's submissions that seasonal and low-flow sampling calls into serious question whether agriculture makes a meaningful contribution to pollution in this case, by indicating a much higher point source contribution than estimated by the Environment Agency. The Environment Agency's estimate suffers from the multiple evidential frailties identified above, together with showing signs of not having been cogently formulated in the first place. We reluctantly conclude that there was no proper evidential basis upon which to conclude that agriculture makes a meaningful contribution to pollution in this NVZ. The making of even a 10% contribution, argued by the Environment Agency as still being significant, would still simply be too speculative based on the evidence available.
25. We are fortified in the above conclusion by the distinct possibility that better evidence *might* yield the same result. Everyone agrees that there is local agriculture that leaches nitrates, the question is simply to what extent it is dwarfed by the WWTW. If we had been provided with either SIMCAT modelling or ammonia results pointing towards significant agricultural contribution, this might have been enough to tip the scales towards designation. Nothing in this decision excludes the possibility that designation might not be the sustainable outcome of a future decision. In this case however, we find that the Secretary of State was wrong to identify the water as polluted on the evidential basis relied upon. The appeal is accordingly upheld under regulation 6(2)(b).

Signed

Date:

Judge Neville

5 July 2024

ⁱ <https://webarchive.nationalarchives.gov.uk/ukgwa/20231007175036/https://assets.publishing.service.gov.uk/media/5a817efced915d74e33fe868/surface-water-nvz-methodology-2017-2020.pdf>

ⁱⁱ https://environment.data.gov.uk/farmers/download?fileDataSetId=b65eabf0-c547-4659-acb5-36219f94f678&fileId=NVZ2017_S522.pdf