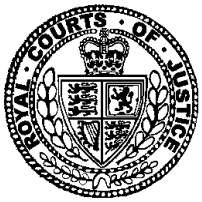


Neutral Citation Number: [2024] EWHC 2029 (Admin)

Case No: AC-2023-LON-003242

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN LONDON

Wednesday, 21st August 2024

Before:
FORDHAM J

- -

Between:

THE KING (on the application of FIGHTING DIRTY LIMITED)	**Claimant**
- and -	
ENVIRONMENT AGENCY	**Defendant**
- and –	
SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS	**Interested Party**

- -
- -

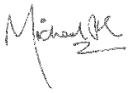
David Wolfe KC and Rosalind Comyn (instructed by Leigh Day) for the **Claimant**
Mark Westmoreland Smith KC (instructed by the EA) for the **Defendant**
Ned Westaway (instructed by Government Legal Department) for the **Interested Party**

- -

Hearing date: 9.7.24
Draft judgment: 2.8.24

- -

Approved Judgment



- -

FORDHAM J

Remote hand down. This judgment was handed down remotely at 10am on 21st August 2024 by circulation to the parties or their representatives by email and by release to The National Archives.

FORDHAM J:

Introduction

1. This is a judicial review case about the environmental regulation of sludge when it is spread on farmland. The issue is whether the Environment Agency's decision to remove the Target Date for implementing its Sludge Strategy, without identifying a replacement Target Date, was reasonable in public law terms. "Sludge" is encountered at §§5 and 11[1] below; the "Sludge Strategy" is at §§9 and 13. There is a question about the intensity of reasonableness review in environmental judicial review cases (see §§29-35 below). All three parties have environmental protection at the heart of their identity and ethos. I am grateful to them and their legal teams for the assistance given to the Court.

The Claimant

2. The Claimant is a private company limited by guarantee without share capital (ie. not-for-profit), set up by its three directors as a campaign group committed to identifying and challenging legal and policy mechanisms that allow pollution to enter the natural environment. Georgia Elliott-Smith is an environmental engineer, a Chartered Environmentalist, Member of the Institute of Environmental Management of Assessment, and former UNESCO Special Junior Envoy for Youth and the Environment. George Monbiot is an award-winning journalist, filmmaker, speaker, activist and author, who won the Orwell Prize for journalism in 2022 for his decades-long commitment to neglected environmental issues, and is an honorary fellow at Wolfson College Oxford. Steve Hynd is the Policy Manager at the award winning not-for-profit 'City to Sea' which campaigns to stop plastic pollution at source, who has led on campaigns to see the most polluting single-use plastics banned, and has previously worked at every level of politics in both the UK and European Parliament and as The Head of Mayor's Office on Bristol City Council. The Claimant's corporate objectives are: (i) to raise awareness of and fight environmental pollution that results in harm to life on Earth; (ii) to campaign for elimination, abatement, or mitigation of such pollution; (iii) to use legal instruments where necessary to challenge mechanisms that enable such pollution including, but not limited to, local, national, or international policy and regulations for the purpose of reducing or eliminating such pollution; (iv) to engage in political advocacy aligned with the above objects; (v) to undertake any other business in connection with the above objects; and (vi) to do all such other things as are incidental or conducive to the attainment of the above objects or any of them. This is an Aarhus Convention claim (CPR 46.24) on the basis that the grounds for judicial review concern alleged breaches of domestic law relating to the environment. The sufficiency of the Claimant's interest was recognised in the grant of permission for judicial review.

The Agency

3. The Agency (also known as the EA) is an independent environmental regulator, established in April 1996 as a non-departmental public body under the Environment Act 1995. It is a public authority whose powers and duties are found in primary and secondary legislation. Its sponsoring Government department is the Department for Environment, Food and Rural Affairs, headed by the Environment Secretary. The relationship between the Agency and the Department is governed by a published 2017 Framework Agreement. The Agency is independent of the Department. It undertakes a wide range of environmental functions mainly regulatory in nature. By s.4(1) of the 1995 Act,

Parliament has identified as the Agency's principal aim – in discharging its functions – to protect and enhance the environment taken as a whole, so as to make the appropriate contribution towards attaining the objective of achieving sustainable development, about which objective the Environment Secretary is statutorily-required to give statutory guidance (s.4(3)). Pursuant to s.56(1), "the environment" means "all, or any, of the following media, namely, the air, water and land". "Sustainable development" has been taken to mean meeting the needs of the present without compromising the ability of future generations to meet their own needs: Spurrier v Transport Secretary [2019] EWHC 1070 (Admin) at §635. By s.37(2) of the 1995 Act, the Agency is obliged to provide, at their request, the Environment Secretary (or the Minister) with advice and assistance. The Agency is frequently interwoven as environmental regulator into regulations made by the Environment Secretary. By s.37(1)(a), Parliament empowered the Agency to "do anything which, in its opinion, is calculated to facilitate, or is conducive or incidental to, the carrying out of its functions". Mr Westmoreland Smith KC identifies this as the statutory power being exercised, and function being discharged, by the Agency in issuing and reissuing the Sludge Strategy. The Agency is the identified regulator so far as concerns the 1989 Regulations and the 2016 Regulations (§§5-8 below).

The Environment Secretary (and the Department)

4. The Environment Secretary is a member of the Government and is head of the Department (also known as Defra). By s.4(2) of the 1995 Act, Parliament has required the Environment Secretary to give statutory guidance to the Agency – to which the Agency is required to have regard (s.4(4)) – with respect to objectives which the Environment Secretary considers it appropriate for the Agency to pursue in the discharge of its functions, including (s.4(3)) the appropriate contribution towards attaining the objective of achieving sustainable development. December 2002 statutory guidance describes "sustainable development" as being about "achieving a better quality of life for everyone, now and for generations to come", with four simultaneous key objectives: social progress which recognises the needs of everyone; effective protection of the environment; prudent use of natural resources; and maintenance of high and stable levels of economic growth and employment. As "appropriate Minister" (s.56), the Environment Secretary is empowered (s.40(1)) to give directions of a general or specific character with respect to the carrying out of any of its functions, with which the Agency as a "new Agency" (s.56) must comply (s.40(8)). The Environment Secretary's powers include statutory rule-making by delegated legislation, with statutory powers to make and amend secondary legislation to regulate environmental hazards. The Environment Secretary is the identified rule-maker so far as concerns the 1989 Regulations and the 2016 Regulations (§§5-8 below).

The 1989 Regulations (SUiAR)

5. On 24 July 1989 the Environment Secretary as legislative rule-maker (acting in respect of England) – together with the Welsh Secretary and the Scottish Secretary (acting in respect of Wales and Scotland) – made the Sludge (Use in Agriculture) Regulations 1989 (SI 1989 No. 1263). The rule-making power was s.2(2) of the European Communities Act 1972. The 1989 Regulations continue to have effect pursuant to s.2 of the European Union (Withdrawal) Act 2018. There have been a series of amendments to the 1989 Regulations over time, most recently in 2019. The 1989 Regulations have been accompanied by a Code of Practice, issued by the Environment Secretary. The version of the Code of Practice on the gov.uk website is dated 23 May 2018. Under regulation 2,

"sludge" means "residual sludge from sewage plants treating domestic or urban waste waters and from other sewage plants treating waste waters of a composition similar to domestic and urban waste waters"; and "septic tank sludge" means "residual sludge from septic tanks and other similar installations for the treatment of sewage".

6. I have derived this overview from the original 1989 Explanatory Note, with some revision to reflect 1996 amendments, and focusing on England. The 1989 Regulations implemented EU Directive No. 86/278/EEC on the protection of the environment, and in particular of the soil, when sewage sludge is used in agriculture. Regulation 3 prohibits sludge from sewage plants from being used in agriculture unless specified requirements are fulfilled. They include the testing of the sludge and the soil (Schedules 1 and 2). Regulation 4 specifies precautions which must be taken after sludge from sewage plants or septic tanks is used on agricultural land. Regulation 5 requires the occupier of land on which sludge has been used to provide the sludge producer with information about the land and the sludge used. Regulations 6 and 7 require every sludge producer to maintain a register of the quantities of sludge produced and supplied for use in agriculture, including details of the amount of sludge used on each agricultural unit and the results of analysis of the sludge and the soil. The register is to be available to the Agency for inspection, together with such information or facilities as the Agency may reasonably require, including facilities for analysing the sludge or soil. The sludge producer is required to provide persons they supply with the results of analysis of the sludge. Regulation 8 makes special provision for dedicated sites, which on 17th June 1986 (the date of notification of the Directive) were dedicated to the disposal of sludge but on which commercial food crops were being grown exclusively for animal consumption. Regulation 9 provides an offence of contravening the Regulations, which carries a maximum fine on summary conviction of level 5 on the standard scale. Regulation 10 empowers the Agency to take civil sanctions in relation to Regulation 9 offences. Regulation 11 requires the Environment Secretary to publish a report by 31 December 2019 on implementation of the Regulations.

The 2016 Regulations (EPR)

7. On 11 December 2016 the Environment Secretary as legislative rule-maker (acting in respect of England) – together with the Welsh Ministers (acting in respect of Wales) – made the Environmental Permitting (England and Wales) Regulations 2016 (SI 2016 No.1154). The primary rule-making powers were in the Pollution, Prevention and Control Act 1999, the Water Act 2014 and the 1972 Act. By virtue of regulations 2 and 32, the "regulator" for England is primarily the Agency. In designing the 2016 Regulations, the Environment Secretary excluded by express provisions in regulations 2 and 8 the use of sludge on agricultural land. The use of sludge on non-agricultural land, and its storage, were both regulated by the 2016 Regulations.

8. I have derived this overview on the original 2016 Explanatory Note, focusing in particular on England. The 2016 Regulations provide a consolidated system of environmental permitting in England and Wales, replacing 2010 regulations, and transposing provisions of 15 EU Directives which impose obligations required to be delivered through permits or capable of being delivered through permits. Part 1 contains general provisions, in particular interpretation. Regulation 12 requires every regulated facility to be operated under the authority of an environmental permit. Part 2 sets out the procedures in relation to environmental permits. Part 3 provides for the discharge of functions by the regulator in relation to permits. Part 4 contains enforcement-related

provisions. Part 5 make provision for public registers to be kept by the regulator. Part 6 confers powers on the regulator and the Environment Secretary and imposes duties on the regulator. Part 7 contains miscellaneous provisions. Regulation 80 requires the Environment Secretary to review the operation and effect of the 2016 Regulations before the end of April 2019 and every 5 years thereafter and lay a report before Parliament.

The Sludge Strategy

9. The Sludge Strategy (entitled Strategy for Safe and Sustainable Sludge Use) was first issued by the Agency on 17 March 2020, with a Target Date of 2021. It was then reissued four months later, on 15 July 2020, with a Target Date of 2023. Three years later it was reissued again, on 1 August 2023, with no Target Date. It can be seen online at gov.uk. Everyone agrees that, by August 2023 the Target Date of 2023 had become unachievable and needed to be removed. But the question is whether the failure to include a replacement Target Date was compatible with the Agency's public law duty to act reasonably.

The Regulatory Change

10. All three versions of the Sludge Strategy describe a regulatory change, identified as appropriate by the Agency. The regulatory change would move the regulation of sludge used on agricultural land from being governed by the 1989 Regulations to being governed by modified arrangements in the 2016 Regulations. That would mean repealing the 1989 Regulations and modifying the 2016 Regulations.

A Briefing Paper from July 2021

11. In explaining what this case is about, a helpful source is the background briefing paper which was emailed on 16 July 2021 by James Croft, then the Department's new policy advisor on Water Quality and Agriculture. Mr Croft's email went to Clive Humphreys, a policy lead at the Agency, and colleagues at the Department including sludge policy lead Tom Davies. It was one of the documents disclosed by the Agency in these proceedings (in March 2024). Its contents show how Mr Croft saw the position. Here is an extract (with numbers in square brackets because I am compressing a layout including headings and bullet points):

> ***[1] What is Sludge? Sludge is a semi-solid slurry that can be produced from a range of industrial processes, from water treatment, wastewater treatment or on-site sanitation systems. In this paper, 'sludge' refers to Sewage Sludge, the resulting material from wastewater treatment from both water companies and Septic Tanks.***
>
> ***[2] Background. In early 2020, the Environment Agency ("EA") published their 'Sludge Strategy' which was designed to manage both Water Company Sludge and that resulting of Septic Tanks. The EA's aims were to modernise and clarify the existing regulatory framework, have a consistent approach between the water and waste industry and identify emerging risks… In summary, the current regulatory regime is complex. The Sludge (Use in Agriculture) Regulations regulate the content of sludge and how and where it is spread. Environmental Permitting controls the storage of sludge on agricultural land and storage or use of sludge on non-agricultural land (eg. for energy crops). Environmental Permitting is also applied to the storage or use of mixed/co-treated materials that contain sludge (eg. when sludge is mixed with food waste for Biogas). So there are multiple competing regimes and this is creating loopholes/gaps, particularly for Septic Tank Waste (non-sewer connected homes). Also, the market for Bioresources (ie. waste manures being used as fertiliser) is starting to grow (this includes processes such as Anaerobic Digestion of Food Waste) and therefore having different regulatory approaches for these activities***

compared to Sludge means there is an argument for harmonisation that the EA make in their Strategy. The Sludge Strategy concludes that the best way to achieve EA's goals was to add specific provisions to the Environmental Permitting Regime to fully capture issues of sludge and committed to developing this option. No specific timeframe was mentioned in the strategy itself.

[3] Progress so far. [a] Overview. Following the publication of the Strategy, initially the EA were seeking for the changes to be incorporated in the third cycle of Environmental Permitting Planning (EPP3). EA have been moving forward following publication of the strategy and have set up a number of working groups with the water industry to develop their policy proposals for how this may be achieved which are due to report in July 2021. The Environment Agency have stated publicly that they wish this to take effect as from 2023. [b] Environment Agency Working Groups. The Environment Agency set up four individual working groups looking at how to implement the Sludge Strategy with the water industry. This process is almost finished, and the latest EA progress update is below: [i] All of the four working groups which started in October finished in May – these groups (which looked at legislative change, assurance schemes and future treatment/landspreading of septic tank waste) were put in place to liaise with the water industry and others to design the formal consultation due later this year. They were designed to flush out issues, not to reach complete agreement. In this they have been successful. [ii] We have held a further mtg (with another one planned) with Assured Biosolids Ltd (ABL) to further examine how the existing BioSolids Assurance Scheme (BAS) could be modified to allow for earned recognition with sludge under EPR. We have made some progress here, but more needs to be done before we get to the stage of accepting the use of BAS. This is one of the biggest sticking points atm. It's not just the water companies (who naturally want to retain it) but the waste industry and land spreaders that need to be happy with it as well as the EA. Water companies are showing some flexibility but we still have some significant differences. [iii] EA are pulling together a final summary output for the groups to form part of the proposals we are compiling together for Defra. [iv] The Proposals package EA are pulling together for Defra will consist of a collated output summary, risk register, remaining issues, project plan, timeline and comms plan. The hope at present is that we can still go to formal consultation in Sept 2021 with sludge moving into EPR in 2023. [c] Note the EA are very keen for this to happen and it is a priority area for them and they have offered to help with resource however they can.

[4] The issues: [a] Resourcing: EA have taken on some additional project management resourcing to manage the process and the working groups, but this has been a watching brief for Defra due to capacity issues in Defra Water Quality. However, to take this further, there is now a need to be supportive of the legislative process and guide through the amendments. [b] Ministerial Appetite: This approach has yet to be tested with ministers and this will need to be done before we can commit to implementation. [c] Impact Assessment: An Economic Impact Assessment needs to be done for the full SI by the end of March and it is unlikely that EA would be able to meet that timeline. (The original plan was to converge later in the process buying time, but it is looking like this is not possible).

[5] However, the benefits to the Environment and the regulatory landscape would be good and there seems to be increasing appetite. It would be a shame to have to pause this work given the work done so far by the EA having the water companies buy in to the process.

[6] Options and Next Steps: A decision needs to be taken whether Defra Water Quality can support the implementation of the Sludge Strategy and if so, to what timeline. This would mean: [a] Conducting an Impact Assessment; [b] Liaising with lawyers to draft measures; [c] Running a consultation on the proposed measures; and [d] Overseeing implementation of the Strategy. If we decide this can be done, we would need to take forward legislation that would amend the Environmental Permitting Regulations in order to implement the Sludge Strategy. Currently, there seems to be three main options available to do this: [i] 'Piggy back' on another amendment: This was the initial plan. The Water Resources team are planning an SI that is going to have several sections and we were planning on joining up to include both groundwater amendments to EPR (Steph Firth is leading this for Defra WQ) and the sludge amendments. Secondary Legislation is due to be laid in Jul 2022. However, due to the need to go out to consultation quickly, we wouldn't have been able to join up. However, this may have changed and would be worth exploring in the first instance. [ii] Broader EPR Amendments: There are broader EPR reforms being led by Alexander Rees … and there may be a route for Sludge under this. [iii]

> ***Water Quality lay their own Secondary Legislation to enact this. This would be likely to be the most resource intensive option…***

The Position in the Public Domain

12. If you were a keen observer monitoring what was being said in the public domain, here are some key things you would have noticed. On 4 February 2020 a report by AECOM entitled "Materials to Land Phase 2 Technical Report" was made public, following freedom of information requests by Greenpeace and work by investigative journalists. The Agency had commissioned the AECOM Report and it had first been published on 13 November 2017. The AECOM Report described information arising from sampling of sludge spreading on farmland. Mr Wolfe KC and Ms Comyn for the Claimant say this about the AECOM Report:

> ***It found that some of the samples it took of sludge being sent to farmland were "vastly different" from the way they were described in consignment documents. It found that Sludge was contaminated with harmful chemicals, such persistent organic pollutants, at levels that "may present a risk to human health". It concluded that "perhaps the biggest risk to the landbank" from land-spreading arises from the "spreading and incorporation of physical contaminants" like microplastics into agricultural soils. It noted that the risk is that these will build up over repeated spreading until the land becomes "unsuitable for agriculture". It said that, while the "cumulative enrichment" from multiple applications of sludge over many years has yet to be fully assessed, the evidence suggests that levels of "enrichment" are sufficiently high, and the testing of soil undertaken so infrequently under the current regulatory regime, that year on year applications could result in the soil no longer being "suitable for supporting crop growth".***

Mr Westmoreland Smith KC for the Agency agrees that "there are emerging concerns about risks from chemicals and microplastics in particular" and that this is behind the Sludge Strategy. But he says, by reference to passages in the AECOM Report, that it would be wrong "to paint the position as well understood or settled".

13. The Sludge Strategy was published on 17 March 2020. Key points made by the Agency within the text of the Sludge Strategy are the following:

    (1) The Agency has reviewed the current regulatory regime for sludge treatment, storage and use. It has looked at the advantages and disadvantages of four options. It has chosen the option which would bring sludge (including septic tank sludge) into the 2016 Regulations, so that the 1989 Regulations would no longer be needed.

    (2) The Agency's overall role is to protect and improve the quality of air, land and water in England. It acts as the environmental regulator for the supply, treatment, storage and use of sludge, including through the 1989 and 2016 Regulations. It provides technical advice to Government. It reviews and assesses the effectiveness of its regulatory activities. It will promote the need for change if it believes change to be necessary, allowing it to manage risks and push for environmental improvement.

    (3) The Agency needs to make the changes because: many current sludge practices do not fit with the 1989 Regulations; the current regulatory regime is complex; there have been changes to the supply chain; there have been changes to treatment processes, with a greater focus on the energy value of sludge; new hazards are emerging (the chemical complexity of incoming sewage and understanding of the associated risks having changed); and there have been complaints, pollution

incidents and poor management practices involving septic tank sludge (the spreading of untreated septic tank sludge being allowed under the 1989 Regulations).

(4) The Agency's purpose in issuing the Sludge Strategy is to enable safe and sustainable sludge use on land; and to contribute to the Department's plans, where the Department's published 25 year environment plan reflects the need for using and managing land sustainably, increasing resource efficiency and reducing pollution and waste.

(5) As objectives, the Agency will develop the Sludge Strategy to achieve two aims of its business plan, being that its investment choices deliver 75% of water at good status, and land and soil that is healthy and productive, and it has a priority to enable water companies to meet their environmental obligations through clear guidance and partnership working, assuring delivery and taking action when required.

(6) The three main principles of the Sludge Strategy are: to modernise and clarify the regulatory framework (as a risk-based, outcome-focused and effective regulator, aiming to give industry and the public confidence that sludge is being managed correctly and safely); to develop a consistent approach with the water and waste industry (as a fair and reasonable regulator); and to identify and assess emerging risks (to maintain industry and consumer confidence).

(7) The advantages of the selected option, evolving EPR regulatory tools, include providing an opportunity to make sure human health and the environment are protected, through modern risk-based regulation. The disadvantages include that it would need time and resource. The disadvantages of revising the 1989 Regulations include that changing the 1989 Regulations is not within the Agency's remit.

(8) Do-Nothing is not an acceptable option. Its disadvantages including inadequate recognition of the potential hazards in sludge, not allowing the Agency to make improvements to ensure protection of human health and the environment.

(9) The Agency aims to make the changes in 2021, working with the Department and others to develop the strategy.

14. The Agency's publication of the Sludge Strategy on 17 March 2020 coincided with this Government Response to a Parliamentary Question:

> ***Question: Dr Matthew Offord, Hendon, to ask the Secretary of State for Environment, Food and Rural Affairs, what steps his Department takes to ensure that people who spread sludge monitor potential toxic elements contained in the product.***
>
> ***Government Response: The use of sewage sludge on agricultural soils is regulated under the Sludge (Use in Agriculture) Regulations (SUiAR). These regulations and their supporting Code of Practice includes maximum permissible concentrations of potentially toxic elements in soil after application of sewage sludge and maximum permissible concentrations of potentially toxic elements in soil after application of sewage sludge and maximum annual rates of addition. Information on these regulations and the Code of Practice for sewage sludge in agriculture can be found [link]. Compliance checking against the SUiAR is undertaken by the Environment Agency. The Environment Agency has today (17 March) published its Sludge Strategy to facilitate the safe and sustainable use of sludge on land. This strategy sets out the purpose, principles and priorities for delivering change to the regulation of sludge. Defra and the***

> ***Environment Agency are working together to update the current legislation and provide industry and the public with the confidence that sludge is being managed correctly and safely.***

15. When the Sludge Strategy was reissued on 15 July 2020 its contents including (1) to (8) (§13 above) remained the same, but with this as a new point (9):

    (9) The Agency aims to do this in 2023, working with the Department and others to develop the Strategy. The Agency aims to make a request in mid-2023 for legislative change.

16. When the Sludge Strategy was reissued on 1 August 2023 its contents including (1) to (8) (§13 above) remained the same, but point (9) from July 2020 (§15 above) was deleted and not replaced.

17. On 12 March 2024 there was this Government Response to a Parliamentary Question:

> ***Question. Baroness Miller of Chilthorne Domer, to ask His Majesty's Government whether they intend to revoke the Sludge (Use in Agriculture) Regulations 1989 that regulate sewage sludge and bring sewage sludge regulation within the Environmental Permitting Regime; and if so, when.***
>
> ***Government Response: The Government is working with the Environment Agency to assess the regulatory framework for sludge. We recognise the importance of improving the regulatory framework, however, further work is required before any proposal for change may be progressed.***

Parliamentary Privilege

18. The Environment Secretary originally took the position that the two Government Responses were "inadmissible" as evidence. The basis for that contention was that Parliamentary questions and Responses constitute "proceedings in Parliament" for the purposes of Article 9 of the Bill of Rights 1689 and the material did not fall within the exceptions as set out R (Heathrow Hub Ltd) v Transport Secretary [2020] EWCA Civ 213 [2020] 4 CMLR 17 at §58. In the end, this objection subsided. The fact that Government made the two statements is useful background. I detected no impermissibility of purpose. Mr Westmoreland Smith KC did not rely on them to make any point – or rely on any point being made – about Government priorities at different times. The contents of the Government Responses were and are not being questioned, impugned or interpreted.

A Date for Requesting Legislative Powers

19. The March 2020 and July 2020 versions of the Sludge Strategy gave Target Dates (of 2021 and 2023 respectively) for the regulatory change to have been implemented. However, the July 2020 version of the Sludge Strategy also gave a date ("mid-2023") for the Agency to have requested the Environment Secretary to exercise legislative powers (see §15 above). Fleetingly, a point arose out of this. But it fell away. In granting permission for judicial review, Eyre J referred to the absence in the August 2023 reissued Sludge Strategy of a new date for this action by the Agency, of making a request to the Environment Secretary. By the time the case came before me for substantive hearing the case for the Claimant – advanced and developed by Mr Wolfe KC and Ms Comyn – was squarely put in terms of the absence of a Target Date for the regulatory change to have been implemented. That is where they and everybody else has focused and that is where I will focus.

Internal Communications: Deleting an Unachievable 2023 Target Date

20. The July 2020 reissued Sludge Strategy described the Target Date of 2023 for the regulatory change to have been implemented. The reason why – as everyone agrees – the Target Date had become unachievable by 1 August 2023 was because there was now insufficient time for implementation by the exercise of the Environment Secretary's rule-making powers. So far as concerns the removal of the Target Date, what happened internally was this. On 22 March 2023 the Agency's Phil Fitzgerald (Advisor in the Land and Contamination Management Team) emailed three colleagues at the Agency. They were Barry Sheppard (Land and Contamination Manager in the Water and Land Quality Team), Sean McKay (Implementation Project Manager) and Lottie Hutchinson (Senior Adviser Materials to Land). Mr Fitzgerald said he was "just flagging that we are likely to need to make some small changed to the [Sludge Strategy]" which "involves removing/changing the 2023 target date". On 5 May 2023 the Agency's Mr Sheppard sent an email to Jane Learmount, Chris Judd and James Croft at the Department, ahead of a Strategic Steering Group Meeting the following week. Mr Sheppard's email recorded that the water companies would have realised "we can't bring it in in 2023 as we say on gov.uk". On 13 June 2023 a Note to Ministers, written by Ms Learmount, told the Environment Secretary and Minister Pow that the regulatory change would require a statutory instrument and "the timeline is no longer feasible", and recommended that the Environment Secretary and Minister Pow "note" that the Agency "are removing 'we aim to do this in 2023' from the gov.uk published Sludge Strategy". On 14 June 2023 Mr Sheppard emailed Ms Learmount and Mr Croft (cc'ing others), referring to "the need to update the 2023 date on gov.uk that is clearly no longer achievable". On 12 July 2023 Mr Sheppard emailed Ms Learmount, Mr Judd and Mr Croft (cc'ing others), referring to updating and revision of the Sludge Strategy, and referring (among other things) to action to "remove the 2023 date". Mr Sheppard said the Agency "need to make sure you are happy with what we are proposing to do". After a call on 18 July 2023, Ms Learmount replied on 19 July 2023, saying (among other things) that she was content with "removal of the 2023 date". These emails were disclosed in these proceedings in October 2023 and March 2024.

Internal Communications: Including no Replacement Target Date

21. So far as concerns the inclusion of no replacement Target Date, what happened internally was this. In his 5 May 2023 email to the Department's Ms Learmount, Mr Judd and Mr Croft, ahead of their Strategic Steering Group Meeting the following week, the Agency's Mr Sheppard said: "I'd like your view as to how far we can go" in relation to "timelines for the Strategy". He said the water companies "will ask for a timeline". He asked whether Department officials would be "happy with me mentioning the need for a fresh ministerial steer and awaiting the outcome of this". He asked about floating with the water companies the idea that "implementation may be pushed back to 2029/30" to fit in with a "PR29 process", complete the impact assessment and then "implement permit changes in 2030". He wanted to "make sure they realise that the Sludge Strategy work has not stopped but may be undergoing a reprogramme" and "would like your view as to how far you'd like me to go". The email concluded with this:

> ***It would … be good to agree how we are going to alter the wording [of the Sludge Strategy] on gov.uk and whether to include another specific date or a general statement of intent.***

That reference to including "another specific date" stands as contemporaneous evidence that that was being considered within the Agency, and raised with the Department.

22. In the 13 June 2023 Note to Ministers, the Department's Ms Learmount told Ministers that the Agency was wanting, in removing the 2023 Target Date, to "send information to key stakeholders that affirm[s] a commitment, but to a later unspecified deadline", thus "informing stakeholders". In his 14 June 2023 email to Ms Learmount and Mr Croft, Mr Sheppard asked "do we have to await a ministerial response" and said he was "uneasy about the reputational risk for the [Agency]". In his 12 July 2023 email to Ms Learmount, Mr Judd and Mr Croft, Mr Sheppard proposed that the Agency would:

> ***Remove the 2023 date and say that we are currently in discussion with yourselves to agree a new timescale for implementation given the current changing situation and impacts of other workstreams on the original proposed date.***

He was raising this because, as he put it: "we … need to make sure you are happy with what we are proposing to do", and "especially" in light of the Note to Ministers "that recently went up". Ms Learmount replied on 19 July 2023:

> ***I am … [a]lso now content with removal of the 2023 date with a fairly succinct justification of the removal such as "the timeline is currently under review" to reflect the fact that this will require legislative changes and we do not yet have a ministerial steer in the priority of this work stream. This is endorsed by Adnan [Obaidullah, Deputy Director (Water Quality)].***

Ms Learmount added, "in the spirit of our collaborative approach" that it would be "good to review the proposed change", the Agency's "reactive lines" and the Agency's "comms to stakeholders". It follows that there was a collaborate approach and the Agency was clearly told that Department officials were not content with a reference to "agreeing a new timescale", but only with something like "the timeline is currently under review".

Communications to Interested Persons

23. It was in these circumstances that the Agency deleted the 2023 date and said no more about implementation timing in the Sludge Strategy. However, Mr Sheppard said this in an email to stakeholders (water companies) – reviewed by the Department and using Ms Learmount's phrase "the timeline is currently under review" – written on 2 August 2023, the day after reissuing the Sludge Strategy, and disclosed in these proceedings on 5 October 2023:

> ***In July 2020 we published the Environment Agency strategy for safe and sustainable sludge use (the Sludge Strategy) to enable the transfer of sludge use from The Sludge (Use in Agriculture) Regulations (SUiAR) into the Environmental Permitting (England and Wales) Regulations (EPR), aiming to complete this in 2023. We have had to amend implementation of this move due to factors beyond our control. This includes prioritising wider delivery work linked to improving agricultural practices and water quality, such as the Environmental Improvement Plan and the Plan for Water. The timeline is currently under review. Consequently, we have removed "We aim to do this in 2023" from the Sludge Strategy on gov.uk. We have also taken the opportunity to refresh the document, mend broken links etc in the document. We still consider the move into EPR as critical for the effective and efficient regulation of sludge use and we are still committed to achieving this. We are amending the project plan accordingly and will communicate the changes to stakeholders in due course. Additional planned work (separate to moving sludge into EPR) continues. This includes planned updates to the three existing mobile plant standard rules permits. We will also improve our guidance on the management of waste from non-mains sewerage systems, including septic tanks, composting and other separator toilets. Please pass this onto colleagues who may have an interest in this.***

24. The Claimant's solicitors had written (27 July 2023), ahead of reissue of the Sludge Strategy, asking for an update. The Agency's Leonore Frear (Deputy Director, Water and Land Quality) replied on 22 August 2023, telling the Claimant's solicitors this:

> ***The Environment Agency are committed to progressing the ambition laid out in the Strategy to bring sludge and septic tank sludge into the Environmental Permitting (England and Wales) Regulations (EPR). Working with Defra, EA have needed to review the delivery timeline as this this will no longer be possible in 2023. EA have updated gov.uk on 11 August 2023 to reflect this and at the same time as making some minor changes including repairing broken links. Following publication in 2020, four informal Task & Finish working groups were created to help inform design aspects of the Strategy and to give the Environment Agency and Defra a better understanding of sludge management and use in agriculture. The groups met between 2020 and 2022, during which time design ideas and discussion were held. No formal decisions on the Strategy were made by the groups, and they made no recommendations in relation to microplastics. You have also asked about external engagement. There will be full public consultation on proposals for future legislation in in the usual way, in due course.***

Agency Input

25. The Agency has filed witness statement evidence – and the Agency and the Department have disclosed documents – relating to what was happening during the period between 2020 and 2023. From those materials there are various themes, from which I emphasise two. The first theme is that there were multiple inputs by the Agency to the Department. On 26 January 2021, the Department's William Lacey (Team Leader, Water Quality and Agriculture Policy) recognised that the Agency's "work is already underway, particularly with the relevant working groups with industry partners" and suggested "that these are completed and final recommendations submitted to Defra", after which "this work will have to be paused" in light of the Department having "struggled to resource work on sludge regulation". The upshot was the 16 July 2021 briefing by the Department's Mr Croft (§11 above), which accompanied an email describing the Department as "currently at the stage of assessing the resource intensity of the strategy and examining our options moving forward". Here are examples of the Agency's inputs. On 8 March 2022, as requested, the Agency sent the Department information for a Note to Ministers. On 11 March 2022, as requested, the Agency sent Mr Croft a 7-page draft Formal Sludge Strategy Proposal. On 28 June 2022, the Agency marshalled information for use in a discussion with the Department the following day. On 27 September 2022 the Agency team conducted a "Defra Teach-in" on implementing the Sludge Strategy with 11 PowerPoint slides including a timeline slide, projecting implementation as still (just) achievable by the end of the calendar year 2023. On 12 October 2022 the Agency provided 6 pages by email, answering the Department's questions arising out of the Teach-in. On 23 February 2023 the Agency provided 3 pages by email, answering questions raised by Chris Judd on 1 February 2023.

Ministerial Appetite and a Ministerial Steer

26. The second theme is that there were repeated references to ministerial "appetite", the "political" process, and the need for a "steer" from Ministers. As has been seen (§11 above at [4][b]) James Croft's July 2021 briefing note said the "issues" included:

> ***Ministerial Appetite: This approach has yet to be tested with ministers and this will need to be done before we can commit to implementation… However, the benefits to the Environment and the regulatory landscape would be good and there seems to be increasing appetite…***

Mr Lacey told the Agency (14 June 2022) that "to get the ball rolling" would need:

> ***a submission to Ministers testing their appetite to push reform in this area***

Subsequently (27 June 2022), Mr Lacey told the Agency that there had been confusion by reason of:

> ***a difference of view between us and EA about Defra Group's readiness to implement any reforms. Due to an understandably incomplete understanding of the process for political decisions and legislative implementation of the reforms, the EA seem to think the process is straightforward …***

The Agency Teach-in slides (27 September 2022) identified among the "tasks for successful delivery":

> ***Defra leadership: Ministerial steer.***

Within the Agency, it was recognised that (14 November 2022):

> ***… we are running out of things we can do to progress the sludge strategy without a ministerial steer. Defra have been proposing to send a submission up to the minister for at least 8 months. They, understandably, want to get confirmation from ministers that they still want to go ahead with moving sludge to EPR…***

The Claimant's Argument

27. I can now turn to the argument advanced by Mr Wolfe KC and Ms Comyn on behalf of the Claimant, in their written and oral submissions. Here is the essence of the argument, as I saw it:

    (1) The Agency's action in deleting the 2023 Target Date for implementation of the regulatory change, without replacing it with another Target Date for doing so, is unreasonable in public law terms. First, it was "outside the range of reasonable responses open to the decision-maker": see R (Law Society) v Lord Chancellor [2018] EWHC 2094 (Admin) [2019] 1 WLR 1649 at §98. Secondly, there is an "unexplained evidential gap or leap in reasoning which fails to justify the conclusion reached": see R (Friends of the Earth) v Energy Secretary [2024] EWHC 995 (Admin) at §127 (to which I can add R (Finch) v Surrey County Council [2024] UKSC 20 at §56). Thirdly, because it had not assessed the environmental impacts of reissuing the Sludge Strategy with no replacement Target Date, the Agency failed to take reasonable steps to acquaint itself with relevant information (see R (Plantaganet Alliance Ltd) v Justice Secretary [2014] EWHC 1662 (Admin) at §§99-100, applying the principle in Tameside MBC v Education Secretary [1977] AC 1014) and failed to take into account an obviously material consideration (R (Friends of the Earth) v Transport Secretary [2020] UKSC 52 [2021] 2 All ER 967 at §119)).

    (2) The starting point is that the Agency has the responsibility and autonomy, as independent environmental regulator, to choose and 'own' the content of the Sludge Strategy. As Mr Sheppard rightly said in the email to Ms Learmount and Mr Croft on 12 July 2023:

> ***Obviously, it is an EA document and we can amend it at any time …***

Autonomy matters in public law. The Agency accepts that the Sludge Strategy is issued and reissued in the exercise of a statutory power. A public authority with responsibility for the exercise of a statutory power must not abdicate or delegate or fetter its statutory function to do what it considers to be right. The Department and Environment Secretary could not dictate to the Agency the content of the Sludge Strategy. The only powers of Government direction are those found within the statutory scheme (cf. Tameside at 1063E).

(3) It is true that the regulatory change of switching to the 2016 regulations from the 1989 regulations would necessarily involve the exercise by the Environment Secretary of legislative powers. But that is no impediment. For it was always thus, and this did not preclude the giving of the 2021 Target Date in the March 2020 issued Sludge Strategy, or the giving of the 2023 Target Date in the July 2020 reissued Sludge Strategy. Neither the Agency nor the Environment Secretary has argued that it was unlawful or unreasonable to have done so. Importantly, it was within the Agency's power to do so again, by including a new Target Date in the August 2023 reissued Sludge Strategy.

(4) Public law standards are contextual in their nature and application. And this case is all about environmental regulation and the discharge of a statutory environmental protection and sustainable development objective entrusted by Parliament to the Agency. It is legally legitimate that the Agency should take a lead, and should do so publicly. The Agency had been taking a lead. It had stated publicly what should happen, why it should happen, and when it should happen. Because it did not have the rule-making power, it could not dictate any of this. But it could adopt a position. It twice adopted a position on what and why and when. The third time it adopted a position on what and why, but was silent on when.

(5) That course of action arose against the backcloth of recognised needs for regulatory change with appropriate prioritisation, based on a considered and reasoned assessment of evidence. The Agency, as independent environmental regulator, had since March 2020 recognised the current regulatory regime of the 1989 Regulations – when applied to the use of sewage sludge on agricultural land – as being an outdated and inadequate regulatory regime which is unfit for purpose. In that considered and reasoned assessment of evidence, the Agency has identified multiple – no fewer than nine – disadvantages of continuing that current outdated and inadequate regulatory regime, entailing numerous risks to the environment and human health. That same assessment recognises multiple – no fewer than 14 – advantages of the Agency's identified preferred option, the regulatory change of switching to the 2016 Regulations. It also recognised the urgency and need for prompt action. All of this was in the context of new and emerging hazards within sludge not removed by sewage treatment plants, still less by cesspits. It involved a recognition that sewage sludge contains hazardous chemicals, pathogens and micro-plastics, which are not adequately regulated through the 1989 Regulations and which pose a risk to the environment and to human health, upon and after being released through use on agricultural land. There was the identified environmental regulatory purpose within the Sludge Strategy, of securing safety and sustainability. The Target Date (when) was an essential element within that considered and reasoned assessment, which meant that the identified action was expressly time-bound.

(6) Importantly, at the heart of the considered and reasoned assessment of the evidence by the Agency when the Sludge Strategy was issued back in 2020 was the clear recognition that maintaining the regulatory status quo (described as a "Do-Nothing" option) was "unacceptable". And yet, by deleting the previous Target Date of 2023 and not replacing it with any new Target Date, the position was left open-ended and in abeyance. In substance and reality, this was an abandonment. In substance and reality, it involved maintaining the very "Do-Nothing" option previously identified as unacceptable, having been rejected upon a considered and reasoned assessment of the evidence in 2020. This action was the Agency now maintaining or allowing the maintenance of the very status quo assessed as unacceptable. It meant, in substance, failing to address acknowledged environmental harms. It meant, in substance, abandoning the previous goals as to the regulatory change, in light of a perceived policy de-prioritisation on the part of the Environment Secretary. That is especially unjustifiable in circumstances where the Environment Secretary maintains in these proceedings that any perceived de-prioritisation of policy is a misapprehension of the Environment Secretary's position. All of which means that there was a fundamental flaw and logical gap in the Agency's reasoning.

(7) All of which is especially concerning in light of the passage of time and the lack of progress in the period since March and July 2020. By August 2023 more than 3 years had elapsed. And yet the Agency as independent environmental regulator was supposedly maintaining the considered and reasoned assessment of the evidence, as found in the Sludge Strategy as originally issued in March 2020, reissued in July 2020 and reissued in August 2023. Plainly, the passage of time has materially undermined the achievement of the regulatory course for which environmental protection and the protection of human health in the assessment of the Agency. Plainly, it has materially undermined the achievement of the regulatory timeframe which the Agency had identified as being appropriate.

(8) Then there are the serious impacts and implications of the action that was taken, deleting the Target Date with no replacement. Nothing in the evidence before the Court reflects the Agency addressing any alternative Target Date. Nothing in the evidence reflects there being a review. The proof of the pudding, so far as impacts and implications are concerned, is to be found in the ongoing inaction that followed after 1 August 2023. In pre-action correspondence the Agency told the Claimant's solicitors that it was committed to progressing the regulatory change which it had announced in the original March 2020 strategy. But there has been no progress. Assertions about work continuing are not borne out. The inactivity reinforces the obvious conclusion that what has happened in substance is a reversion to the unacceptable "Do-Nothing" option, indefinitely.

(9) For all these reasons and in all the circumstances, the Agency through failing to include any replacement Target Date has made a decision outside the range of reasonable decisions which cannot be lawfully justified and is beyond reasonable justification. That is public law unreasonableness in its classic sense.

(10) Further, the August 2023 action of failing to include any replacement Target Date in the reissued Sludge Strategy was undertaken without any inquiry – still less reasonable sufficiency of inquiry – and so consideration of the environmental impacts and implications of adopting that position. The documents which have

> been disclosed record that the Agency was concerned to address reputational risks, but they contain no evaluation or consideration of the risks to the environment and public health. That was an obviously relevant consideration. The Agency plainly needed to take reasonable steps to acquaint itself with that relevant information. All of which stands as further or alternative reasoning by the judicial review court should conclude that the Agency's failure to include an alternative Target Date was a breach of its public law duty to act reasonably. The consequence is that the decision should be quashed and the matter remitted for lawful consideration of the question of a new Target Date.

28. That is the argument. I address it at §§36-47 below.

Nature and Intensity of Review

29. My attention was invited to R (Justice for Health Ltd) v Health Secretary [2016] EWHC 2338 (Admin) where Green J stated this cardinal truth (at §186):

> ***In determining whether a decision maker has acted irrationally the intensity of the scrutiny to be applied by a court is context sensitive.***

In R (Packham) v Transport Secretary [2020] EWCA Civ 1004 [2021] Env LR 10 (at §51) it was described as:

> ***… fundamental that both the intensity of review and the extent to which a court will accord a margin of judgment or discretion to a decision-maker will always depend on fact and context.***

In Justice for Health, features which tended to "broaden the scope of the margin" included that the decision was in the health field with the objective of improving patient care; it was prospective and precautionary, based on a prediction of future benefit; and there was a willingness and intention to keep the decision under review. I was shown R (Friends of the Earth) v Energy Security Secretary [2024] EWHC 995 (Admin), a climate change case (§112) where, in the context of a long-term evaluative predictive judgment in a polycentric context, over which the judicial review court had no real expertise or competence, a low intensity of review was appropriate (§141). In Packham, which concerned HS2 and climate change, a "low intensity of review" was regarded as apt because the decision was a "political judgment on matters of national economic policy" (§§48, 52). It is common ground that this is not one of those environmental cases which engage Convention rights (cf. Verein Klimaseniorinnen Schweiz v Switzerland (2024) 79 EHRR 1).

30. What do we mean by a contextually variable intensity of scrutiny in a reasonableness judicial review? One idea is that the judicial review court does more, in terms of taking a closer look, which we can think of as careful scrutiny. Another idea is that the judicial review court needs more, in terms of the strength of the reasons required to justify the public authority action as reasonable. Where a court does more, and in particular where a court needs more, we may think of a narrowing in the width of the latitude afforded to the public authority rule-maker, decision-maker or policy-maker. The language of "deference" has fallen into disuse, but reference is made of a "light touch" approach (Packham §51). In all this, the central point is that what the judicial review court is looking for, and what it needs, does not involve substitutionary review on a correctness standard; but a reasonable justification, from the reasons put forward, recognising who is the primary decision-maker with the built-in latitude for evaluation and choice.

31. Mr Wolfe KC and Ms Comyn submit as follows. Environmental judicial review cases can attract a close intensity of reasonableness review. A principled basis for identifying a class of case attracting close intensity of review is a claim which challenges the legality of any decision act or omission, of a body exercising public functions, which contravenes provisions of national law which relate to the environment. This is the familiar "Aarhus Convention claim" for access to justice in environmental matters, used in our costs rules (CPR 46.24). The correct position was articulated by Ouseley J in R (McMorn) v Natural England [2015] EWHC 3297 (Admin) [2016] PTSR 750 at §§174, 204-205. That should be followed notwithstanding the observations of Gilbart J in R (Dillner) v Sheffield City Council [2016] EWHC 945 (Admin) [2016] Env LR 31 at §§184-187. The observations which the UK has made to the Aarhus Convention Compliance Committee (20.8.18 and 22.10.19) are correct on this point. This is a case which should attract a close scrutiny of review, as an Aarhus Convention claim, and in any event given the environmental protection context and circumstances. That is because of the seriousness of the environmental problem and the necessary change which had been long and publicly recognised.

32. Mr Westaway for the Environment Secretary submits as follows. It is well-established that – when reviewing the lawfulness of a decision on public law reasonableness grounds – the intensity or standard of review depends on the context. Where, fundamental human rights or other matters necessitating specific engagement and justification are at issue, a more intense scrutiny or standard of review may be appropriate (see De Smith §6-108). This is not such a case. The content and timing of any legislative proposal involve complex socio-economic and environmental judgment on matters of policy (Friends of the Earth at §141), with an essentially "political" quality of the decision under challenge needing to be accorded a broad margin of discretion (Packham at §§48-52).

33. Mr Westmoreland Smith KC for the Agency submits as follows. Context is everything in judicial review. The starting point is the general standard of unreasonableness (De Smith §6-108). But "context is everything". The fact that the claim is an Aarhus Convention claim does not change the standard of review (Dillner §187). McMorn does not say that an Aarhus claim means a more intensive review each time; it was the facts (McMorn at §205) which warranted the closer examination, including an undisclosed policy with differential treatment and impact on livelihood. This is not an anxious scrutiny case, because it does not engage fundamental rights or human rights (De Smith §§6-060, 6-062) and is not of real importance to individuals (De Smith §6-030). Greater intensity of review is not warranted simply by reference to the importance of the issue, at least where, as here, there are complex factors (Friends of the Earth §141). The context here is an update to a policy, whose propagation is for the policy maker, and lies in the "political" arena (Packham).

34. In my judgment, the correct legal analysis is as follows:

    (1) It is correct, as all Counsel recognised, that environmental judicial review cases can attract a close intensity of reasonableness review. The Aarhus test, which focuses on "relating to the environment", does not stand as a rigid test for a uniformly heightened scrutiny. There will always be context-specific features which point in favour of, or away from, a heightened intensity of review; or a narrower latitude. It seems odd if an environmental regulator using powers to bring forward an environmental protection measure, in the face of resistance, were subject to heightened scrutiny by reference to the importance of the environment

and environmental protection. The seriousness of an environmental problem and a publicly recognised necessity for change are capable of pointing in favour of a contextually higher intensity of review; so can the importance of the issue. But these do not stand alone. Whether the function is legislative can point towards a lower intensity. The political, policy-laden, complex or predictive quality of the decision will all do so. As will any institutional or process limitations of the court. A more intensive review will not be required each time.

(2) I would not accept, in the context of environment protection, a fixed focus on "human" rights; as distinct from fundamental rights, interests and values. Where "an important individual interest is at stake" is only an "instance" of "more intense scrutiny where the circumstances require it" (De Smith §6-108). Nor can I accept a characterisation of environmental protection as "a matter" which does not "raise[] issues of real importance to individuals" (De Smith §6-063). On an international plane, the lexicon embraces "the right to a clean, healthy and sustainable environment" as a "human right" (Verein §144). Public law protects rights, but also values and interests, including the public interest. This allows for an ecocentric standpoint; not just an anthropocentric one.

(3) The position that in an Aarhus claim there is not "a different standard of review", a position taken in R (Evans) v Communities Secretary [2013] EWCA Civ 114, means that the "relevant standard" is the public law unreasonableness "standard" (see Dillner §§185-187). What, however, is crucial about the public law unreasonableness standard is that it involves "variations in the intensity of Wednesbury review that reflect the nature of the interest affected". That was recognised, eleven years ago, in that same environmental context: Evans at §37. It is a cardinal truth. It stands, as I read them, as the crucial point made in the UK's submissions to the Aarhus compliance committee. On a domestic legal plane, it stands as the crucial point adopted in McMorn, where it was the standard of public law unreasonableness which "can accommodate a more intensive review" (§§174, 204-205). That is the position in environmental judicial review cases, where the focus then turns to the contextual features of the individual case, by which the intensity of review is then calibrated.

35. I am persuaded that the present case warrants careful scrutiny, apt for the environmental protection context in which it arises, in terms of what the judicial review court does (§30 above). But I do not accept that this is a case where the judicial review court needs more, in terms of the strength of the reasons required to justify the Agency's action as reasonable; nor that the context and circumstances serve to narrow the width of the latitude afforded to the Agency. The claim is built on the seriousness of the environmental problem, and the necessary regulatory change, publicly recognised by the independent regulator. But, as I will explain below, that position does not equate to imperative urgency; nor does external material support a case of imperative urgency. The question in issue concerns the judgment as to whether to include a replacement Target Date for implementation of regulatory change, where the context is: that regulatory change would involve Government using legislative powers; that this was appropriately a collaborative decision-making setting; and where the rate of progress and engendered expectations about future progress came into collision with questions of policy prioritisation which the Agency would inform but did not own and could not dictate. In that context, there was in my judgment a broad latitude for the Agency in deciding

whether a new Target Date, and if so what Target Date, should form part of the reissued Sludge Strategy.

Analysis

36. The question I have to decide is one of law. My function, after reading and listening, is limited to deciding that question and giving this written explanation of my decision. I have arrived at the conclusion that the action of the Agency in deleting the unachievable 2023 Target Date from the Sludge Strategy and reissuing the Strategy without any Target Date but with the other contents repeated, involved no breach of the Agency's public law duty to act reasonably. Here are the reasons why I have arrived at that conclusion:

37. First, there is the legal setting in which the Agency was acting. The power being exercised has been identified, without contradiction, as s.37(1)(a) of the 1995 Act, "do anything which, in its opinion, is calculated to facilitate, or is conducive or incidental to, the carrying out of its functions"; where its functions are to protect and enhance the environment taken as a whole, so as to make the appropriate contribution towards attaining the objective of achieving sustainable development (s.4(1)). This power enables the Agency to promote regulatory change which it believes to be necessary, to manage risks and push for environmental improvement. Especially where it is interwoven into regulatory regimes as a regulatory decision-maker. It can publish a strategy. It can give a timeline. It can do all of this, notwithstanding that it does not possess the statutory powers whose exercise would be involved in the favoured regulatory change. There was no duty from any statutory or policy framework to state a Target Date, or a new Target Date. Rightly, no public law legitimate expectation is claimed. Judgments, in the exercise of an opinion – about what facilitates and is conducive – are evaluative matters of appreciation. And as Mr Westmoreland Smith KC and Mr Westaway both point out, without contradiction, it is not unusual for statements of policy intention not to set out a timetable because of the various pressures of Government which makes it difficult to be specific as to timings.

38. Secondly, there is the nature of the source on which the claimed unreasonableness is based. It is not said that the Agency has acted unreasonably in the light of an environmental protection necessity found in some external source of information. All of the points about the environmental protection necessity derive from the contents of the Sludge Strategy itself. This is the very platform on which the claim for judicial review stands. That means the Agency is being characterised as unreasonable in the way it has promoted in public its own recognised need for regulatory change. The logic is that the Agency's actions are so contradictory of its own words as to constitute public law unreasonableness. I repeat. Rightly, no breach of any public law legitimate expectation is claimed.

39. Thirdly, there is the provisional nature of the need for regulatory change which the Agency had publicly recognised. The Sludge Strategy was and is clear that the Agency, for its part, has identified the regulatory change of including agricultural land-use of sludge within the 2016 Regulations as the way forward. But that was a position which was necessarily provisional. The Agency had identified what it wanted to happen. It was going to engage through working groups to progress that objective. It was not going to conduct further consultation. To the Agency, this was a "commitment". The Agency's Letter of Response (5.10.23) describes its "commitment to Option 4". The Teach-In slides (27.9.22) had identified its "commitment to deliver in 2023". Mr Judd's Note to

Ministers (13.6.23) said of the July 2020 Sludge Strategy that the Agency's "commitment was made to move and evolve SUiAR requirements into the EPR by 2023"; that the Agency now wanted to "affirm a commitment"; and that there was a "low reputational risk" that the Department would be "seen" to not be acting quickly enough "on published commitments that will improve environmental outcomes". But this could never be a commitment to legislative action by the Environment Secretary. It was always publicly known where the legislative powers reside. That is why the Target Date was necessarily aspirational. The Sludge Strategy was explicit that the Agency would "submit a request for legislative change". As the Agency put it, writing to the Claimant's solicitors (14.3.24), it is "unable to make a commitment to legislative change because this is not in our control. Only Government can make a commitment to bring forward legislation".

40. Fourthly, there is the question whether temporal-urgency was reflected in the Agency's position assessing a need for regulatory change. When the Sludge Strategy was issued in March 2020, the Target Date was 2021. But by July 2020 the Agency had re-set its aspirations, putting the Target Date back by two years. The regulatory need which the Agency had assessed as arising was not a pressing imperative. It could not have been, consistently with this two-year deferral. This was not therefore an environmental emergency. The use of sludge on agricultural land was not unregulated. There were the 1989 Regulations and the Code of Practice. The concerns that had arisen related to an emerging picture about evidence and risk. Had the Agency in its considered and reasoned assessment taken the view that there was serious environmental hazard and a serious and immediate risk to health or the environment, it could not have been communicating an aspirational date which was a further two years away. Notwithstanding the palpable frustrations, recorded internally during the period 2021 to 2023, this was not an assessed temporal imperative. Mr Sheppard's email (5.5.23) to Ms Learmount, Mr Judd and Mr Croft included this:

> ***I'd like your view as to how far we can go with discussion timelines for the strategy. The water companies will obviously have realised we can't bring it in in 2023 as we say on gov.uk, so will ask for a timeline… What do you think about floating the idea (to get their reaction) that the strategy implementation may be pushed back to 2029/30 to fit in with the PR29 process? This would give the extra time to complete the impact assessment and for the water companies to think about cost of implementation which they could put into the PR29 process. We would then implement permit changes in 2030. This would also help with the assessments of the current WINEP process.***

This does not support a conclusion that the Agency was content with the delay, or the ongoing delay. But what it does is to reinforce that this was still not – in the Agency's assessment – a matter of imperative urgency. If it had been, the idea (in May 2023) of setting a timeline of 2029/30 could not possibly have been put forward. All of this is important, because it is the Agency's assessed need – identified from the contents of the Sludge Strategy – which is the platform for the claim.

41. Fifthly, there is the incorrectness of the Do-Nothing criticism. In this judicial review claim, the Agency's action is characterised – in substance – as being the very "Do-Nothing" option which the Agency had in 2000 rejected as unacceptable. Looking at the picture in its true context, I am satisfied that this is not a sustainable or fair characterisation. The Agency has had an unstinting ongoing resolve, that the regulatory change is the right thing for environmental protection, and that it would wish to see the change implemented. As Ministers were told in Mr Judd's June 2023 Note to Ministers, the Agency wanted to "affirm a commitment". Identifying the regulatory change as

necessary and appropriate did not, as I have explained, entail a particular temporal-urgency. The Sludge Strategy was not withdrawn. It was not left on the gov.uk shelf with an expired Target Date. It was specifically reissued by the Agency, as an act of the Agency's initiative, removing the unachievable 2023 Target Date. The contents of the Sludge Strategy (§13 above) were repeated. The Agency was publishing its position, in August 2023, as to the regulatory change that was needed and as to the Do-Nothing option that was unacceptable.

42. Sixthly, there is the bigger picture context. When a single-issue case comes before a judicial review court, it is understandable that the focus will be on that part of the map. The judicial review Court may, or may not, find that the parties provide a bigger picture so that some informed appreciation can be gained of what the other moving parts were. What can with confidence be said, and must be remembered, is this. Environmental protection is multi-faceted. The Agency will have its own workstreams, making its own choices as to resource-deployment and prioritisation. The same will be true within the Department. These are distinct entities. Each will have its position about its own workstreams and choices regarding resource-deployment and prioritisation. This is linked to Ministerial "appetite" (§26 above). The Claimant, and others interested in environmental regulation, will have their own positions. Obviously, full institutional resources and top prioritisation cannot be put behind every strand of environmental protection simultaneously. The judicial review Court is not an auditor of resource-deployment or an umpire of policy-prioritisation. Furthermore, it is not the Department's action, but the Agency's decision not to insert a replacement Target Date, which is under challenge in this case. When a court is considering a position, relating to how one aspect of environmental regulation has been handled, it must think about the extent to which it can see the knock-on implications and effects for other aspects of work. In this case, I do not have anything approaching that picture. I cannot look at this aspect of environmental protection – this regulatory change – and see what else there is, if anything, which might be given reduced-resourcing or lower prioritisation.

43. Seventhly, there is the nature of the action which the Agency did take, acting collaboratively, on the question of a Target Date. As I have explained, the Agency took the step of communicating directly with the Department about reissuing the Sludge Strategy, removing the now-unachievable Target Date, and about what it would now say about timing, in the Sludge Strategy and in communications alongside the Sludge Strategy (§§21-22 above). It is impossible, in my judgment, to characterise as unreasonable in a public law sense the action of raising the question of a published timeline, and then adopting a position which was in line with what the Department was asking. Given that the Agency's position could only ever be provisional (§39 above), because the authority exercising the legislative powers was necessarily going to be the Environment Secretary, this collaborative approach is beyond any criticism which can properly be given a public law shape.

44. Eighthly, there are the real-world implications of adopting a new Target Date. How was the Agency to do that? Suppose the Agency had given a new Target Date of 2025. What would the basis of that have been? The Agency could have taken such a date, with the objective of publicly putting the Department under renewed pressure to act. That could have undermined the working relationship between the two authorities. It could have undermined the progress of this aspect of regulatory change. It could have undermined other aspects of important environmental protection work. Suppose the Agency had

given a new Target Date of 2029. What would the basis of that have been? The Agency could have taken such a date, with the objective of allowing a generous headroom, as a long-stop. But the impression given might have been that the Agency did not for its part favour action being taken in the years before 2029. Any Target Date involved this basic problem. The Agency had properly asked the Department, and it knew that the Department did not want anything concrete to be said. The Department had specifically asked the Agency not even to say "we are currently in discussion with [the Department] to agree a new timescale". The Agency could, in those circumstances, have decided to include a Target Date. But it is not difficult to see that such a course might not have been conducive to a good working relationship with appropriate collaboration, between the Agency and the Department, with the latter having responsibility for any exercise of the all-important legislative powers. To take the opinion that the adoption of a new Target Date would not be calculated to facilitate, or be conducive to, the carrying out of its functions was, in my judgment, reasonable in public law sense.

45. In the light of these points, I cannot accept that the action of not including a Target Date in the reissued August 2023 Sludge Strategy was action outside the range of reasonable responses open to the decision-maker. Nor can I see any unexplained evidential gap or leap in reasoning which fails to justify the conclusion that it was not appropriate to include a replacement Target Date.

46. That leaves the argument that it was unreasonable of the Agency not to assess the environmental impacts of reissuing the Sludge Strategy with no replacement Target Date, so that the Agency failed to take reasonable steps to acquaint itself with relevant information and failed to take into account an obviously material consideration. There is a preliminary problem. This point was separately pleaded as Ground 1, and the Order granting permission for judicial review (16.2.24): (a) expressly refused permission on Ground 1; and (b) directed that it was open to the Claimant within 7 days to request reconsideration which (by agreement) could be rolled-up with the substantive hearing. The position taken by the Claimant's representatives in an email (23.2.24) and in their Skeleton Argument (17.6.24) was that the Judge's comment meant the point was in scope. I do not agree with that reading of the Order. The Judge was saying that Ground 1 was insubstantial (by the comment), but also unarguable (by the refusal of permission). But be all of that as it may, there is no substance in this additional argument. The answer is this. The Agency was very well aware of the environmental implications of the regulatory change which it was itself describing. The picture as assessed by it in 2020 remained accurate, which was why the contents of the Sludge Strategy were reissued in August 2023, and there is no challenge to that substantive content (which indeed is the platform on which the claim stands). The Agency had done the work with the working groups and had provided the Department with multiple inputs (§25 above). It did not need to a do a separate impact assessment on timing, in August 2023, any more than it needed to do in March 2020 and July 2020. The Agency acted reasonably so far as concerned informing itself as to, and taking into account of, the harm.

47. I have discussed what a court does and what it needs (§30 above). I have explained (§35 above) that I have sought to give this case careful scrutiny; but that I have not identified a basis for a high intensity of review, where the Court needs more than it conventionally would from the reasons put forward to justify the action as reasonable; nor have I identified a basis for an appreciably narrowed latitude on the part of the Agency. To be transparent about it, I have asked myself whether – if I am wrong about what the Court

needs – my conclusions and reasons would have been different. Having done so, my answer is that I would have come to the same conclusion, for substantially the same reasons.

Conclusion

48. For the reasons that I have given, I will dismiss this claim for judicial review. The Agency did not act unreasonably when reissuing the Sludge Strategy, in deleting the unachievable Target Date without replacing it with a new Target Date. The parties were agreed, in light of the judgment circulated in draft, that the appropriate Order is as follows (in light of the Aarhus cost caps directed by Eyre J on 16.2.24 pursuant to CPR 45.43). (1) The Claimant's application for judicial review is dismissed. (2) The Claimant shall pay the Defendant's costs in the amount of £10,000 within 28 days.

Permission to Appeal

49. Mr Wolfe KC and Ms Comyn have asked me to grant permission to appeal. They say there is a real prospect of success in persuading the Court of Appeal that the judgment contains a material error of law. They raise what are really three points. (1) They say it is arguably wrong to have found no "unexplained evidential gap" (§45 above), because no (authorised) Agency decision-maker ever recorded a documented decision, it being insufficient that the Agency collaborated with the Department after floating the idea of "another specific date" (§§21, 43 above). (2) They say it is arguably wrong to have found no "imperative urgency" or "pressing imperative" (§§35, 40 above), because these were (a) implied by the 2021 Target Date and (b) consistent with the pandemic-related deferral to a 2023 Target Date. (3) They say it is arguably wrong to have taken into account "knock-on implications" (§42 above), because these were unevidenced and speculative.

50. I have not been persuaded to grant permission to appeal. The Agency's collaboration with the Department, after considering and raising the question of "another specific date", was sufficient in the context and circumstances; and the documents do not leave the Agency's position "unexplained". The Sludge Strategy and its Target Dates (2021, then 2023) do not identify or reflect an "imperative urgency" or "pressing imperative". I did not take into account unevidenced "knock-on implications", but made a "bigger picture" point recognising a contextual reality. The reasoning on these topics – and the other points by reference to which I have assessed reasonableness (§§37-44 above) – needs to be read in full and as a whole. I am unpersuaded that there is a realistic prospect of success in persuading the Court of Appeal to overturn any of these aspects of the judgment; still less in overturning the overall conclusion on reasonableness.