



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
ENVIRONMENT**

Appeal Reference: NV/2016/0008

**Determined without a hearing
at Field House**

Before

JUDGE PETER LANE

Between

ULVERSTON ANGLING ASSOCIATION

Appellant

and

THE ENVIRONMENT AGENCY

Respondent

DECISION AND REASONS

1. The appellant appeals against the respondent's decision of 14 April 2016 to designate the Knottallow Tarn Reservoir ("the reservoir") as a high-risk reservoir under section 2B (designation) of the Reservoirs Act 1975, as amended by the Flood and Water Management Act 2010. The designation decision confirmed a provisional designation of the reservoir, made under section 2A of the 1975 Act.

The legislation

2. Sections 2A to 2C of the 1975 Act provide as follows:-

"2A Consideration of risk and provisional designation: England and Wales

- (1) As soon as is reasonably practicable after the registration of a large raised reservoir under section 2 the appropriate agency shall consider whether the reservoir is to be designated as a high-risk reservoir (applying the criteria set out in section 2C).
- (2) The appropriate agency may –

- (a) Make a provisional designation by giving notice to the undertaker, or
 - (b) Notify the undertaker that the reservoir is not designated as a high-risk reservoir.
- (3) A provisional designation notice must specify –
- (a) The reasons for the provisional designation,
 - (b) How representations to the appropriate agency may be made, and
 - (c) The period within which those representations may be made.
- (4) The Minister may by order specify a minimum period within which representations may be made under subsection (3)(c).

2B Designation

- (1) The appropriate agency may designate a large raised reservoir as a high-risk reservoir by giving notice confirming a provisional designation to the undertaker.
- (2) In deciding whether to confirm a provisional designation the appropriate agency must have regard to the representations made in accordance with section 2A.
- (3) A notice under subsection (1) may not be given before the end of the period within which representations may be made under section 2A(3)(c).
- (4) The notice must –
- (a) Specify the provisional notice, to which it relates,
 - (b) Specify the reasons for the designation,
 - (c) Give information about the procedure for bringing an appeal under regulations under section 2E,
 - (d) Specify the period within which an appeal may be brought, and
 - (e) Specify the date on which the designation takes effect, which must be after the end of the period specified under paragraph (d).

2C Meaning of “high-risk reservoir”

- (1) The appropriate agency may designate a large raised reservoir as a high-risk reservoir if –
- (a) The appropriate agency thinks that, in the event of an uncontrolled release of water from the reservoir, human life could be endangered, and

- (b) The reservoir does not satisfy the conditions (if any) specified in regulations made by the Minister.
- (2) The conditions specified in regulations under subsection (1)(b) may, in particular, include conditions as to –
 - (a) The purpose for which the reservoir is used,
 - (b) The materials used to construct the reservoir,
 - (c) The way in which the reservoir is constructed, and
 - (d) The maintenance of the reservoir.
 - (3) Sections 10 to 12 make provision about requirements for inspection, monitoring and supervision of high-risk reservoirs.
 - (4) References in this Act to a “high-risk reservoir” are references to a large raised reservoir that has been designated under section 2B as a “high-risk reservoir”.
3. Section 10 (periodical inspection of large raised reservoirs) requires undertakers to have any high-risk reservoir inspected from time to time by an independent qualified civil engineer and to obtain from the engineer a report of the result of the inspection. Unless under the supervision of a construction engineer, or similar, a high-risk reservoir must be inspected under section 10 at the time specified by regulations made by the Minister. The undertaker must comply with recommendations made by the inspecting engineer as to the maintenance of the reservoir. Where the inspecting engineer has recommended measures to be taken in the interests of safety, then unless the matter is referred to a referee, the undertakers must carry the recommendation into effect under the supervision of a qualified civil engineer.
 4. The right of appeal against designation as a high-risk reservoir is to be found in regulation 4 of the Reservoirs Act 1975 (Exemptions, Appeals and Inspections) (England) Regulations 2013 (SI 2013/1896):–
 - “4. Right to appeal a designation of a large raised reservoir as a high-risk reservoir**
 - (1) An undertaker who has been given a notice under section 2B(1) of the 1975 Act may appeal on any ground to the First-tier Tribunal against the designation confirmed in that notice.
 - (2) on deciding an appeal under paragraph (1), the First-tier Tribunal must confirm or cancel the designation”.

The interpretation of section 2C

5. In directions to the parties, I required them to make submissions to the Tribunal on a preliminary issue relating to the interpretation of section 2C of the 1975 Act. As can be seen, the power of the appropriate agency (which, in England, is the respondent) requires (a) the agency to think that, in the event of an uncontrolled release of water from the reservoir, human life could be endangered; and (b) that the reservoir does not satisfy the conditions (if any) specified in regulations made by the Minister.
6. The Tribunal was of the view that the drafting of section 2C(1) is problematic. The Tribunal's directions put the matter as follows:-
 - "3. No regulations have been made under section 2C(1)(b). Section 5(4) and (5) requires such regulations to be subject to 'affirmative resolution' procedure; but section (5) has not been brought into force.
 4. It appears that the respondent considers it can designate a reservoir as a high-risk reservoir, either on the basis of section 2C(1)(a) alone or on the basis that the reservoir concerned cannot satisfy conditions mentioned in subsection (1)(b) because there are none.
 5. The Tribunal required submissions to be made on this issue, since it is arguable that the respondent's view of the legislation may be incorrect. In particular, it is arguable that the effect of paragraphs (a) and (b) is that Parliament intends the power to designate to be exercisable only where the reservoir is non-compliant with conditions and that, if there are no such conditions, then paragraph (b) cannot be satisfied. If there are no conditions to satisfy, it is arguable that the reservoir cannot be said to be unable to satisfy non-existent conditions.
 6. It is arguable that the effect of the respondent's stance is to treat section 2C(1)(b) not as a provision containing a requirement for designation as a high-risk reservoir but as a means whereby reservoirs designated as high-risk by reason of subsection (1)(a) can cease to be subject to such a designation, if the Minister imposes conditions that the reservoir satisfies. If that is its effect, then the way in which section 2C(1) is structured is arguably curious. So too is the decision to subject the relevant regulations to affirmative resolution procedure".
7. The Tribunal's directions required the respondent to set out the background to the insertion by the 2010 Act of section 2C of the 1975 Act, so that appropriate use could be made of it in construing section 2C, were that to be warranted. On behalf of the respondent, Charles Harpum of Counsel produced a comprehensive and helpful set of submissions, referencing a range of material. The appellant did not make any submissions in reply.

The floods of 2007 and their aftermath

8. In 2007, England experienced serious flooding in a number of areas. There were fears that the Ulley Reservoir, near Rotherham, might burst owing to cracks appearing in its wall. A thousand people had to be evacuated temporarily from their homes because of the risk posed by the damaged reservoir.
9. The Government responded by commissioning an independent review of the floods and the lessons to be learned from them. The resulting "Floods Review" was published in June 2008. In December 2007, the Environment Agency published its "Review of 2007 summer floods". This observed that, under the 1975 Act, reservoirs were regulated merely by reference to their size. Section 1 of that Act defines "large raised reservoirs" as reservoirs designed to hold or capable of holding more than 25,000 cubic metres of water above the natural level of any part of the land adjoining the reservoir.
10. The respondent's review concluded that an enhanced risk-based approach was required to reservoir safety, focusing on those reservoirs "that posed the greatest risk to the public" even though they were not covered by the existing regime relating to large raised reservoirs. The review proposed amending the Act to remove the legal burden from remote, low consequence reservoirs, whilst tightening controls on those that pose significant risks to the public.

The background materials

11. The 2010 Act was initially published as a draft Bill. I agree with Counsel that this document and its related consultation paper are permissible aids to the interpretation of section 2C.
12. The consultation paper stated that the Government was seeking to implement the following major changes to the 1975 Act:-
 - “ • to place a requirement for all reservoirs above a minimum volume capacity (10,000 cubic metres) to be included on an EA register;
 - to require the EA to classify each relevant reservoir according to whether they pose a threat to human life, or meet technical conditions (to be specified) which in effect mean the risk is negligible;
 - to specify the duties of managers; and
 - To specify panel engineers' duties in relation to these reservoirs based on the level of risk" (paragraph 330).

13. Paragraphs 339 and 340 state as follows:-

“339. Reservoirs are currently categorised on a non-statutory basis. We want to classify all reservoirs subject to the revised regime according to whether they pose a threat to human life or not. This classification would be determined by the EA as enforcement authority by reference to, in particular, the inundation map for each reservoir and in consultation with local authorities. The prescribed methodology for the production of inundation maps in England and Wales is currently under development.

340. We are proposing that some reservoirs should be classified as high-risk reservoirs – this classification will apply to any relevant reservoir which, if it failed, could result in the loss of life to downstream populations (daytime and night time). The Bill will also provide for detailed rules to be drawn up which would specify types of reservoirs which, regardless of closeness to populations, are unlikely to give rise to other than negligible risks. These would not be treated as high-risk and the regulatory provisions would be reduced accordingly”.

14. So far as the draft Bill was concerned, clause 130 corresponded to what is now section 2C of the amended 1975 Act. The draft Bill was considered by the House of Commons Environment, Food and Rural Affairs Committee in its sixth report of 16 September 2009. The report described the draft Bill as, amongst other things, making provision:-

“ • to require the Environment Agency to classify each relevant reservoir according to whether they pose a threat to human life, or meet technical conditions (to be specified) which in effect reduce the risk to a negligible level;”

15. That bullet point mirrors the second bullet point contained in paragraph 330 of the Government’s consultation paper (see paragraph 12 above). Counsel relies heavily on the wording of these bullet points and, in particular, the use of what he describes as the disjunctive “or” between the references to posing a threat to human life and meeting technical conditions.

Submissions and analysis

16. *Bennion on Statutory Interpretation (Sixth Edition 2013)* states at p. 662 that “a court may treat as persuasive authority on the construction of an enactment the view of an official committee reporting on the meaning of the enactment”. Counsel submits that the same should be the case where the provision in question is, at that stage, a draft Bill, rather than an enactment. Counsel points out that the wording of the relevant provision of the draft Bill did not change.

17. The first matter to note about the bullets is that the words “to be specified” run counter to the respondent’s contention, as set out in Counsel’s submissions, that the Minister is not under any statutory obligation to make regulations specifying conditions for the purposes of section 2C(1)(b). Leaving that aside, I agree that the bullets provide some support for the construction placed on section 2C(1) by the respondent. The bullet points assume the key element is the respondent’s view that, in the event of an uncontrolled release of water, human life could be endangered. The uncontrolled release is, for this purpose, to be assumed; but compliance with technical conditions regarding the reservoir will result in non-designation as a high-risk reservoir, because such compliance will, in practice, mean that the risk can be discounted.
18. Counsel also points to the August 2013 “Reservoir Risk Designation Guidance”, published by the respondent, describing the methodology for risk designation that would be applied by it in connection with section 2C:-
- “Paragraph 7 of Schedule 4 of the Flood and Water Management Act 2010 inserts sections 2A to 2E into the Reservoirs Act 1975. Section 2C requires the Environment Agency to determine whether a large raised reservoir is a high-risk reservoir if:-
- (a) The Environment Agency thinks that, in the event of an uncontrolled release of water from the reservoir, human life could be endangered, and
 - (b) The reservoir does not satisfy the conditions (if any) specified in regulations made by the Minister (NB: at present there are no such conditions specified).
- The Environment Agency considers that life could be endangered if there is a reasonable expectation that in the event of an uncontrolled release of water from a reservoir, conditions downstream will be such that:
- (a) Persons within or in the immediate vicinity of residential, business or recreational areas, whether they be permanent or temporary establishments, could be endangered;
 - (b) Damage to infrastructure is sufficient to lead directly to human life being endangered”.
19. Counsel submits that what was conspicuous by its absence from the guidance was any discussion of when the regulations under section 2C(1)(b) might be made and what they might contain. Accordingly, the submission is that it is plain from chapter 2 that “the non-existence of any regulations under section 2C(1)(b) of the 1975 Act was not in any way considered by the Agency to be an impediment to designating reservoirs as ‘high-risk’ within section 2C(1)(a)”.
20. The respondent stresses the significance, in its view, of the words “(if any)” in section 2C(1)(b). The respondent contends that these words make it plain that the Minister does not have to make regulations under that provision.

21. I do not consider that the words “if any”, in themselves, take the respondent’s case any further. It can equally, if not more powerfully, be said that, if there are no conditions specified in regulations, then the reservoir does not fall within paragraph (b), on the basis that the reservoir cannot be non-compliant with non-existent conditions.
22. The background materials mentioned at paragraphs 11 to 15 above – particularly paragraph 340 of the consultation paper - do, however, provide significant support for the respondent’s discrete submission that the word “and” between paragraphs (a) and (b) of section 2A(1) must be read disjunctively, so that paragraph (a) falls to be treated as a free-standing provision that may in effect be overridden if paragraph (b) applies.
23. Furthermore and contrary to my initial view when drafting the directions, I consider the fact that any regulations made under section 2C(1)(b) must be subject to affirmative resolution procedure provides additional support for the respondent’s construction of the enactment. If the respondent concludes that, on the hypothesis of an uncontrolled release of water, there is a reasonable expectation of human life being endangered, whether directly or by reason of damage to infrastructure, then it is understandable that Parliament would wish to have close scrutiny of any regulations that are said to be capable of, in effect, rendering that hypothesis unrealistic.
24. Counsel places considerable weight on the transitional provisions, contained in the Commencement Orders bringing into force those provisions of the 2010 Act which amended the 1975 Act. The provisions in question are section 33 and Schedule 4.
25. Article 4 of the Flood and Water Management Act 2010 (Commencement No 2, Transitional and Savings Provisions) (England) Order 2013 (SI 2013/1590) provides, so far as relevant, as follows:-
 - “(2) For the relevant period, sections 11, 12 and 21(5) of the 1975 Act continue to apply in relation to a large raised reservoir in England as though paragraphs 16, 17 and 18 of Schedule 4 to the 2010 Act had not been brought into force in relation to England.
 - (3) In paragraph (2), ‘the relevant period’ means the period beginning on 30th July 2013 and ending on the first date on which the Environment Agency gives notice to the undertaker of the large raised reservoir –
 - (a) That it has designated the reservoir as high-risk under section 2B(1) of the 1975 Act; or
 - (b) That it has not designated the reservoir as high-risk (whether or not having made provisional designation under section 2A of the 1975 Act)”.

26. The duties on an undertaker in respect of a high-risk reservoir as regards monitoring and supervision are contained in sections 11 and 12 of the 1975 Act. The obligations regarding inspection are contained in section 10. According to the respondent, the absence of a reference to section 10 in article 4(2) of the 2013 Order indicates that section 2C must be capable of empowering the respondent to designate a large raised reservoir as a high-risk reservoir, notwithstanding the fact that the Minister has not made regulations specifying conditions for the purposes of section 2C(1)(b).
27. I am by no means persuaded that this is so. I cannot see a good reason why article 4(2) omits any reference to section 10. The thrust of article 4(2) and (3) is clear: the obligations on undertakers in respect of large raised reservoirs remain those set out in the unamended 1975 Act, until such time as the reservoir in question is either designated as a high-risk reservoir under section 2B or the Environment Agency positively decides not to designate the reservoir.
28. In my view, the effect of article 4 has been to remove the duty of inspection conferred by section 10 of the 1975 Act in respect of all large raised reservoirs, with effect from 30 July 2013. A reservoir which, on or after that date, is provisionally designated under section 2A or in respect of which a confirmed designation is made under section 2B, becomes subject to the section 10 inspection duties.
29. None of this, however, is of any assistance to the respondent's case on the construction of section 2C(1). Sections 2A, 2B and 2C were brought into force on 1 October 2011, but only for the purpose of enabling the Minister to make regulations. That suggests Parliament envisaged it was necessary for the Minister to have time to frame regulations comprising conditions for the purposes of section 2C(1)(b), before the provisions could be commenced in full.
30. The result of this necessarily lengthy analysis is that, in my view, section 2C(1) remains opaque. The way in which both section 2C and its related provisions have been brought into force by the Commencement Orders does nothing to change that view.

What section 2A(1) requires

31. I have, nevertheless, concluded that the background materials described in paragraphs 11 to 15 above disclose the nature of the "mischief", which Parliament decided to address in the 2010 Act, and that they are sufficient to inform the way in which section 2C(1) must be construed. As a result, I find that the effect of the provision is as follows.

(i) Section 2C(1)(a): the Environment Agency's task

32. The Environment Agency must decide, on the hypothesis that there is a fundamental failure in the water-retaining mechanism of the reservoir, so as to cause "an uncontrolled release of water from the reservoir", whether "human life could be endangered". This requires an assessment of where water from the uncontrolled release might go, in the event of such a failure. If there is any realistic prospect of the water making significant direct contact with a human being or with buildings, plant or equipment that may be affected in such a way as to put a human being at risk, then designation may occur.
33. In deciding this matter, the respondent is not required (or indeed allowed) to form a view on the likelihood of such an uncontrolled release actually occurring. Its task is to hypothesise such a release and decide if, in that scenario, human life could be endangered.
34. The word "could" makes it plain that the respondent is not required to be satisfied on the balance of probabilities. Only if the risk is entirely fanciful or utterly unrealistic would the test not be satisfied.
35. Otherwise, the power of designation arises; and, given the nature of the risk, it will generally be very difficult, to say the least, to argue that the respondent, as the body entrusted by Parliament with protecting the public, should not exercise its discretion to designate under section 2B.

(ii) Section 2C(1)(b): the Minister's conditions

36. The effect of section 2B(1)(b) is, therefore, to provide an exemption for certain reservoirs, which would otherwise fall within the respondent's power of designation. As I indicated in the directions, section 2B(1)(b) is a somewhat strange way of expressing an exemption; but that is what it is.
37. In what circumstances might the Minister specify conditions which the reservoir can satisfy? Drawing on the background materials, the paradigm instance would be where a reservoir has only recently been constructed, to the highest possible standards. In such a case, the actual risk of an uncontrolled release – as opposed to its consequences – may be so remote as to make designation inappropriate, even though, if the hypothetical release occurred, human lives could be at risk. As I have already mentioned, the conferring of such an exemption in a case where subsection (1)(a) is satisfied is, on this construction, so significant that Parliament must expressly approve the relevant regulations, by affirmative resolution procedure.

The substance of the appeal

38. Having disposed of the preliminary issue in favour of the respondent, I turn to the substance of the appeal.
39. In essence, the case for the appellant is that there is a causeway across the reservoir, which effectively means that, from the point of view of risk, the reservoir should be viewed as two separate water containment units. In the event of a breach of the downstream dam, only around 9,000 cubic metres would be lost and the remainder would be retained behind the causeway. The appellant also submits that the envisaged downstream flooding, as described in the respondent's flood inundation map, is excessive, in that it does not take into account local variations in the topography. It is said that several features would "slow down the flow".
40. Mr Martin Hewitt of Messrs Mott MacDonald prepared a technical report on the reservoir, on behalf of the respondent, following a site visit on 24 April 2015.
41. Mr Hewitt accepted that the "breach scenario" on which the respondent's modelling and mapping had been undertaken, was "overly conservative, taking account of how the contents of the reservoir would be released, and the estimated likely credible breach flows. Also, the hydraulic modelling appeared not to have simulated the attenuating effects of the topography and other structures, which would further reduce the depth and velocity of inundation shown on the RIM flood maps.
42. The report described the effect on human life as follows:-
- "Approximately 1.5km downstream of the Main dam, at the hamlet of Rosside, the RIM map and RRDF indicate the potential for flooding of 2 to 3 residential buildings, and also a 75m long (approx.) section of minor road. It appeared unlikely that the 2 residential buildings on the northern (upstream side) of the road would be inundated by the considerably lower estimated credible breach flow, but on the downstream side of the road, there was a single residential house that could well still be inundated, but the hazard, i.e. depth and velocity of flow would be much less than indicated by the RIM map. The minor road would still be expected to be inundated, but risk to life would be expected to be very low, given the minor nature of the road".
43. In his summary, Mr Hewitt stated as follows:-
- "There remains some slight residual uncertainty regarding the extent of inundation that might be experienced by a single residential building at Rosside, and also the amount of water that might pass down a railway track towards Ulverston in the event that both the Main dam and the causeway dam failed and released the maximum credible storage. This could be evaluated by re-running the RIM hydraulic model using the estimated maximum credible peak flow in table 2 to further support the observations and opinions in this report".

44. In all the circumstances, Mr Hewitt was of the opinion that the reservoir “should not be designated as a high-risk reservoir, within the meaning of the Reservoirs Act 1975”.

45. In its response to the grounds of appeal, the respondent says:-

“There are approximate 2,000 Large Raised Reservoirs in England. Assigning risk designation to all of these has been a mammoth task. We have used a variety of data sources in our considerations including reservoir flood maps which were produced from computer models in 2009. The maps were originally produced for emergency planning purposes, to give an indication of where emergency resources should be directed in the event of a dam failure. The maps do not give a bespoke or especially accurate indication of a dam break flood but are presently the best available information for making designations.

Given the intention and history of reservoir safety legislation, to protect human life, our interpretation of section 2C(1) is that the precautionary principle should be applied and reservoirs should be designated high-risk unless we have clear evidence that a dam failure would not present a hazard to human life. It is our view that assigning a designation of not high-risk consequently increases the probability of a dam failing as professional oversight is removed. This can only be acceptable if a dam failure does not present a hazard to human life.

Where it is clearly demonstrated by good evidence that a dam failure and uncontrolled release of water would be safe for people it is reasonable that an undertaker should be able to dispense with panel engineers’ services.

In this case the appellant highlighted reasonable concerns around the accuracy of the flood maps which led us to commission further advice based on the site visit by an independent panel engineer ...”

46. Having set out Mr Hewitt’s conclusions, the response continues:-

“Our view is that this residual uncertainty [regarding the single residential building at Rosside] no matter how slight, is incompatible with a not high-risk designation when taking account of the words in section 2C(1), ‘human life could be endangered’ (our emphasis). It is important to note that the occupants of the single residential building and users of the railway line are not involved in the designations process or aware that the standard of protection against a dam failure which presently exists at Knottallow Tarn could be reduced.

In order to resolve this uncertainty it was suggested to the undertakers that the designation would be reviewed upon the issue of new reservoir flood maps in 2017. The new maps are being produced to a much higher and more accurate specification although as stated by the appellant they will not be bespoke. It was proposed that Knottallow Tarn could be added to a priority risk for re-modelling.

.....

We estimate the cost to Ulverston Angling Association of operating the reservoir in compliance with the reservoir Act (sic) to be approximately £600 for the appointment of a supervising engineer in the next year. It would cost us in the region of £5,000 to run a one-off model. This cost would be reduced to around £2,500 if the model is batched with others as planned in 2017. We have a duty to spend public money appropriately.

.....

We are committed to making reasonable decisions when assigning risk designation. We contend that in order to properly discharge our duty of care to people downstream of dams there should be a high standard of proof that a dam failure would not present a hazard to human life before it is reasonable for us to make a designation of not high-risk.

We remain open to remodelling Knottallow Tarn as a priority and working with the undertaker to review the high-risk designation once in receipt of better data”.

Discussion

47. As I have endeavoured to explain, the way in which section 2C(1) of the 1975 Act falls to be construed requires the respondent to hypothesise an uncontrolled release of water, however unlikely that might be. In common parlance, the respondent is required to assume a “worst-case scenario”, involving a total failure of the water-retaining mechanism of the reservoir. In the present case, this means the respondent must assume a failure of both the dam and the causeway occurring simultaneously or near-simultaneously.
48. Mr Hewitt’s report and its conclusions fall to be read in this light. Not having the benefit of the analysis to which subsection 2C(1)(a) has been subjected in the course of these proceedings, Mr Hewitt understandably did not differentiate between what he regarded as the overstatement of the risk of an uncontrolled release (which is irrelevant) and what he found to be the overstatement of how and where the water from the reservoir would disperse, having a regard to the topography of the downstream land.
49. I find the evidence indicates human life at the single dwelling could be endangered. I also consider that, on the state of the current evidence, it is not possible to discount as entirely fanciful the risk to life in respect of the two residential buildings on the northern upstream side of the road at Rosside. As is plain from the part of his report quoted at paragraph 42 above, Mr Hewitt’s assessment of risk in respect of these buildings was affected by his incorrect decision to have regard to the actual risk of an uncontrolled release of water from the reservoir.
50. In view of my findings, the respondent had power to designate the reservoir as a high-risk reservoir. The respondent is entrusted by Parliament with statutory functions, which include the protection of human life. Its decision to exercise its

power of designation under section 2B falls to be accorded significant weight (R (Hope & Glory Public House Ltd) v City of Westminster Magistrates' Court [2011] PTSR 868; Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60). It has not been shown that the respondent's decision to exercise its discretion to designate the reservoir was wrong.

51. Whilst the outcome of the present appeal will be disappointing to the appellant, it is important to record the respondent's decision to commission new modelling in 2017. If the result of this modelling is that the respondent's current assessment under section 2C(1)(a) can longer be maintained, then the appellant can expect the respondent to de-designate the reservoir.

Decision

52. The appeal is dismissed.

Judge Peter Lane
7 April 2017