NCN: [2022] UKFTT 00418 (GRC)
Case Reference: **NVZ/2021/0017**

First-tier Tribunal
General Regulatory Chamber
Environment

Determined on the Papers
On 18 October 2022

Decision given on: 17 November 2022

Before

TRIBUNAL JUDGE G WILSON
TRIBUNAL MEMBER PROFESSOR A JOHNSON

Between

ANDREW R DUNLOP

Appellant

and

SECRETARY OF STATE FOR THE ENVIRONMENT

Respondent

Decision: The appeal is Dismissed

REASONS

Background to these Proceedings

1. Every four years the Secretary of State identifies those waters in England which are either polluted by the discharge of nitrogen compounds from sources which include agricultural sources or are at risk of being so polluted unless action is taken. He then designates as Nitrate Vulnerable Zones, ("NVZs") all areas of land which drain into such waters and which contribute to the pollution. This has consequences for agricultural holdings within a NVZ; they must observe the restrictions prescribed in the Nitrate Pollution Prevention Regulations 2015 as amended ("the 2015 Regulations").

2. The Environment Agency (EA) has made recommendations for NVZs to the Secretary of State and he has published those which he is inclined to accept. This includes NVZ S502. The

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Appellants land at Lunsford Farm, Pett Road, Pett, Hastings TN35 4HH , as shown on delineated on plans 1 -3 attached to the Appellant's application for appeal, (the holding) forms part of NVZ S502

3. The EA has conduct of the Respondent's case in the tribunal.

The Law

4. The source of the Secretary of State's obligation to designate NVZs is the Agricultural Nitrates Directive (91/676/EEC). The Directive has been considered by the European Court of Justice (ECJ) in enforcement proceedings brought against the UK in Case C-69/99; and also in R v Secretary of State for the Environment and Another, ex parte Standley and Others: National Farmers Union, intervener (29 April 1999) Case C-293/97 reported as R v Secretary of State for the Environment and MAFF [1999] Env LR 801. This emphasised the flexibility the Directive gives to enable member states to achieve the aims of the Directive and noted:-

   "Community law cannot provide precise criteria for establishing in each case whether the discharge of nitrogen compounds of agricultural origin makes a significant contribution to the pollution."

5. The 2015 Regulations so far as relevant to this appeal provide as follows:

   Regulation 2(2)

   For the purposes of the Regulations, a reference to "polluted water" means "water which—

   (a) is freshwater and contains a concentration of nitrates greater than 50 mg/l (or could do so if these Regulations were not to apply there), or

   (b) is eutrophic (or may in the near future become so if these Regulations were not to apply there)

   Regulation 4(5)

   No later than the end of each four-year period provided for under paragraph (2), the Secretary of State must—

   (a) identify water that is affected by pollution, or could be if the controls in these Regulations are not applied in the area concerned, using the criteria in Annex I to Council Directive 91/676/EEC"

   Regulation 4(7))

   Provides that following the UK's departure from the European Union, Annex 1 to Council Directive 91/676/EEC should be read as follows:

   "ANNEX I
   CRITERIA FOR IDENTIFYING WATERS REFERRED TO IN ARTICLE 3 (1)

A. Waters referred to in Article 3 (1)7 shall be identified making use, inter alia, of the following criteria:
1 . whether surface freshwaters, in particular those used or intended for the abstraction of drinking water, contain or could contain, if action pursuant to Article 5 regulations 7 to 35 of the Regulations is not taken, a concentration of nitrates greater than 50 mg/l;
2 . whether groundwaters contain more than 50 mg/l 1 nitrates or could contain more than 50 mgl/ 1 nitrates if action pursuant to Article 5 is not taken;
3 . whether natural freshwater lakes, other freshwater bodies, estuaries, coastal waters and marine waters are found to be eutrophic or in the near future may become eutrophic if action pursuant to Article 5 is not taken .

B. In applying these criteria, Member States shall also take account of:
1 . the physical and environmental characteristics of the waters and land;
2. the current understanding of the behaviour of nitrogen compounds in the environment (water and soil);
3 . the current understanding of the impact of the action taken pursuant to Article 5 .

Regulation 6(2)

Provides that the owner or occupier of an affected holding can appeal to the tribunal against the proposed designation but only on very limited grounds. The grounds are that the relevant holding (or any part of it):

(a) does not drain into water which the Secretary of State proposes to identify, or to continue to identify, as polluted or which has been similarly identified in Wales or Scotland, . . .

(b) drains into water which the Secretary of State should not identify, or should not continue to identify, as polluted.

6. In EC v Belgium CJEU C-221/03 22 September 2005), the ECJ ruled that where water was polluted, the imposition of controls on farming practice to reduce the agricultural contribution to nitrate pollution was proportionate even when the contribution from agricultural sources was only 17%.

7. In Commission v France C-280/02) (at paragraph 77) the Court held:-

"The ERM report of 1999 produced by the Commission indicates that 9.8% of the spring and summer nitrogen inputs into the Lorient roadstead, even in the period of green algal blooms, are of urban origin, which amounts to 374 tonnes. Under these conditions, the Commission is right to conclude that urban waste water discharges contribute significantly to eutrophication of the waters of the Lorient roadstead"

8. In two more cases relating to urban waste water, Commission v Sweden (C-438/07) and Commission v Finland (C-337/07 2009), the Court held, having found that the contribution in

these cases was 1.2%,:-

"In those circumstances, the Commission has failed to show that the transfer of nitrogen from Finnish treatment plants of urban waste water from agglomerations of more than 10,000 p.e. whose discharges flow into the Gulf of Bothnia towards the Baltic Sea proper can be categorised as significant for the purposes of the case law according to which the flow of nitrogen caused by urban waste water discharged into eutrophied waters must be considered significant if it accounts for 10% or more of the total flow of nitrogen (see, to that effect, Commission v France, paragraph 77)"

9. The burden of proof is on the Appellant and the standard of proof is on the balance of probabilities (i.e. more likely than not).

The Appeal

10. This appeal relates to a surface water NVZ S502; Brede between Battle and Winchelsea. The Appellant does not dispute that his holding falls within the area designated as NVZ S502.

11. The Appellant's appeal is set out within his notice of appeal and letters dated 17 November 2021 and 3 January 2022.

12. The notice of appeal and letter dated 17 November 2001 together with the "Cover Sheet for Nitrate Vulnerable Zone appeal" provides (with the sub headings below largely adopted from the Appellant's letter dated 17 November 2021) as follows:

    a. Background - The Appellant missed the deadline to appeal in 2018 as the notice and documentation had been sent to the Appellant's late mother. The Appellant is aware that neighbouring farmers successfully appealed the NVZ designation during the last round of appeals.
    b. Ground of Appeal - Defra should not identify the water as polluted.
    c. Water Quality – The Appellant relies upon a Fairlight Stream Invertebrate Survey and Sewage Treatment Survey, conducted by the National Trust, dated 16-19 August 2019. The Appellant asserts that the water survey was carried out upstream of his holding. The Appellant asserts that the survey demonstrates there is contamination of local water courses from the Fairlight Sewage Treatment Plant, also upstream of the Appellant's holding. The Appellant asserts that in times of heavy rainfall, Southern Water releases huge quantities of water and sewage before it reaches the sewage works, into the Marsham Sewer and down through the holding. The Appellant asserts that this is an ongoing frequent occurrence authorised by the Environment Agency to prevent the sewage works-from being overwhelmed. The Appellant asserts that this is a significant source of non-agricultural nitrates. The Appellant relies upon a report by Ben Webster environment editor in The Times dated 27 October 2021. The report relates to the Environment Bill tabled on the 26 October 2021 which the Appellant asserts "*will see a duty enshrined in law to ensure water companies secure progressive reduction in the adverse impacts of discharge from storm overflows"*.
    d. Water levels – The Appellant asserts that water levels are managed artificially by the Environment Agency to let excess flood water and sewage be discharged as quickly as possible (out to sea) through the holding in the Marsham. The Appellant asserts that this

is done to reduce the impact on the environment and the residents of the Marsham Brook Lane who regularly complain about the smell and presence of sewage. This has been documented at Parish Council Meetings.

e. The Appellant's Farming Activities - The Appellant asserts that most of his farm is in the Higher Tier Countryside Stewardship Scheme and he meets criteria for a 'low intensity farmer". The Appellant asserts at least 80% of his farmland is grassland, he applies no more than 100kg of nitrogen per hectare as organic manure (including any nitrogen in manure deposited on the field by livestock). The Appellant asserts that the nature of the holding is such that it supports only very low stocking rates and the holding is well below relevant levels for grazing. The Appellant asserts that he spreads no more than 90kg of nitrogen per hectare per year as manufactured fertiliser and he does not bring any organic manure onto the farm.

13. In a letter dated 3 January 2022 the Appellant set out that it is "*my overall wish for my land to be removed from the NVZ, as my farm does not cause pollution and I believe my land should not have been designated within the NVZ in the first place"*. The Appellant relies upon a letter form the Internal Drainage Board for the Romney Marshes Area which the Appellant asserts demonstrates that the run off from the Appellant's holding and the Pett Levels drains directly into the sea and not into any catchment.

14. Drawing these threads together, the Appellant's claim that this holding drains directly into the sea and not into any catchment can be considered an appeal pursuant to Regulation 6(2)(a). The Appellant's claim that the sewage discharge and the management of water levels within the catchment are the cause of pollution and Appellant's holding and his farming practices are such that his holding does not cause pollution can be considered an appeal pursuant to Regulation 6(2)(b. When considering Regulation 6(2)(b), given that the Appellant raises issues as to the contribution made to the nitrates load within the catchment, it is necessary to consider whether agriculture makes a contribution to background nitrate levels and if so whether that contribution is significant.

The Responses

15. On 20 December 2021 the Respondent responded to the Appellant's notice of appeal pursuant to rule 23 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

16. The Respondent relied upon the original data report for NVZ S502 being the individual data sheet for the NVZ. The Respondent asserted that the data report provided a sufficient level of confidence that the relevant waters had been correctly identified as polluted or likely to become polluted. The Respondent asserted that the Appellant had not demonstrated that the designation methodology adopted by the Respondent had been incorrectly applied to the available data. The Respondent asserted that the methodology was suitable and robust having been developed by Defra with input from representatives from farming community and water industries as well as independent academics.

17. Following the Appellant's letter dated 3 January 2022, the Respondent submitted a further response. The Respondent noted that the Appellant was also pursuing his appeal on the basis of a Regulation 6(2)(a) appeal. The Respondent confirmed that the Appellant's evidence from the internal drainage Board for the Romney Marshes Area was accepted. The Respondent stated that "*We agree with the drainage pattern and direction of flow for water draining from*

the landholder's farm and the explanatory notes, in particular with the assessment that the Marsham Sewer drains into the Royal Military Canal (RMC), which discharges to the River Brede and ultimately into the sea.". In addition, the Respondent undertook and relies upon a detailed land drainage assessment reviewing land elevation data (LIDAR data) in conjunction with surface water course locations. The Respondent, relying upon maps A to E annexed to the second response concluded that part the Appellant's land drains in part to an unnamed watercourse to the north which drains into the Royal Military Canal (RMC) and in part into the Marsham Sewer, which drains into the RMC, which discharges to the River Brede and ultimately into the sea. The Respondent therefore concluded that The Appellant's land exclusively drains into the RMC before discharging into the River Brede, the designated waterbody (see Maps A to E at Appendix 1 of the second response). The Respondent notes that the RMC is part of the NVZ S502. The Respondent goes onto state that Water quality data from the nearby Marsham Sewer monitoring location SEE0001604 does not support removing the RMC from the NVZ S502. Quality class for SEE0001604 is 6 (fail), with high confidence that the 95th percentile concentration is above 11.3 mg/L nitrate. Finally, the Respondent noted that the RMC and all land draining into the RMC is clearly part of the NVZ.

Evidence, Findings of Fact and Discussion

Regulation 6(2)(a)

18. The letter from the internal drainage Board for the Romney Marshes Area produced by the Appellant provides that

    "All land South of the Royal Military Canal (RMC) drains into the Dimsdale Main which has a gravity discharge into the Brede, and when required can be pumped into the same through a pipe under Sea Road to the North.

    The Pett Level marshes can be topped up as required from the Pannel Petty Sewer to the East via a feed under the RMC, it normally flows into the RMC. The Marsham Sewer drains into the Royal Military Canal which discharges to the River Brede and then the sea, therefore it does not drain into the Dimsdale or any of the extensions".

19. The letter is supported by a Map with manuscript markings of drainage routes.

20. When the map attached to the internal drainage boards letter is compared with the holding map submitted by the Appellant and the NVZ map produced by the environment agency, it is clear that the holding lies to the north of the RMC rather than the south. The letter also indicates that the run-off from the Pett level marshes flows into the RMC as does the Marsham Sewer drain.

21. The LIDAR elevation map produced by the environment agency shows the topography of part of the holding falling towards an unnamed watercourse and part of the holding falling towards the Marsham sewer [bundle page 145 map B]. Map A shows the position of the unnamed watercourse and Marsham sewer in relation to the holding and the drainage routes of both the unnamed watercourse and Marsham sewer leading to the RMC [bundle page 144].

22. On the evidence before the tribunal, we find that the holding drains to the RMC via the unnamed watercourse and Marsham sewer as shown on map B [page 145 of the bundle]. We find that the unnamed watercourse and Marsham sewer drain to the RMC at a point where the Royal military Canal is included within the NVZ boundaries. It follows that we find that, on the balance of probabilities, that the Appellant has failed to demonstrate that the holding or any

part thereof does not drain into water which the Secretary of State proposes to identify, or to continue to identify, as polluted. It follows that we dismiss the Appellant's made pursuant to Regulation 6(2)(a).

Regulation 6(2)(b)

23. In relation to the Appellant's appeal pursuant to Regulation 6(2)(b) we note that this element of that the Appellant's appeal is in part misconceived. The Appellant asserts that the holding and his farming practices are such that they do not cause pollution. However, that is not the basis upon which designation is made. Designation is made by considering Water Framework Directive River catchments. Accordingly, the Appellant cannot succeed in his appeal by demonstrating that his own holding and farming practices do not cause pollution. The Appellant can however successfully appeal on the basis that nitrate inputs from agriculture as a whole within the Water Framework Directive River Catchment are insignificant. We have considered the Appellant's Regulation 6(2)(b) appeal on this basis.

24. The Appellant relies upon a Fairlight Stream Invertebrate survey and sewage treatment report dated the 16/19 August 2019. The survey was based upon a sampling methodology of a three minute kick sweep using a standard pond net followed by a minute manual search and account of the invertebrates found. Pollution was then measured by using a Field Studies Council method of applying a score to each invertebrate found then calculating the average score by dividing the total score by the numbers of invertebrate found to give a biotic index. As a point of reference, a clean unpolluted mountain stream could have a biotic index of 10. At the sampling points, the survey found biotic index scores of between 5 and 2.25. The report concluded that the sewage discharge from housing developments would increase water pollution entering a SSSI and the RMC and result in a decrease in diversity of invertebrates and oxygen levels. We pause here to note that there is no consideration within this evidence of the contribution from agriculture to nitrates within water courses sampled in the survey. Accordingly, this evidence, whist revealing an impact of sewage on the local water course, does not rebut the Environment Agency's findings that the sources of nitrates from agriculture remain significant within this NVZ.

25. The evidence for the designation is set out in the relevant designation datasheet. The Appellant raises no express challenge to the monitoring data produced by the environment agency or methodology adopted by the environment agency or the application of that methodology. In particular, there is no express challenge to the methodologies relating to modelling future contamination and allocation of contribution to pollution to specific land uses. The tribunal notes that the methodologies were developed under the guidance of the review group convened by the Department for Environment Food and rural affairs which included representatives from the farming and water industries as well as independent academic experts. In absence of any express challenge to the monitoring data and methodologies adopted by the Respondent or their application we place weight upon the evidence produced by the environment agency which is considered below.

26. The monitoring dataset shows sites 1604, 1614, 1617, 1651 up to 2015 clearly exceeding the 11.3 mg/L $N\text{-}NO_3$ limit (p128-130). This is the operational definition for pollution for the purposes of NVZ designation. Site 1614 has for a long period of time significantly exceeded the 11.3 mg/l threshold and is confidently predicted to continue to exceed that limit in the future. Site 1604 has for a long period of time significantly exceeded the 11.3 mg/l threshold [bundle pages 128-130]. Site 1604 is close to the Appellant's

holding (Fig 4 p115). More recent data for site 1604 shows that the site continues to regularly exceed the 11.3 mg/l threshold [bundle 143]. Therefore, this part of the NVZ continues to regularly exceed the 11.3 mg/l threshold. Accordingly, on the basis of the evidence before Tribunal we find that the water within the NVZ is affected by pollution to a level exceeding the 11.3 mg/l threshold.

27. The analysis by the Environment Agency predicts agriculture to contribute about 60% of the total nitrate loading to this catchment (Table 6 and Fig 7 see p118). As stated above, there is no challenge to the methodology adopted by the Environment Agency and the allocation of contribution to water pollution from different land uses. Again, we note that the Environment Agency's methodologies have been developed through the guidance of a review group as detailed above and accordingly we place weight upon the upon the Respondent's evidence. In addition, we note that the maps provided by the Appellant and the Respondent do not show a densely populated area and accordingly the land use as indicated by those maps is consistent with the allocation of pollutants as set out by the in the environment agency's evidence. Accordingly, we accept the environment agency's evidence and find that agriculture contributes approximately 60% of the total nitrate loading to this catchment.

28. As set out above, a contribution of 17% or more can be considered to be a significant contribution [EC v Belgium]. It follows that we find that agriculture contributes significantly to the nitrate loading in this NVZ. It follows that we find that the Appellant has failed to demonstrate that the holding drains into water which the Respondent should not identify, or should not continue to identify, as polluted nor has the Appellant demonstrated that agriculture within this NVZ is not a significant contributor to such pollution. It follows that we find that the Appellant has not made out his appeal pursuant to Regulation 6(2)(b). It follows that we dismiss the Appellant's appeal pursuant to Regulation 6(2)(b).

Conclusion

29. There are no grounds to disturb the designation of this land as lying within a NVZ and the appeal is dismissed.

Signed

TRIBUNAL JUDGE G WILSON **Date: 14 November 2022**