



NCN: [2023] UKFTT 424 (GRC)  
Case Reference: NVZ/2022/0023

First-tier Tribunal  
General Regulatory Chamber  
Environment

Determined on the Papers  
On 23 December 2022

Before

TRIBUNAL JUDGE G WILSON

Between

MR DENIS FOWLER

and

SECRETARY OF STATE FOR THE ENVIRONMENT

Appellant

Respondent

**Decision:** The proceedings are struck out pursuant to rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

## 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 ID G51.
3. The Appellant asserts that part of the Appellant's land at Quarry Farm, Jewison Lane, Sewerby, Bridlington, YO16 6YQ, more particularly identified in the application (the holding) does not drain into water which the Secretary of State proposes to identify, or to continue to identify, as polluted. Alternatively, drains into water which the Secretary of State should not identify, or should not continue to identify, as polluted. Accordingly, the Appellant asserts that the holding and should not form part of the groundwater NVZ G179 Flamborough.
4. The EA has conduct of the Respondent's case in the tribunal.

### **The Appeal and Evidence**

5. This appeal relates to ground water NVZ G179 Flamborough.
6. The Appellant appeals against the Respondent's notice of decision, pursuant to Regulation 5(3)(b) of the 2015 Regulations, informing the Appellant that from 31 December 2020 the holding falls wholly or partly within an area the Respondent has designated as a Nitrate Vulnerable Zone for 2021 to 2024. The Appellant claims that the holding does not drain into water which the Respondent has identified as polluted. The Appellant also claims that the holding drains into water which the Secretary of State should not identify, or should not continue to identify, as polluted. Accordingly, the Appeal is made pursuant to Regulation 6(2)(a) & (b).
7. The Appellant appealed to the Tribunal on the basis that "*he had not used any fertiliser, pesticide or other [sic] on any of my land*" whilst in occupation, a period of 14 years plus; the holding is small and is used to keep two horses, 3 goats together with 4 sheep, in accordance with the instructions of Natural England, on that part of the site designated as a SSSI; the remainder of the holding consists the Appellant's house, garden and 3 acres where the Appellant keeps 6 chickens, 8 geese and 3 rheas; the Appellant's and his wife's health is such that they do not work the land and are unlikely to do so. The Appellant reiterates that he uses no fertiliser, pesticides or anything else on any portion of the holding. The Appellant states that "*Only rainwater drains into anywhere but we are not aware of where it drains to we just thought this goes into the land*". In summary, the Appellant's appeal is that his practices and use of the land do not cause or significantly add to pollution. The Appellant has produced no evidence in support of the appeal.
8. The Respondent relies upon the original data report for groundwater NVZ G179 Flamborough being the individual data sheet for the NVZ. The Respondent asserted that the data sheet for the NVZ provides the most accurate assessment that the holding does drain to a polluted water. The Respondent asserted that the holding has been correctly identified as draining to a polluted water by hard

boundary mapping methodology as described in the Designation methodology.  
water.

9. The methodology used by the Respondent to derive and delineate NVZs for groundwaters in England is set out in the document titled “ Implementation of the Nitrate Pollution Prevention Regulations 2015 in England Method for designating Nitrate Vulnerable Zones for groundwaters December 2016”. Base maps from the Ordnance Survey and the geological mapping from the British Geological Survey (BGS) are utilised. Aquifer locations and designations are also taken from BGS information. Field boundaries for the final mapping of zones use data supplied by the Rural Payments Agency (RPA). The method uses these datasets (for example, geological and hydrological maps) combined with analysis of farm-derived nitrate loadings (from farm census returns) and monitored concentrations in groundwater together with a conceptual understanding of the behaviour of groundwater and nitrate both in general and in particular locations. A series of workshops with local EA staff provide for more detailed local knowledge to be obtained and area ground specialists consider factors affecting the path of water from the surface downwards into a groundwater body including, for example, the presence of impermeable layers and lateral flow through subsoil. Final mapping involves establishing boundaries that in general reflect geological or hydrological divides. This may include geological boundaries such as changes in rock type, faults and geological contacts; surface water catchment boundaries, groundwater level contours, high permeability drift outcrops; low permeability drift outcrops or rivers, acting as groundwater catchment divides. These boundaries are then applied to existing field boundaries based on map data provided by the Rural Payments Agency.
10. The Appellant raises no express challenge to the data upon which the environment agency conclusions are based (for example the geological and hydrological mapping); the methodology adopted by the environment agency or the application of that methodology. The tribunal notes that the data relied upon by the environment agency is from reputable sources to include Ordnance Survey and the geological mapping is from the BGS. The methodology described above is rationale relying upon amongst other things geological and hydrological features, analysis of farm-derived nitrate loadings (from farm census returns) and monitored concentrations in groundwater. In addition, the methodology has been tested against local knowledge at local workshop events such that local knowledge has been factored into the findings. In absence of any express challenge to the data and methodology adopted by the Respondent or their application, I place weight upon the evidence produced by the Environment Agency.

## The Law

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

### 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.

#### Regulation 8(3)(c)

Provides that the Tribunal may strike out the whole or a part of the proceedings if the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

12. As to when it is appropriate to strike out proceedings due to a lack of reasonable prospects of success, in HMRC v Fairford Group (in liquidation) and Fairford Partnership Limited (in liquidation) [2014] UKUT 329 it was held that the approach should be similar to that taken in the civil courts pursuant to r.3.4 of the Civil Procedure Rules. The Tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of being entirely without substance) prospect of succeeding on the issue on full consideration. A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable. The Tribunal must avoid conducting a 'mini-trial'. The power to strike out must be exercised in accordance with all aspects of the overriding objective (at r.2 of the Procedure Rules) to deal with cases fairly and justly, its effect being to debar a litigant from a full hearing of his claim. Yet striking out will be the correct course of action, and support the overriding objective, where an appeal or application raises an unwinnable case and continuance of the proceedings would be without any possible benefit to the parties and a waste of resources.

#### Application to Strike Out

13. On 2 March 2022 the Respondent applied to the Tribunal to strike out the Appellant's application pursuant to rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. The application was made on the basis that that the evidence presented by the Environment Agency is an accurate assessment that the land identified in this appeal does drain to a polluted water. No new substantive evidence had been produced by the Appellant to demonstrate that the land identified in the appeal did not drain to a polluted water. The Respondent asserted that without any alternative evidence to the contrary, the appeal must fail.
14. The Appellant was given until the 16 March 2022 to respond. The Appellant has

not responded.

### **Consideration and Decision**

15. The Appellant claims that the holding identified in the appeal does not drain into water which the Respondent has identified as polluted pursuant to Regulation 6(2)(a). The Environment Agency has brought forward detailed evidence to demonstrate that the holding drains to polluted waters. For the reasons set out above I attach weight to this evidence. The Appellant has brought forward no evidence to support his assertion that the holding does not drain to polluted waters. The Appellant's submissions confirm that he believes that water from the holding drains to the ground. The Appellant's submissions focus on the Appellant's assertion that the land use and practices do not cause pollution. In absence of any evidence demonstrating that the holding does not drain to polluted waters or detailed submissions setting out why the Appellant believes that the holding does not drain to polluted waters, I find that there is no realistic prospect of the Appellant's appeal, pursuant to Regulation 6(2)(a), succeeding. It follows that I grant the application to strike out the Appellant's appeal pursuant to Regulation 6(2)(a).
  
16. In relation to the Appellant's appeal pursuant to Regulation 6(2)(b), I find that this element of that the Appellant's appeal is 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. However, this is not the basis on which the Appellant advances his appeal nor is there any evidence in this regard. In contrast, the Environment Agency evidence, which for the reasons set out above, I attach weight indicates that the holding drains to polluted waters. Accordingly, on the evidence before me, I find that there is no realistic prospect of the Appellant's appeal pursuant to Regulation 6(2)(b) succeeding. It follows that I that I strike out the Appellant's appeal pursuant to Regulation 6(2)(b).

### **Conclusion**

17. It follows from what I have said above that the proceedings are struck out pursuant to rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

Signed

A handwritten signature in black ink, appearing to read 'G Wilson', written in a cursive style.

TRIBUNAL JUDGE G WILSON

Date: 23 December 2022