

## Nutrients and Pollution

The decision in R (Sahota) v Herefordshire [2022] EWCA 1640



**Alex Goodman**

## R (Sahota) v Herefordshire Council [2022] EWCA Civ 1640

- Singh LJ, Arnold LJ, Lewis LJ
- 13 December 2022
- Pollution from nitrates and phosphates to River Wye; Special Areas of Conservation
- Regulation 63 of the Conservation of Habitats and Species Regulations 2017
- Challenge to grant of planning permission for the erection of a cattle shed near to, and within the hydrological catchment of, the River Wye Special Area of Conservation.

## Two Issues

- Two issues in the appeal before the Court of Appeal:
  - i. whether the Judge in the High Court erred in admitting the evidence of Mr Bisset, a council ecologist; and
  - ii. whether the Defendant's planning committee was misled into believing that there was no need for a Habitats Regulation Assessment by virtue of a failure to consider cumulative impacts of multiple developments both in agriculture and in housing which had the potential to load phosphates and nitrates into the River Wye.

## Advice to Herefordshire's Planning Committee

- The officer compiling the report to committee had consulted the Council's ecology officer in August 2019 and transcribed that response into the OR. The consultee advised
- No likely significant effects on any relevant SSSI have been identified. There are no further ecology comments on this this development
- The Planning Officer had advised the committee
- “Noting that the site is outside the River Wye SAC, there are no other triggers for a Habitats Regulation Assessment (HRA) process and there are therefore no likely significant effects on any other relevant SSSI”.
- Transcripts of the Committee meeting showed that councillors in the committee meeting had queried the lack of analysis of cumulative impacts but had been told simply there had been no objection from ecology

## River Wye Special Area of Conservation

River Wye SAC is threatened by phosphates, nitrates and other nutrient load as are tributary rivers in those counties and in Shropshire, particularly the Lugg.

The SAC itself encompasses the river and its banks.

The main sources of these pollutants are what Natural England calls “point source and diffuse water pollution”: mainly sewage and agricultural run-off.

Other sources include surface water run-off, road run-off, and run-off from the urban environment, Manure being spread on fields which then washes into watercourses that reach the River Wye is a principal culprit from agriculture.

## Expert Evidence

- Expert Evidence was admitted for limited purposes.
- The expert explained:

“In simple terms, the whole issue is that when manure is spread within the hydrological catchment area, the rain causes that to run off, in part as surface run-off. The manure is nutrient-rich, and it is this increase in nutrients which causes the problem with the River Wye SAC. I have concluded that all of the land on which the manure is being spread is within the hydrological catchment area of the River Wye SAC.

Notwithstanding this, on the Council's case, some of the land is within the purple shaded area, which leads to the conclusion that (even on the Council's case) some of the manure spreading areas will potentially cause problems to the River Wye SAC. I am therefore unclear as to why an HRA wasn't carried out.”

## Herefordshire's Position Statement

After the ecology officer gave his response and shortly before granting planning permission in this case the Council adopted a "Position Statement":

-Commits to "Habitats Regulation Assessment" (here encompassing both non-statutory 'screening' and appropriate assessment) for all developments within two areas marked Red or Purple on the attached plan (encompassing around two thirds of the County).

-Some of the fields part of the farm around the application site and owned by the applicant and on which manure is spread are within the "Purple Area" on the Council's Position Statement Map: i.e. run off from there drains to the Wye.

-However, the area within the 'red line' of the application site itself is not within the Purple Area.

## Natural Resources Wales Position Statement

“New development within any part of the catchment which will increase the amount or concentration of wastewater effluent or organic materials discharged directly or indirectly into the catchment’s waterbodies has the potential to increase phosphate levels within those waterbodies.”

... “Any proposed development within the Wye catchment that might increase the amount of phosphate within the catchment could lead to additional damaging effects to the SAC features and therefore such proposals should be screened through a HRA to determine whether they are likely to have a significant effect on the SAC condition. Once issued by NRW, this position statement in combination with the Compliance Assessment Report, applies to all development that is yet to be determined by the relevant planning authority.”

## NRW Position Statement (2)

- The summary of Natural Resources Wales's current position is as follows:

“A large number of water bodies on the Wye are failing their phosphate targets. Even where they are passing, there is generally little headroom. For this reason we are unable to rule out the possibility that additional phosphate input on any part of the River Wye SAC will further damage the SAC. We therefore recommend that any proposed new development that might otherwise result in increasing the amount of phosphate within the SAC either by direct or indirect discharges must be able to demonstrate phosphate neutrality or betterment.”

## Summary of Claim

- The proposed development would involve the expansion of livestock farming, a consequent increase in manure production, and resultant spreading of manure on the fields which then runs off into watercourses increasing nutrient loads on the Wye.
- The development site is in the very centre of the catchment as defined by Natural England.
- Development was of a kind identified by Natural England, Natural Resources Wales and Herefordshire as capable of leading to increased phosphate and nitrate loads on the River Wye SAC and in the very location that risked such an impact.
- The Council had erred in failing to undertake “appropriate assessment” of the likely significant in-combination effects on the SAC as required by regulation 63 of the Habitats Regulations 2017 before granting planning permission and indeed in failing even to “screen” whether that was required.

## Issue 1: Admission of Council Evidence

3 Objections taken by the Appellant:

1. The Council's witness Mr Bisset was a consultee and so evidence of his uncommunicated thoughts was not relevant to what the Committee decided since they were not told his thoughts, they were only told what he communicated. The Court of Appeal disagreed and held that the reasons advanced to it were those of the officer; and so – the Court said- the distinction fell away and the Council could rely on the elaboration of the reasons given by the consultee in evidence as its reasons. [22]

2. It was alleged that Mr Bisset's evidence went beyond what the courts permit as correction or elucidation: see *R v Westminster City Council, ex parte Ermakov* [1996] 2 All ER 302; *R (Lanner Parish Council) v Cornwall Council* [2013] EWCA Civ 1290; *R (Watermead Parish Council) v Aylesbury Vale District Council* [2017] EWCA Civ 152, [2018] PTSR 43 *Kenyon v Secretary of State for Communities and Local Government* [2021] Env. L.R. 8. The Court disagreed.

3. Introducing new evidence in this way such that the true reasons for the decision could only be ascertained following permission being granted for judicial review runs against the grain of the statutory scheme for planning in which decisions are taken publicly in the open and on the basis of public consultation. The Court simply said that there was no express statutory obligation to which the Appellant could point.

## Issue 2: Failure to Undertake Appropriate Assessment

- Allegation was the officers failed to give any advice as to consideration of cumulative impacts.
- The advice given was that the site was not in the SAC and that was inadequate.
- That flaw was exacerbated at the committee meeting when committee members sought advice on cumulative impacts from the officer.
- The submission was that consequently the failure to conduct appropriate assessment was *Wednesbury* unreasonable.

## Regulations 63 (and 7) of the 2017 Regulations

63.— Assessment of implications for European sites and European offshore marine sites

(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which— (a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and (b) is not directly connected with or necessary to the management of that site, must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives.

...

(3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specifies.

(4) It must also, if it considers it appropriate, take the opinion of the general public, and if it does so, it must take such steps for that purpose as it considers appropriate.

(5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).

## Coöperatie Mobilisation for the Environment and Vereniging Leefmilieu (C-293/17 and C-294/17) [2019] Env. L.R. 27

The Court of Justice of the European Union held:

- At paragraph 73 that cattle rearing, and the application of fertilisers in the vicinity of Natura 2000 sites may be classified as a project within the meaning of article 6(3) of the Habitats Directive.
- At paragraphs 98-101 it set out the role of the Court under the Directive in reviewing whether the requirements of the Directive have been fulfilled:
  - 98. The assessment carried out under the first sentence of art.6(3) of the Habitats Directive cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the plans or the projects proposed on the protected site concerned (judgment of 25 July 2018, *Grace and Sweetman*, C-164/17, EU:C:2018:593 , at [39] and the case-law cited).
  - 100. Article 6(3) of the Habitats Directive thus integrates the precautionary principle
  - 101. In order to ensure that all the requirements thus recalled are fulfilled, it is for the national courts to carry out a thorough and in-depth examination of the scientific soundness of the “appropriate assessment”

## Article 6(3) and Reg 63 main principles from challenges

- A grant of planning permission for a project by a competent authority is unlawful where, before granting the permission, the authority fails to make an appropriate assessment of likely significant (i.e. 'possible significant') in-combination effects of the project on a European Site (in view of the site's conservation objectives) (*Sweetman AG* § 49-50; see also: NPPF §180; and NPPG §65-001).
- The informal threshold as to when appropriate assessment must be undertaken is a very low one (*Sweetman AG* §49; *Champion* § 41).
- A competent authority may lawfully decide to not even "bother to check" whether appropriate assessment is required where it is obvious that the purpose of undertaking appropriate assessment is already met: i.e. it is obvious and the competent authority is certain that there is no scientific doubt that the project could have a significant effect on the European Site even in combination with other developments. (*Sweetman* §49; *Champion* §41; *Cooperatie Mobilisation (Tab 28)* § 114, 117)).

## Two Prior Successful Cases

There have been two cases in which a challenge to a decision on whether to conduct appropriate assessment were successful. They are *Cumberlege* and *Wealden*.

- *DLA Delivery Ltd. v Baroness Cumberlege of Newick* [2018] Env. L.R. 34 was a case of a mistake of fact in appropriate assessment
- *Wealden D.C. SSCLG* [2017] Env L.R. 31 was a case of A mis-stated legal test- see Jay J at paragraph 104 and 109. The only rational approach was to reject the advice of Natural England which had failed to take account of cumulative impacts of traffic.

*Smyth v Secretary of State for Communities and Local Government [2015] EWCA Civ 174, [2015] PTSR 1417, at para. 83*

Per Sales LJ:

"I agree with Mr Jones's submission, to the extent that he argued that it would not comply with the relevant standards of evidence indicated by the Court of Justice for a national competent authority simply to rely for its screening opinion or 'appropriate assessment' under article 6(3) on a mere assertion by an expert, unsupported by consideration of any background facts and without reasoning to explain the assertion made. If such a case arose, evidence of that character could fairly be described as merely subjective, and as material which failed to qualify as something which could be regarded as 'the best scientific knowledge in the field'. However, *such a case will be rare* . Expert witnesses know that it is incumbent on them to refer to relevant underlying evidence and to explain their opinions, and typically do so."

- Was this one of those "rare" cases in which it was "obvious" that no appropriate assessment was required.?

## Resolution of Issue 2

- The error alleged was that checking the NE database to ascertain whether the red line of a development site fell within a zone was not dispositive of the question whether appropriate assessment was required. The advice actually given – that the site is not within the SAC and that there are no triggers- that was plainly wrong as a sufficient basis. There was a lacuna in the consideration of cumulative impacts because the committee were not advised whether development outside those areas which were flagged by N.E. might be hydrologically connected to the River Wye SAC in any event and (b) restricting the search to the red line area rather than the impact are of the development omitted consideration of impacts of manure spreading on surrounding fields on within the catchment of the Wye.
- Dismissing the Appeal in a fairly summary way, the Court held that the Appellant's complaints did not amount to allegations of public law error and were in truth a disagreement with the evidence, but that such a disagreement was not a basis for challenge.

# Supreme Court Appeal

- Appeal filed in Supreme Court.
  - (1) To what standard must a decision by a competent authority that a development is not likely to have a significant effect on a European site be made where that conclusion leads it not to trigger appropriate assessment?

Having regard to the conclusion on issue 1:

- (1) Did the Court of Appeal properly direct itself in proceeding on the basis that the reasons given in evidence by a consultee to the Council's committee could be imputed to the Committee, or should its focus have been on the advice communicated to the Committee in the officer report?
- (2) Did the Court err in failing to quash the planning permission on the ground that that the consultee officer's evidence did not show the Respondent had dispensed with appropriate assessment to the proper *Waddenzee* standard?
- (3) What is the proper approach of a Court to satisfying itself of the scientific and legal soundness of a decision to dispense with appropriate assessment and did the Court fulfil that duty?

# Thank you for listening

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