Neutral Citation Number: [2022] EWHC 508 (Admin)

Case No: CO/3345/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 10/03/2022

Before:

MR JUSTICE CHAMBERLAIN

- -

Between:

TIMOTHY CHARLES HARRIS **Cla**
and ANGELIKA HARRIS

- and -

ENVIRONMENT AGENCY **Defe**

- and –

NATURAL ENGLAND **Interested**

- -

- -

Richard Wald QC (instructed by **Freeths LLP**) for the **Claimant**

Matthew Dale-Harris (instructed by **Environment Agency**) for the **Defendant**

Hearing dates: 24 February 2022

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Approved Judgment

Mr Justice Chamberlain :

Introduction

1
The claimants, Timothy and Angelika Harris, renew their application for permission to apply for judicial review of decisions of the Environment Agency ("the EA") reflected in a report dated 14 June 2021 entitled Ant Broads and Marshes Resorting Sustainable Abstraction: Investigation and Options Appraisal Closure Report ("the RSA report"). It addresses the effects of water abstraction in relation to three sites of special scientific interest ("SSSIs") in the Ant Valley in Norfolk.

Background

2
The key background to the RSA report is set out in the witness statement of Ian Pearson on behalf of the EA. The Restoring Sustainable Abstraction programme ("the RSA programme") is a programme of work undertaken by the EA across England to identify, investigate, and resolve environmental risks or problems caused by unsustainable licensed water abstraction.

3
Between 1999-2012, the EA identified approximately 500 sites, predominantly SSSIs, which were potentially at risk from water abstraction. They also included other sites where EA staff, Natural England or other organisations had identified abstraction as a potential environmental risk. The RSA programme was closed to new sites in 2012. If new evidence shows that another site needs investigation, the EA can still address it, but not as part of the RSA programme.

4
The Ant Valley SSSIs were first investigated under the RSA programme as part of the Review of Consents initiative between 2002 and 2010, which concluded that the risk associated with licensed abstraction was unacceptable at four SSSIs in the Norfolk Broads, not including the Ant Valley sites. This resulted in a programme to manage the risks identified. The programme ran between 2009 and 2014.

5
A new investigation under the RSA was begun in 2010 in relation to the Ant Broads and Marshes SSSI, partly as a result of information provided by the claimants. In 2016, some results from this investigation were relied upon in rejecting appeals from the EA's decision not to renew irrigation licences. In 2018, the EA conducted an external consultation, during which consultees suggested extending the RSA investigation to cover other SSSIs. The EA initially rejected the suggestion, because the RSA programme was closed to the addition of new sites, but then decided that two further sites immediately adjacent to the Ant Broads and Marshes SSSI – Broad Fen, Dilham and Alderfen Broad – could be added without significant additional expense. The outputs from this extended investigation were also considered by the EA to be potentially relevant to some licence renewal applications which were pending.

6
It was decided not to include Smallburgh Fen SSSI because ecological concerns had previously been identified there and licence changes recently introduced. The EA decided that the inclusion of this additional site was not justified.

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The claimants' first ground of challenge is to the scope of the RSA Report, which on its face makes clear that it is limited to considering 240 licensed abstractions (comprising both surface and groundwater licences) and their effect on three SSSIs: Ant Broads and Marshes, Broad Fen Dilham and Alderfen. All three are located within what are called the "Broads European sites", which are special areas of conservation for the purposes of Council Directive 92/43/EEC ("the Habitats Directive"). Importantly, however, the three SSSIs make up only a small part of the Broads European sites.

Ground 1

The claimants' submissions

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The claimants say that the EA is aware of the risk of damage from abstraction to sites other than the three SSSIs identified. This awareness comes in part from material brought to its attention by the claimants and from its own investigations undertaken as part of the licence appeals process in 2016. The claimants also point to other documents which show the EA's knowledge of risks to other areas within the Broads European sites.

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The essence of the claimants' ground 1 is this. The Conversation of Habitats and Species Regulations 2017 (SI 2017/1012, "the Habitats Regulations") were adopted to implement the UK's obligations under the Habitats Directive. Article 6(2) of the Habitats Directive requires Member States to "take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of the Directive".

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As respects non-marine areas, reg. 9(1) of the Habitats Regulations applies to "the appropriate authority" and to "nature conservation bodies" and provides that they "must exercise their functions which are relevant to nature conservation… so as to secure compliance with the requirements of the Directives". The Directives referred to are the Habitats Directive and Directive 2009/147/EC ("the new Wild Bird Directive"). It is common ground that reg. 9(1) does not apply to the EA, which is neither an "appropriate authority" nor a "nature conservation body". However, the EA is a "competent authority" to which the provisions of reg. 9(3) apply. That provides:

"Without prejudice to the preceding provisions, a competent authority, in exercising any of its functions, must have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions."

11
The claimants submit that, taken together, Article 6(2) of the Habitats Directive and reg. 9(3) of the Habitats Regulations require the EA to take appropriate steps to avoid the deterioration of the natural habitats and the habitats of species within European sites, as well as disturbance of the species for which the areas have been designated in so far as such disturbance could be significant in relation to the objectives of the Habitats Directive.

12
This, the claimants say, imposes a proactive or anticipatory duty to avoid or prevent the relevant deterioration or significant disturbance, in line with the EU law "prevention principle". They cannot simply wait until the deterioration has happened before taking action. Moreover, it is not sufficient to rely on the previous Review of Consents process, which concluded in 2010, because the duty imposed by Article 6(2) is an ongoing one and, in any event, the EA now has better information which it accepts calls the results of the previous process into question. Finally, the claimants say that what the EA must look for is not the deterioration or significant disturbance which has happened, but the risk of this occurring in the future.

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The claimants submit that, having elected to review the effect of 240 abstraction sites, it was incumbent on the EA to ensure that none of them has any adverse effect on the integrity of the Broads European sites, rather than to limit its inquiry to the three SSSIs identified. In this regard, the claimants rely on Article 6(3) of the Habitats Directive, which has been interpreted as requiring that any assessment "may not 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 works proposed on the protected site concerned": see Case 399/14 Grüne Liga ECLI:EU:C:2016:10, at [50].

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The claimants add that the RSA Report itself acknowledges the existence of other sites, beyond the three SSSIs identified, where the EA's own thresholds for significant impact are met.

The EA's response

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The EA accepts that there may indeed be evidence showing a probability or risk of deterioration affecting other sites than the three SSSIs identified. But the decision challenged is the decision not to include any other sites in the RSA Report. New evidence of risk in respect of other protected sites can be addressed under separate workstreams.

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In this regard, the EA notes that the investigation which resulted in the RSA Report was begun in 2010 in response to specific concerns about the Ant Broads and Marshes SSSI. Its scope was broadened in 2018 to two other sites on the basis of their physical proximity and similar protected habitat, but a decision was taken not to include other sites which were further away and likely to give rise to wider concerns or require new evidence. All this was against the background that the RSA programme was closed to new sites.

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The EA relies on the decisions of Lang J in R (WWF-UK) v Secretary of State for Environment, Food and Rural Affairs [2021] EWHC 1870 (Admin), at [44]-[46] for the proposition that public authorities are entitled to have regard to cost in deciding how to exercise their functions.

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The EA submits that it is unsustainable to argue that reg. 9(3) of the Habitats Regulations imposes an obligation of result to comply with the requirements of the Habitats Directive. Regulation 9(1) does impose such an obligation, though not on the EA, but reg. 9(3), which does apply to the EA, is deliberately differently framed. It imposes only an obligation to have regard to the requirements of the Directive. Moreover, Article 6(2) of the Habitats Directive has not been recognised as having direct effect.

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In any event, the EA submits that it is not arguable that it breached reg. 9(3). That provision imposes an obligation to have regard to the requirements of the Directive so far as they may be affected by the exercise of its functions . The relevant function was the production of a report focussed on three SSSIs. It was not the function of considering more generally what action needed to be taken to address risks to other parts of the Broads European sites. The RSA Report made plain on its face, at §2.3, that "[s]hould concerns be expressed in relation to additional SSSIs via the database, a new, separate investigation could be instigated". A footnote made clear that this would not be under the RSA programme, which was closed to new sites in 2012.

Discussion

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I consider that this ground is arguable. In those circumstances it would not be appropriate to say very much about it, save to indicate briefly what I see as the main area of dispute.

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There is force in the EA's submissions that it must be able to take decisions about the allocation of its scarce resources; and that the decisions to close the RSA programme to new sites (in 2012) and to extend the present investigation to the other Ant Valley sites but no further (in 2018) were rational resource-allocation decisions; and that the EA cannot be required to keep expanding the programme indefinitely. But it is arguable that, once it had information that other sites within the area protected by the Habitats Directive were potentially impacted by the abstraction licences it had identified, it had an obligation to do something (whether within the scope of the RSA programme or otherwise) proactively to address the risk of deterioration caused by water abstraction at those sites. Although the EA has not ruled out action in respect of other sites, it is arguable that it has not taken steps of a kind that would satisfy the duty which the claimants submit, on an arguable basis, reg. 9(3) imposes on it.

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The extent of the obligations imposed post-Brexit on the EA by reg. 9(3) of the Habitats Regulations, read with the relevant provisions of the European Union (Withdrawal) Act 2018, is a question which would benefit from fuller argument.

Ground 2

The claimants' submissions

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Under ground 2, the claimants submit that it was not reasonably or lawfully open to the EA to conclude (i) that the action recommended at section 7 of the RSA Report could comply with the Broads SAC and Broadlands SPA conservation objectives ("COs") in relation to the three SSSIs, or (ii) that such action would have no adverse effect on the integrity of the three SSSIs.

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The function of defining the COs is that of Natural England. The COs were defined in two documents published by Natural England in 27 November 2018 and 21 February 2019 to include maintaining or restoring "the supporting processes on which qualifying natural habitats and the habitats of qualifying species rely". The claimants say that the river flow of the River Ant is very important to the hydrological health of the Ant Broads and Marshes hydrological system and is therefore is one such "supporting process". Its importance lies, inter alia , in the river's ability to push back saline tidal waters, which is vital for birds such as the Great Bittern. River flow is also vital in other ways for other qualifying species, such as the Desmoulins whorl snail, the otter and the fen orchid.

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The RSA Report modelled river flows at three locations on the Ant. A further technical report published on 22 June 2021 modelled river flow at a fourth location. Based on its findings, the EA recommended action, including amendments to abstraction licences.

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The claimants complain about this conclusion on two bases: first, that it failed to apply the correct standard, which it says was the “high ecological status” (“HES”) standard; and second, that it failed to realise the significance of its own findings in relation to the results seen at one of the four outflows sampled, described as “outflow from ABM”.

The EA’s submissions

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The EA responds that there are no flow standards defined in law and the guidance acknowledges explicitly that different flow deviation thresholds may be set for different reaches of the same river. Reference is made to the Joint Nature Conservation Committee guidance of September 2016.

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The EA submits that the question of which standards to apply was carefully considered on the basis of advice from Natural England, which was followed.

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As to the complaint that the EA failed to realise the significance of the result from “outflow from ABM”, the EA responds that this is based on a misreading of the relevant part of the technical report.

Discussion

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As the EA has pointed out, the selection of flow standards was not prescribed by legislation or guidance. There was no requirement to apply the same standards to every part of the same river. There are other examples where different standards have been applied to different reaches of the same river: the River Gipping in Suffolk and the River Stour in Essex. That being so, the selection of the relevant standard was quintessentially the kind of matter on which a wide margin of discretion must be accorded to the decision-maker. It is a matter with which this court could interfere only if the decision were irrational or vitiated by some other public law error.

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It is clear that the EA took advice from Natural England. On a fair reading of the document recording that advice, what was described by Natural England as “odd” was the suggestion that there should be no flow target at all for main river channels. Although this was at one stage under consideration, it was not taken forward by the EA. The suggestion that was taken forward, the use of the rCSMG flow target, for the main river channels, was approved by Natural England in these terms:

“We agree achieving this target would restore the flow elements of the hydrological function of the river system sufficiently to meet the conservation objectives. Without pre-empting the EA’s HRA, we believe that combined with achieving all other targets as discussed this could enable a conclusion of no adverse effect on the integrity of the site to be reached.”

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I therefore reject the claimants’ suggestion that there was anything equivocal about Natural England’s advice. Natural England advised that the use of the rCSMG flow target for the main river channels could enable a conclusion of no adverse effect on site integrity to be reached. The EA accepted that advice.

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I accept in principle that taking and following advice form an expert body such as Natural England is not necessarily a complete answer to a claim for judicial review. If, for example, Natural England's advice had been infected by a public law error, and the EA had simply adopted it, the error would infect the EA's decision: see Wealden District Council v Secretary of State for Communities and Local Government [2017] EWHC 351 (Admin), [2017] Env LR 31, [111]. But in this case, the question of which flow standard to apply to the main river channels was one of judgment. Strong evidence would be required to show that the expert judgment of Natural England on this point was irrational. Despite the submissions of Mr Wald, I am not persuaded that there is any such evidence in this case.

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As to the treatment of the results from the AMB outflow, the evidence of Mr Pearson shows that this too was considered. Changes to licence conditions, and in particular a condition called "hands off flow", were anticipated to bring river flow within the standard selected. The evidence presented by Mr Pearson is thorough, detailed and compelling. It would take a great deal to show that the approach of the EA in this highly technical area was not properly open to it. The claimants have not established that the EA acted irrationally in concluding that the actions recommended in section 7 of the Report would meet the COs with no adverse effect on the integrity of the SSSIs.

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Ground 2 is not arguable.

Conclusion

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I will therefore grant permission to apply for judicial review on ground 1 but refuse it on ground 2.