

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

B E T W E E N :

R (on the application of
(1) ANGLING TRUST
(2) BROADS ANGLING SERVICES GROUP)

Claimants

and

(1) THE ENVIRONMENT AGENCY
(2) NATURAL ENGLAND

Defendants

NATURAL ENGLAND'S SUMMARY GROUNDS OF DEFENCE

[S/T/P] is a reference to the claim bundle where S is a section number, T a tab number and P a page number

SFG # is a reference to the Claimants' Statement of Facts and Grounds [A/3/9-37] where # is a paragraph number

INTRODUCTION

1. The Claimants seek to bring a challenge by way of judicial review against the decision of the First Defendant ("**the EA**"), to grant a flood risk activity permit ("**FRAP**") to the Second Defendant ("**NE**") on 23 July 2020. The FRAP authorises for the purpose of the Environmental Permitting (England and Wales) Regulations 2016 ("**EPR**") the installation of three temporary fish barriers at the entrances to Hoveton Great Broad ("**HGB**") in the Norfolk Broads. The claim was filed on 7 October 2020.

2. The FRAP is required for the next phase of the Hoveton Wetland Restoration Project, an important conservation scheme designed to improve water quality at HGB and Hudson's Bay and improve the conservation status of these protected sites.
3. NE accepts that ground 1 is arguable and, in line with the position of the EA, is prepared to consent to judgment on that ground. NE accepts that it is appropriate that a further public consultation exercise is carried out, including on certain documents relied upon by the EA in making the decision.
4. NE does not accept that grounds 2 and 3 are arguable and, for the reasons set out below, it resists those grounds.
5. NE also does not accept that ground 4 is arguable. By ground 4, the Claimants seek to challenge "*NE's decision to proceed with the installation of the barriers despite having given an assurance not to do so if the EA's fisheries specialists assessed the impact on fish as significant*" (SFG 1). That appears to be the reason for which NE is identified as Second Defendant, rather than as an interested party. The argument was not raised in pre-action correspondence [B/4/38-49]. Nor does it have any direct connection to the decision that is challenged: the grant of FRAP by the EA.¹ NE accordingly submits that ground 4 is (i) misconceived in that it fails to identify the decision under challenge and (ii) substantially out of time to the extent that it seeks to challenge any decision by NE to proceed with the project. Moreover, the single sentence relied upon in the 2014 Environment Statement ("**ES**") clearly did not create a legitimate expectation upon which the Claimants can rely, especially given that further work has been undertaken to assess the impacts on fish since 2014, NE considers that it is appropriate to pursue the project notwithstanding any residual risk of impacts on fish and – in granting the FRAP – the EA agreed.
6. Given NE's intention to consent to judgment on ground 1, this document is relatively brief and does not set out all the relevant background. If the FRAP is quashed, grounds 2 and 3 become wholly academic and ground 4 becomes substantially academic. NE will

¹ Except arguably to the extent that in making the FRAP application on 25 November 2019, NE expressed its clear intention to proceed with this part of the project.

seek its costs of responding to ground 4 (or any of the other grounds that are maintained) notwithstanding the indications from it and the EA that they will consent to judgment on ground 1.²

7. The claim should be considered by the Planning Court as it involves a statutory consent under an environmental consenting regime. For the avoidance of doubt, NE also asks that the Planning Liaison Judge categorises the claim as “significant” in accordance with PD 54E para.3.1 as it relates to a significant project of wider environmental importance for the Broads and the Natura 2000 network generally. The project is time-sensitive and urgently needed.

BRIEF OUTLINE OF FACTS

8. HGB and Hudson’s Bay are part of the Bure Marshes National Nature Reserve (“**NNR**”), the Bure Broads and Marshes Site of Special Scientific Interest (“**SSSI**”), the Broads Special Area of Conservation (“**SAC**”) and Broadland Special Protection Area (“**SPA**”) and the Broadland Ramsar site. They are also a single lake water body under the EU Water Framework Directive³ (“**WFD**”). The sites are in long-standing poor condition, recognised as “*unfavourable – no change*” for nature conservation and of poor ecological status under the WFD. They require positive management to improve that condition.
9. The FRAP is part of a wider restoration project for HGB and Hudson’s Bay. Planning permission for the creation of reed beds, pumping of lake sediment to create bunds and the construction of temporary fish barriers was granted by the Broads Authority on 25 September 2014 [I/29/535-544]. The aim is to create a “*healthy clear water body with thriving macrophyte beds [that] will be beneficial for fish which migrate between the broads, river and marshes*” (2014 WFD Compliance Assessment [I/28/530]).
10. In 2014, NE (as co-ordinating beneficiary) applied for and received EU LIFE programme funding for the Hoveton Wetland Restoration Project. The phases of the project relating

² NE does not otherwise seek its costs. Costs schedules, if required, will be filed and served separately.

³ Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy.

to sediment removal and habitat creation have been completed. The claim relates to the next phase (biomanipulation) whereby temporary fish barriers will be erected and fish removed from HGB in order to establish a more ecologically balanced condition. Despite various statements in the SFG,⁴ the proposal is for temporary fish barriers for up to 10 years only – any possible extension would require an extension of both planning permission⁵ and environmental permitting for which NE would have to apply.

11. In order to inform this phase, NE and the EA commissioned further work to assess the impact on fish in HGB and Hudson’s Bay, including funding PhD research. This information was shared with the Second Claimant in 2018 and 2019.
12. The FRAP application was accepted by the EA on 2 December 2019. The focus of the application documents submitted was on approving the technical details of the three fish barriers and disclosing modelling to assess the flood risk impact of the project (carried out by Jacobs). The activity is not EIA development. The EA confirmed by notices issued on 28 and 29 January 2020 that it did not consider that the project would have a likely significant effect on habitats (either EU sites or the SSSIs).
13. Separately, NE had been engaging with the EA over issues about the wider impacts of the project. In that connection, NE prepared a background document entitled *Hoveton Project: creating a sustainable future for the Bure system (“Sustainable Future”)* that was shared with the EA in November 2019, but was not part of the application documents. As is explained in the introduction:

“The document has been circulated for comment to those officers within NE and the EA with an interest, relevant specialism or historic involvement in the project ...” [G/21/376].

14. *Sustainable Future* set out in one place the case for the project, including the background, the legal drivers, the ecological justification for the project and the implications for fish.

⁴ See SFG 3, 51 and 53.

⁵ Condition 22 of the 2014 permission requires the removal of the barriers at the latest after 10 years from installation [I/29/540].

15. NE also submitted an addendum to the 2014 WFD Assessment [G/25/461-474] in January 2020. As part of the determination process, the EA made two formal requests for further information on 28 February 2020⁶ and 27 March 2020.⁷ NE responded to those requests, including the submission of a composite updated WFD Assessment [G/20/361-374].
16. On 28 February 2020 the EA's FBG team provided its detailed comments in response to the application [F/17/317-332].
17. The EA decided to carry out non-statutory consultation on the application between 20 January and 17 February 2020. It is understood that this was on account of the high level of public interest in the application, to afford members of the public the opportunity to submit their comments. 83 comments from the public – both in support and opposition – were received in response, including from the Second Claimant.⁸
18. Separately, NE continued to have meetings with the Second Claimant to explain the basis and justification for its approach, including at meetings on 8 January 2020 and 3 February 2020. At the February meeting NE shared a slightly edited copy of *Sustainable Future* and a copy of its Fisheries Improvement Programme. That was done in specific response to a request from the Second Claimant to see a copy of NE's evidence in connection with the current consultation. The claims of non-disclosure at SFG 20, SFG 37(c) and SFG 37(f) are therefore somewhat overstated.

LAW

19. The WFD is implemented in England and Wales by the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017. The objective of the WFD is to achieve at least good water status at a river basin management level. It applies to all water bodies. Water quality is defined in Annex V. Section 1.1 breaks this down for lakes into (i) biological elements, (ii) hydromorphological elements and (iii) chemical and

⁶ Seeking more information about hydraulic modelling.

⁷ Seeking more information about project alternatives.

⁸ As is set out at the end of the Decision Document [E/15/275-311]. A summary of the Second Claimant's response is at [E/15/309-310].

physico-chemical elements. Fish fauna is one of the biological elements. Section 1.2.2 defines “high status”, “good status” and “moderate status” for the various elements. Waters achieving a status below moderate are classified as poor or bad. Broadly, for fish fauna, the more that species composition and abundance correspond to undisturbed conditions, and the less that the age structures of fish communities show signs of anthropogenic disturbance, the better the status.

20. This case concerns the EA’s predictive judgment about environmental status where there are conflicting scientific views. The guidance of the Court of Appeal in R (Mott) v Environment Agency [2016] EWCA Civ 564; [2016] 1 WLR 4338 is therefore of particular relevance. In that case, which also concerned assessments about fish behaviour, Beatson LJ at para.69 approved the common ground that:

“the court should afford a decision-maker an enhanced margin of appreciation in cases, such as the present, involving scientific, technical and predictive assessments.”

RESPONSE TO GROUNDS OF CHALLENGE

Ground 1: Failure to publicise and consult

21. The EA was not under a statutory duty to consult on the FRAP application.⁹ The EA instead decided to carry out a non-statutory consultation exercise on account of what it perceived to be the “*high public interest*” in the application. NE is prepared to accept that in carrying out that exercise, the EA acted in breach of procedural fairness by omitting from the scope of the consultation NE’s document *Sustainable Future* and/or the draft Fisheries Improvement Programme.

Ground 2: wrong test under Water Framework Directive

22. The Claimants’ basic contention under ground 2 is that the EA was not entitled to grant the FRAP given the risk of deterioration in the fish quality element of HGB and/or Hudson’s Bay, or that of any other water body in the wider Broads system (SFG 50).

⁹ See para.5 of Sch.5 to the EPR that specifically excludes applications for a stand-alone flood risk activity from the requirements for consultation in para.6 unless the project is likely to have a significant adverse effect on the environment that has not been assessed under another consenting process.

23. However, the EA considered the status of the water bodies carefully and came to a reasoned view that *“the scheme will achieve its stated aims within a temporary period, not exceeding 10 years, with benefits in terms of ecological status and water quality and with no deterioration in the fish element status”* (Decision Document Introduction [E/15/244]). The EA recognised the difference in technical and scientific opinion on whether excluding fish from HGB constitutes deterioration in the fish element status of the biological quality elements of ecological status, but concluded that such a deterioration would not occur. This ground of claim is therefore based on a fundamental misunderstanding of the decision.
24. The EA did not fail *“to determine, or even consider, what the effect of the barriers would be on the status of the ‘fish quality element’ in HGB/HB whilst they are in place”* (SFG 52). The Decision Document sets out the competing views of the FGB team and NE [E/15/248-250] and concludes at points 1-11 that the potential reduction in the numbers of the dominant species in HGB will not constitute a deterioration in status [E/15/250-256].
25. Indeed, as is acknowledged at SFG 53 the EA to a large extent *“adopted NE’s evidence and arguments in support of the conclusion that there would be no deterioration”*.
26. In coming to that conclusion, the EA accepted that there were *“inherent unknowns”* and a *“potential risk to bream spawning success”* and for that reason the EA added condition 8 to the permit [E/14/238]. As the Decision Document explains:
- “This is to ensure that if bream spawning success is significantly affected and is directly attributable to their exclusion from HGB and HB and not to other factors, we can require the fish barriers to be opened up to allow bream into HGB and HB, so as to mitigate this potential impact”* [E/15/255].
27. Condition 8 is triggered by *“environmental harm”*, which is defined among other things as human activity that may *“prevent the achievement of environmental objectives within the meaning of the Water Framework Directive 2000/60/EC”* [E/14/242]. As the Decision Document acknowledged the description of the fish element status in Annex V

to the WFD refers to the natural composition and abundance of “*fish communities*” rather than a single species [point 5 E/15/252].

28. Case 461/13 Bund für Umwelt und Naturschutz Deutschland eV v Bundesrepublik Deutschland about a scheme to deepen parts of the river Weser in Germany to allow for the passage of larger container vessels (hereafter “Weser”) is distinguishable. There was no doubt in that case that the project would lead to the deterioration of the status of the river. The primary question, that the CJEU answered in the negative, was whether the obligation in Art.4(1)(a)(i) of the WFD did not prevent authorisation of a project having that effect, as it is “*merely a statement of an objective for management planning*”. In this case, the project was designed to improve water status under the WFD and the EA concluded that there would be no deterioration of the fish quality element.
29. Similarly, the Claimants are wrong to pray in aid the precautionary principle simply on the basis that risks were acknowledged (SFG 54), for two reasons. First, the EA concluded that those risks could be managed through conditions. Second, and taking a wider view, the FRAP is part of a project intended to improve water quality from poor status and to improve the conservation status from “*unfavourable – no change*” to “*recovering*”. It would be absurd to interpret EU law as preventing projects designed to improve the environment on account of residual uncertainties. It would make positive conservation management impossible and would run counter to the primary objective of EU environmental law to achieve “*a high level of protection*” (TFEU Art.191(2)).
30. Cases about screening in Environmental Impact Assessment (Case C-2/07 Abraham and R (Birch) v Barnsley MBC [2010] EWCA Civ 1180) are also of no relevance. All they establish is that environmental assessment needs to be taken with full knowledge of the likely environmental impacts. The project consented under the FRAP is not EIA development and, in any event, the decision was taken following careful consideration of the potential impacts.

31. Ground 2 is therefore unarguable. The EA came to a careful and considered conclusion on the fish fauna element of water quality for the purposes of the WFD. That was a predictive scientific judgment to which the Court should give a wide margin of appreciation (see R (Mott) v EA, above).

Ground 3: irrationality in weight to evidence

32. Ground 3 is hopeless. The EA was obviously entitled to give greater weight to NE's evidence over that from its FBG team on the basis that the former was more robust scientifically. The Court should give a wide margin of appreciation to the EA's weighing up of scientific evidence.

Ground 4: legitimate expectation

33. Ground 4 is the argument that it would be "*fundamentally unfair*" for NE to depart from the statement at para.8.5.24 of the 2014 ES (SFG 63). The paragraph relied upon is as follows:

"While fish are considered to be of low ecological value (there are no protected or designated species present), recreational angling is of significant economic importance within the middle Bure. The impacts on fish are being assessed as part of on-going work to inform the project. If these impacts are assessed by Environment Agency fisheries specialists as being significant, biomanipulation will not proceed" [D/13/208].

34. There are a number of fundamental flaws in this ground.

35. First, it is not said *what decision* by NE amounts to an unlawful breach of any legitimate expectation. Para.8.5.24 of the 2014 ES was not referred to in any of the consultation responses on the FRAP. The First Claimant's letter of 11 August 2020 states that "*[t]he Angling Trust has uncovered the now broken commitment from Natural England in your 2014 Environmental Statement ...*" [J/36/568]. Logically, in these terms, any "*commitment*" must have been "*broken*" at some stage prior to NE deciding that it wished to pursue the FRAP, which it applied for on 25 November 2019. It is too late for the Claimants to seek to bolt this argument onto a claim against the FRAP. It should be summarily dismissed for this reason alone.

36. Second, it is unarguable that the statement creates a legitimate expectation from which it would be “*fundamentally unfair*” for NE to depart. The most recent authoritative case in this area is Re Finucane’s application for Judicial Review [2019] UKSC 7; [2019] HRLR 7 where Lord Kerr JSC surveyed the authorities and summarised (at para.62):

“...where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so. The court is the arbiter of fairness in this context. And a matter sounding on the question of fairness is whether the alteration in policy frustrates any reliance which the person or group has placed on it.”

37. The attempt to establish the basis of a substantive¹⁰ legitimate expectation in this case obviously fails on a number of bases as follows:

- a. The statement is not clear and unambiguous: it depends upon the view of EA specialists about what is “*significant*”, which is a subjective judgment.
- b. It is not at all clear that the Claimants placed any reliance (detrimental or otherwise) on para.8.5.24. As above the First Claimant’s letter of 11 August 2020 describes it as “*uncovered*” (presumably only recently).
- c. It would be unreasonable to hold a public authority to the subjective judgment of third party specialists (with no right of appeal), especially if that meant potentially disregarding new information or changes in circumstances.
- d. There are powerful legal and policy reasons pointing away from holding NE to a statement purporting to restrict the management of water bodies and conservation sites: NE is bound by statutory duties to achieve good water quality status in the HGB and to improve its conservation status. A legitimate expectation cannot override those duties.
- e. There is no reason why fairness in this case requires NE to adhere to a statement made in 2014. The FRAP application was fully considered and the risks and impacts, including on fish, fully assessed. A statement made six years before is of no real or continuing force in that context.

¹⁰ The claimant Claimants relies upon the Divisional Court authority of R v IRC ex p MFK Underwriting Agencies Ltd [1990] 1 WLR 1545 a case about substantive legitimate expectation.

38. Third, and in any event, NE's position remains that there is unlikely to be a long-term significant impact on fish. The *Sustainable Future* document makes clear that the aim is to restore a more diverse and natural fish assemblage which also contains species such as tench, eels and rudd [G/21/392 and 400]. It emphasises that bream are a common and adaptable species and that it is "very unlikely" that they would not be able to access other areas for spawning, feeding and loafing habitat [G/21/406] and that the risk to fisheries is "unlikely to be significant" given the alternative habitats available [G/21/410]. The EA agreed in the Decision Document that "it is unlikely that this temporary project will have long-term widespread angling tourism impacts in the connected wider Broadland system" [E/15/254]. As is explained in NE's letter of 9 September 2020, "NE are satisfied that EA granting the permit meets our commitment under point 8.5.2 of the environmental statement".

39. Ground 4 is therefore wholly without merit. It was not raised in pre-action correspondence, has no obvious relevance to the decision under challenge and is unsustainable on the facts. In the circumstances, it is obviously not unfair for NE to proceed with the project following the detailed deliberations and assessment that has taken place since 2014.

40. SFG 66 suggests that NE would be in breach of the FRAP and/or the 2014 planning permission if they carried out the works "without the EA's fisheries experts confirming that they no longer consider that there will be a significant impact on fish". That is on the supposedly separate basis that Table S1.1 of the FRAP indicates that "[t]he works shall be carried out in accordance with the permit application and the plans and drawings which accompany it" listing, among other things the 2014 ES [E/14/237]. Condition 2 of the 2014 planning permission is to similar effect [I/29/535]. However, the significance of those references is primarily for technical or design specifications.¹¹ Such general references cannot be taken as importing as conditions statements in the ES, still less a statement such as para.8.5.24 that requires action on the part of a third party. Had the Broads Authority and/or the EA seen fit to include controls in the permission

¹¹ Albeit it is arguably a somewhat over-comprehensive list. Condition 2 to the 2014 permission includes the caveat "unless superseded" [I/29/536]. The FRAP condition also lists updated documents, including NE's *Sustainable Future* document.

and/or permit about the impact on fish, they would have done so by way of separate controls. Indeed, that is the role of condition 8 to the FRAP. It is unmeritorious to suggest that the generic conditions referred to have the specific effect contended for by the Claimants.

41. In any event, the impact on fish will be reconsidered as part of any reconsultation given the position of the EA and NE on ground 1.

NED WESTAWAY

3 NOVEMBER 2020

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