LEIGH DAY

By email
Secretary of State for Environment, Food and Rural Affairs
Seacole Building
2 Marsham Street
London SW1P 4DF

[redacted]

DATED
1 February 2024

YOUR REF

OUR REF
[redacted]

EMAIL
[redacted]

TELEPHONE
[redacted]

LETTER BEFORE CLAIM
THIS LETTER REQUIRES YOUR URGENT ATTENTION

Dear Secretary of State

Notice of designation of sensitive catchment areas 2024

Introduction

1. We act for Wild Justice, a not-for-profit company limited by guarantee set up to advocate on behalf of wildlife to further nature conservation in the United Kingdom, to encourage public participation in nature conservation issues, and to ensure that UK laws, policies and practices protect wildlife.

The decision our client proposes to challenge

2. Our client proposes to challenge the publication on 25 January 2024 of the "Notice of designation of sensitive catchment areas 2024" (the "**Notice**") in accordance with section 96C of the Water Industry Act 1991 (the "**WIA**"). Wild Justice has no objection to the designation of the specified catchment areas as sensitive to nutrient pollution or the consequent obligation on water companies to meet specified nutrient removal standards by 2030. However, it is not lawful for the Secretary of State to require: "*Competent authorities (including local planning authorities) considering planning proposals for development draining via a sewer to a wastewater treatment works subject to the upgrade duty are required to consider that the*

nutrient pollution standard will be met by the upgrade date for the purposes of Habitats Regulations Assessments."

This letter

3. This letter is a formal letter before claim, sent in accordance with the Pre-Action Protocol for Judicial Review. It sets out the factual and legal basis (as we presently understand it to be) on which any claim would be pursued. Please be clear in your response in identifying any areas of factual and/or legal dispute and the basis for them so that the issues in dispute can be identified and if possible narrowed.

4. We are aware that judicial review is a remedy of last resort and write in the hope that this matter can be resolved without recourse to legal proceedings. We therefore outline at the end of this letter the steps which we ask you to take in order to avoid recourse to the Court. If we do not receive a satisfactory response to this letter, we propose to advise our client to make an application for judicial review without further reference to you.

Party details

5. In accordance with the Pre-Action Protocol, we confirm the following details:
   a. Proposed claimant: Wild Justice
   b. Proposed defendant: Secretary of State for Environment, Food and Rural Affairs ("**SSEFRA**")
   c. Proposed interested parties:
      (i) Natural England, as the designated nature conservation body in accordance with Regulation 5 the Conservation of Habitats and Species Regulations 2017 ("**Habitats Regulations**")
      (ii) Secretary of State for Levelling Up, Housing and Communities ("**SSLHC**"), as the minister with planning portfolio
   d. Our reference [redacted]
   e. The matter being challenged: The decision, as described above.
   f. Details of claimant's legal advisers [redacted] and [redacted]

The Issues

6. We deal with the factual and legal background together, because the factual background to the passage of the relevant legislative provisions in the Levelling Up and Regeneration Act 2023 ("**LURA**") is key to the issues in the proposed claim.

The LURA

7. Sections 96B to 96N of the WIA were inserted by section 168 of the LURA.

8. The Notice specifies a number of Special Areas of Conservation ("**SACs**") and 36% of Special Protection Areas ("**SPAs**") which are in an unfavourable condition. In significant part, this is due to nutrient pollution from phosphorous and nitrogen, largely from sewage and agriculture. That is the reason why the SSEFRA was empowered to issue and has issued the Notice under section 96C WIA. Section 96C provides, where he "*considers that a habitats site that is wholly or partly in England is in an unfavourable condition by virtue of pollution from nutrients in water comprising [nitrogen or phosphorus] or compounds of [nitrogen or phosphorus], the Secretary of State may designate the catchment area for the habitats site as a [nitrogen or phosphorus] sensitive catchment area.*"

9. Section 96B requires sewerage undertakers to secure that by 1 April 2030 (the "**upgrade date"** for the purposes of section 96E) each sewage treatment plant discharging into a nutrient sensitive catchment area must meet relevant pollution standards.

10. At the end of August 2023, prior to the final reading of the Levelling Up and Regeneration Bill (as it then was) in the House of Lords, the SSLHC tabled amendments which would have required competent authorities for the purposes of the Habitats Regulations to assume that a proposed development will not have an adverse effect on European sites (i.e. SACs and SPAs) as a result of nutrients in urban waste water (proposed Schedule 13 to the LURA including proposed Regulation 85A of the Habitats Regulations). The amendment was defeated, in particular following a letter from the Chair of the Office for Environmental Protection indicating that the amendments would "*demonstrably reduce the level of environmental protection provided for in existing environmental law*" on the basis that:

    "*The proposed amendments include making changes to the Conservation of Habitats and Species Regulations 2017 that would permit certain environmentally damaging activity to proceed without 'appropriate assessment' of certain nutrient impacts, thus risking substantial harm to protected wildlife sites. Planning authorities would also be required to disregard negative findings concerning such nutrient pollution in any appropriate assessments, and disregard representations from Natural England or others. The proposed amendments would therefore remove legal controls on the addition of nutrient loads to sites that already suffer from these impacts. Legal certainty is replaced with policy interventions announced alongside the Bill amendments.*"

The Habitats Regulations

11. Regulation 63(1) of the Habitats Regulations requires:

    "*(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."

12. Regulation 63(5) prohibits a competent authority from agreeing to a plan or project unless it has ascertained that no such adverse effects will arise.

13. If for example a proposed housing development would generate sewage which would increase the level of nitrogen or phosphorus in a European site, and thereby have an adverse impact on its integrity, then a competent authority must refuse planning permission for that development (unless the requirements of Regulation 64 are met).

The Notice

14. The Notice purports to require competent authorities "*to consider that the nutrient pollution standard will be met by the upgrade date for the purposes of Habitats Regulations Assessments*". We assume that the supposed rationale for this is that the legal duty on water companies following the designation of sensitive catchment areas to carry out upgrade works to sewage treatment plants in order to meet the relevant nutrient removal standards will address any potential issues of nutrient pollution from sewage.

15. Therefore, even in a situation where a competent authority determines as part of an appropriate assessment or otherwise that a proposed development will have adverse effects on a sensitive catchment area, the Notice requires it to assume that that is not the case. There might be all manner of reasons for the nutrient pollution standard not being met in spite of the publication of the Notice. For example:

    a. A water company may not comply with its duties under section 96B WIA. There may be perfectly lawful reasons for that, e.g. difficulties in obtaining planning permission, or in obtaining approval from Ofwat for required capital expenditure.
    b. The water company may purport to comply with its duties under that provision by carrying out some improvement works, but those works may not ultimately be sufficient to meet the relevant nutrient pollution standards by the upgrade date.
    c. The regulatory authorities may seek to take enforcement action in respect of a breach of the section 96B duty, but that enforcement action may not have the result of bringing the relevant sewage works into compliance by the upgrade date.

16. The Notice goes on to discuss a limited exemption process which may apply to the section 96B duty, and states that "*It is important that planning decisions continue to be taken based on material planning considerations.*" This highlights the issue. It suggests that, in the limited circumstances where an exemption process is being followed, local planning authorities must have regard to material planning considerations, but in other circumstances material planning considerations may be ignored in favour of the general requirement in the Notice to assume that the nutrient pollution standard would be met.

17. The Notice, if complied with by competent authorities, would have the same effect as some of the LURA amendments that were defeated in the Lords. It appears that the SSEFRA is trying to achieve with guidance some of what could not be passed as primary legislation.

Proposed grounds of challenge

18. Please note that the claimant reserves the right to amend the grounds, or to add/remove grounds of challenge, based on the defendant's response and any further matters which come to light, and may do so without further recourse to the defendant.

Ground 1: unlawfully requiring competent authorities and other local planning authorities to disregard matters which they are required to have regard to in accordance with the Habitats Regulations and planning law generally

19. A competent authority is required to have regard to any potential adverse impacts which a proposed development may cause to a European site, and is prohibited from granting planning permission for such a development unless certain (prescribed) circumstances apply. A local planning authority must have regard to any impacts to such a site when deciding whether to grant planning permission (for example, as a result of paragraph 186(b) and 187 of the National Planning Policy Framework). By requiring such authorities to assume that the relevant nutrient pollution standard has been met, the Notice would require the authorities to ignore potential impacts to sensitive catchment areas in situations where the relevant pollution standard has not been met even though the LURA requires it to be. If the authority were to follow the requirement of the Notice, it would unlawfully grant planning permission contrary to the Habitats Regulations and general principles of planning law.

Ground 2: Unlawful fettering of discretion

20. Similarly, by purporting to prohibit competent authorities from having regard to the fact that a relevant nutrient pollution standard has not been met when in fact that might be the case, the Notice unlawfully fetters authorities' discretion as regards the material considerations which apply in the carrying out of an appropriate assessment or the determination of a planning application.

Ground 3: ultra vires

21. The Notice is made "in accordance with the power in Section 96C" WIA. That provision provides no power for the Secretary of State to direct what matters a competent authority may or may not have regard to in carrying out an appropriate assessment or determining a

planning application. Those matters are governed by the Habitats Regulations and planning legislation respectively, which were not amended by the LURA, in spite of the draft amendments tabled by government.

Ground 4: Irrationality

22. The rationale for the Notice is to prevent the further deterioration of the nutrient sensitive catchments which it lists. However, because the Notice would, if complied with by competent authorities, have the effect of requiring them to disregard potential adverse effects on the catchments which without the Notice they would have been required to have regard to, the Notice has the perverse effect of lowering the level of environmental legal protection afforded to the nutrient sensitive catchments. In that sense, the Notice is self-defeating and therefore irrational.

Action the defendant is expected to take

23. In order to remedy the legal errors identified in this letter, we request that the Secretary of State immediately withdraws and revises the Notice in order to remove the requirement on competent authorities to assume that nutrient pollution standards will be met.

24. If you refuse to take the above steps, or we do not receive a satisfactory response to this letter, we propose to advise our client to make an application for judicial review without further reference to you.

ADR proposals

25. We would welcome any proposals to engage on the substantive issues raised in the letter, so as to resolve or narrow the dispute.

Aarhus Costs

26. The proposed claim is an environmental claim that falls within the scope of Articles 9(2) and 9(3) of the Aarhus Convention. The case law is clear that "environment" should be given as broad a definition as possible. Please confirm in response that you do not contest the application of the Aarhus Convention and that any claim will benefit from the costs capping in CPR r. 46.26.

Information or documents sought

27. In accordance with the defendant's duty of candour, please provide:

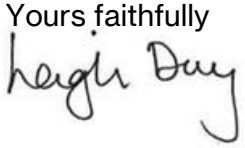
    a. any advice which the SSEFRA's civil servants provided to him in respect of the proposed Notice;
    b. any advice sought or received from Natural England in respect of the Notice; and
    c. any communications between the SSEFRA and SSLHC or their respective departments regarding the Notice.

28. If you fail to disclose a document now, which you later rely on in defence of this claim, then we reserve the right to bring this to the Court's attention when it comes to the matter of costs. Moreover, as a matter of law, a claimant in a claim for judicial review cannot be prejudiced at the permission stage due to an absence of documents, and the existence of such further material, which may be critical to the arguability of the claim, is capable of being a good reason in and of itself to grant permission (see *R (Blue Sky Sports & Leisure Ltd v Coventry City Council* [2013] EWHC 3366 (Admin), at §25).

Address and proposed date for reply

29. Please send your response to [redacted] and [redacted] Please respond within 14 days of the date of this letter, i.e. **by no later than 15 February 2024**.

Yours faithfully



Leigh Day

CC:

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