

**Case Name:** *Harris & Anor v Environment Agency* [2022] EWHC 2264 (Admin) (06 September 2022)

**Full case:** [Click Here](#)

**Commentary:** This was a successful challenge to the decision of the Environment Agency (the “EA”) to not expand the scope of its investigation into the effect of 240 water abstraction licences on three Sites of Special Scientific Interest (the “Three SSSIs”) within The Broads Special Area of Conservation (“The Broads SAC”).

The claimants brought the challenge because they were concerned that water abstraction was causing irremediable damage to the environment, including ecosystems that were legally protected, in other parts of The Broads SAC beyond just the Three SSSIs. The basis of their claim was that:

- 1) the EA was in breach of an obligation under article 6(2) of the EU Habitats Directive;
- 2) the obligation under article 6(2) of the Habitats Directive had effect in domestic law by reason of regulation 9(3) of the 2017 Habitats Regulations which required the EA to “have regard” to the Habitats Directive;
- 3) irrespective of the effect of regulation 9(3) of the Habitats Regulations, article 6(2) of the Habitats Directive was enforceable by the domestic courts; and
- 4) the EA’s decision to not conduct a more expansive investigation into the impact of licenced water abstraction was irrational.

Regulation 9(3) of the Habitats Regulations requires the EA to have regard to the requirements of article 6(2) of the Habitats Directive. This means that the EA must take appropriate steps to ensure that, in The Broads SAC, there is no possibility of the deterioration of protected habitats or the significant disturbance of protected species as a result of licensed water abstraction.

The court also considered whether article 6(2) was enforceable by UK courts in its own right (irrespective of regulation 9(3)) pursuant to section 4(2)(b) of The European Union (Withdrawal) Act 2018. This provision relates to obligations in EU law which are of a kind that has been recognised by the Court of Justice of the European Union (the “CJEU”), or any court or tribunal in the UK, in a case decided before 11pm on 31 December 2020. In the Dutch Waddenzee case the European Court of Justice (part of the CJEU) held that article 6(3) of the Directive had direct effect. Therefore, the High Court in this case considered article 6(2) to be “of a kind” that was recognised in Waddenzee as having direct effect, so article 6(2) continues to be recognised and enforceable in domestic law.

The court noted that the conventional approach to the “have regard” duty is that the

relevant competent authority is obliged to take account of legal requirements but may depart from them if there is good reason to do so. However, the requirement to “have regard” is a duty rather than a suggestion, and all competent authorities must each have regard to the Habitats Directive so as to ensure that, overall, compliance with the Directive is achieved. In this instance, the court observed that the EA was effectively the sole (and certainly the principal) public body responsible for water abstraction licences. If the EA did not secure the requirements of article 6(2) in respect of those decisions, then no other public body was capable of filling the gap.

The EA accepted that it had a duty to have regard to article 6(2) of the Habitats Directive. It maintained that it had done so and that it had, after taking the Directive into account, reasonably decided to limit its investigation of the impact of the 240 licences to the Three SSSIs. However, the claimants were able to show that water abstraction may be causing deterioration of protected habitats or significant disturbance of protected species within The Broads SAC beyond the Three SSSIs included in the EA’s investigation.

The court agreed with the claimants that the EA had not taken sufficient steps in respect of the risks to other sites in The Broads SAC posed by water abstraction permitted by permanent licences. Consequently, it was held that the EA had breached both article 6(2) of the Habitats Directive and regulation 9(3) of the Habitats Regulations. The court added that, since the EA had committed itself to discharge the article 6(2) obligation, it was irrational for it not to expand its investigation without having any alternative mechanism in place that could ensure compliance with article 6(2). The court indicated that it would issue at a later date its directions as to how the EA must remedy this breach.

*Case summary prepared by Safiyah Islam*