Case Name: *Harris & Anor v Environment Agency* [2022] EWHC 508 (Admin) (10 March 2022)

Full case: Click Here

Commentary:
The court has granted permission to apply for judicial review of the Environment Agency's (the "EA") 'Ant Broads and Marshes Resorting Sustainable Abstraction: Investigation and Options Appraisal Closure Report' which concerns the effects of water abstraction in relation to three sites of special scientific interest ("SSSIs") in the Ant Valley in Norfolk.

Through its Restoring Sustainable Abstraction programme (the "Programme") the EA identifies, investigates and resolves environmental issues caused by unsustainable licensed water abstraction. Between 1999 and 2012 the EA identified around 500 sites, predominantly SSSIs, which were potentially at risk from water abstraction. The 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 Programme.

An investigation under the Programme was begun in 2010 in relation to the Ant Broads and Marshes SSSI, partly as a result of information provided by the claimants. 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 could be added without significant additional expense.

The claimants argued that the EA was aware of the risk of damage from abstraction to sites other than the three SSSIs identified, both from material brought to its attention by the claimants and from its own investigations. The claimants submitted that the Habitats Directive and 2017 Regulations imposed a proactive or anticipatory duty to avoid or prevent the deterioration and/or significant disturbance of natural habitats within European sites in line with the EU law "prevention principle". The claimants' view was that the EA must not only look for deterioration or significant disturbance which has already happened, but the risk of it occurring in the future. Moreover, it was not sufficient to rely on previous review processes because the duty was an ongoing one and, in any event, the EA had new information which it accepted called the results of the previous process into question.

The EA's response was that, although there may indeed be evidence showing a probability or risk of deterioration affecting other sites than the three SSSIs identified, new evidence of risk in respect of other protected sites could be addressed under workstreams separate to the Programme.

Though the court accepted:

1. that the EA must be able to take decisions about the allocation of its scarce resources;
2. that the decisions to close the 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
3. that the EA should not be required to keep expanding the programme indefinitely.

It also considered it arguable that, once it had information that other protected sites were potentially impacted by the abstraction licences it had identified, the EA had an obligation to do something (whether within the scope of the Programme or otherwise) proactively to address the risk of deterioration. Although the EA had not ruled out action in respect of other sites, it was arguable that it had not taken steps of a kind that would satisfy the duty which the claimants submitted, on an arguable basis, the Habitats Regulations imposed on it.

The court also considered that the extent of the obligations imposed post-Brexit on the EA by the Habitats Regulations, read with the relevant provisions of the European Union (Withdrawal) Act 2018, was a question which would benefit from fuller argument.

Case summary prepared by Safiyah Islam