

Case Name: *C G Fry & Son Ltd v Secretary of State for Levelling Up Housing and Communities & Anor* [2023] EWHC 1622 (Admin) (30 June 2023)

Full case: [Click Here](#)

Commentary: This case relates to Natural England's advice that, due to potential harm to Special Areas of Conservation ("SACs") and Special Protection Areas ("SPAs") caused by water abstraction, recreational pressures and the release of nutrients (nitrates and phosphates), development should not be permitted in certain areas without an appropriate assessment ("AA") under the 2017 Habitats Regulations demonstrating that the development will not have an adverse effect on the integrity of the relevant protected area. AAs are usually carried out when outline or full planning permission is being granted for development that is likely to have a significant effect on an SPA or SAC, but Natural England's position (supported by the Government) is that an AA can now be required in certain circumstances at the point of seeking reserved matters approval or the discharge of a pre-commencement condition where planning permission has already been obtained.

In this case, outline permission had been granted and all reserved matters had been approved for a residential-led, 650-home development in Somerset without an AA having been required or conducted. Natural England then published its advice to Somerset authorities, advising that greater scrutiny was required of plans and projects that would result in increased nutrient loads which may have an effect on SPAs, SACs and sites designated under the Ramsar Convention such as the Somerset Levels and Moors Ramsar Site. When the claimant then sought to discharge various pre-commencement conditions, the Council withheld approval on the basis that an AA was required before the conditions could be discharged. The claimant appealed and the inspector dismissed the appeal.

In its legal challenge to the inspector's decision, the claimant argued that the effect on protected water habitats of additional phosphates resulting from the proposed development was not a material consideration at this stage because it fell outside the parameters of what the outline permission and the reserved matters approval had left over for consideration under the pre-commencement conditions: there was no connection between phosphates and the conditions, even in respect of the condition relating to waste water.

The court recognised that on a natural and ordinary reading of the domestic Habitats Regulations, they do not require an AA at reserved matters stage or before the discharge of conditions. However, on a purposive reading in the light of binding case law, the regulations require an AA before any consent, permission or other authorisation is given for a project likely to have significant effects on a protected, and the court decided that giving consent for a project extends to approving reserved matters and discharging of conditions.

Furthermore, article 6(3) of the EU Habitats Directive continues to apply under the 2018 EU Withdrawal Act because the provision was recognised as having direct effect pre-Brexit. Article 6(3) requires that a project which is likely to have a significant effect on a protected site should not be authorised until an AA has shown that the project will not adversely affect the integrity of the site. The court considered that the approval of reserved matters and the discharge of pre-commencement conditions was a necessary step in the authorisation of a development for the purposes of article 6(3).

The court concluded that accepting the claimant's position would lead to the possibility that, as here, development could proceed without an AA being undertaken when negative environmental effects were only ascertained after the first stage in a multi-stage consent process. In this case, an AA had not been undertaken before the Natural England advice had been issued prior to the pre-commencement condition discharge stage, so the Court held that the inspector was right to determine that the conditions could not be discharged unless an AA was undertaken.

Case summary prepared by Safiyah Islam