

Case Name: *Wildfish Conservation, R (On the Application Of) v Secretary of State for Environment, Food and Rural Affairs* [2023] EWHC 2285 (Admin) (15 September 2023)

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Commentary:

This case dealt with two unsuccessful claims challenging the lawfulness of the Storm Overflows Discharge Reduction Plan (“the Plan”) against the Secretary of State for Environment Food and Rural Affairs (“the Defendant”). The first claim was by Wildfish Conservation and consisted of four grounds (“the Wildfish Claim”) and the second claim was brought jointly by the Marine Conservation Society (“MCS”), Richard Haward’s Oysters (Mersea) Limited (“RHO”) and Mr Hugo Tagholm and consisted of three additional grounds (“the MRT claim”).

Background

The Plan was introduced by the Defendant in 2022 in response to the introduction of s.141A into the Water Industry Act 1991 (“WIA 1991”). S.141A required the Defendant to prepare a plan for the purposes of:

- a) reducing discharges from the storm overflows of sewerage undertakers whose area is wholly or mainly in England; and
- b) reducing the adverse impacts of those discharges.

The Plan sets 3 substantive targets ([23]):

“(1) A target for protecting the environment: water and sewerage companies (“WaSCs”) will only be allowed to discharge from a storm overflow where there would be no local adverse ecological effect. The target must be met by 2050, save for overflows discharging in or close to certain sensitive areas where the target must be met by 2035, or 2045 at the very latest;

(2) A target to protect public health in designated bathing waters: WaSCs must significantly reduce harmful pathogens from overflows either by carrying out disinfection or by reducing the frequency of discharges to meet EA standards by 2035.

(3) A backstop target for 2050, which operates in addition to the first two targets: by 2050 storm overflows will not be permitted to discharge above an average of 10 heavy rainfall events a year.”

Grounds of challenge

The Wildfish claim

Wildfish challenged the Plan on four grounds.

Ground 1 – a) In setting the first and third targets, the Defendant failed to understand Regulation 4 of the Urban Waste Water Treatment (England and Wales) Regulations 1994 (“the 1994 Regulations”); or b) the Plan is unlawful because it has the effect of directing WasCs to breach Regulation 4 of the 1994 Regulations; or c) the Plan will frustrate purpose of the 1994 Regulations.

Ground 2 – the Defendant failed to take into account obviously material considerations including Regulation 4 of the 1994 Regulations and addressing any gap between requirements of environmental permits and the 1994 Regulations.

Ground 3 – the Plan is a plan under Regulation 63 of The Conservation of Habitats and Species Regulations 2017 (“the 2017 Regulations”) such that in approving the Plan the Defendant was in breach of Regulation 63 in failing to carry out an appropriate assessment of its effects on European Sites.

Ground 4 – the Defendant acted irrationally in approving the Plan.

The MRT claim

MSC, RHO and Mr Tagholm challenged the Plan on three grounds.

Ground 1 – the Plan fails to accord with or undermines the target in s.3 of the Environment Act 2021 to halt the decline in species abundance by 2030.

Ground 2 – the Plan breaches the rights of RHO under Article 1 of the First Protocol to the ECHR (Protection of Property) (“A1P1”) and the rights of Mr Tagholm under Article 8 of the ECHR (Right to Respect of Private and Family life);

Ground 3 – the Plan is contrary to the “public trust doctrine” which is said to impose a duty on the Defendant to maintain coastal waters in a fit ecological state for the purposes of the public’s right to fish there.

Judgement

Holgate J made 3 key observations (2 legal and 1 factual) which formed the basis of his conclusion for several of the grounds.

First, he observed that the mere fact that a storm overflow discharges to a waterway is not unlawful under the 1994 Regulations. Discharge is permitted under the 1994 Regulations in exceptional climatic circumstances provided that there is no remedy available for such discharges applying the BTKNEEC. Further, even if there were no exceptional climatic circumstances, discharge is still lawful if no remedy is available that

satisfies the BTKNEEC test ([162-163]). BTKNEEC is the best technical knowledge not entailing excessive costs – it involves weighing the best technology and its estimated costs against the benefits that a more effective water collection/treatment system may provide. Therefore, if there are exceptional rainfall conditions and/or the remedial measures required are excessively costly, then discharge of storm overflows is lawful.

Second, he observed that s.141A of the WIA 1991 only required the Defendant to produce a plan to reduce discharges from storm overflows and adverse impacts of those discharges.

Third, he notes that there is a separate, ongoing large scale investigation being conducted by the Environment Agency and OFWAT to determine whether WaSCs are complying with statutory requirements including, environmental permits and the 1994 Regulations.

The Wildfish claim

Ground 1

Holgate J held that Claimant is unsuccessful on Ground 1 for three reasons.

First, looking at the research and work conducted in the preparation of the Plan, Holgate J was satisfied that the Defendant understood Regulation 4 of the 1994 Regulations because the Defendant had considered a strategy for the complete phasing out of discharge from overflows, which indicates that he had considered an option which went beyond what Regulation 4 required (i.e. elimination of all discharge of storm overflows). Also, the Defendant was advised by his officials on the cost-benefit analysis of various options including total elimination of discharges and the option of allowing either 10 or 20 per year average discharges. This, Holgate J held, indicated that the Defendant had understood Regulation 4 ([165-167]).

Second, Holgate J held that the Plan does not direct a breach of Regulation 4 since it in fact goes beyond the requirements of Regulation 4 by setting targets that are not subject to the BTKNEEC test. This means that regardless of the financial costs, the targets in the Plan must be met ([168]).

Third, as stated above, the Plan goes further than Regulation 4 by setting a more challenging policy target, therefore, the Plan does not frustrate the purpose of the 1994 Regulations ([192]).

Ground 2

Holgate J rejected this ground on the basis that the purpose of the Plan (as outlined in

s.141A of the WIA 1991) was to set targets to reduce discharges and reduce any adverse impacts from those discharges nationally. Whether or not individual environmental permits issued by the Environment Agency are compliant with relevant regulations is a matter that requires case-by-case analysis in line with the BTKNEEC test. There is an ongoing investigation being conducted by the Environment Agency and OFWAT in relation to this very matter. Therefore, not taking into account any gaps between permits and regulations does not amount to an obviously material consideration leading to irrationality. Moreover, on the facts, Holgate J held that the Defendant did take into account non-compliance with legislative requirements and steps taken by the Environment Agency and OFWAT ([196-198]).

Ground 3

Holgate J held that the Plan does not fall under Regulation 63 of the 2017 Regulations since it is merely a "high-level strategic document" which sets national targets. How it will be implemented, and which specific sites will require upgrades as a result of the implementation of the Plan, will only come to light over time. Therefore, there is no link between the targets set in the Plan and any specific European site ([208]).

Ground 4

Since it was already concluded under grounds 1 and 2 that the Plan was not in breach of the relevant regulations and that the gap between environmental permits and regulations were not an obviously material consideration, Wildfish was unsuccessful on this ground too with Holgate J holding that the Defendant did not act irrationally in adopting the Plan.

The MRT Claim

Ground 1

Holgate J held that s.141A of the WIA 1991 does not require the Defendant to put forward any targets nor does it require the Defendant to produce a plan that aligns with the species abundance target under s.3 of the Environment Act 2021. It merely requires the Secretary of State to produce a plan for reducing discharges from storm overflows and their adverse impacts ([220]).

Holgate J further held that the Defendant did have regard to the target under s.3 since one of the sub-targets in the Plan relates to the protection of biodiversity at both local and national scale and the complete elimination of ecological harm from storm overflows ([223]).

Ground 2

In relation to A1P1, RHO's claim was that "possessions" includes not only physical items of property but also "the marketable goodwill of a business, in the sense of the present-day value of a business derived from its reputation based upon its business endeavours" ([233]). Therefore, RHO argued that the State has an obligation to take positive measures to protect the A1P1 right where there is a direct link between "measures a person may legitimately expect to be taken by the authorities and his effective enjoyment of his possession" ([234]). RHO specialises in cultivating oysters and argued that the discharge from storm overflows disrupted this practice.

Holgate J rejected this ground on the basis that:

- a) RHO had not shown that other existing statutory requirements (including the current investigation being undertaken as a result of such requirements), would not be a sufficient to protect A1P1 rights; and
- b) The Plan also sets out in a separate section measure to be taken for improving the quality of shellfish waters by 2030.

Therefore, RHO failed to show that the Defendant was obliged to take additional positive measures through the Plan to protect A1P1 rights ([242]).

In relation to Mr Tagholm's Article 8 right, he argued that due to the discharges, swimmers and surfers have suffered from a variety of health problems such as gastroenteritis and ear, nose, throat and eye infections (although he had managed to avoid ill-health due to precautionary measures he takes). Holgate J rejected the submission that Mr Tagholm's Article 8 right was engaged, let alone breached. This was because, Holgate J held, that Mr Tagholm did not demonstrate that the problems he described "involved a hazard of such severity as to impair significantly his ability to enjoy family or private life" ([244]). He held that s.141A of the WIA 1991 only required the Defendant to produce a plan to reduce storm overflow discharges and adverse impacts across the country; it did not require a plan to completely eliminate discharges, nor did it require a plan that dealt with hazards at specific locations. These, Holgate J held, were matters for the enforcement agencies. Additionally, Holgate J disagreed with counsel's submission for Mr Tagholm that the case law indicated that under Articles 2 and/or 8 environmental protections against pollution is owed to society or the population of the country as a whole under those articles ([243]).

Ground 3

This ground was premised on the argument that since there is a public right to navigate and fish in tidal waters, which carries with it ancillary rights (as per *R (Newhaven Port and Properties Limited) v East Sussex County Council* [2015] AC 1547), those ancillary rights include the public right for waters not to be polluted to the extent that oysters

and other shellfish are unfit for human consumption ([249]).

Holgate J rejected this submission on the basis that:

- a) a. He disagreed that the above alleged right for waters to not be polluted is a necessary implication of the public right to fish ([251]);
- b) Since Parliament has provided dedicated controls to address pollution of tidal waters (e.g. environmental permits) there is no justification for extending the common law in the manner suggested by the claimants ([252]);
- c) There is a public interest in the proper operation (including discharge) of storm overflows in exceptional periods of rainfall or where the remedial action would not be BTKNEEC ([253]);
- d) RHO's right to fish is not negated by the use of storm overflows as per the evidence produced, since it is clear that RHO employs techniques to avoid risk to human health.

For the above reasons, both claims were unsuccessful.

Case summary prepared by Chatura Saravanan