



Neutral Citation Number: [2021] EWHC 2391 (Admin)

Case No: CO/1290/2021

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**PLANNING COURT**

Cardiff Civil and Family Justice  
2 Park Street  
Cardiff CF10 1ET

Date: 27/08/2021

**Before :**

**HIS HONOUR JUDGE JARMAN QC**

Sitting as a judge of the High Court

**Between :**

**THE QUEEN (on the application of CLIVE STEPHEN  
TOWNLEY)**

**Claimant**

**- and -**

**NATIONAL RESOURCES WALES**

**Defendant**

**-and-**

**WYE VALLEY CANOES LTD**

**Interested  
Party**

**Ms Sioned Davies** instructed by the **claimant**  
**Mr Leon Glenister** (instructed by **Browne Jacobson**) for the **defendant**  
The interested party did not appear and was not represented

Hearing dates: 19 August 2021

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**Approved Judgment**

This judgment is handed down remotely via CVP and is deemed to be handed down at 10am  
Friday 27 August 2021. It will be sent to the parties and to Bailli for publication.

**HH JUDGE JARMAN QC:**

1. The River Wye rises on Plynlimon and makes its way through the Cambrian Mountains and over the Welsh-English border before returning and entering the Severn Estuary near to Chepstow. Its ecological importance is recognised in its designation as a special area of conservation (SAC) under the Conservation of Habitats and Species Regulations 2017 (the Habitats Regulations). In addition, there are sites along its lengths and including adjacent riparian habitats which are designated as sites of special scientific interest (SSSI) under the Wildlife and Countryside Act 1981 (the 1981 Act). That gives protection to specified wildlife, including sea lamprey and twaite shad which migrate to the river to spawn. One such SSSI is that of the Upper Wye from source to Hay (the site). Part of that protection is to prohibit certain activities, including the use of craft or recreational activities likely to damage riparian features or disturb features of interest. Consent to carry on such activities may be given by a competent authority, which for the site is the defendant (NRW), under section 28E of the 1981 Act, and such consent may be withdrawn or modified.
2. Regulation 24(1) of the Habitats Regulations has the effect in the present case that where it appears to NRW that a notice of a proposal under section 28E of the 1981 Act relates to an operation which is or forms part of a plan or project which is likely to have a significant effect on a European site (either alone or in combination with other plans or projects), then it must make an appropriate assessment of the implications for that site in view of the site's conservation objectives. Regulation 24(2) provides that in light of the conclusions of the assessment, the appropriate body (NRW in this case) may give consent for the operation "only after having ascertained that the plan or project will not adversely affect the integrity of the site."
3. NRW on 5 January 2021 granted consent C000886/1 (the consent) to the interested party (WVC) to launch canoes onto the river from a boat house at Glasbury, which is several kilometres upstream from Hay. The precise terms of the consent, so far as relevant, are as follows:

"As owner/occupier of land within the above site(s), may carry out, or cause or permit to be carried out the operation(s) specified below in the manner prescribed. Launching up to 40 canoes, 20 kayaks and 5 paddle boards a day from the boat house between the hours of 9.30 to 13.30."
4. The consent is subject to conditions, the third of which is in these terms:

"Boats must not be launched when frequent grounding is likely in the passage downstream to Hay. It is recognised that channel conditions will vary from season to season and that some craft are more likely to get stuck than others during low water periods."
5. The reason stated for that condition is stated thus:

"To avoid damage and deterioration to the riverbed, gravel shoals and water crowfoot beds,"

6. The claimant owns land and fishing rights downstream of Glasbury where people who hire WVC's canoes paddle. He is member of Clyro Court and Hay Castle fishing syndicate and a supporter of and advisor to the Wye and Usk Foundation (WUF). He seeks to challenge by way of judicial review the lawfulness of the decision to grant the consent on five grounds. Permission to do so was refused on consideration of the papers by Steyn J. He renewed his application for permission at an oral hearing before me and this is my decision on that application.
7. At the heart of the claimant's challenge is the claim that in making the decision to grant the consent, NRW did not fulfil its obligations under the Habitats Regulations to be satisfied beyond all reasonable doubt that where there is a likely significant effect on the site, mitigation will be effective.
8. NRW undertook such an appropriate assessment. Its conclusions included that likely significant effects on the integrity of the site could not be ruled out because the impact pathway (from the launching of canoes) would damage or disturb the designated species features. Accordingly, mitigation measures were required, specifically during periods of very low flow in late May to early June, as spawning gravels used by sea lamprey between Glasbury and Hay were being damaged and disturbed by canoes grounding or being dragged.
9. That is the particular harm which concerns the claimant, and is the harm which condition 3 seeks to prevent, but the claimant maintains that that condition is imprecise, subjective and ineffective. He says that the condition should have specified that no boats were to be launched if the water level was lower than 0.67 meters shown on the gauge at Glasbury Bridge. That is the low water level chosen for this stretch of the river by WUF in a document dated July 2020 relating to access to the river. However, the precise basis for that figure is unclear.
10. The approach which competent authorities must take in deciding whether to give consents such as these, and which courts must take in reviewing that decision making process, has been summarised by Jay J in two recent authorities *Wealden District Council v Secretary of State for Communities and Local Government Housing and others* [2017] EWHC 351 (Admin) and *R(Wyatt) v Fareham District Council and others and Natural England* [2021] EWHC 1434 (Admin). In paragraphs 29-39 of the latter judgment, Jay J summarised the relevant principles as follows:

“First of all, it is necessary to underscore the distinction between the degree of rigour the local planning authority must apply to the consideration of its HRAs and the approach this court must take as the reviewing body: the two processes must be kept distinct...

Secondly, the CJEU has stated on a number of occasions that appropriate assessments must be based on “the best scientific knowledge in the field” (*Holohan v An Bord Pleanála* (Case C-461/17) [2019] PTSR 1054 at para 33) which is both up-to-date and not based on the bare assertion of an expert (on the latter point, see *Smyth v SSCLG* [2015] EWCA Civ 174; [2015] PTSR 1417, at para 83).

Thirdly, the absence of adverse effects must be established at the point of consent, which in the present context means the date the appropriate assessment is made (*Coöperatie Mobilisatie for the Environment UA, Vereniging Leefmilieu v College van Gedeputeerde Staten van Limburg* (Case C-293/17) [2019] Env LR 27 (the “Dutch Nitrogen case”), at para 94 of the opinion of Advocate General Kokott).

Fourthly, a high standard of investigation is demanded in line with the precautionary principle. This has been stated and reiterated in a large number of cases, including in particular *Waddenzee* (Case C-127/02) [2004] Env LR 14 and the Dutch Nitrogen case. In *Waddenzee*, Advocate General Kokott stated that the burden on the competent authority was to prove that there would be no adverse effects, not to a standard of absolute certainty but to being “at least satisfied that there is no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned”. A requirement of absolute certainty would be impossible of scientific attainment as well as being disproportionate (see paras 99, 104, 107 and 108). The ECJ accepted the Advocate General’s interpretation of the Habitats Directive in the light of these general principles of EU law, expressing their conclusions in a slightly different way (see paras 44, 58, 59 and 61). At para 58 the CJEU confirmed that the authorisation criterion in the Habitats Directive “integrated” the precautionary principle...

Fifthly, it is clear from the scheme of the Habitats Regulations, the application of common sense and authority that competent authorities must give condign weight to the expert advice of Natural England, and if minded to deviate from that advice furnish cogent reasons for doing so: see, in particular, Baroness Hale JSC in *R (Morge) v Hampshire CC* [2011] UKSC 2; [2011] 1 WLR 268, at para 45.

Sixthly, the judgment whether a proposal will adversely affect the integrity of the protected sites for the purposes of regulation 63(5) of the Habitats Regulations is one for the competent authority. Insofar as case law is required for this proposition, it may be found in *R (Champion) v North Norfolk DC* [2015] UKSC 52; [2015] 1 WLR 3170, per Lord Carnwath JSC at para 41, referring to Advocate General Kokott in *Waddenzee*, at para 107...

Seventhly, the approach of this court in the exercise of its supervisory function is standard *Wednesbury*, albeit one which accords appropriate cognisance to the nature of the subject-matter and the expertise of the decision-maker: see *Smyth v SSCLG* [2015] EWCA Civ 174; [2015] PTSR 1417 (per Sales LJ at para 80), and *Plan B Earth v Secretary of State for*

Transport [2020] EWCA Civ 214; [2020] PTSR 1446, paras 68, 75-79.”

11. It is clear that the court affords competent authorities an enhanced margin of appreciation in cases involving scientific, technical and predictive assessments In *R (BACI) v Environment Agency* [2020] Env LR 16, Lindblom LJ at paragraph 98, said in the context of a permission to allow a large waste facility:

“There may be disagreement over the appropriateness of the intended operating techniques, or on the likely effectiveness of measures proposed for the prevention or acceptable mitigation of polluting emissions. Objectors may suggest other measures...But these are in the end matters for the Environment Agency to resolve.”
12. With those principles in mind I now turn to the grounds.
13. The primary submission of Ms Davies for the claimant under Ground 1 is that the mitigation measures relied upon were wholly inadequate for a number of reasons. First, it could not be guaranteed beyond reasonable doubt that the conditions would be observed because they were plainly being disregarded. On 2 December 2020, the claimant submitted a report (the report) which showed 146 pictures of canoes and kayaks grounding and landing in the river between Glasbury and Hay, and of being on the river beyond the permitted times. It detailed how canoes were grounding or being dragged, and included website screen shots of operators, including WVC, who were promoting tours on this stretch of the river in breach of licence conditions then in force, and of the terms of a voluntary access agreement between various stakeholders in respect of the river, although WVC was not a party to that agreement.
14. Second, the condition imposed is unclear, and leaves the decision whether or not to launch boats to the judgment of WVC. Minimum water levels, which the claimant raised with NRW in the decision making process, were expressly rejected. Accordingly, there can be no certainty beyond all reasonable doubt that there would not be harm to the integrity of the site.
15. Third, the condition has proved in the event to be ineffective, which shows that the judgement of NRW of its efficacy was misplaced. The claimant sets out details of boat activity since the consent was granted, in his fourth witness statement.
16. Ms Davies also points out that later consents to other operators of such craft have included stipulations on water heights when craft should be given a list of defined instructions.
17. The claimant needs permission to file his fourth statement out of time, and I give that permission. However, insofar as it goes beyond the grounds set out in the claim, then as there was no application to amend the grounds I limit my consideration of it to that which is relevant to those grounds.
18. In my judgment the decision to deal with potential harm by the imposition of condition 3, rather than one measurement taken at Glasbury as advocated by WUF and the claimant, comes comfortably within the margin of appreciation to be afforded

to NRW. As Mr Glenister for NRW submits, what NRW must be sure about under the Habitats Regulations is that the consent will not adversely affect the integrity of the site. It does not have to be sure that no part of the riverbed or gravel shoals will be disturbed or that no part of the water crowfoot beds will be damaged by granting the consent. It is difficult to see how that level of certainty could ever be achieved as to such damage, as opposed to adverse effects on the integrity of the site, even if the suggestion of a low water gauge of 0.67 meters taken at one point on this stretch of the river were adopted. NRW expressly applied its statutory obligations in the decision making process.

19. It appears that the NRW were not previously aware of the breaches recorded by the claimant, but they were also taken into account in the decision making process. There are several similar operators to WVC along this stretch of the river, and it is not suggested that such breaches were those only of WVC customers. Later references by NRW to specified water levels were given in the context of advice to local authorities on operations on other parts of the river and not in a consent to an experienced operator, as WVC is, on this particular stretch of the river.
20. The approach of this court is to ask whether the decision of NRW to deal with potential harm of the consent by imposing condition 3 was so unreasonable that no competent authority proceeding lawfully could have come to such a decision. That is a high threshold, and one which in my judgment is not arguably reached. Permission is not granted under ground 1.
21. Ground 2 is that an NRW Official, Mr Drewett, gave a promise to the claimant that he would be consulted. In an email to the claimant on the 18 August 2020, which was copied to senior officers in NRW and also to WUF, Mr Drewett said  

“...as part of this review, we will be looking at the effectiveness and compliance with conditions attached to the previous consents and so the information that you have supplied in this respect is invaluable. I was previously unaware of the incidents of potential non-compliance that you have highlighted...It is my intention to consult with a variety of expert advisors and stakeholders, including other land owners, rights holders and WUF, later in the year regarding draft conditions on launching consents but, in the meantime, please do not hesitate to contact me if you would like to discuss this further?”
22. Such consultation did not take place. None is required by law. Accordingly the claimant can only succeed on this ground if he can establish a clear and unambiguous representation that such consultation would be carried out. In my judgment this indication was a statement of intention rather than such a representation. Even if it did amount to the latter, it is clear that there was extensive communication between the claimant and NRW as part of the decision making process. Even though he may not be expected to speculate what other stakeholders might have said if consulted, as he adopted the approach of WUF as to the gauging of low water levels between Glasbury and Hay, it is difficult to see what more information might have been forthcoming on this rather narrow issue as to whether such gauging should have been adopted in granting the consent. In my judgment this ground is not arguable.

23. Ground 3 is that NRW failed to have regard fully to the report and wrongfully took into account the business interests of WVC. In my judgment neither of these limbs are arguably made out. On receipt of the report, Mr Drewett thanked the claimant for it and said that he had read it. In respect of the business interests of WVC, it is clear that these were referred to in some of the communications sent by WVC to NRW, but as Ms Davies realistically acknowledged there is nothing expressly to show that NRW took these into account in its decision making process. She submits that this is to be inferred. In an email from WVC to Mr Drewett on the 6 December 2020 asking for a consent without a specific depth. In response on 20 December 2020 Mr Drewett said:
- “You seem to have found some more detailed water level data than me! I am now persuaded that the 0.67m limit may be suspect and should not be directly mentioned in the conditions at all. I will be including a condition to cease launching if boats cant get down to Hay without the likelihood of frequently getting stuck but this will obviously be dependent on type of craft and variations in the river channel and so is largely down to your own judgement.”
24. In my judgment, far from indicating that NRW took the business interests of WVC into account, this indicates that it was the water level data supplied by WVC that persuaded the NRW that the 0.67 limit may be suspect. There is no room to infer that business interests were taken into account.
25. Under ground 4 the claimant maintains that selective consultation with WVC and the national governing body, Canoe Wales, shows apparent bias on the part of NRW. This ground relies on the lack of consultation with other stakeholders, and this has already been dealt with to some extent under ground 2. It also relies upon taking the business interests of WVC into account and this has been dealt with under ground 3. In my judgment it is not arguable that the fair-minded and informed observer having considered the facts would conclude that there was a real possibility that NRW was biased.
26. Ground 5 is that the decision was ultra vires as WVC has not shown that it is an owner/occupier of any part of the site for the purposes of section 28E of the 1981 Act, which provides that the owner or occupier of land included in a SSSI shall not cause or permit to be carried out an operation specified in the notification unless that operation is carried out with the consent of the competent authority. In his second witness statement, the claimant, whilst accepting that WVC owns some of the riverbank in the site, gives reasons why it does not own the riverbed.
27. However, as Mr Glenister submits, the meaning of occupier in this context includes someone who is in a relationship with the owner so that the mechanisms provided under the 1981 Act can sensibly be made to apply to that occupier (see *Southern Water Authority v Nature Conservancy Council* [1992] 1 WLR 775 at 782 per Lord Mustill). In my judgment it is clear that WVC is such an occupier in running its business of launching boats into the river at Glasbury.
28. Accordingly, in my judgment none of the grounds is arguable and permission is refused. Counsel helpfully agreed that any consequential matters which cannot be agreed can be dealt with by written submissions and such submissions, together with a

draft order agreed as far as possible, should be filed and exchanged within 14 days of hand down. There is an outstanding application for a cost capping order, but given this decision and the fact that the cost order made by Steyn J comes within the relevant limit, it does not appear to be necessary to make such an order.