

## Poultry and Pollution: The National Farmers' Union v Herefordshire Council & Ors [2025] EWHC 536 (Admin)



**18 March, 2025**

On 10 March 2025, the High Court dismissed a challenge to the [Herefordshire Minerals and Waste Local Plan](#) (“**the MWLP**”) brought by the National Farmers’ Union (“**the NFU**”). Whilst the immediate impact of the decision will primarily affect livestock production in Herefordshire, the Court’s conclusions on the meaning of “waste” is likely to have wider implications for the agricultural sector more generally.

The NFU brought a claim against Herefordshire Council (“**the LPA**”) and the Secretary of State for Levelling Up, Housing and Communities (“**the SoS**”). River Action UK (“**River Action**”), a charity that campaigns against river pollution, was the intervener.

### **Context**

The MWLP forms part of the Herefordshire Local Plan. Policy W3 of the MWLP controls agricultural waste management, including for livestock units.

Under Policy W3, proposals for livestock unit(s) on agricultural holdings must meet certain requirements: they are required to provide waste management method statements (“**Requirement 1**”); and they are also required to demonstrate “*at least nutrient neutrality*” if they are within the River Wye or River Clun Special Areas of Conservation (“**SACs**”) (“**Requirement 2**”).

Notably, Policy W3 is a planning policy which seeks to regulate agricultural waste. Agricultural activities ordinarily fall outside planning control, benefiting from a suite of permitted development rights. However, as the LPA accepted, Policy W3 was “*unusual*” in this respect (at [7] and [25]).

The justification given by the LPA for this peculiarity is the context for Policy W3, this being the pollution to the river network in Hertfordshire caused by excess nutrients. This is a well-documented and sensitive local issue and is, as the Judge notes, “*a matter of strategic importance within Herefordshire and beyond*” (at [12]).

Both the River Clun SAC and part of the River Wye SAC are failing in respect of their water quality objectives. A substantial contribution to nutrient load comes from agriculture, in particular, from chicken manure produced by the growing industrial poultry farming sector. Roughly 24 million chickens, a quarter of the UK's poultry production, are raised in the River Wye's catchment area.

In the light of this background, the LPA, as a unitary authority with a prominent agricultural sector, sought to promote Policy W3 to strengthen controls on agricultural waste and address water quality. Following examination in November 2022, the MWLP was approved and adopted in March 2024.

### **The Claim and the Grounds**

The NFU brought a challenge to the lawfulness of Policy W3 of MWLP on five grounds:

Ground 1 alleged the unlawful extension of policy to address agricultural matter beyond the definition of "waste" in the Planning Acts.

Ground 2 alleged the irrational and/or improper extension of policy requirements to the whole agricultural unit within which development takes place.

Ground 3 alleged the irrational extension of nutrient neutrality requirements, not supported by Natural England.

Ground 4 alleged procedural unfairness on the basis that the failure to consult the NFU at regulation 19 stage caused substantial prejudice.

Ground 5 alleged a failure to provide adequate reasons.

The essence of the claim is captured in two related propositions: firstly, agricultural activities are generally exempt from planning control (at [58]); and secondly, agricultural activities are subject to other non-planning regulatory regimes (at [59]).

The discussion below focuses primarily on the issues arising under Ground 1 whilst providing a brief summary of the Judge's findings on Grounds 2 to 5.

### **Ground 1 in detail**

Two issues arose for consideration, one narrow and one broad. The narrow issue concerned the definitional question of "waste" in the Planning Acts, and relatedly, whether Policy W3 extends beyond this definition. The broad issue concerned the lawfulness of any extension. It is appropriate to deal with the broad issue first.

#### *The broad issue*

The NFU placed reliance on s.19(1) of the Planning and Compulsory Purchase Act 2004 ("**the PCPA**"), which requires development plan documents to be prepared in accordance with the local development scheme. The MWLP, being a development plan document, must be prepared as such. The local development scheme is a creature of the Planning Acts. As it is titled a "...Waste...Plan", it follows, the NFU argued, that it can only contain policies that refer to "waste" as defined in the Planning Acts (at [80]).

The Judge rejected this argument. Accepting the SoS's submissions, she noted that the local development scheme does not purport to limit the definition of "waste". As such, s.19(1) could not otherwise limit the LPA's powers. The name of the document also did nothing to restrict the MWLP to the scope of "waste" as defined in the Planning Acts (at [80]).

As a result of the Judge's conclusion on the broad issue, Ground 1 necessarily failed. Policy W3 of the MWLP could lawfully exceed the scope of "waste" as defined in the Planning Acts. Nevertheless, she went on to consider the narrow issue, i.e. whether it in fact did.

### *The narrow issue*

The starting point here is the definition of "waste" within the Planning Acts. s.336 of the Town and Country Planning Act 1990 provides that this is the same as that from the EU Waste Framework Directive (2008/98/EC, as last amended by 2018/851) ("**the WFD**").

Article 3(1) of the WFD defines "waste" as "*any substance or object which the holder discards or intends or is required to discard*".

Article 2(1) sets out exclusions from the scope of the WFD. Within this list is "*faecal matter*" where it is used in farming through processes or methods which do not harm the environment (Article 2(1)(f)).

Further, Article 5 covers "*by-products*", and provides that a substance resulting from a production process, the primary aim of which is not its production, may be considered not as waste – but instead a byproduct – if 4 conditions are all met:

- (a) further use of the substance is certain;
- (b) the substance can be used directly without any further processing other than normal industrial practice;
- (c) the substance is produced as an integral part of a production process; and
- (d) further use is lawful.

On the other hand, "*agricultural waste*" for the purposes of the MWLP is defined as "*includ[ing] a variety of substances such as pesticides containers, oil and silage wrap, as well as slurry which result from activities including horticulture, fruit growing, dairy farming, livestock breeding, seed growing, grazing and nurseries*" in the Glossary. There is no reference to the Planning Acts or the WFD.

Central to the NFU's case was the applicability of Article 5 to agricultural waste. As chicken manure is typically not discarded but used in farming as fertiliser, it fell to be considered as a by-product, not waste (at [64-66]). It also argued, in respect of the requirement under Article 2(1)(f) for there to be no environmental harm, that the existence of parallel regulatory regimes for environmental protection (here, the Farming Rules for Water) meant that it should be assumed that they would operate effectively to prevent any harm (at [67]). Chicken manure was therefore caught within the Article 2(1)(f) exclusion. By covering such agricultural waste, Policy W3 would be going beyond the scope of the WFD.

The Judge disagreed with the NFU on the narrow issue and accepted River Action's submissions. Importantly, she did not accept that the existence of other regulatory regimes obliged the LPA to assume no environmental harm. This was particularly so where there was undisputed evidence that the regime "*beyond any doubt had failed to protect the environment from harm*" (at [81]). Having regard to the overall purpose of the WFD to reduce and prevent harm, it would be contrary to this purpose to apply the Article 2(1)(f) exclusion to the manure under such circumstances (at [81]).

The Judge also considered the two cases which considered agricultural waste in relation to the 1975 version of the WFD: *Commission v Spain* [C-121/03] and *Brady v Environmental Protection Agency* [C-113/12]. She accepted River Action's submission that *Brady* confirmed that chicken manure could be classified as a by-product under Article 5, but only where there was "*sufficient certainty*" of re-use (at [82]). On the present facts, it could not be assumed the manure would be used in farming which causes no environmental harm, not least because there was evidence to the contrary (at [76-77]). Further, this

was a challenge to a policy which is “*necessary speculative*” and “*imports an inevitable degree of uncertainty*” about the use and potential harms of the manure (as opposed to *Brady* which was concerned with a specific proposal) (at [83]). There was nothing unlawful about Policy W3 in effect taking this into account by including within its scope agricultural waste.

## **Grounds 2 to 5**

Ground 2: The issue concerned the requirements for Environmental Impact Assessment (“**EIA**”) development, which related to the whole agricultural unit, rather than simply the proposed development. The NFU argued any condition imposed to secure these would fall foul of the principles in *Newbury v Secretary of State for the Environment* [1981] AC 578.

Dismissing this ground, the Judge found no conflict. In respect of Requirement 1, she found clear justification for the more onerous requirement. Requiring a method statement to address the “*overall management of waste generated*” amounted to “*no more than considering the cumulative impacts*” of what would be major development with significant likely environmental effects (at [99]). In respect of Requirement 2, the Judge held that the wording of Policy W3 was clear that nutrient neutrality applies only to the proposal and not the entire unit (at [100]). Insofar as the Supporting Text states otherwise and “*tr[ies] to do too much*” (a point conceded by the LPA at [96]), “*there is sufficient flexibility [in the text] ...to not cut across the meaning of*” the policy itself (at [101]). It did not, therefore, illegitimately extend Requirement 2 so as to render Policy W3 unlawful.

Ground 3: The NFU argued that it was irrational for a policy to require nutrient neutrality for the entire LPA area in circumstances where Natural England had only advised that it was necessary for a smaller specific area (at [104] and [111]). This ground was dismissed. The Judge found no irrationality, noting that Natural England’s position “*was clear that it was open to the LPA to take a local approach so long as that was justified on the facts and before the Inspectors*” (at [116]).

Ground 4: It was common ground that there was a procedural error in the LPA’s failure to consult the NFU at regulation 19 stage. The only issue was whether it caused substantial prejudice (at [122]). This ground was dismissed. Whilst acknowledging the procedural importance of regulation 19 (at [146]), the Judge did not consider any of the specific points raised by the NFU to be material, as they had either already been raised at regulation 18 stage and/or subsequently in the NFU’s response to the consultation on Main Modifications (at [148]-[152]). No substantial prejudice arose.

Ground 5: The NFU argued that inadequate reasons were supplied in respect of (i) the scope of the MWLP as regards agricultural waste, and (ii) the soundness of Policy W3 in light of its duplication of other non-planning regulatory controls. This ground was dismissed. The Judge held that the reasons for both issues were adequately provided not only in the Inspectors’ Report, but also in the background documents available to the NFU (at [163] and [164]).

In summary, all five grounds, and the claim as a whole, were rejected.

## **Comment**

This blog concludes with four observations:

Firstly, the decision affirms the need for sufficient certainty of further use in order to engage the “*by-product*” classification under Article 5, particularly if the classification is to be applied at the point of production. Given the Judge’s clear view of the inherent speculation and uncertainty borne out of the facts, there was limited need to grapple with the degree of certainty required. Nonetheless, absolute certainty is not required (see *Brady* at [48]), and the Judge (as well as the LPA) accepted the potential

for “*a case specific argument on particular application*” to satisfy the requisite threshold, as was the case in the case law (at [82]).

This no doubt highlights the difficulty with mounting a challenge on this basis against a policy. A party seeking to do the same in respect of a specific proposal would likely be in a better position, since it might be possible to identify the destination(s) for the substance. That said, it remains the case that this question of certainty invariably invites the exercise of judgement by a decision-maker. In determining whether such judgement strays into irrationality, a Court is also likely to have regard to the legislative purpose of the WFD to reduce environmental harm, as the Judge has done here.

Secondly, the NFU’s reliance on parallel regulatory regimes engages the familiar principle from *Gateshead MBC v Secretary of State for the Environment* (1995) Env LR 37, namely that planning decision-makers are entitled to assume that other regulatory regimes will operate effectively. This has been followed in a line of authority and is enshrined in para.201 of the NPPF (December 2024). However, the Judge’s approach and her refusal to assume no environmental harm serves as a reminder that this principle is not absolute and can be rebutted in the light of evidence to the contrary. The existence of other regulatory regimes is ultimately, as stated in *Gateshead* at 44, a material consideration; it is not, as aptly put by Michael Rhimes in [this blog post](#), “*a principle of blind faith*”.

Thirdly, whilst the NFU appeared to contest the notion that manure could, depending on the stage of the activities, “*[fall] in and out of the definition of waste*” (at [66]), this point was not expressly addressed in the decision. However, given the Judge roundly agreed with River Action’s submissions and made no qualification of *Brady*, it seems implicit that the possibility for manure to move between the definitions in its lifetime, as envisioned in [50] of *Brady*, is accepted. Therefore, a substance may be considered a by-product at the point of production on the basis that there was originally sufficient certainty of re-use, but nonetheless may subsequently become waste if it is later discharged as such.

Fourthly, it is important not to overlook the broad ground upon which Ground 1 actually failed, that being the Judge’s acceptance that the MWLP did not need to be coterminous with the Planning Acts in its definition of “*waste*” and could in fact exceed them. It follows from the Judge’s reasoning that it would have been necessary for the local development scheme to take up a position on the meaning of “*waste*” for s.19(1) PCPA to bite. It also follows that where the local development scheme is silent, as seems to be the case here, the Planning Acts do not ‘step in’ to apply their definition. In these circumstances, the LPA was entitled to adopt a policy that went beyond the Planning Acts’ definition, in spite of the fact that their plan-making functions derive from the very same Acts. Whilst the outlines of a *vires* issue appear present, it seems as though this was not pursued at the hearing (at [63]). Finally, one final parting thought on this issue – whilst the Glossary to the MWLP defines “*agricultural waste*”, it is silent on any definition for “*waste*” itself. If, contrary to the Judge’s conclusion on the narrow issue, the MWLP did exceed the Planning Acts’ definition, where are the boundaries of “*waste*” for the purposes of the MWLP to be found?

It remains to be seen how the industrial poultry farming sector in Herefordshire, as well as livestock production generally, will respond to the greater requirements for waste management. The decision also raises the question of whether other LPAs might draw from Policy W3 in formulating their MWLPs. As for the river network, on the same day as this decision, the English and Welsh government jointly announced a £1m fund to investigate the sources of pollution in the River Wye. At present, there is also an ongoing group action against Cargill UK poultry group and Dŵr Cymru Welsh Water. It seems safe to say that this decision is unlikely to be the last word on this complex landscape.

A link to the reserved judgment handed down by Mrs Justice Lieven DBE can be found [here](#).

[Jeffrey Chu](#) is a pupil barrister at Francis Taylor Building.

Ned Westaway acted for the Claimant in this matter. He has had no involvement in the drafting of this post.