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Environmental Law Blog

ELB seeks to provide regular posts on developments in environmental law and policy, from the forthcoming Environment Bill to recent climate litigation to developments in environmental policy both domestically and internationally.

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FTB Quarterly Environmental Law Update

24 May 2021



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R (Anglian Water Services Ltd) v. EA [2020] EWHC 3544 (Admin)

Meyric Lewis

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Anglian Water's region (as statutory water and sewerage undertaker) includes Cleethorpes, Humberston Fitties and Ingoldmells South beaches in Lincolnshire

AW's water recycling centres discharge treated effluent into rivers and the sea – but they are given incentives under their financial settlement with OFWAT to maintain the quality of bathing waters in their region as “excellent”.

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The Bathing Water Regulations 2013

EA has to “classify” bathing water quality for (inland and) coastal waters in accordance with an “assessment” of samples taken in accordance with their “monitoring calendar” (and samples must be taken “no later than four days after the date specified in the monitoring calendar”)

The classifications are “poor”, “sufficient”, “good” or “excellent”

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Short term pollution/abnormal situations

“short-term pollution” incidents – ie one “not normally expect[ed] to affect bathing water quality for more than approximately 72 hours...”

Samples taken during incidents may be “disregarded” so long as EA makes up samples to the minimum number required under their monitoring calendar

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“abnormal situation” – ie “an event or combination of events impacting on bathing water quality which the [EA] would not expect to occur, on average, more than once every four years”

Monitoring calendar can be “suspended” during so long as EA “take sufficient additional samples to replace those missing due to the suspension and to ensure that it has the minimum number required...”

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Three fateful occurrences

10 June 2019 – fridge in EA sampling van breaks down and samples spoiled

10-12 June 2019 – intense rainfall in Lincolnshire causing widespread flooding and requiring evacuation of 600 homes (Met Office: “one of the most significant rainfall June rainfall events across Lincolnshire of the last 50+ yrs... c. 2.5 times monthly average rainfall fell 10-12 June”)

EA goes out again on 12/13 June to take repeat/timetabled samples – all with elevated levels of contaminants

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The claim

The aberrant samples had such high levels of contamination that they would have resulted in the classifications for the three beaches falling from “excellent” to “good”

AW raised the issue and said EA should have either (1) invoked short term pollution procedures or (2) declared an abnormal situation

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EA response – (1) short term pollution

(1)(a) no short term pollution incident on 12 June because no indication on our pollution risk forecasting software

(b) short term pollution incident indicated on 13 June (and 11 June) BUT not triggered because no warning not to bathe – so no replacement samples taken

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EA response – (2) abnormal situation

(2)(a) no abnormal situation because can't be “based on heavy rainfall alone”

(b) “impossible... to confirm that heavy rainfall is as a result of a 1 in 4 year storm until after the event” and

(c) abnormal situation can't be declared retrospectively – and no replacement samples taken

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Thornton J held

Definition of short term pollution satisfied but failure to warn bathers (a general public interest requirement of the Regs and Directive) meant that EA entitled not to invoke disregard procedure

Also, could not extend short term procedures to beaches not covered by pollution risk forecasting (that was the model they had adopted and BACI/Mott principles applied to any challenge)

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BUT declaring an abnormal situation required a contemporaneous decision: an abnormal situation had to be identified at the time of its occurrence. But EA stance that pollution source should be a known one in order for an event to qualify as an abnormal situation impermissibly narrowed the definition of an abnormal situation by excluding unexpected pollution events with complex causes.

In any event, the EA had a discretion to take account of an abnormal situation in its assessment and classification of water quality, even where sampling had not been suspended at the time. It had a duty to ensure compliance with the Directive, which sought to ensure realistic water quality classifications based on the most reliable parameters. In believing that it could not do so, the Agency misdirected itself.

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FTB Quarterly Environmental Law Update

Conservation Covenants

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a) Intro and background

- Part 7 of Environment Bill 2019-21
- Applies to England only
- Follows on from:
 - Law Commission investigation in 2012, public consultation in 2013, Law Commission report in 2014
 - Forerunners
 - s.8 National Trust Act 1937
 - s.5 Forestry Act 1967

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b) What is a CC and formalities

- In summary a CC is a provision in a private, voluntary CC agreement between a landowner and responsible body. They provide for the conservation of the natural environment and heritage assets for the public good on land subject to the CC and crucially- by binding successors in title if it is sold or passed on- they ensure that that conservation can be maintained in the long-term.

- A provision will qualify as a CC (and thereby be given statutory effect) if it meets the following conditions:

- it is of a 'qualifying kind'
- it is for a 'conservation purpose'
- it is intended by the parties to be for the public good

- CC agreement formalities

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c) Duration of an obligation under a CC and how CCs bind subsequent landowners

- Duration of an obligation under a CC (unless the parties agree to a shorter period in the CC agreement):

- indefinitely where the relevant qualifying estate is freehold; or
- the remainder of term where relevant qualifying estate is leasehold.

- A CC will bind:

- landowner who created it
- any successor of the original covenantor

- A CC will not bind:

- whose interest in the land predates the CC
- who is a lessee or sub-lessee under a lease granted for 7 yrs or less in respect of positive obligations
- who acquires an estate in land in circumstances where the CC in respect of it- which is a local land charge- has not been registered as such
- whose immediate predecessor was not bound by the CC

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d) Enforcement

- If breached what in a CC agreement can be enforced?
 - a provision which meets the conditions of a CC
 - a provision which does not meet those conditions but which is nevertheless also given statutory effect because it is or should be treated as being ancillary to such a provision
- Who can enforce and who can be enforced against?
 - Where a landowner breaches its obligation under a CC- enforceable by resp body
 - Where a resp body breaches- enforceable by anyone who holds the relevant qualifying estate (or an estate derived from it) at that time

- LP = 6 years



e) Defence to enforcement

It will be a defence where the breach occurred:

- because of something beyond the defendant's control;
- as a result of something done in an emergency to prevent loss of life or injury;
- in circumstances where it is not possible to comply with an obligation under a CC without breaching a statutory control applying as a result of the designation of the land for a public purpose, provided that designation was after the CC was created and, in the event that the defence is relied on only because of a failure to obtain authorisation that would have enabled compliance with the obligation, the defendant can show that they took all reasonable steps to obtain such an authorisation;
- but where, for responsible bodies, the defence of statutory authority applies



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Further info...

- For further info, see articles on FTB Environmental Law Blog (<https://www.ftbchambers.co.uk/elb>)



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Quarterly Environmental Law Update (May 2021)

Environment and Human Rights

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Some facts and figures

- Between 2015 and May 2020, litigants brought 36 lawsuits against states (as well as 3 lawsuits and 1 investigation against corporations) for human rights violations related to climate change
- Cases were filed in 23 national jurisdictions, 2 regional and 3 global judicial/quasi-judicial bodies
- Before 2015, only 5 rights-based climate cases had been filed in the world

Taken from 'Global trends in climate change litigation: 2020 snapshot' Joana Setzer and Rebecca Byrnes, Policy Report, July 2020 (London School of Economics Grantham Research Institute on Climate Change and the Environment and the Centre for Climate Change Economics and Policy)

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Urgenda 2019

- Urgenda Foundation and 900 Dutch citizens against the Dutch government
- Articles 2 and 8 European Convention on Human Rights
- Concerning necessary target levels for GHG emission reduction by 2020
- Supreme Court upheld the Court of Appeal's order requiring a 25% reduction in GHGs (compared to 1990 levels) by 2020
- Contracting states, to the ECHR, are obliged to take suitable measures if a real and immediate risk to people's lives/welfare exists and the state is aware of it



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Urgenda 2019

This case involves an exceptional situation. After all, there is the threat of dangerous climate change and it is clear that measures are urgently needed, as the District Court and Court of Appeal have established and the State acknowledges as well (see 4.2-4.8 above). The State is obliged to do 'its part' in this context (see 5.7.1-5.7.9 above). Towards the residents of the Netherlands, whose interests Urgenda is defending in this case, that duty follows from Articles 2 and 8 ECHR, on the basis of which the State is obliged to protect the right to life and the right to private and family life of its residents (see 5.1-5.6.4 and 5.8-5.9.2 above). The fact that Annex I countries, including the Netherlands, will need to reduce their emissions by at least 25% by 2020 follows from the view generally held in climate science and in the international community, which view has been established by the District Court and the Court of Appeal (see 7.2.1-7.3.6 above). The policy that the State pursues since 2011 and intends to pursue in the future (see 7.4.2 above), whereby measures are postponed for a prolonged period of time, is clearly not in accordance with this, as the Court of Appeal has established. At least the State has failed to make it clear that its policy is in fact in accordance with the above (see 7.4.6 and 7.5.1 above).

(Urgenda, judgment of the Netherlands' Supreme Court at 8.3.4)

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Since 2019...?

- Torres Strait Islanders (Torres Strait 8) (filed 2019) – UN Human Rights Committee (ICCPR)
- Saachi et al v Argentina et al (filed 2019) – UN Committee on the Rights of the Child (CRC)
- **Youth for Climate Justice v Austria et al (filed 2020) – ECtHR (ECHR)**
- **Union of Swiss Senior Women for Climate Protection v Swiss Federal Council et ors (filed 2020) – ECtHR (ECHR)**
- **Climate Case Ireland – (decision 2020) Supreme Court of Ireland**
- Association Oxfam France et ors v France, decision Paris administrative court (decision Feb 2021)
- Petition seeking to redress violations of the rights of children in Cité Soleil, Haiti (filed 2021) – Inter-American Commission on Human Rights
- Mex M v Austria (filed 2021) – ECtHR (ECHR)
- Neubauer et al v Germany (decision April 2021) – German Supreme Constitutional Court
- **Young People v UK Government (filed 2021) (High Court) (Human Rights Act 1998)**

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Union of Swiss Senior Women

- Group of senior women against Switzerland
- Three grounds:
 - (i) Switzerland's climate policies violate Arts 2 and 8 ECHR (noting vulnerability of older demographic to heat waves)
 - (ii) Domestic court rejected the case on arbitrary grounds (breach of Art 6)
 - (iii) The Swiss authorities/courts not deal with the complaints (breach of Art 13)
- ECtHR communicated the case to the Swiss government on 25 March 2021
- Case has priority status; Swiss response due 16 July 2021



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Youth for Climate Justice

- Filed 2 Sept 2020
- 6 Portuguese youth against 33 countries (MS of the EU + Norway, Russia, Switzerland, Turkey, Ukraine and UK)
- Alleges that states have not taken enough action on CC – seeks order requiring more ambitious action
- Arts 2, 8 and 14:
 - (i) Right to life threatened by CC effects in Portugal, including forest fires
 - (ii) Privacy – includes physical/mental wellbeing – threatened by heatwaves forcing time indoors
 - (iii) Young people – experience worse effects of CC
- Alleged failure to keep temp rise to 1.5 degrees – breach of HR obligations



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Youth for Climate Justice

Timeline

- 3 September 2020 – case filed
- 15 October 2020 – ECtHR fast-tracks case
- 13 November 2020 – ECtHR requires States to respond (by end of Feb 2021)
- 15 January 2021 – Governments ask ECtHR to reverse fast-tracking
- 4 February 2021 - ECtHR upholds fast-tracking decision
- 6 May 2021 – 8 supportive third party interventions filed
- 27 May 2021 - new deadline for defences

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Young People v UK Government

- Arts 2, 8 and 14 HRA
- Allege that UK Gov has failed to take practical and effective measures to implement central commitments in Paris Agreement, despite acknowledging that it is necessary to do so, which is inconsistent with the Claimants' fundamental rights (SFG at [34])
- Seeks a declaration to that effect and mandatory order that the Gov must implement, with appropriate urgency, a legal/regulatory framework sufficient to meet commitments



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Young People v UK Government

"In particular such a framework must ensure that:

- a. All Government Departments, local authorities and regulatory bodies are under a duty to align all activity under their control with the Paris Temperature Limit and the net zero target;*
- b. All Government Departments, local authorities and regulatory bodies are under a duty to ensure that all activity under their control is resilient to the current and projected impacts of climate change;*
- c. UK financial flows from both public and private institutions are consistent with the Paris Temperature Limit;*
- d. This Government and future governments implement the polluter pays principle to provide consistent and principled compensation and financial and technical assistance to historically low polluting and consuming communities on the frontline of the climate crisis, in the UK and internationally."* (para 38 of SFG)

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Climate Case Ireland

- Decision July 2020 (leapfrog to the Supreme Court)
- Case brought by Friends of the Irish Environment
- Concerned the Irish Government's National Mitigation Plan (required under the Climate Action and Low Carbon Development Act 2015)
- Also raised human rights questions
- FOIE found not to have standing re HR but the Court still considered the issue
- Focus on: right to life and right to bodily integrity
- Query: is there a separate "right to a healthy environment"?
- Barrett J in Dublin Airports Case – had found a "right to an environment that is consistent with the human dignity and well-being of citizens at large"



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Climate Case Ireland

That the rights sought to be relied on are recognised in the ECHR is, of course, clear. However, the precise way in which those rights may impact on legitimate decision-making in the field of climate change is disputed. There would not appear to have been any judgments, as yet, of the ECtHR directly in this area. On that basis the Government argued that national courts should not anticipate but rather should follow the ECtHR. (at 5.9)

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Climate Case Ireland

Returning to the issue in this case, it might be said that, in one sense, the beginning and end of this argument stems from the acceptance by counsel for FIE that a right to a healthy environment, should it exist, would not add to the analysis in these proceedings, for it would not extend the rights relied on beyond the right to life and the right to bodily integrity whose existence is not doubted. However, that very fact seems to me to demonstrate one of the difficulties with the asserted right. What exactly does it mean? How does it fit into the constitutional order? Does it really advance rights beyond the right to life and the right to bodily integrity? If not, then what is the point of recognising such a right? If so, then in what way and within what parameters? (at 8.10)



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Climate Case Ireland

...If it does not extend existing recognised rights, then there is no need for it. If it does extend existing recognised rights, then there needs to be at least some general clarity about the nature of the right so that there can be a proper analysis of whether the recognition of the asserted right can truly be derived from the Constitution itself. In my view, the right to an environment consistent with human dignity, or alternatively the right to a healthy environment, as identified in Fingal Co. Council and as accepted by the trial judge for the purposes of argument in this case, is impermissibly vague. It either does not bring matters beyond the right to life or the right to bodily integrity, in which case there is no need for it. If it does go beyond those rights, then there is not a sufficient general definition (even one which might, in principle, be filled in by later cases) about the sort of parameters within which it is to operate. (at 8.11)



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Climate Case Ireland

It does not seem to me that a cogent case has been made out for the identification of a derived right to a healthy environment. However, it is important, in saying that, to fully acknowledge that there may well be cases, which are environmental in nature, where constitutional rights and obligations may be engaged. (...) In indicating that I consider the asserted right to a healthy environment to be an either unnecessary addition (if it does not go beyond the right to life and the right to bodily integrity) or to be impermissibly vague (if it does), I should not be taken as suggesting that constitutional rights and state obligations have no role to play in environment issues.

(at 8.14)



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Conclusions?

- There has been considerable recent growth in this area
- Policy “gaps” on tackling CC – is litigation the plug?
- Query how a rights-based focus in environmental matters may filter through decision-making eg. PSED, HR impacts, def of “significant” environmental effects (EIA etc)
- Use by the courts of scientific reports and international consensus
- Urgency reflected in procedural decisions – fast-tracking etc

*R (Keir) v
Natural England
[2021] EWHC
1059 (Admin)*

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Jones Hill
Wood



Barbastelle Bat

- One of the UK's rarest mammals
- On the ICUN Red List
- Fewer than 5000 in the UK
- Maternity Roost assumed due to lack to appropriate surveys



C-674/17 Luonnonsuojeluyhdistys Tapiola Pohjois-Savo – (“Tapiola”) [2020] 2 CMLR

- Para. 61 “a derogation cannot be granted without an assessment of the conservation status of the populations of the species concerned and the impact that the envisaged derogation is capable of having on it at both local level and the level of the territory of that Member State”
- Para. 66 “in accordance with the precautionary principle enshrined in Article 191(2) TFEU, if, after examining the best scientific data available, there remains uncertainty as to whether or not a derogation will be detrimental to the maintenance or restoration of populations of an endangered species at a favourable conservation status, the Member State must refrain from granting or implementing that derogation.”

Bat Mitigation Guidelines

Maternity sites of rarest species
 “oppose interference with existing roosts or seek improved roost provision. Timing constraints. No destruction of former roost until replacement completed and significant usage demonstrated”

Planning mitigation and compensation [Key principles of mitigation]

Low	Roost status	Mitigation/compensation requirement (depending on impact)
	Feeding patches of common/rare species Individual bats of common species Small numbers of common species. Not a maternity site	Flexibility over provision of new boxes, access to new buildings etc. No conditions about timing or monitoring
	Feeding patches of Annex II species	Provision of new roost facilities where possible. Need not be exactly like-for-like, but should be suitable, based on species requirements. Minimal timing constraints or monitoring requirements
	Small numbers of rare species. Not a maternity site	Timing constraints. More or less like-for-like replacement. Data not to be left without a roost and must be given time to find the replacement. Monitoring for 2 years preferred.
	Maternity sites for small numbers of common/rare species	
	Maternity sites of common species	
Conservation significance		
	Maternity sites of rare species	Timing constraints. Like-for-like replacement as a minimum. No destruction of former roost until replacement completed and usage demonstrated. Monitoring for at least 2 years.
	Significant roosting sites for important species or all species assemblages	
	Sites meeting SSSI guidelines	Oppose interference with existing roosts or seek improved roost provision. Timing constraints. No destruction of former roost until replacement completed and significant usage demonstrated. Monitoring for as long as possible.
High		

Figure 4. Guidelines for proportionate mitigation. The definition of common, rare and rarest species requires regional interpretation.

Licensing Policy 4

“Natural England will be expected to ensure that licensing decisions are properly supported by survey information, taking into account industry standards and guidelines. It may, however, accept a lower than standard survey effort where: the costs or delays associated with carrying out standard survey requirements would be disproportionate to the additional certainty that it would bring; the ecological impacts of development can be predicted with sufficient certainty; and mitigation or compensation will ensure that the licensed activity does not detrimentally affect the conservation status of the local population of any EPS.”

Amended by Mrs Justice Lang on 16 April 2021



In the High Court of Justice
Queen's Bench Division
Planning Court

CO/1327/2021

In the matter of an application for Judicial Review

THE QUEEN

on the application of

MARK KEIR

versus

NATURAL ENGLAND

Claimant

Defendant

(1) FUSION AND MURPHY JOINT VENTURE

(2) HIGH SPEED TWO (HS2) LIMITED

Interested Parties

Application for permission to apply for Judicial Review and interim relief

NOTIFICATION of the Judge's decision (CPR Part 54.11, 54.12)

Following consideration of the documents lodged by the Claimant, and the representations made by the Defendant and the First Interested Party,

Order by the Honourable Mrs Justice Lang DBE

1. The Interested Parties are forthwith restrained from carrying out works or other activities at Jones' Hill Wood, Buckinghamshire, in the Licensed Area, as defined in Licence WML/CRS, issued by Natural England on 30 March 2021, until the determination of this claim or further order.

2. The application for permission is adjourned to be listed in court as a "rolled up hearing", on notice to the Defendant and Interested Parties, on a date in the week commencing 24 May 2021 or as soon as possible from 8 June 2021 onwards having regard to the availability of courtrooms already instructed at the date of this order. If permission to apply for judicial review is granted at that hearing, the Court will proceed immediately to determine the substantive claim.

3. The claim is to be expedited.

4. The Claimant do have permission to rely upon the expert reports of Dominic Woodfield and Robert Misato.

5. This is an Aarhus Convention claim within the meaning of CPR 45.41. The Claimant's liability for the costs incurred by the Defendant and Interested Parties is limited to £5,000, and the Defendant's liability for the costs incurred by the Claimant is limited to £35,000.

6. Costs reserved.

Fees PD9 (R) 1 June 2017 - Judicial Review Adjourned for a Roll-up Hearing

Timeline

- 3 February 2021 NE refused to issue a derogation licence
- 5 March 2021 HS2 resubmit a licence application
- 30 March 2021 (i.e. one clear day before the Easter Bank Holiday weekend) NE granted HS2 a Licence for "removal of vegetation (tree felling) to facilitate the translocation of ancient woodland soils to a receptor site, to facilitate the construction of HS2 railway line, and subsequent works". CB/259-276
- 12 April 2021 Mark Keir brings Judicial Review
- 16 April 2021 Lang J. imposes injunction says "real prospect of success" and refusal of permission "unlikely"
- 19 April 2021 HS2 applied urgently for that order immediately to be varied
- 23 April hearing before Holgate J.
- 26 April 2021 refused permission for judicial review and discharged the order of Lang J

Ground 1: Misdirection of Law

- Para. 41 "I agree with Mr. Streeten that that approach must accord with the precautionary principle. In other words, levels of confidence, or likelihood, or risk, may be judged to be acceptable if the decision-maker does not consider that there is a reasonable scientific doubt about whether an action authorised by a licence would be detrimental to the maintenance of the population of a species at a "favourable conservation status in their natural range." On the other hand, as Mr. Streeten put it crisply, an expression of likelihood, such as the balance of probabilities, should not be *substituted* as a decision-making test for the "absence of reasonable scientific doubt" required by the precautionary principle."
- Para. 66 "expressions of likelihood may be taken into account as factors in a FCS assessment. But NE did not commit the error of substituting "likelihood" as a test for absence of *reasonable* scientific doubt. The precautionary principle does not require the exclusion of *any* scientific doubt. NE explained in several places where they considered the information provided to be satisfactory."

Ground 2: Failure to Justify Departure from Policy

LP4:

- Para. 90 NE's judgment is that barbastelle are unlikely to be present in the Wood. But the Guidance proceeds on the basis that a maternity site is *in fact* present (i.e. no destruction of "former roosts").
- Para. 91 "Mr. Streeten speaks of the "continued viability of the colony" as if it actually exists. But the worse case scenario is simply an assumption which enabled the effects of, for example, the loss of one potential maternity roost to be assessed in the broader context explained by IP1 and also precautionary mitigation to be identified, both as inputs to the application of the statutory test laid down by regulation 55(9)(b).

BMG

- Para. 74 "The claimant's argument fails to address the conditions of the licence. As we have seen, they prevent felling during both the hibernation season and the maternity season. Condition 13 prohibits the licensed activities from taking place while any *actual* maternity roost found to be on site is being used for that purpose. In reality, the bat boxes provide compensation for the loss of what is no more than a single "potential roosting feature" in one tree, which would not be "typically favoured" by the species. NE's decision also had regard to the substantial availability of habitat within 3 or 6 km, in addition to the compensation and mitigation measures."

Grounds 3, 4, and 5

-
- Ground 3:** Adequate reasons given for position notwithstanding previous refusal
-
- Ground 4:** HS2 amended licence during proceedings to move mitigation off land not in their ownership.
-
- Ground 5:** Essentially for the reasons already given, the decision was not irrational.

Interim Injunction

“Even if it were to be arguable that NE has made an error of law in one or more of the respects alleged, I am not persuaded that the injunction is necessary to avoid that risk, or, alternatively, that any significant weight should be attached to that factor. I reach that conclusion after having considered all the ecological material before the court as a whole. I do not propose to analyse the varying conflicting points of view. I mention, by way of example, certain factors which have been accepted by NE the independent statutory authority responsible for applying regulation 55. There is only one tree in the licence area of relevance. It is not particularly attractive for breeding by the barbastelle. The habitat of the site itself is sub-optimal. On the other hand, there are many potential opportunities within 3 or 6 km for roosting by the barbastelle, including maternity roosting, in so far as the species may be present in the area. In my judgment, the evidence does not persuade me that the maintenance of the FCS of the barbastelle depends upon, or is affected by, the retention of the 19 trees.”



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