Neutral Citation Number: **[2024] EWHC 1279 (Admin)**

Case No: AC-2023-CDF-000045

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 24/05/2024

Before :

THE HONOURABLE MR JUSTICE DOVE

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Between :

The King (on the application of RIVER ACTION UK)	**Claimant**
- and -	
THE ENVIRONMENT AGENCY	**Defendant**
-and-	
SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS	**Interested Party**
-and-	
NATIONAL FARMERS UNION	**Intervenor**

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Mr David Wolfe KC & Mr Peter Lockley (instructed by **Leigh Day**) for the **Claimant**
Mr Charles Streeten (instructed by **Environment Agency Legal Department**) for the **Defendant**
Mr Ned Westaway (instructed by the **GLD**) for the **Interested Party**
Mr Hugh Mercer KC and **Ms Naomi Hart** (instructed by the **National Farmers' Union**) for the **Intervener**

Hearing dates: 7th & 8th February 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE DOVE

Mr Justice Dove :

Introduction

1. The claimant is a UK-based environmental charity which is committed to addressing the problem of river pollution, in particular that which is caused by agricultural and food production practices and the discharge of sewerage by water companies. Since 2021 the claimant has been campaigning to draw attention to the pollution of the River Wye ("the Wye"), specifically targeting the activities of the intensive livestock industry. The defendant is the agency who have specific responsibilities for environmental regulation, and in the context of this case are charged with responsibility for enforcing the Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018 ("the 2018 Regulations"). The interested party are the government department who sponsored and developed the 2018 Regulations. The intervenor is an Employers' Association pursuant to the Trade Union and Labour Relations (Consolidation) Act 1992, and its objects include representing and promoting the interests of farmers and growers. The intervenor was permitted to intervene solely on the question of the interpretation of Regulation 4 of the 2018 Regulations.

2. This claim for judicial review is brought by the claimant on three grounds. The first two are interrelated. The claimant challenges the legality of the approach of the defendant to the enforcement of the 2018 Regulations, both in terms of the enforcement action taken by the defendant and also the role of the Statutory Guidance published by the interested party pursuant to the 2018 Regulations for the purpose of guiding the defendant's enforcement activity. The third of the claimant's grounds alleges a breach of regulation 9(3) of The Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations"). In relation to that ground, it is alleged that the defendant has failed to have regard to the requirements of the Habitats Regulations in undertaking its enforcement activity.

3. I repeat the thanks to all the legal teams involved in this case which I expressed in court. A great deal of thought went into the preparation of the papers for the hearing, and in particular the preparation of a helpful core bundle. The written and oral submissions which the court received were of high quality, and the focussed advocacy of those appearing in the case enabled us to have an efficient and effective hearing. I am very grateful for all the parties' hard work.

The Wye

4. The Wye, along with the River Lugg, have wide catchment areas within the borderlands between England and Wales. Both rivers are areas of special importance for nature conservation and are designated as Sites of Special Scientific Interest. The lower reaches of the River Lugg along with the Wye are also part of the River Wye Special Area of Conservation (SAC) which was originally designated under the European Community Habitats Directive. The Wye is also a valuable recreational resource, providing the opportunity for tourism and outdoor pursuits such as fishing and kayaking. The catchment supports a significant number of agricultural and, in particular, livestock enterprises including a large number of intensive poultry units.

5. In recent years the Wye has been the subject of extensive pollution in the form of high concentrations of phosphorus in the river's water. The consequences of this include the development within the river of substantial algal blooms, turning the river green, interfering with its ecology and leading to an impact upon key species, such as *ranunculus* or the water crowfoot family of plants, the presence of which justified the original designation of the Wye as an SAC. The evidence also suggests that the effect of the algal blooms also impacts upon the recreational and tourist use of the river.

6. There is no dispute in this case that there are water quality issues in the Wye related to phosphate limits being exceeded within the catchment. This was documented in November 2021 in the "River Wye SAC Nutrient Management Plan Phosphate Action Plan", published by the defendant, along with Natural Resources Wales and Natural England. The document identifies point sources of phosphorus pollution, such as water treatment works, and the actions being taken to address reducing their contribution to the levels of phosphorus in the Wye. The document also identifies the issue, which is of central concern in these proceedings, of diffuse phosphate sources. By diffuse sources, what is meant is multiple sources, in contrast to point sources, the contribution of each of which may be small but cumulatively they may have a significant effect in aggregate. The document noted that modelling indicated that most of the diffuse phosphate load in the catchment arose from agriculture.

7. In a subsequent study, entitled "Re-Focusing Phosphorus use in the Wye Catchment: RePhoKUs", co-ordinated by academics at the University of Lancaster and the University of Leeds, it was estimated that, following the improvements in relation to phosphate emissions from water treatment works, some 60 to 70% of the total phosphate load in the catchment came from agricultural sources. The following extracts from the summary of the key findings of this study provide a distillation of the issues facing the conservation of the Wye and the need for the action which is the subject matter of this case.

   - "The Wye catchment has a high risk of agricultural P loss due to high P input pressure, poorly-buffered and highly dispersible P-rich soils, steep slops and moderate to high rainfall.
   - Farming generates an annual P surplus (i.e. unused P) of ca.3000 t (17kg P ha-1) in the Wye catchment, which is accumulating in the agricultural soils. This P surplus is nearly 60% greater than the national average, and is driven by the large amounts of livestock manure produced in the catchment.
   - The risk of P loss in land runoff due to accumulation of soil is greater in the Wye catchment than in other UK soils due to poor soil P buffering capacity and high dispersibility during storm events.

   …

   - Water quality in the Wye catchment, and many other livestock-dominated catchments, will not greatly improve without reducing the agricultural P surplus and drawing down P rich soils to at least the agronomic optimum. This will take many years.
   - A combination of reducing the number of livestock and processing of livestock manures to recover renewable fertilisers that can substitute for imported P products is needed to effectively reduce the P surplus."

The origin of the 2018 Regulations

8. The genesis of the 2018 Regulations, which are also known as the Farming Rules for Water, is that they were part of a broader initiative to meet the requirements of The Water Framework Directive, which itself included requirements to address the control of diffuse pollution. The 2018 Regulations apply to the whole of England, not simply the Wye, but given the issues set out above they are of importance to the control of pollution in the Wye. The background to this legislation, as explained in the documentation and the witness statement of Mr Adnan Obaidullah on behalf of the interested party, is that agriculture was identified as the single largest source of water pollution in England both at the time when the 2018 Regulations were introduced and now. Whilst the detail varies from catchment to catchment, it is estimated that nationally agricultural activities are responsible for 50% of nitrate pollution, 25% of phosphorus pollution and 75% of sediment pollution.

9. Work on the preparation of the 2018 Regulations commenced in early 2013. In September 2015 the interested party published a consultation in relation to new basic rules to tackle diffuse water pollution from agriculture. The consultation explained that the impact of diffuse water pollution included eutrophication, increased flood risk, the silting of fish spawning grounds, as well as pollution of bathing waters. There were advantages for farm businesses in the form of increasing the productivity and the resource efficiency of farms, as well as building a strong reputation for environmental standards in England. The basic rules which were proposed were said to reflect good practice already set out in the interested party's Code of Agricultural Good Practice. Option 1 comprised seven rules, including at rule 2 that the land manager should use a fertiliser recommendation system taking into account soil reserves and organic manure supply, thereby reducing "diffuse pollution to surface water and groundwater by planning crop nutrient requirements and spreading no more inorganic and organic fertilisers than a crop (including grass) needs."

10. Option 2 contained a further four rules in addition to Option 1. These additional rules included rule 8, which required that the land manager "not spread more than 30m3/ha of slurry or digestate or more than 8t/ha of poultry manure in a single application between 15th October and the end of February" with no repeat spreading for 21 days. This was intended to reduce diffuse pollution through surface runoff and leaching by not spreading large amounts of fertiliser during the time of year when the risk of pollution is greatest and plant requirement least. There would be expected to be less uptake by crop of nutrients over the winter months. Rule 9 precluded the spreading of manufactured fertiliser or manures at high-risk times or in high-risk areas. By this was meant avoiding "weather and soil conditions (eg high rainfall or frozen ground) which favours quick transfer to surface runoff or drains, or when crops cannot take up nutrients".

11. The consultation contained information about the approach which was to be taken to enforcement of the new rules. At paragraph 3.7 the consultation document provided as follows:

> "3.7 The Environment Agency's risk-based approach to regulation would be the basis for enforcement of the new rules. Where farmers did not comply with the rules, we propose to focus enforcement efforts on priority catchments. This would normally be an advice-led

approach at first. Farms remaining non-compliant could then expect to receive formal warnings and potentially a fine. Prosecution would generally only follow in the case of the more serious offences where there had been a failure to respond to those warnings. This staged approach is designed to avoid placing a disproportionate burden on farm businesses."

12. In November 2017 the interested party reported the response to the consultation. As a result of the consultation exercise there were now proposed to be eight rules, including in particular the following:

Final set of rules and changes from consultation proposals		
Rule	You said - key points raised	We did – changes made
Organic Manures and Manufactured Fertilisers		
1a) Application of organic manures and manufactured fertilisers to cultivated land must be planned in advance to meet soil and crop nutrient needs and does not exceed these levels. 1b) Soil testing must be carried out for Phosphorus, Potassium, Magnesium, pH and Nitrogen levels at least every 5 years for cultivated land.	Concern about the complexity of a fertiliser recommendation system (proposed rule).	We have adapted the rule to make it more outcome focussed and less prescriptive in the action required. Rather than requiring a fertiliser recommendation system, farmers need to test their soils periodically and apply nutrients to meet soil and crop needs.
…	…	…
3. Organic manures or manufactured fertilisers must not be applied: a. if the soil is waterlogged, flooded, or snow covered b. if the soil has been frozen for more [than] 12 hours in the previous 24 hours	There was concern that the proposed rule might be too inflexible (slurry and manure spreading limits from 15 October to February) and not clearly defined (do not spread manufactured fertiliser or manure at high-risk times or in high-risk places).	The revised rule puts the onus on the farmer to decide when conditions are unsuitable for applying fertilisers or manures. Risk criteria are provided to help inform this decision.

c. if there is significant risk of causing environmental pollution from soil erosion and run-off		
4. Organic manures must not be applied: a. within 10 metres of any inland freshwaters or coastal waters, except, if precision equipment is used within 6 metres of inland freshwaters or coastal waters. b within 50 metres of a spring well or bore hole.	The rule gave rise to similar concerns to those above, that the proposed rule was too inflexible (slurry and manure spreading limits from 15 October to February).	We have revised the rule, replacing fixed dates with clear limits for organic manure application and more lenient restrictions where precision equipment is used.

13. In February 2018 the interested party published an Impact Assessment in relation to the proposal to introduce secondary legislation. This document explained that as a result of market failure there were limited incentives for farming businesses to adopt practices which would reduce water pollution, and that effectively tackling water pollution required a mix of regulation, voluntary action and financial incentives. The measure was also required in order to meet the objectives of the Water Framework Directive: "there is evidence of widespread agricultural diffuse pollution by phosphorus but no mandatory controls in place to tackle it". Whilst some farmers had responded to the need to take steps on a voluntary basis, it was concluded that it was now necessary to engage with the farmers who had not responded to these voluntary approaches. The policy objective was identified as being to establish a basic standard of mandatory good practice through the introduction of rules which met the requirements of the Water Framework Directive "without gold-plating".

14. To assess the impact of the proposed new legislation the document set out the three options which had been considered. The first option was to do nothing, and it was rejected because it would not meet the requirements of the Water Framework Directive. The document noted the two options that had been the subject of consultation and concluded that the option which was being proposed was "a proportionate, risk-based approach to tackling diffuse pollution in a way that minimises burdens to farmers". The final preferred option comprised eight rules, five of which were with reference to organic manures and manufactured fertiliser planning, storage and application. The other three rules were related to soil management. The first five rules, dedicated to the planning, storage and application of organic manures and manufactured fertiliser, were framed in the following terms:

Issue	Proposed Rule
Organic manures and manufactured fertiliser	1. A person who has custody or control of agricultural land must ensure that when organic manures and manufactured fertilisers are applied to that land that all reasonable precautions are taken to

planning, storage, and application storage	prevent causing environmental pollution from significant soil erosion or runoff. That person must also ensure: a. application of organic manures and manufactured fertilisers must be planned in advance to meet and not exceed soil and crop needs, and b. soil testing must be carried out for Phosphorus, Potassium, Magnesium, and pH, and Nitrogen levels assessed, at least every 5 years, for cultivated land.
	2. Organic manures must not be stored on land: a. within 10 metres of inland freshwater or coastal waters, b. where there is significant risk of runoff entering inland freshwaters or coastal waters, c. within 50 metres of a spring, well or borehole
	3. A person must not apply organic manures or manufactured fertilisers: a. if the soil is waterlogged, flooded, or snow covered b. if the soil has been frozen for more than 12 hours in the previous 24 hours c. if there is significant risk of causing pollution from soil erosion and run-off
	4. A person must not apply organic manures: a. within 10 metres of inland fresh waters or coastal waters b. within 50 metres of a spring, well or borehole.
	5. A person must not apply manufactured fertiliser within 2 metres of inland freshwaters or coastal waters.

15. The impact assessment went on to record that this final preferred option was anticipated to achieve a 4.6% reduction in phosphorus arising from diffuse agricultural pollution. It was recognised that the introduction of the rules would give rise to costs for some farmers, in particular if they did not have sufficient slurry storage available to them and had to undertake capital expenditure to increase their storage capacity. The impact assessment concluded that there was a trade-off between the cost to business and the need to achieve good status under the Water Framework Directive and that what was proposed was regarded by the interested party's lawyers as the minimum required for basic measures.

16. In March 2018 the interested party published a policy paper in relation to the proposed Farming Rules for Water. The paper set out the approach which it was intended would be taken to enforcement, emphasising that they would be introduced through an "advice-led approach", in which it would be for the defendant to provide advice on how to comply with the new legislation and help farmers to understand it. Enforcement was proposed to be proportionate, with an emphasis on working with farmers to ensure that they were brought into compliance. The majority of cases would be dealt with by the provision of advice and if necessary civil sanctions, with prosecution being reserved for cases in which other approaches to enforcement had been unsuccessful. The section of the paper devoted to managing compliance contains the following observations:

"In line with government policy, the Environment Agency will make best use of the data and technology available to them to build upon and refine their risk-based approach to enforcement. This means that the Environment Agency can focus on catchments where agriculture is known to be having an environmental impact, associated higher risk farming activities and non-compliant farmers. Farmers who have demonstrated good environmental practice through a farm accreditation scheme, for example, are less likely to receive a compliance visit.

Where a suspected breach is visited and confirmed by the Environment Agency or found during inspection, the Environment Agency will work with farmers to agree which changes need to be made to come into compliance and the timescale to achieve them. A follow up visit or evidence provided by the farmer, such as photographic evidence of a change, may then be used to verify compliance. If there is a high risk of pollution or if pollution is already occurring, then the Environment Agency may immediately initiate enforcement action in line with its enforcement and sanctions policy."

The 2018 Regulations

17. The preparation described above gave rise to the enactment of the 2018 Regulations, which were designed to give legislative effect to the Farming Rules for Water which had been the subject of consultation and refinement by the interested party. Regulation 2 of the 2018 Regulations contains a number of definitions of terms to assist in the operation of the Regulations. In particular the term "agricultural diffuse pollution" is defined as follows:

"agricultural diffuse pollution" means the transportation of agricultural pollutants into inland freshwaters or coastal waters, or into a spring, well or borehole where –

a. the transportation occurs by means of soil erosion or leaching, and
b. the agricultural pollutants may be harmful to human health or the quality of aquatic ecosystems or terrestrial ecosystems directly depending on aquatic ecosystems"

18. Regulation 2(2) assists with the term "application" as it used in the context of the Regulations and provides as follows:

"(2) References in these Regulations to "application" in relation to organic manure or manufactured fertiliser –
a. include –
i. spreading on the surface of the land,
ii. injection into the land, and
iii. mixing with the surface layers of the soil, and
(b) does not include the direct deposit of excreta onto land by livestock."

19. At regulation 2(3) a definition of "leaching" is provided, identifying that it "means the process by which agricultural pollutants are washed or drained from soil into inland freshwaters or coastal waters, or into a spring, well or borehole, by rainwater or other liquid applied to agricultural land".

20. Regulation 3 prohibits the application of either organic manure or manufactured fertiliser to agricultural land if the soil is waterlogged, flooded or snow covered, or where the soil has been frozen for more than 12 hours in the previous 24 hours. Regulation 4 is the regulation which is central to these proceedings, and which addresses the application of organic manure and manufactured fertiliser to agricultural land. It provides as follows:

"**4 – Applying organic manure and manufactured fertiliser to agricultural land**
(1) A land manager must ensure that, for each application of organic manure or manufactured fertiliser to agricultural land, the application –
(a) is planned so that it does not –
(i) exceed the needs of the soil and crop on that land, or
(ii) give rise to a significant risk of agricultural diffuse pollution, and
(b) takes into account the weather conditions and forecasts for that land at the time of the application.
(2) When planning under paragraph (1)(a)(ii), the land manager must ensure that any factors which mean there would be a significant risk of agricultural diffuse pollution from the application are taken into account, including –
(a) the slope of the land, in particular if greater than 12 degrees,
(b) any ground cover,
(c) proximity of the land to inland freshwaters, coastal waters, wetlands, or to a spring, well or borehole,
(d) the soil type and condition of the land, and
(e) the presence and condition of any agricultural land drains.

(3) In addition to paragraphs (1) and (2), the land manager must ensure that reasonable precautions are taken to prevent agricultural diffuse pollution resulting from applications.
(4) Without limiting what may otherwise be done to comply with paragraph (3), examples of reasonable precautions must include –
(a) checking spreading equipment for leaks and correct calibration,
(b) incorporating organic manure and manufactured fertiliser into the soil within 12 hours of, or as soon as possible after, its application, and

(c) checking the organic matter content in, and moisture levels of, the soil.

5. In this regulation- "spreading equipment" means any machinery used for the application of organic manure or manufactured fertiliser to agricultural land and includes precision spreading equipment; "wetlands" means land that is covered with or saturated by water permanently or for a significant part of the year."

21. The provisions of Regulation 4 are supplemented by Regulation 5 which provides as follows:

"**5. Applying organic manure and manufactured fertiliser to cultivated agricultural land**

1.When planning an application under regulation 4(1)(a) to cultivated agricultural land, a land manager must ensure that the results of soil sampling and analysis are taken into account.
2. The results of the soil sampling and analysis –
(a) must include the pH of the soil and the levels of nitrogen, phosphorus, magnesium and potassium present,
(b) must be no more than 5 years old at the time of application, and
(c) may have been collected before the date on which these Regulations come into force, including by another land manager.
(3) For the purpose of paragraph (2)(a), nitrogen levels may be determined by means of assessment of the soil nitrogen supply, rather than the sampling and analysis of the soil.
(4) In this Regulation, "cultivated agricultural land" mean agricultural land which has been cultivated –
(a) by physical means (including ploughing, sowing or harvesting) at least once in the previous year, or
(b) by chemical means (including the application of organic manure or manufactured fertiliser) at least once in the previous 3 years."

22. Regulations 6, 7 and 8 deal with the question of application of manufactured fertilisers and organic manure in proximity to a spring, well or borehole, in-land freshwaters or coastal waters. Regulation 9 deals with the storage of organic manure and regulation 10 addresses issues related to the management of livestock and soil. Regulation 11(1) creates a criminal offence of failing to comply with the requirements of Regulations 3 to 10, and by Regulation 11(2) the penalty for a person found guilty of this offence to be liable to an unlimited fine. Regulation 12 creates a defence for a person who is able to show that they "took all reasonable steps and exercised all due diligence to avoid committing the offence". Regulation 13 creates the possibility of imposing various civil sanctions in relation to an offence. Finally, Regulations 14 and 15 deal with enforcement and the roles of the defendant and the interested party as follows:

"**14. Enforcement**
The Agency has the function of enforcing these Regulations.

15. Guidance to the Agency
(1) The Secretary of State may issue guidance to the Agency with respect to the exercise of the Agency's functions under these Regulations.
(2) In the exercise of its functions, the Agency must have regard to any guidance issued under paragraph (1).
(3) The Secretary of State must publish any guidance issued under paragraph (1) on a website maintained by or on behalf of the Secretary of State."

23. The interested party, in accordance with Regulation 15 of the 2018 Regulations, published Statutory Guidance entitled "Applying the Farming Rules for Water" ("the Statutory Guidance") on 30th March 2022, and updated its text on 16th June 2022. It commences by noting that the defendant's approach will generally be to prioritise the provision of advice and guidance before taking enforcement action. If advice and guidance do not achieve the necessary changes in behaviour, then the defendant will

escalate matters and impose either civil or criminal sanctions. The Statutory Guidance then proceeds to set out criteria that the defendant "should consider" when undertaking an inspection in relation to the 2018 Regulations, and states that "[e]nforcement action should not normally be taken where land managers have met the criteria".

24. The criteria commence with the observation that land managers will need to demonstrate that they have planned applications in accordance with the Farming Rules for Water and that plans should:

> "- be proportionate to the needs of individual circumstances, informing decisions about applying organic manures and manufactured fertilisers
>
> - show an assessment of the crop nutrient requirement for each cultivated land parcel that should be informed by one of the following:
>
> - a manual such as AHDB's nutrient management guide (RB209) (https://ahdb.org.uk/nutrient-management-guide-rb209)
>
> - farm software such as PLANET or nutrient management tools such as those provided by Tried and Tested
>
> - a suitably qualified professional, such as an agronomist or FACTS advisor
>
> - take account of the results of soil sampling and analysis
>
> - take account of the nutrient content of the applied organic manures and manufactured fertilisers."

25. Section 2.2 of the Statutory Guidance contains material in relation to the assessment of crop and soil need when undertaking the planning required. This section provides in detail as follows:

> "**2.2 Assessment of crop and soil need when planning**
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> Land managers should plan to avoid significant risk of diffuse agricultural pollution. This includes not exceeding the needs of the soil and crop on the land.
>
> Land managers should consider soil and crop need for Nitrogen (N) based on an annual crop cycle.
>
> As a general guide, land managers should plan to avoid applying organic manures that raise the Soil Phosphorus Index (soil P index) above target levels for soil and crop on land over a crop rotation, unless they can demonstrate that:
>
> - it is not reasonably practicable to do so

> - they have taken all appropriate reasonable precautions to help mitigate against the risk of diffuse agricultural pollution
>
> Examples of when it would not be reasonably practicable to do so include if a farm:
>
> - produces and applies its own organic manure to its own land and cannot reasonably take measures to treat or manage the manure (for example, if it exports it) to avoid applications that risk raising the soil P index level of soil above crop and soil need target levels over a crop rotation
>
> - imports organic manure as part of an integrated organic and manufactured fertiliser system and cannot reasonably import organic manures that would not risk raising the soil P index level of the soil above crop and soil need target levels over a crop rotation." (Emphasis added)

26. The Statutory Guidance goes on to deal with specific details in relation to the assessment of whether there is a significant risk of agricultural diffuse pollution due to nitrate leaching depending upon the readily available nitrogen content of organic manures. The Statutory Guidance sets out application rate limits for different time periods within the calendar year depending upon the soil type of the land on which the application is going to be made. The Statutory Guidance also sets out matters to be assessed in deciding whether reasonable precautions have been taken to prevent agricultural diffuse pollution.

The Habitats Regulations

27. As set out above, the Wye is an SAC, designated originally under the Habitats Directive, which at article 6(2) provides :

> "2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitat of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive."

28. The provisions of the Habitats Directive were transposed into domestic legislation most recently in 2017 in the provisions of the Habitats Regulations. Following the departure of the UK from the EU, the Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019 inserted Regulation 3A into the Habitats Regulations to ensure the continued application of the substance of the Habitats Directive in the UK. Regulation 16A was also inserted so as to ensure the continuation of the duty upon the interested party, as the "appropriate authority" for the purposes of the Habitats Regulations, to ensure the achievement of the management objectives of the national site network. This duty includes maintaining (or where appropriate restoring) protected habitats like the Wye at favourable conservation status.

29. It is common ground that for the purposes of the Habitats Regulations the defendant is a "competent authority". The requirement that the defendant is under given this status is set out in Regulation 9(3) of the Habitats Regulations in the following terms:

"(3) Without prejudice to the preceding provisions, a competent authority, in exercising any of its functions, must have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions."

30. The content of this duty under Regulation 9(3) of the Habitats Regulations was recently considered in the case of *R (Harris) v Environment Agency* [2022] PTSR 1751; [2022] EWHC 2264 (Admin). This case concerned a review of the grant of licences for the abstraction of water by the defendant which might affect Sites of Special Scientific Interest in the Norfolk Broads. Initially the defendant was required by Regulation 50 of the Conservation (Natural Habitats etc) Regulations 1994 (the predecessor of the Habitats Regulations) to review all licences for the abstraction of water granted prior to 30 October 1994. The review identified the need for revision to some abstraction licences. The defendant also undertook an investigation as part of the "Restoring Sustainable Abstraction" ("RSA") programme to identify, investigate and resolve environmental damage caused by unsustainable water abstraction.

31. In 2018 Natural England produced a site improvement plan for the Broads SAC and advised the defendant that there was a need to investigate where abstraction was having an impact on a particular site and examine whether there was a need to review abstraction licences as a consequence. The defendant decided to limit the RSA investigation to the impact of 240 licences on three Sites of Special Scientific Interest in the Broads SAC, notwithstanding that the modelling undertaken for the investigation showed that there were risks to other sites within the SAC beyond those Sites of Special Scientific Interest.

32. The claimants sought judicial review of the decision to limit the RSA investigation to these three sites on the basis that to do so was a breach of the defendant's duty under Regulation 9(3) of the Habitats Regulations. Johnson J found for the claimants. He provided as follows in relation to the scope and nature of the duty under Regulation 9(3) of the Habitats Regulations and how it applied in that case:

> "82. Here, the natural and conventional approach to the "have regard" duty is that it means that the Environmental Agency is obliged to take account of the requirements of the Habitats Directive but may depart from its requirements if there is good reason to do so. In other words, it must take account of the Habitats Directive but is entitled not itself to discharge all of the requirements of the Directive where that can be justified.
>
> 83. It is, however, relevant (when considering whether a departure can be justified) that the object of the "have regard" duty is "requirements", rather than advice or guidance. Advice or guidance is not, ordinarily, mandatory. The "requirements" are set out, in mandatory terms, in a Directive which the Regulations themselves transposed. In this context, there is not the same broad scope for taking something into account, but then deciding for good reason to depart from it, as there is in the case of non-binding guidance.
>
> 84. There is an important part of the regulatory context which helps explain the different language as between regulations 9(1)

> and 9(3). Regulation 9(3) is concerned with a "competent authority". That has a broad meaning (including every public body). In some contexts, different competent authorities may have different overlapping roles that are relevant to the discharge of the requirements of the Habitats Directive. In such cases, it would not be meaningful or appropriate to impose on one single competent authority (or on every competent authority) an obligation to secure compliance with the Habitats Directive. Instead, what is required is that all competent authorities have regard to the Habitats Directive, so as to ensure that, in the result, compliance with the Directive is achieved.
>
> 85. Conversely, regulation 9(1) is concerned with the Secretary of State and the nature conservation bodies, who each have overarching responsibility for compliance with the Habitats Directive. That seems to me to explain the difference in language. This implies that the duty to "have regard" here does not implicitly permit the Environment Agency to act in a way which is inconsistent with the Habitat Directives (in other words to have regard to the requirements of the Directive but then deliberately decide to act in a way that is inconsistent with those requirements). Rather, it recognises that the Environment Agency is one part of a complex regulatory structure, and, depending on the issue, it may have a greater or lesser role to play.
>
> 86. In the present context the Environment Agency is, effectively, the sole (and certainly the principal) public body which is responsible for determining whether abstraction licences should be granted, varied or revoked. If it does not secure the requirements of article 6(2) in respect of those decisions, then no other public body is capable of filling the gap.
>
> 87. For those reasons, in this context, the duty on the Environment Agency to have regard to the requirements of the Habitats Directive means that the Environment Agency must take those requirements into account, and in so far as it is (in a particular context) the relevant public body with responsibility for fulfilling those requirements, then it must discharge those requirements. In other words, the scope for departure that is ordinarily inherent in the words "have regard to" is considerably narrowed."

33. Johnson J went on to analyse the application of the duty in the context of this particular case, and specifically with respect to permanent abstraction licences, in the following terms, leading to the conclusion that the defendant was in breach of the duty under Regulation 9(3) of the Habitats Regulations and Article 6(2) of the Habitats Directive:

> "103. That leaves over the question of permanent licences. In his witness statement, Mr Pearson says that the ongoing work includes "adjusting permanent licences shown to be seriously

damaging, either through voluntary action or by using our powers provided under section 52 of the Water Resources Act 1991". This shows that there are significant limitations to the ongoing work that is being done in respect of permanent licences. First, Mr Pearson does not suggest that any systematic programme is in place to investigate permanent licenses so as to establish whether abstraction under those licences is risking damage to protected sites. The deficiencies in the review of consent process, and the Environment Agency's recognition of the risks of such damage, means that some form of review is required. Absent such a review there is no secure basis for identifying a need for adjustments to licences. Second, the test that is applied before an adjustment is applied (that is, that the licence is shown to be "seriously damaging") is contrary to the precautionary principle. A much lower threshold for intervention is required. The Environment Agency must act unless it is satisfied that there is no risk of significant damage. Mr Pearson, has, elsewhere, recognised that the flaws in the review of consents process necessitate further work to review permanent licences. In an internal email, in May 2021, he said the assessments made during the review of consents were called into question by the subsequent work but that there was "no plan or resourcing to look at these sites again other than through the occasional licence renewals process, and the chances are that time-limited licences are not the main cause of any concerns".

104. It follows that the Environment Agency has not taken sufficient steps in respect of the risks to sites in the SAC (beyond the three SSSIs) posed by abstraction in accordance with permanent licences. It is only the Environment Agency (albeit with advice from Natural England) that may vary or revoke permanent licences. No other authority can do so. So, the Environment Agency cannot absolve itself from compliance with article 6 by pointing to work done by other public authorities. It has not, therefore, complied with article 6(2). Although it has taken account of article 6, it has not justified its failure to take steps in respect of the risks (particularly risks posed by abstraction in accordance with permanent licences) and it is, therefore, in breach of its obligation under regulation 9(3) of the Habitats Regulations. The claimed lack of resource does not justify these breaches. Resources may be relevant to the decision as to how to discharge the article 6(2)/regulation 9(3) obligations, but they are not relevant to the question of whether to discharge those obligations. The Environment Agency say that "other strands of work may be added… in due course" but that is too vague and too late.

105. It was not essential for the risks to other sites to be addressed in the course of the RSA programme. It was open to the Environment Agency (within the bounds of rational decision-

> making) to focus the RSA programme on a small number of sites, so long as adequate steps were taken, outside the RSA programme, to address the risks to other sites. The Environment Agency is entitled to exercise its scientific expertise in assessing what steps should be taken. I agree with the submission advanced on its behalf that relevant factors may include the degree of risk, the extent to which the risk is already being addressed and the availability of resources. It may also take account of technical constraints (so, for example, it is said that a single RSA programme could not practically address disparate European sites featuring different habitat types). I also accept the submission that a court should be slow to second guess expert scientific and technical assessments that are made by the Environment Agency. So far, however, the Environment Agency has not undertaken any sufficient analysis of the steps needed to address the impact of abstraction in accordance with permanent licences.
>
> 106. The claimants have, therefore, demonstrated a breach of article 6(2) of the Habitats Directive and a breach of regulation 9(3) of the Habitats Regulations."

The evidence in relation to agricultural practice

34. As will become apparent below, underlying these proceedings is a disagreement in relation to the correct interpretation of Regulation 4 of the 2018 Regulations. The interpretation supported by the claimant and the defendant is not favoured by the interested party or the intervenor. In support of their various submissions on the topic of the correct interpretation of the 2018 Regulations evidence was provided to the court bearing upon the practical issues surrounding the timing of the application of the various forms of fertiliser to agricultural land.

35. In essence, the view of the claimant and the defendant is that the phrase "the needs of the soil and crop on that land" in Regulation 4(1)(a)(i) of the 2018 Regulations should be interpreted as meaning the soil and crop on the land at the time of the application. The view of the interested party and the intervenor is that these words should be interpreted as allowing farmers to plan their nutrient applications in the light of soil and crop needs beyond immediate needs, such as over an annual crop cycle or a crop rotation, rather than the immediate needs of the soil and crop at the time when the application of manure or fertiliser is made.

36. The particular interest of the intervenor is that the interpretation favoured by the claimant and the defendant is in their view unworkable and impractical. The intervenor contends that there would be serious implications for farmers if they are not permitted to carry out autumn spreading of manures on the basis of soil and crop needs being immediate as opposed to with respect to some crop in the future. The intervenor relies upon evidence in the form of an impact assessment from the Agriculture and Horticulture Development Board ("AHDB") published in June 2021 dealing with the effects of the Farming Rules for Water. This study examined the implications of the

claimant and defendant's interpretation of Regulation 4(1)(a)(i) of the 2018 Regulations and, in effect, the inability of farmers to apply the various kinds of manure and fertiliser in the autumn, and requiring that the focus of applications of these materials be in the spring.

37. The AHDB report concentrates on the implications for farm practice of the claimant and defendant's interpretation of the Regulations. The report notes that there would be an increased requirement for storage of organic materials, both in terms of temporary field heaps and also the length of time that they would be in place. This would increase the risk of them becoming a point source of pollution. There would also be an increased requirement for storage in terms of the provision of extra slurry storage tanks or lagoons.

38. The report explains that whilst manufactured fertilisers can be top spread in the spring with comparatively light machinery, by contrast organic materials in the form of solid manures or slurry require heavier machinery for them to be applied and therefore there is a need to ensure that the soils to which they are to be applied are in a condition strong enough to support the weight of this machinery so as to avoid causing significant compaction. The conclusions of the report in this connection are as follows:

> "These results suggest that in most seasons it would not be possible to spread organic materials without significant risk of soil compaction and runoff until April in most English regions. This is likely to delay applications to winter cereal crops until stem extension which typically begins in early April. For slurry and liquid digestate applications made using band-spreading equipment, this may still practically be possible. However, for solid manures, the possible physical damage caused to the plants along with potential crop contamination issues is likely to make topdressing to cereal crops in spring impractical. Topdressing bulky organic materials to growing cereal crops is likely to result in reduced nutrient use efficiency; soil and crop damage; and reduced crop yield and quality compared with autumn applications."

39. The report undertook modelling work in relation to the effects of the impact of the claimant and the defendant's interpretation of the 2018 Regulations and concluded that as a consequence of limiting the autumn application of fertilisers and the use of current farm manure application practices there would be an increase in loss of nitrogen through ammonia volatilisation to the atmosphere, as well as an increase in phosphorus loss to water. The report considers possible changes to farm practices, but does not support either of the options it considers, namely restricting applications to the spring or the out-wintering of livestock to reduce the amount of managed manure. The report also considers the opportunities represented by slurry separation, composting and incineration as alternative means of treating organic manures.

40. The report sets out a risk-based matrix to assist with the timing of application of fertilisers, factoring in matters such as the soil type concerned, the time of year and the nature of the crop to arrive at an understanding of the level of risk of applications at particular times. The report concludes as follows:

"9.3 Conclusions

A large proportion (up to 70%), of solid, low RAN [readily available nitrogen] materials are currently applied and incorporated in the autumn-sown cereals. The modelling undertaken as part of this study has shown that the EA's interpretation of Rule 1 of the FRfW will:

- reduce nitrate leaching losses by c.60% (1.5% decrease in the total loss from agriculture)

- increase in ammonia emission by c.10% (2% increase in total emissions from agriculture)

- increase in P loss by c.30% (5% increase in the total loss from agriculture)

- increase solid manure storage requirement by 7 million tonnes and slurry by 3million m^3

The increase in ammonia emissions and P losses is largely due to the inability to incorporate solid manures in spring, which is an important mitigation method for controlling loss of N by ammonia volatilisation and P via surface runoff. P losses are also likely to be higher from spring applications as soils are usually closer to field capacity than in autumn increasing the risk of surface runoff after application. For livestock manures, these impacts are likely to be greatest in the East of England where most pig and poultry manures are currently applied ahead of autumn cropping.

The FRfW aim to ensure that "all reasonable precautions" are taken to prevent diffuse pollution following the application of organic manures and manufactured fertilisers, stating that materials should not be applied "if there is a significant risk of agricultural diffuse pollution". This impact assessment has shown that the effective management of organic materials needs to consider the "balance of risks" to the water, air and soil environments, as well as practical considerations. It is important to take into account not only the type of organic material and when it is applied, but how and where it is applied. Light textured soils present the greatest risk of nitrate leaching, and "best opportunity for travelling in the spring, whereas clay and medium soils present the greatest risk of NH3-N emissions, P losses, and soil damage in the spring. Clay and medium soil types also have more limited opportunities for spring cropping (and hence the potential for soil incorporation). There are also limited options for further treatment or sustainable alternative uses of these materials if spreading to agricultural land is prohibited."

41. The AHDB report underpins the expert evidence relied upon by the intervenor produced by Mr John Rhys Williams, an expert in the field of soil science and agriculture. In his report he explains that there are three steps to effective nutrient management planning. The first step is to assess the soil nutrient supply and pH, which can be undertaken in accordance with the AHBD's Nutrient Management Guide (RB209) and its field assessment method, or by soil analysis and the taking of samples.

42. The second step is to quantify the nutrient supply from organic materials, starting with the quantification of the manure nutrient content in the material to be applied. It is also necessary as part of the second step to minimise nitrogen losses, noting that application timing "is key to minimising nitrate leaching losses with autumn applications of high readily available N manures (e.g. poultry manure, slurry and digestate) likely to increase the risk of losses".

43. The report notes the legislation in relation to Nitrate Vulnerable Zones restricts the timing of application of high readily available nitrogen manures to reduce nitrate leaching. The report also notes that "the risks of phosphorus and ammonium losses to water can be significant following applications of slurry and digestate to wet soils in spring as the potential for the contamination of drain flow and surface runoff is likely to be greater than following application to dry soils in the autumn". Mr Rhys Williams further observes, in line with the AHDB report, the differences in applying manufactured fertiliser and organic manures and the need to ensure that soils are strong enough to withstand the heavier machinery involved in the application of solid and liquid manures. Mr Rhys Williams draws attention to the risk-based matrix in the ADHB report which is referred to above.

44. The third element of this second stage of the planning process is the estimation of crop available N supply, in relation to which it is noted that technical advice and guidance exists to determine the crop available supply of nitrogen from the manure type application method, delay between application and soil incorporation, soil type, excess rainfall and the contribution from mineralisation of organic nitrogen.

45. The third and final stage of the process is the calculation of the fertiliser requirement, which will vary depending upon soil nitrogen supply, crop type and weather. Mr Rhys Williams concludes by observing that nutrient management planning ensures that nutrient applications from organic materials and manufactured fertilisers meet the requirements for optimal crop production to minimise cost and the risks of nutrient losses to the environment. The conclusions are summarised as follows:

> "Manufactured nitrogen fertilisers should be applied at or just before rapid periods of crop growth to minimise the risks of N losses to the environment.
>
> Phosphate and potash fertilisers feed the soil rather than the crop. In most situations once soil P and K levels are at target index applications can be managed to replace P and K offtakes over a rotation rather than annual applications. Where responsive crops are grown P applications in the seedbed or at planting are recommended.

> Applications of organic manures have to be managed differently to manufacture fertiliser applications because of fundamental differences in the materials. The physical nature of organic materials, the potential for water and air pollution and the uncertainty over the crop available nutrient supply following application will require application timings that are appropriate for soil, organic material and crop type as well as soil and weather conditions. E.g. top dressing solid manure to growing crops in spring increases the risk of crop damage, odour and ammonia emissions. On medium/heavy soils that are drained spring application timings pose a significant risk of phosphorus, ammonium and BOD contamination of drainage water. Incorporation of solid manures following applications to stubbles in the autumn reduces the risks of ammonia emissions to air.
>
> A risk-based approach to organic manure application timing that accounts for soil type, manure type, crop type and soil nutrient status based on the application matrix published by Bhogal et al. (2021) will help minimise the risks of diffuse pollution and maximise the benefits from the application of organic materials in agricultural systems."

46. The claimant responds to this material with its own evidence to support the proposition that their interpretation of Regulation 4(1)(a)(i) of the 2018 Regulations is neither unworkable nor impractical. In his third witness statement Mr Charles Watson notes that, as recorded in the RePHoKUs report, there are parts of the country, like parts of East Anglia, in which there is a deficit of soil nutrients and a need to import large quantities of synthetic fertiliser to support their crops. Mr Watson alludes to a number of technical solutions which have been developed to enable the transfer of nutrients from areas such as the Wye catchment to areas where there is a deficit. He draws attention to an example of a food processor who operates 120 intensive poultry farms in the Wye catchment and who has commenced exporting its manure having treated it out of the catchment and selling it as a phosphorus-rich fertiliser in areas in which it is required. Mr Watson cites other examples of agricultural logistics operators and individual farmers supporting initiatives to export chicken litter and manures out of the catchment and to areas which require it as fertiliser.

47. The claimant also relies upon the evidence of Mr Ben Taylor-Davies who is a farmer and agricultural consultant based in the Wye catchment. Mr Taylor-Davies explains that manure can be spread in the spring onto a crop that was sown in the autumn with little or no detriment to the crop. Mr Taylor-Davies also explains that he considers the intervenor's concerns about soil compaction as a result of spring applications of organic manures to be overstated, as on his own farm and in private trials of which he is aware there have been no yield losses from travelling over a crop in the spring. He therefore considers that "whilst applying manure in the spring when a winter sown crop needs the fertility may mean that farmers have to modify their practices, which some may be reluctant to do, I entirely reject the suggestion that it is not practicable to do so."

48. The claimant has submitted evidence from another farmer, Mr John Turner, who explains that on his Lincolnshire farm he operates a Manure Management Plan and a

Soil Management plan as his farming business is covered by certification as "organic" and also operates under the "Red Tractor Farm Assurance" scheme. The plans allow Mr Turner to establish in advance how the fertility of his soil will be managed, including the consideration of the application rate of manure based upon soil measurements and laboratory analysis.

49. Mr Turner explains how the manure from the sheds in which his cattle are housed over the winter is removed every six weeks and stored. The manure is composted between April and July and following composting is in a more stable form than fresh manure. In his witness statement he explains how his farm operates in relation to the application of manure in the autumn and spring as follows:

> "9. Because we only have limited quantities available, at Turns of Bytham we apply FYM [farmyard manure] strategically, preferring to focus on two main areas of production. The first is to incorporate it in September into seedbeds immediately prior to winter wheat being sown. FYM has relatively low level of Readily Available Nitrogen ("RAN") and consequently the rate of release is well matched to the low demands of the crop for nutrients at that point of growing season.
>
> …
>
> 11. We also found that it was difficult to predict the rate and duration of growth of autumn sown crops due to the increasingly unpredictable weather patterns. As a result, we now only apply sufficient manures in the autumn to cover the period of growth for the crop up to middle of November and no further.
>
> 12. The second phase of our FYM application is undertaken in spring and this happens in a number of different ways. It is applied to previously (autumn) sown 'green manure' cover crops, typically mustard, ahead of them being mulched and incorporated as part of the preparations for spring-sown crops. These cover crops act as a "bank" which then subsequently release their nutrients for the benefit of the following cash crop. The important role of cover crops is now recognised and financially supported in the new DEFRA Environmental Land Management Schemes (ELMS). We pay particular attention to the vigour of winter wheat crops where we are trying to boost the quality for milling and where we feel it would be beneficial, apply a light (3 tonnes per hectare) rate of composted manure at a point between the second and last week in April. We follow the application of composted FYM with a light harrow to incorporate it into the top layers of the soil and minimise losses of nutrients to the atmosphere. In split-field trials that we have conducted, we have found no detectable impact in terms of yield loss due to any short-term plant damage in applying FYM at this stage and it does increase protein levels in the grain between 0.5% and 1.0%. Finally, we also apply composted FYM to grassland that is used for conserved forage. We ensure that the

> FYM is applied at least 4 weeks prior to cutting the grass in order to avoid contamination of the conserved forage and for that purpose we also use the grassland harrow to help disperse any clumps of manure. As a general rule, we apply around 15% of our composted FYM into autumn seedbeds and 85% in the spring months between late February and mid-May.
>
> 13. To minimise compaction, we always take into account the soil conditions and use relatively light equipment that is fitted with low ground pressure tyres. In organic farming systems, the effects of compacted soils are more apparent than in non-organic counterparts because they are not masked by chemical fertilizer inputs. As a result, we know with a high degree of confidence that finding suitable conditions to apply FYM without any impact on soil connection is not an issue. The soils on our farm range from boulder clay to alluvial sand and gravel.
>
> **Consideration of alternative ways of using and disposing of slurry or manure**
>
> 14. For some large-scale poultry farmers, the slurry/manure is seen as a liability rather than an asset and that tends to be reflected in the way that it is treated. There are a number of ways that farmers are responding to this which I set out below.
>
> *Investment in slurry storage*
>
> 15. The Government has responded to the challenges of managing slurry over the closed periods by introducing grant funding for livestock (i.e. beef cattle, dairy and pig) farming businesses wishing to install storage capacity. The scheme, which is administered by Rural Payments Agency (RPA) opened for its first round in 2022 and the second round of funding has just reached the end of its application period."

50. Mr Turner goes on to describe how grant funding for slurry management has been provided through the Rural Payments Agency to assist in the provision of future-proofed slurry infrastructure. Mr Turner also describes the opportunities for slurry processing and draws attention to the experience in the Netherlands of pig and poultry waste being transported out of the area of production to other areas in which it can be utilised. Mr Turner goes on to identify a number of available mitigation techniques such as the use of low-ground pressure application machinery and the availability of equipment to process slurries and manures so as to allow them to be transported to where they can be effectively deployed so as to minimise levels of pollution. In short, Mr Turners, overriding conclusion, is that it is entirely possible to farm with livestock without creating volumes of slurry or manure which cannot be responsibly managed and as a result of that management avoid the negative consequences of pollution.

51. Against the background of evidence produced by the claimant, the claimant contends that the intervener has not come close to demonstrating that the claimant's interpretation of a Regulation 4(1)(a)(i) is either unworkable or impractical. The

claimant relies upon this material in support of the construction which it places on regulation 4(1)(a)(i).

The actions of the defendant

52. The evidence in relation to the actions of the defendant in respect of the issue of diffuse agricultural phosphorus pollution of the Wye can be broadly categorised into three themes. Firstly, there is evidence in relation to the policies of the defendant bearing upon how it deploys its enforcement powers and the strategic approach which its policies set out as the context of enforcement. Secondly, the defendant has produced evidence in relation to specific examples of enforcement activity to show how the policy approach plays out in practice and on the ground. This material is subject to detailed criticism by the claimant, who submits that the evidence does not demonstrate a robust and lawful approach to the enforcement of the 2018 Regulations. Thirdly, there is evidence in relation to the actions relied upon by the defendant to demonstrate that they are complying with the duty under Regulation 9(3) of the Habitats Regulations, and addressing the decline in the nature conservation status of the Wye and the SAC.

53. Commencing with the first theme in relation to the actions of the defendant, the background to the exercise of the defendant's powers of enforcement is provided by the Legislative and Regulatory Reform Act 2006. The defendant is an agency which is subject to the principles set out in section 21(2) of the 2006 Act which provide as follows:

> "(1) Any person exercising a regulatory function to which this section applies must have regards to the principles in subsection (2) in the exercise of the function.
>
> (2) Those principles are that –
>
> (a) regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent;
>
> (b) regulatory activities should be targeted only at cases in which action is needed."

54. Pursuant to section 22 of the 2006 Act ministers have power to issue, and from time to time revise, a code of practice in relation to the exercise of regulatory functions.

55. The defendant publishes its own "Environment Agency Enforcement and Sanctions policy", the most recent version of which was updated on 17th March 2022. The policy emphasises that the defendant seeks to pursue "Outcome Focused Enforcement". The four outcomes which are sought to be achieved by its enforcement activities are to stop illegal activity from occurring or continuing; to put right environmental harm or damage; to bring illegal activity under regulatory control and so ensure compliance with the law; and to punish an offender and deter future offending by that offender and others through the use of enforcement action. The policy goes on to emphasise the need to act proportionately and provides as follows:

> "**3.1 Act proportionately**

> We will act proportionately when we apply the law. We will take account of and balance the:
>
> -risk posed to people and the environment
>
> -seriousness of the breach of the law
>
> -impact on the environment, people and legitimate business
>
> -cost of taking enforcement action against the benefit of taking it
>
> -impact on economic growth"

56. The policy identifies that enforcement action will be targeted in particular at those activities which cause the greatest risk of serious environmental damage and where risks are least well controlled. Enforcement action is also to be targeted to breaches which undermine the regulatory framework or where deliberate or organised crime is suspected. The policy includes enforcement and sanction penalty principles, which set out the aims of the enforcement activity in which the defendant engages. The policy provides as follows:

> "4. Enforcement and sanction penalty principles
>
> When we carry out any enforcement activity we aim to:
>
> -change the behaviour of the offender
>
> -remove any financial gain or benefit arising from the breach
>
> -be responsive and consider what is appropriate for the particular offender and regulatory issue, including punishment and the public stigma that should be associated with a criminal conviction
>
> -be proportionate to the nature of the breach and the harm caused
>
> -take steps to ensure any harm or damage is restored
>
> -deter future breaches by the offender and others."

57. Section 7 of the policy sets out the enforcement options that are available to the defendant in undertaking the exercise of its regulatory powers. As set out above the defendant identifies that an enforcement response should be designed to be proportionate and appropriate to the circumstances of the case. The first response will usually be to give advice or guidance or issue a warning to bring an offender into compliance where possible. Other more serious options include a range of civil sanctions which are available for use for many offences for which the defendant has the responsibility of enforcement. The policy sets out that the defendant "will normally consider all other options before considering criminal proceedings". Generally, the policy notes that prosecution is a last resort.

58. The policy identifies a number of public interest factors which are set out to guide the question of the type of enforcement action which should be taken in respect of any particular breach. Those public interest factors start with the question of intent: the policy identifies that the defendant is more likely to prosecute when an offence has been committed deliberately, recklessly, or as a consequence of serious negligence. A further factor is foreseeability: if the circumstances leading to an offence could reasonably have been foreseen and no action was taken to avoid or prevent what occurred that will guide the nature of the enforcement sanction.

59. Additional factors to be taken into account are the environmental effect of the breach; the nature of the offence in the sense of the extent to which it impacts upon the ability of the defendant to effectively regulate; the question of whether or not the breach was motivated by financial gain; and the deterrent effect of the choice of sanction. The public interest issues also include the previous history of the offender and, separately, their attitude to the offence and the defendant's investigation. Finally, the personal circumstances of the offender will also be taken into account, including factors such as any ill health and their ability to pay any financial sanction. Thus, it is submitted by the defendant, the policy provides a comprehensive spectrum of enforcement techniques together with a range of criteria to guide the defendant in exercising its regulatory powers.

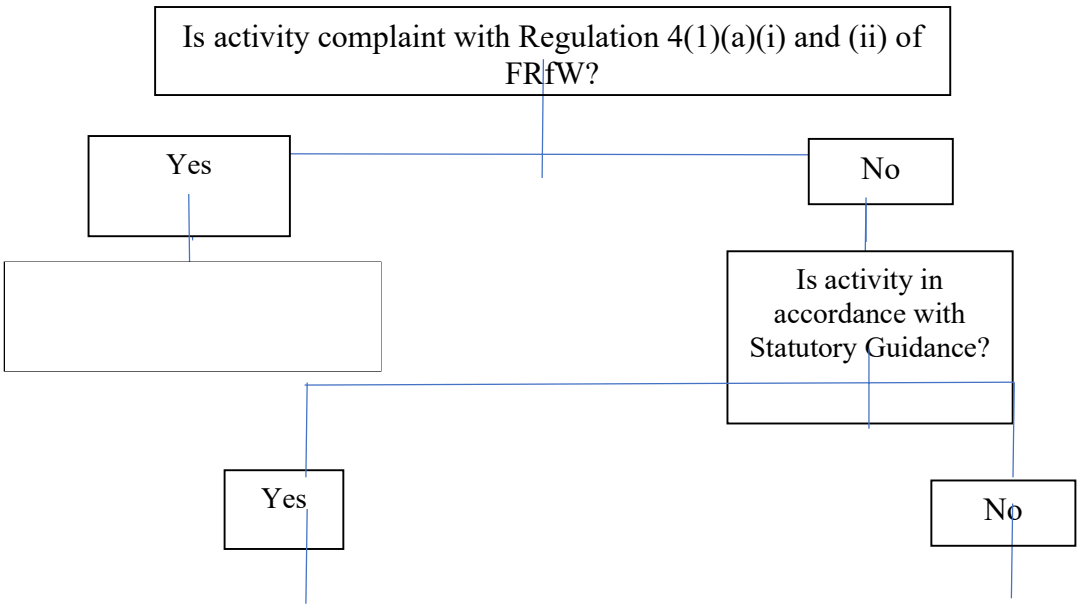
60. The defendant's approach to the enforcement of the 2018 Regulations is set out in a detailed witness statement from Mr William Crookshank who is an Agricultural Manager at the Environment Agency and whose role covers a broad range of issues in respect of the regulation of agriculture in England. In his witness statement Mr Crookshank explains that in July 2021 the defendant published a Frequently Asked Questions document ("the FAQ's") which set out its position in respect of the Farming Rules for Water. Following this, when the Statutory Guidance from the interested party was published in March 2022, the FAQs were reviewed and reframed. The status of the FAQ's is internal guidance for the defendant, and in particular a section of the FAQ's was devoted to the enforcement of regulation 4(1)(a)(i) reflecting how the defendant intended to have regard to the Statutory Guidance.

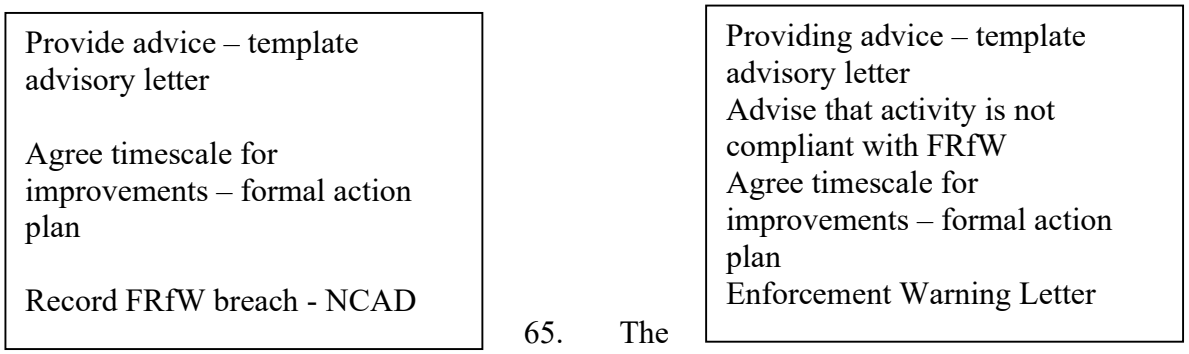
61. In July 2022 the FAQ's were made available to the defendant's officers along with a template letter and internal supplementary guidance in respect of these issues. Initially in July 2022 the FAQ's suggested that if a land manager was operating within the terms of the Statutory Guidance, but the defendant's enforcement officer believed there to be a breach of Regulation 4 of the 2018 Regulations as interpreted by the defendant the officer should record that breach on the defendants' systems but not inform the land manager of this view. In the circumstances the officer would provide guidance to bring the land manager's operations back into compliance with the defendant's view of the 2018 Regulations.

62. This approach, perhaps reflecting the difference of view in relation to the interpretation of regulation 4(1)(a)(i) between the defendant and the interested party, followed correspondence between the interested party and the defendant in which the interested party explained that their position in respect of the Statutory Guidance was that the defendant should not normally take enforcement action where a farmer was acting in accordance with the Statutory Guidance.

63. Following the receipt of pre-action correspondence from the claimant, on 7th February 2023 the defendant changed its approach, and revised the FAQ's and internal supplementary guidance in March 2023. The new approach was that if the defendant considered that a land manager was in breach of the 2018 Regulations as interpreted by the defendant, the land manager would be informed of this even if they were complying with the provisions of the Statutory Guidance. This enabled the taking of informal enforcement action against such breaches, albeit that the internal supplementary guidance provided that enforcement action would not normally proceed beyond advice and guidance where a land manager could demonstrate compliance with the Statutory Guidance. A timescale for improvements via an action plan and record would be agreed to bring an operation into compliance within a reasonable timescale.

64. This approach is set out in the form of a helpful flow chart diagram within the supplementary guidance as follows:





65. The provision on the right-hand side of the diagram in respect of an activity which is not compliant with regulation 4(1)(a)(i), but in accordance with the Statutory Guidance, reflects the difference in interpretation between the defendant and the interested party as to the meaning and interpretation of regulation 4(1)(a)(i). It also, for instance, reflects the disagreement between the defendant and the interested party in respect of section 2.2 of the Statutory Guidance set out above (with emphasis added) in which the Statutory Guidance provides an exception in respect of applying organic manures to raise phosphorus levels above target levels where "it is not reasonably practicable to do so". The defendant observed in the course of submissions that such an exception is not anywhere provided for by the Regulations and its status could only be as a matter of discretion in relation to enforcement.

66. These issues are further explored in the most recent version of the FAQ's published on 24th November 2023. The answers provided to FAQ's 7, 10 and 11 provide an illustration of the approach taken by the defendant, notwithstanding the difference of interpretation of regulation 4(1)(a)(i) between themselves and the interested party. Those questions and their answers, so far as relevant, provide as follows:

> "**7. What does the Secretary of State's Statutory Guidance allow land managers to do?**
>
> The Secretary of State's Statutory Guidance is not law. The guidance outlines criteria that the Environment Agency should consider when it is determining if it should take enforcement action under the FRfW.
>
> FRfW require that each application of organic manure or manufactured fertiliser to agricultural land is planned so that it does not exceed the needs of the soil and crop on the land or give rise to a significant risk of agricultural diffuse pollution. The Environment Agency's interpretation is that crop available nutrients should be applied at a time of immediate crop uptake. However, the Statutory Guidance provides for land managers to have planned applications of organic manure to agricultural land that do not exceed the crop and soil needs for nitrogen over an annual cycle and that avoid raising the soil phosphorus index above target levels for soil and crop over a rotation. The Environment Agency will consider whether formal enforcement of Regulation 4(1)(a) (i) and (ii) going beyond providing advice

and guidance is appropriate including where the requirements of the Statutory Guidance are met and for as long as the Guidance in place. We will discuss how the land manager can come into compliance within a reasonable timescale and we will continue to work with them to help them do so. However, we will use our enforcement powers where action isn't taken or if there is a significant risk of pollution.

The FRfW do not make reference to either crop cycle or crop rotation; the Statutory Guidance does. A crop cycle is the time between the start of one crop and the start of the next. A crop rotation is the practice of growing a different crop on a given land area every growing/planting cycle and season. Crop rotations may take a number of years.

Land managers need to follow the Statutory Guidance and be able to demonstrate that they are doing so. In all cases land managers must take all appropriate reasonable precautions, to help mitigate against the risk of diffuse agricultural pollution. There is no finite list of appropriate reasonable precautions to help mitigate against the risk of diffuse agricultural pollution, however examples are present within the guidance.

…

10. If I follow the Secretary of State's Guidance, will I be compliant with all the Farming Rules for Water?

A land manager's compliance with the FRfW will depend upon the individual circumstances. The Statutory Guidance outlines criteria that the Environment Agency should consider when they are determining if they should take enforcement action under the FRfW. It does not amend or relax the rules, only the way in which Regulations 4(1)(a)(i) and (ii) could be enforced. It is possible for a land manager to act in accordance with the guidance and be non-compliant with the Environment Agency's interpretation of the FRfW.

For example, a land manager may choose to spread manure in autumn when there is no immediate crop need for nitrogen in accordance with the Statutory Guidance. However, this activity would not be in compliance with the Environment Agency's interpretation of the FRfW because there is no crop need at the time of application.

11. Will I face criminal sanctions if I follow the Secretary of State's guidance?

If there is evidence that land managers have followed the Secretary of State's Statutory Guidance, but are operating outside of compliance with the FRfW, then the Environment

> Agency is not normally expected to take formal enforcement action. Where a land manager has acted in accordance with the Statutory Guidance, we will consider enforcement action and discuss how the land manager can come into compliance with Regulation 4(1)(a) within a reasonable timescale and we will continue to work with them to help them do so. However, we will use our formal enforcement powers where action isn't taken or if there is a significant risk of pollution."

67. In answer to FAQ 21, which asks about the enforcement regime, the answer makes clear that the defendant's approach will normally be to give advice and guidance in the first instance, but that the defendant will reserve the right to escalate enforcement and impose civil or criminal sanctions if the advice, guidance and warnings do not bring about the necessary change in behaviour to bring the operations of the land manager back under control.

68. A further illustration of the defendant's approach in the light of the difference between its interpretation of regulation 4(1)(a)(i) and that of the interested party in the Statutory Guidance is provided in the response to FAQ 32. The answer explains how the defendant will operate its enforcement powers in the light of the difference between the contents of the Statutory Guidance and the defendant's interpretation of the 2018 Regulations. The text of this question and the answer to it is as follows:

> "**32. If I applied slurry in January to a silage crop and could show that the crops dry matter production was greater in March than on non slurried crop, would crop and soil need be demonstrated?**
>
> FRfW require that each application of organic manure or manufactured fertiliser to agricultural land is planned so that it does not exceed the needs of the soil and crop on the land or give risk to a significant risk of agricultural diffuse pollution. The Environment Agency's interpretation is that crop available nutrients should be applied at a time of immediate crop uptake. However, the Statutory Guidance allows land managers to have planned applications of organic manure to agricultural land that do not exceed the crop and soil needs for nitrogen over an annual cycle and that avoid raising the soil phosphorus index above target levels for soil and crop over a rotation. The Environment Agency will consider whether formal enforcement of Regulation 4(1)(a)(i) and (ii) going beyond providing advice and guidance is appropriate including where the requirements of the Statutory Guidance are met and for as long as the Guidance is in place. We will discuss how the land manager can come into compliance with Regulation 4(1)(a) within a reasonable timescale and we will continue to work with them to help them do so. However, we will use our enforcement powers where action isn't taken or if there is a significant risk of pollution.

> Under the FRfW, provided the activity does not give rise to significant risk of diffuse pollution, and what is applied does not exceed the needs of the soil and crop on the land, it is allowed.
>
> It is recommended that no applications of slurry are made to land until after 31 January to avoid nitrate-nitrogen pollution. This is a specific regulatory requirement in NVZ for organic manures with a highly readily available nitrogen content on non-sandy and shallow soil. Notwithstanding that, nitrate-nitrogen is only one risk factor, other factors need to be considered and reasonable precautions, such as those set out in the FRfW, taken to ensure applications do not give rise to the wider significant risk of diffuse pollution."

69. In Mr Crookshank's witness statement he describes the approach taken by the defendant's officers in respect of their day-to-day enforcement activities. After officers have undertaken an inspection, a record of their inspection findings is completed on a Farm Inspection Form and that record is added to the defendants' National Compliance Assessment Database ("NCAD"). The NCAD generates a post-visit letter. There is a template for the letter which provides a number of options and free text fields that can be completed by the officer to reflect the findings of the inspection. The findings following the inspection will include the improvements that are required by the land manager in order to achieve compliance with the Regulations and reduce any risk of pollution. The template letter, a copy of which is included within the bundle, has a specific section addressing the 2018 Regulations and incorporates options in relation to potential breaches of the Regulations and the steps necessary to bring the land management operation within compliance. In particular the template letter addresses the potential difference between a breach of the regulations applying the defendant's interpretation, and compliance with the Statutory Guidance in so far as it differs from that interpretation. The letter states in terms that the "legal requirements of the FRfW are not affected by the Statutory Guidance".

70. Mr Crookshank explains in his evidence that the letter enables the defendant's officers to specify the steps that it is necessary to take, and the period of time over which they are to be taken, so as to ensure compliance with the 2018 Regulations. Mr Crookshank explains that where farmers do not comply within the timescale set out then the defendant will move to taking more formal enforcement action. However, Mr Crookshank records the defendant's experience that most satisfactory outcomes are secured through the provision of advice and guidance rather than the deploying of formal sanctions.

71. A particular focus in the course of argument were the following paragraphs of the template letter relating to the defendant's approach to the enforcement of the 2018 regulations.

> "Further to my visit to your farm on I am writing to advise you about some areas that will enable you to improve or ensure compliance with environmental regulations and reduce the significant risk of diffuse pollution from your farm.
>
> …

Farming Rules for Water (FRfW) – Planning for Crop and Soil Need

Regulation 4 of this legislation requires that each application of organic manure or manufactured fertiliser is planned so that it does not:

4(a)(i) exceed the needs of the soil and crop on that land or;

4(a)(ii) give rise to a significant risk of agricultural diffuse pollution, and

4(b) takes into account the weather conditions and forecasts for the land at the time of the application.

The Secretary of State (SoS) issued Statutory Guidance on this rule to the Environment Agency on 30 March 2022. This guidance will be reviewed in 2025 or earlier.

The Statutory Guidance expects us not to carry out enforcement under the FRfW where nutrient applications in excess of soil and crop need are identified, provided that the conditions are set out in that guidance are met.

We expect that all land managers who spread fertilisers and, or, organic manures, including those from off-farm sources, to have an integrated nutrient management plan that takes into account up-to-date soil sampling information to show how applications do no exceed soil and crop needs.

The Statutory Guidance specifies that nitrogen (N) and phosphorus (P) can be managed differently. Nitrogen can be managed over an annual cycle and phosphorus managed over a crop rotation.

Following our visit we note that:

(use lines below as necessary)

(1) You do not have soil sampling and analysis records

(2) You could not demonstrate how you have planned your application

These legal requirements of the FRfW are not affected by the Statutory Guidance. Therefore, please ensure you have provided them to us by XXXX.

In addition, we have noted that:

Your current nutrient management plan shows that you will exceed the crop and soil need for nitrogen at the time of

application, but you will not exceed the crop's nitrogen need on an annual cycle.

Your current nutrient management plan shows that you will risk raising the soil phosphorus index above target levels over the crop rotation.

Your soil samples show that your soil phosphorus index level is already greater than the target level. You should be taken steps to reduce the soil P reserves.

Your current nutrient management plan shows you are at a significant risk of losing nitrogen and, or phosphorus the environment, which will be unavailable to your crop.

In line with the Statutory Guidance, issued to us we will not be taking any further enforcement action on these specific points at this time. However, to improve nutrient use efficiency so that you can more closely match to crop and soil need and reduce the risk of pollution to the water environment, the following steps should be taken:

Increase your slurry storage to ensure that you can manage your organic manure applications for effectively.

Consider ways to dewater/reduce water content of your organic manures such as clean water separation, slurry separation, or drying so that there is less material to store, transport and spread.

Consider your cropping to make best use of the nutrients available in organic manures.

Reduce the amount of manure you produce, and, or import.

Consider treatment, such as composting your manure, to reduce its readily available nitrogen content.

Make greater use of the existing phosphorus in your soils by not adding more manures to these fields. Use alternative fields where possible.

Spread at lower application rates.

Consider what materials you are importing onto your land and the risks and impacts these will have on nitrogen and phosphorus pollution. Are they appropriate and whether you really need them?"

72. It is, of course, important to bear in mind that the template letter is the starting point rather than the terminus of the defendant's enforcement activity, and it provides a structure or prompt to assist a bespoke response to the findings of the farm inspection.

That this is the case is borne out by the evidence of specific enforcement activities provided by the defendant which is set out below.

73. Turning to the evidence in respect of the practical activities of the defendant in enforcing the 2018 regulations, in his witness statement Mr Crookshank identifies that in 2021 significant additional funding was provided to the defendant for the purpose of enhancing its regulatory activity in respect of the agricultural sector. In addition, the interested party has provided funding to explore improvements to the ways in which the agricultural sector is regulated particularly through the delivery of additional farm inspections.

74. Mr Crookshank's evidence records that between 1st January 2020 and 30th October 2023 the defendant had visited 409 farms and carried out 515 inspections within the Wye catchment. Of these 45% of the inspections were non-compliant with one or more of the 2018 Regulations, and 31% non-compliant with regulation 4(1)(a)(i). In his witness statement he provides the following description of the approach taken by the defendant in these circumstances:

> "102. In all cases the farmers have received advice and guidance on measures needed to comply with the law. This advice will have been given orally whilst an officer is on site with the farmer but will also be followed in the post inspection report, which sets out which Regulations have been breached, the improvement actions that are needed to come into compliance and a date which the Environment Agency requires them to be completed. This is generally effective to secure compliance with the Regulations. As Table 5 demonstrates, however, where it is not the Environment Agency can and will take more formal enforcement action, for breaches of regulation 4(1)(a)(i). The first stage of such action is usually to send a formal warning letter, identifying the offences it believes has been committed and indicating that although the Environment Agency does not propose taking further action with respect to those offences at that time, if the land manager continues to commit offences (or if earlier offences have been committed or the environmental impacts of the offences identified should prove to be greater than it then understood them to be, it reserves the to prosecute. In the overwhelming majority of cases, compliance is achieved once such a letter has been sent. Where is not, the Environment Agency where appropriate, seek an enforcement undertaking or bring a prosecution."

75. The table 5 referred to in this passage of Mr Crookshank's witness statement sets out at a national level the formal enforcement action taken beyond the provision of advice and guidance both before and after the publication of the Statutory Guidance.

> "*Table 5 Formal enforcement action before and after publication of Statutory Guidance*

	1/1/20 – 30/3/22 (Pre Statutory Guidance)	31/3/22 – 30/10/23 (Post Statutory Guidance)

	Total Number	Includes 4(1)(a) offence	Total Number	Includes 4(1)(a) offence
Prosecution			2	
Warning Letter	52	25	92	60
EU			2	
Stop Notice			1	1

76. The contentions of the claimant are founded more specifically on identified examples of the defendant's approach to enforcement. It is unnecessary to set out all of the instances referred to for the purposes of this judgment, but it suffices to identify the principal examples which were relied upon. The first example is a letter in relation to a farm inspection which took place on 26th October and 1st December 2022. The inspection report relates to a number of different regulatory regimes but in particular the 2018 Regulations. Having set out the requirements of regulations 4 and 5 of the 2018 Regulations the document notes as follows.

> ""Issues/Action Specifics
>
> Following our visit, we note that:
>
> - you could not demonstrate how soil sampling and analysis records were taken into account when planning applications.
>
> - you could not demonstrate how you have planned your applications. The Nutrient Management Planning was not drawn up in advance of cropping. SNS was not calculated.
>
> These legal requirements of nutrient and manure management planning of the FRfW are not affected by the Statutory Guidance.
>
> You must therefore produce detailed nutrient management plans which take into account the soil analysis, applications of manufactured fertiliser and organic manures already spread and calculate the crop requirement for the current year 2022/2023 and for the forth coming year 2023/2024.
>
> Please see guidance links below on NVZ and FRfW for guidance on nutrient management planning and requirements.
>
> Deadline 31st January 2023."

77. The document goes on to note in relation to fields of particular concern that in respect of one field the application of material to the field had led to 10 times the amount needed for phosphorus, and 2.5 times the amount needed for potassium as well as the requirements for nitrogen being exceeded in another area. The report noted that the nutrient management plan showed that the soil and crop need for nitrogen at the time of application would be exceeded but would not be exceeded on an annual cycle of identified crops. The nutrient management plan also showed that there was a risk of the

soil phosphorus index being raised above target levels for the crop rotation and it was already above the target level. The nutrient management plan showed that there was a significant risk of losing nitrogen and phosphorus to the environment which would be unavailable to the crop. The inspection report identified steps which should be taken in the form of making greater use of the existing phosphorus in the soil by not adding more organic manure to the identified fields; spreading at lower application rates; and considering what materials were being imported on to the land and the risks of nitrogen and phosphorus pollution. In the section of the inspection report entitled "Enforcement Response" the box was ticked identifying that the defendant would now consider what enforcement action was appropriate and notify the land manager accordingly.

78. Following the change of approach in the FAQ's and the supplementary guidance noted above, a further specific example relied upon relates to an inspection which occurred on 23rd March 2023 addressed in covering correspondence dated 18th April 2023. The letter advised the land manager in the following terms:

> "The Statutory Guidance expects us not to carry out enforcement under the FRfW where nutrient applications in excess of soil and crop need are identified, provided that the conditions set out in that guidance are met.
>
> On some fields, your soil phosphorus index level is already greater than the target level and applications of phosphate have been applied to these soils in excess of the need of the soil and crop. However, you have met the conditions set out in the SoS Statutory Guidance so no enforcement action will be taken and we have been working with you to provide advice and guidance on how to ensure compliance with the Regulations in the future.
>
> Our recent discussion was useful in helping us to gain a further understanding of the rationale behind applications that have been made over the last four years and your current and future plans to ensure compliance with the Regulations including addressing any high phosphate levels in the soil."

79. The farm inspection report went on to identify a number of issues and actions specifically which, for present purposes, were as follows:

> "Issue/Action Specifics
>
> Previous spreading of phosphate onto high P index soils. These applications were not at a level which would risk raising the high P levels further, but do constitute a breach of above legislation (also known as the Farming Rules for Water) as it is agronomically accepted that there is no crop or soil requirement for the application of phosphate at P index 4, 5 and 6 for the crops on which the applications were made. The current Secretary of State Guidance is met and the following feedback from the farm has been provided and action plan agreed to ensure that farm is working towards compliance with this Regulation in the future.

> …
>
> - Whilst the SoS Guidance is in place, on fields with soils at P index 4, application rates of digestate will be managed to ensure that the total phosphate (rather than available phosphate) does not exceed the amount of phosphate that will be removed by the crops in that rotation. Applications will only be made once every two to three years at a rate appropriate to the current growing crop. This will ensure that crop offtake across the rotation will be much higher than input which will allow the index to run down. More frequent soil sampling will be undertaken on these fields to assess how the cropping practices and nutrient planning are affecting soil phosphate levels. These tests show the variation with the soil index so will be helpful in showing whether levels within an index have reduced – for example a high P4 to a low P4.
>
> …
>
> - some rented land is farmed three years out of four, with the fourth year being farmed by a potato grower. Information will be obtained from the potato grower about what manures and fertilisers have been applied so that this can be factored into the nutrient planning on these fields. Sharing data between the two parties will ensure that both have the information needed to remain compliant with the Farming Rules for Water requirement to ensure that nutrient applications are matched to the needs of the crop and soil. Phosphate applied at all stages in the rotation needs to be considered to ensure compliance."

80. What has been set out above are selected points from within a significant number of issues and actions which were identified within the inspection report. The report notes that all of the actions had been agreed and were to be implemented immediately. In the section of the inspection report entitled "Enforcement Response" the following box has been ticked:

> "Other than the provision of advice and guidance at present we do not intend to take further enforcement action in respect of the non-compliance identified above. This does not preclude us from taking enforcement action if further relevant information comes to light or advice is not followed."

81. A further letter dated 24th August 2022 is relied upon by the claimants. This letter followed a farm inspection on 2nd August 2022 and was written to provide advice to enable the farm manager to improve or ensure compliance with regulations including the 2018 Regulations. The letter advises of the need to demonstrate how soil sampling and analysis records had informed applications, and of a need to demonstrate how applications had been planned. In particular, a number of steps are advised such as making greater use of the existing phosphorus in the soil by not adding manure to the fields or using alternative fields where possible. The steps are advised so that "you can more closely match to crop and soil need and reduce the risk of pollution to the water environment".

82. In addition to this material, within the evidence are examples of warning letters following the defendant being satisfied that offences under the 2018 Regulations have been committed, but containing the conclusion that the defendant does not propose to take any further action in relation to those offences. All of this material is relied upon by the claimant in the context of submissions recorded below to the effect that the defendant is not lawfully enforcing the 2018 Regulations. By contrast the defendant submits that these are illustrations of the defendant properly applying a lawful policy in relation to the enforcement of the 2018 Regulations.

83. The third theme of the cases in relation to the defendant's enforcement activities relates to the impact on the Wye as an SAC. The claimant draws attention to the agreed and documented deterioration in the favourable conservation status of the Wye SAC, and in particular the impact of phosphate pollution from diffuse sources upon water quality leading to that deterioration. Indeed, it is noted in the documentation that the historic build-up of legacy phosphate in the soils in the Wye catchment may take more than 10 years to address.

84. Against this background the claimant notes that, akin to the case of *Harris,* the defendant is the sole regulator with responsibility for the 2018 Regulations and their enforcement, and that the continued deterioration in the water quality of the Wye caused by diffuse pollution demonstrates the inadequacy and failure of the enforcement activity taken by the defendant. It is said that these inadequacies demonstrate that the defendant is not having regard, as required by the relevant legislation, to the interests of the Wye SAC.

85. In response to these submissions the defendant, through the evidence of Mr Crookshank, acknowledges that the impact of phosphorus, and in particular legacy phosphorus, is a significant issue which is recognised and being addressed. His evidence is that whilst it cannot be resolved overnight, it is an issue which has to be addressed through the cooperative and coordinated activity of a number of different regulatory organisations acting with the objective of avoiding the deterioration of the SAC in accordance with their duties under the Habitats Regulations.

86. In particular, in 2014 the defendant and Natural England instigated the development of a Nutrient Management Plan ("NMP") in order to reduce phosphate concentrations in the Wye and comply with the Habitats Regulations. The NMP is overseen by a Nutrient Management Board attended by the defendant, Natural England, Natural Resources Wales, local authorities, Welsh Water and other non-governmental organisations. The terms of reference for the Board identified that its purpose is to identify and deliver actions to achieve the phosphorus conservation target of the Wye SAC through the provisions of the NMP.

87. The NMP identifies sources of nutrients entering the river and the steps that can be taken to manage them, as well as including water quality data and identified actions. A River Wye Statutory Officers Group has been established to assist in ensuring that participants collectively use their statutory powers and resources to achieve the requirements of the relevant legislation in particular the Habitats Regulations. This Group meets monthly to ensure effective coordination of the responsible statutory authorities operating within the catchment to restore the conservation status of the Wye. This work is supported by a Technical Advisory Group to provide technical expertise

and advice in supporting development and delivery of actions necessary to implement the NMP.

88. In his evidence Mr Crookshank explains that the defendant is working on a broad range of initiatives, including targeted farm inspections and increased inspection of water sewage treatment works with the specific objective of preventing deterioration in the Wye's habitat. These activities are focused upon improving long-term water quality and addressing issues from diffuse agricultural pollution. A particularly innovative project which Mr Crookshank explains in his evidence is Project TARA. This project examined satellite and high-resolution aerial photographs to identify fields that were being left bare over the winter exacerbating the risk of run-off and soil erosion leading to pollution. The farmers concerned were asked if they had an agronomic justification for leaving the land bare and provided with advice and guidance in respect of ensuring that they were in compliance with the 2018 Regulations, and in particular Regulation 10 which requires reasonable precautions to be taken in relation to soil erosion. Mr Crookshank explains that the defendant has learned from the experience of this test exercise and is programming a further exercise in remote sensing inspections in the Wye catchment.

89. In addition to this, the defendant observes that the Statutory Guidance applies nationally, whereas the interests of the Wye SAC are specifically acknowledged in the defendant's internal documentation in respect of its enforcement activities. For instance, at paragraph 8.1.3 of the defendant's Enforcement and Sanctions policy, where a specific decision is taken in relation to enforcement the policy requires that the public interest factors to be taken into account will include the environmental effect of any non-compliance, and that the more serious the environmental effect the more potent the enforcement response will be. Thus, the defendant contends that the enforcement policy specifically addresses the importance of the environmental impact on an SAC site such as the Wye. Under the defendant's Incidents Classification Scheme, which categorises impact on nature conservation sites, and which informs the enforcement policy, category 1 and category 2 incidents are defined so as to ensure that any damage to a nationally protected habitat of this kind is at least a category 2 incident. Under paragraph 8.1.3 of the enforcement policy this will lead the defendant to normally consider "a prosecution, formal caution or a VMP [a variable monetary penalty]".

90. Returning to the NMP, the defendant notes that this document observes that the issues in relation to phosphate arise from discharges from a number of potential sources. In addition to point sources such as industrial or wastewater treatment works there are also other contributors in the form of urban drainage and leaking sewers, combined sewer overflows and septic tanks. For this reason, the defendant contends that there needs to be a joined-up approach engaging in a range of regulators with responsibility for regulating these potential sources. The NMP itself notes that there will need to be a "mixture of policy instruments" to ensure that appropriate initiatives are taken and effectively implemented. Within the NMP a wide range of regulatory regimes are identified all of which could contribute to tackling the issue of phosphate pollution of the Wye, including the potential for the interested party to introduce a Water Protection Zone. This, it is said, is what led to the NMP adopting a multi-agency approach to tackling the issue of improving the nature conservation status of the Wye. The defendant notes the support for the multi-agency approach in the documentation, including in particular the support of Natural England.

The interpretation of Regulation 4 of the 2018 Regulations.

91. Whilst it is not directly engaged by any of the claimant's grounds, there is an issue between the parties as to the correct interpretation of regulation 4(1)(a)(i) of the 2018 Regulations which all parties accept the court ought to resolve as part and parcel of its decision in this case. In particular, the dispute relates to the question of whether or not, as contended by the claimant and the defendant, the correct interpretation of regulation 4(1)(a)(i) of the 2018 regulations is that the application of organic manure or manufactured fertiliser should be planned so as not to exceed the needs of the soil and crop on the land at the time of the application, or whether it is appropriate to consider need over a longer period, as contended for by the interested party and the intervener, this interpretation is inappropriate. Indeed, the intervener contends that regulation 4(1)(a)(i) should be interpreted so as to entitle consideration of the soil and crop need over a lengthier future period, such as for instance an annual crop cycle or crop rotation.

92. In support of their construction of regulation 4 both the claimant and the defendant draw attention to the purpose for which the regulation was enacted. Regulation 4, and indeed the 2018 Regulations generally, were enacted for the purpose of preventing the pollution of waters from diffuse agricultural sources. The purpose behind their preparation is emphasised in the Explanatory Note prepared to support the regulations, and the background to their drafting which is set out above.

93. The claimant and the defendant submit that regulation 4(1)(a)(i) creates a duty to plan for the application of organic manure or manufactured fertiliser, and to plan for each application. This can be identified from the fact that the application appears three times in the course of regulation 4(1). In effect that word bookends the requirement of planning, and emphasises therefore that the plan must be made at the time of the application, and must be devised and based on needs of the soil and crop at the time of the application and not at some notional time in the future for some anticipated future crop. A part of the purpose of Regulation 4(1)(a)(i) is to avoid the risk of the application of organic manure or manufactured fertiliser that is surplus to the needs of the soil and crop and which may not be absorbed but become the subject of leaching or run-off. Furthermore, this interpretation is reinforced by the provisions of regulation 5, which are also directed to an understanding of soil sampling and analysis at the time of the application.

94. A further factual reinforcement of this interpretation is, it is submitted, that a soil and crop need in relation to nitrogen and phosphorus are different in that they perform differently over the course of time in the soil. Thus, it is submitted by the claimant and the defendant, it is no accident that regulation 4(1) is in fact a single sentence, and that it needs to be interpreted and applied on the basis that the planning of each application must be designed so as to not exceed the needs of the soil and crop on the land at the time that the application is to take place. Furthermore, it is no accident and indeed it is intentional, that regulation 4(1)(a)(i) speaks of the needs of the soil and crop <u>on</u> the land at the time of the application. This further reinforces the interpretation that the needs of the soil and crop are to be assessed at the time when the application is to take place. It is all of a piece with the wording of paragraph 4(1)(b), which requires account to be taken of weather conditions and forecasts for the land "at the time of application".

95. The interested party resists this interpretation of the legislation for the following reasons. Firstly, it is submitted by the interested party that the creation of a duty to plan

the application imports a consideration of the future needs of the soil and crop on the land, permitting planning to occur for crop rotation or over a crop cycle where appropriate. Whether or not it may be appropriate is then a matter of judgment for the land manager or the defendant in applying and operating the legislation. The requirement under regulation 4(1)(b) in relation to whether conditions and forecasts is separate and divorced from the obligation to plan in regulation 4(1)(a), and it is significant that there are no words limiting the needs of the soil and crop to those needs immediately arising. The use of the word "on" within regulation 4(1)(a)(i) is a preposition, rather than as argued by the defendant a word with a temporal implication. Thus, it is submitted that correctly interpreted there is nothing to preclude planning for longer term needs of the soil and crop within the terms of the legislation.

96. By way of background to this interpretation the interested party points out that the regulations were intended to reflect existing good practice as identified within the consultation material about them. The interested party draws attention to its publication "Protecting our Water, Soil and Air: A Code of Good Agricultural Practice for farmers, growers and land managers". Within that document the following is observed in relation to organic manures:

> "72. Livestock manures, such as cattle and pig slurries and poultry manure, and liquid digested sewage sludge contain a relatively high proportion of readily available nitrogen (i.e. greater than 30% of total nitrogen is present in a readily available form). You should apply these in late winter or spring when crops can use the nitrogen efficiently. Where practically possible you should not apply them in the autumn and early winter months. This is particularly important on sandy and shallow soils where the risk of nitrate leaching is greatest.
>
> 73. You may need additional storage for livestock manures. You should provide sufficient storage capacity to allow optimum timing and use of manure nutrients which will allow you to reduce the amount of fertiliser you buy (see Section 4.3). All constructed stores should be impermeable and not allow liquids to escape.
>
> 74. You can spread organic manures that do not contain much readily available nitrogen (i.e. less than 30% of total N is readily available) such as farmyard manure, sewage sludge cake and compost made from green waste at any time, if field conditions are suitable to avoid causing run-off.
>
> 75. You should not apply organic manures when:
>
> - the soil is waterlogged, flooded, frozen hard or snow-covered; or
>
> - there is a significant risk of nitrogen getting into surface water via run-off, taking into account in particular the slope of the land, weather conditions, ground cover, proximity to surface waters, soil conditions and the presence of land drains.

> 76. You should not apply organic manures within:
>
> - 10 metres of surface waters, including field ditches; or
>
> - 50 metres of a spring, well or borehole.
>
> 77. You should be particularly careful when applying organic manures to steeply sloping land close to surface waters.
>
> 78. You should spread organic manures as accurately as practically possible. You should use spreading equipment with a low spreading trajectory when spreading slurries to avoid causing atomisation (small droplets) and subsequent drift (see Sections 5.4 and 5.5)."

97. In the above quotation the interested party draws attention to paragraph 74 indicating that organic manures not containing much readily available nitrogen can be spread at any time. Further advice is contained within this Code of Good Practice in relation to phosphorus in the following terms:

> "**Organic manures and fertilisers**
>
> 100. The amount of phosphorus lost by erosion and run-off, or in drain flow will depend on the quantity of phosphorus in the soil. To reduce losses, you should not apply inorganic fertiliser or organic manures that contain more than the recommended amounts of phosphorus. For most crops, none is recommended at soil phosphorus Index 4 or above (reference 27).
>
> 101. When the soil phosphorus Index is already 3 or above and you wish to utilise the nitrogen and other nutrients in organic manures, you should not apply more total phosphorus than will be removed by the crops in the rotation. This will avoid raising soil reserves above those necessary for crop production.
>
> 102. Soils should be sampled and analysed every three to five years in accordance with a nutrient management plan (see Section 3.3)."

98. In a similar way, the interested party draws attention to a publication of the Agriculture and Horticulture Development Board entitled the Nutrient Management Guide which contains the following in respect of firstly nitrogen and secondly, phosphorus and their management in the application of nutrients:

> "**Principles of nitrogen supply and losses**
>
> Nitrogen is present in organic materials in two main forms:
>
> • Readily available nitrogen (i.e. ammonium-N as measured by N meters, nitrate-N and uric acid-N) is the nitrogen that is potentially available for rapid crop uptake

• Organic-N is the nitrogen contained in organic forms, which are broken down slowly to become potentially available for crop uptake over a period of months to years

Crop-available nitrogen is the readily available N that remains for crop uptake after accounting for any losses of nitrogen. This also includes nitrogen released from organic forms.

Following the application of organic materials to land, nitrogen can be lost as follows:

• Ammonium-N can be volatilised to the atmosphere as ammonia gas

• Following the conversion of ammonium-N to nitrate-N, further losses may occur through nitrate leaching and denitrification of nitrate to nitrous oxide and nitrogen gas under warm and wet soil conditions

To make best use of their nitrogen content, organic materials should be applied at or before times of maximum crop growth – generally during the late winter to summer period. Use relevant sections of the Nutrient Management Guide (RB209) to ensure applications are made at a suitable time for maximum crop growth of the specific crop

…

Phosphate, potash and magnesium

Organic materials are valuable sources of other nutrients as well as nitrogen, although not all of the total nutrient content is available for the next crop. Typical values for the total and available phosphate and potash contents of organic materials are given in this guide.

Nutrients that are not immediately available will mostly become available over a period of years and will usually be accounted for when soil analysis is carried out. The availability of manure phosphate to the next crop grown (typically 50–60%) is lower than from water-soluble phosphate fertilisers. However, around 90% of manure potash is readily available for crop uptake.

Where crop responses to phosphate or potash are expected (e.g. soil Indices 0 or 1 for combinable crops and grassland), or where responsive crops are grown (e.g. potatoes or vegetables), the available (not total) phosphate and potash content of the organic material should be used when calculating the nutrient contribution. Soils at Index 0 will particularly benefit from organic material applications.

> Where the soil is at target Index (usually Index 2) or above for phosphate or potash, the total phosphate and potash content of the organic material should be used in nutrient balance-sheet calculations.
>
> For most arable crops, typical organic material application rates can supply the phosphate and potash requirement. At soil P Index 3 or above, take care to ensure that total phosphate inputs do not exceed the amounts removed in crops during the rotation. This will avoid the soil P Index reaching an unnecessarily high level. It is important to manage organic material applications to ensure phosphate and potash are used through the crop rotation."

99. The intervener submits that the claimant and the defendant's interpretation is unsustainable on the basis that the question of "the needs of the soil and crop on that land" are not qualified by any language suggesting that it is the needs of the time of the application which are definitive. Parliament specifically did not include "current needs" in the drafting of this regulation, and therefore it is submitted that the claimant and the defendant promote an unjustifiable gloss on the language of the regulation. The intervener supports the submission of the interested party that the requirement to plan includes within it an implication of projecting or looking forward to the needs of the soil and crop arising in the future.

100. Whilst the intervener accepts that the words "at the time of the application" arise within regulation 4(1)(b), they draw attention to cases such as *Shepherd v Information Commissioner* [2019] 4 WLR 50; [2019] EWCA Crim 2 in which the court observed that where the legislature chooses one form of words on three occasions, and a different formulation on another two, there is a strong indication that it is the intention of Parliament that two different legal results should be the outcome of that differing use of words. Thus, the language in regulation 4(1)(b) reinforces that regulation 4(1)(a)(i) should not be interpreted as including the language "at the time of the application". Furthermore, it is submitted on the evidence that the requirement to ensure that an application is planned so that it does not "give rise to a significant risk of agricultural diffuse pollution" favours an autumn application of organic manure or manufactured fertiliser over that of one in the spring.

101. In addition to these submissions the intervener draws attention to the case of *R(PACCAR Inc & others) v Competition Appeal Tribunal and others* [2023] 1 WLR 2594; [2023] UKSC 28, and the assistance which it provides in respect of the principle of statutory interpretation that the court should seek to avoid a construction of legislation which produces an absurd result. This was explained by Lord Sales, in a judgment with which the majority of the Supreme Court agreed, in the following terms at paragraph 43 of his judgment:

> "43. The courts will not interpret a statute so as to produce an absurd result, unless clearly constrained to do so by the words Parliament has used: see *R v McCool* [2018] 1 WLR 2431, paras 23—25 (Lord Kerr of Tonaghmore JSC), citing a passage in *Bennion on Statutory Interpretation*, 6th ed (2013), p 1753. See *now Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), section 13.1(1): "The court seeks to avoid a

> construction that produces an absurd result, since this is unlikely to have been intended by the legislature". As the authors of *Bennion, Bailey and Norbury* say, the courts give a wide meaning to absurdity in this context, "using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief." The width of the concept is acceptable, since the presumption against absurdity does not apply mechanistically but rather, as they point out in section 13.1(2), "The strength of the presumption . . . depends on the degree to which a particular construction produces an unreasonable result". I would add that the courts have to be careful to ensure that they do not rely on the presumption against absurdity in order to substitute their view of what is reasonable for the policy chosen by the legislature, which may be reasonable in its own estimation. The constitutional position that legislative choice is for Parliament cannot be undermined under the guise of the presumption against absurdity. There is an issue between the parties whether the presumption against absurdity provides relevant guidance in the circumstances of this case."

102. The intervener submits, based upon the evidence which is set out above as to the implications of the claimant and the defendant's interpretation of the legislation, that it is impractical. The intervener notes that the claimant's own evidence on this topic supports an application of nutrients prior to them being required by a crop, and relies upon the evidence of Mr Williams to demonstrate that the claimant and the defendant's interpretation requiring an assessment of needs solely at the time of the application without account being given to crop demands which might arise over the course of a crop rotation or crop cycle being impractical, and having the potential to give rise to a greater risk of diffuse pollution than the interpretation given by the intervener.

103. Finally, the intervener draws attention to the fact that breaches of regulation 4 have a criminal sanction, and therefore when considering the correct interpretation of that regulation it is critical to bear in mind the serious consequences in the form of criminal enforcement, and the importance of legal certainty in providing any interpretation of the Regulation, which the intervener submits, supports its approach to interpretation of regulation 4(1)(a)(i).

104. Having reflected on the competing submissions on the topic of the interpretation of Regulation 4(1)(a)(i) I have concluded that I am satisfied that the correct interpretation is that set out in the submissions of the claimant and the defendant. I have reached this conclusion for the following reasons.

105. Firstly, in my view the claimant and the defendant are right to emphasise the importance of the purpose of these regulations, widely advertised in the consultation materials and also explained in the Explanatory Note, to reduce diffuse agricultural pollution giving rise to significant risks of deterioration in water quality by avoiding the risks of application of nutrients surplus to requirements of the soil and crop leaching or running off and giving rise to diffuse pollution. In principle, the furtherance of that purpose is more likely to be achieved by planning for the needs of the soil and crop on the land at

the time when the application is to take place. It is more likely to be furthered as an objective on the basis of known soil and crop needs at the time of the application, rather than forecast or potential crop needs that might arise from some future notional but as yet unimplemented crop cycle or rotation. Interpretating Regulation 4(1)(a)(i) of the 2018 Regulations in this way is in my view consistent with the clear purpose of enacting this legislation, to ensure that applications of organic manure or manufactured fertiliser are tailored to the known and established needs of the existing soil and crops so as to avoid the risks of overprovision and subsequent leaching or run-off of unabsorbed nutrients into water courses giving rise to environmental damage. Thus, it is clear in my view that the purpose of the regulation supports the claimant and the defendant's interpretation. The contentions in relation to farming operations and practicality are dealt with in detail below, but it is important to note that this evidence is framed in the context of current practices, as opposed to practices being shaped by and conforming to the proper application of Regulation 4(1)(a)(i) of the 2018 Regulations and its clear purpose.

106. I am reinforced in that conclusion by an examination of the language of regulation 4 and its surrounding regulatory context. In my view the defendant is correct in placing reliance upon the use of the word "on" within regulation 4(1)(a)(i) as being far more consistent with an interpretation of regulation 4 which requires the need of the soil and crop to be planned and determined at the time of the application. I am unable to accept the interested party's submission that this word is simply used as a preposition in this context. Its use brings with it the clear indication that the planning of the application called for by regulation 4 is to be based upon the needs of the soil and crop on the land at the time when the planning is being undertaken.

107. It is also of significance in my view that regulation 4(1) is written as a single sentence incorporating both regulation 4(1)(a) and (b). Thus the natural reading of that sentence as a whole, bearing in mind in particular that (a) is linked to (b) by the use of the word "and", is that the planning which is to be performed in relation to soil and crop needs, the avoidance of significant risk of agricultural diffuse pollution and account being taken of weather conditions and forecasts are all to be undertaken "at the time of the application". In short, the defendant's observation that the word "application" provides the bookends for regulation 4(1) legitimately reinforces the claimant and the defendant's interpretation.

108. In my view cases such as the case of *Shepherd* are of little assistance in relation to the question of construction which arises in this case. As noted above, the case of *Shepherd* addressed different formulations of words in different sections of the same act. The point of the construction which arises in this case relates, in effect, to the single sentence which comprises the regulation which is under consideration. Reading that sentence as a whole, given the language and the context, reinforces the conclusion that the claimant and the defendant are correct in their interpretation of regulation 4.

109. Whilst I have noted the extracts from the Code of Good Practice relied upon by the interested party in relation to nitrogen, that good practice emphasises the need for applications to be made at a suitable time for maximum crop growth of the specific crop concerned. This does not in my mind undermine the claimant and the defendant's interpretation or lead to a different conclusion. Whilst the material in relation to phosphate and potash refers to managing the application of organic material to ensure that it is used through the crop rotation, that again does not in my view provide a

coherent basis to go behind the claimant and the defendant's interpretation when regard is properly had to the purpose of the regulations and the way in which its requirements for planning applications have been articulated in the legislation. It is the language of Regulation 4(1)(a)(i) which is central to the task of interpretation, and the terms of prior guidance (which is far from unequivocal on these issues) is insufficient to undermine the clear conclusions I have reached based on the language of the 2018 Regulations and their purpose.

110. It is important to note that, additionally, regulation 5 of the 2018 Regulations is clearly framed in respect of the results of soil sampling and analysis being current at the time of the application. This is a further feature of the context of regulation 4 which supports the interpretation advanced by the claimant and defendant.

111. The evidence from the claimant and the intervener in relation to the suggestion that the claimant and the defendant's interpretation of regulation 4 is impractical is in many respects conflicting. However, having examined that material I am not satisfied that the intervener has demonstrated that the claimant and the defendant's interpretation is either impractical in terms of its implementation or, for that matter, one which gives rise to absurdity in the outcome which it envisages.

112. The claimant's evidence demonstrates that there is practical experience of agricultural practices being capable of complying with the claimant and defendant's interpretation of the regulations. The evidence provided by the intervener demonstrates that current agricultural working practices would have to change if the claimant's and the defendant's interpretation of the Regulations is to be complied with, and that changes to the way in which farms operate together with associated costs would arise from the operation of that interpretation. Whilst no doubt unwelcome to the intervener and its members, I am unable to accept that the evidence demonstrates the kind of impracticality or absurdity which justifies the rejection of the claimant's and defendant's case on this point. For the reasons I have set out above, the claimants and defendants, is the appropriate interpretation of regulation 4 and its effect.

113. Applying the principles from *PACCAR* I am not satisfied that the principle of statutory interpretation precluding an absurd or unreasonable interpretation bites upon the interpretation advanced by the claimant and defendant in this case. Theirs is an interpretation which might involve a change in the way in which agricultural practices are undertaken, and the incurring of additional cost, and give rise to some environmental effects in relation to additional storage, but that is insufficient to undermine the clear conclusions which I have reached based upon the purpose of the regulations and the language in which they are expressed. I am therefore satisfied that the interpretation placed upon regulation 4(1)(a)(i) of the 2018 Regulations by the claimant and the defendant is the correct interpretation and the one to be taken forward into the assessment of the claimant's grounds of challenge in this case.

Submissions and conclusions.

114. The claimant's submissions under grounds 1 and 2 are overlapping and it is convenient, as was set out in the claimant's written and oral submissions, to deal with them together. The claimant's overall submission is that when the actions of the defendant are scrutinised the defendant's approach is unlawful because its regulatory activities fail to set out a clear requirement for compliance with the requirements of the 2018

Regulations within a reasonable time frame and, as a consequence, allow breaches to continue without limit of time. In particular, the flow chart which has been set out above identifies that in circumstances where there has been a breach of Regulation 4 (1)(a)(i) in accordance with their own interpretation, but the land manager's actions are in compliance with the Statutory Guidance, enforcement action will not usually take place. Instead the defendant will provide advice and agree a timescale for improvements.

115. The two circumstances where the defendant will use its enforcement powers are where action is not taken within a reasonable timescale or there is a significant risk of pollution. The claimant points out that if there is a significant risk of pollution then there is a clear breach of Regulation 4(1)(a)(ii), and thus this approach does nothing to enforce freestanding breaches of Regulation 4(1)(a)(i). In respect of the second scenario, where required actions are not taken within a reasonable time, the claimant contends that a policy of non-enforcement of that kind could only be lawful if the recommended actions would bring the land manager into compliance with the 2018 Regulations. The claimant contends that the template letter set out above fails to tell the land manager that they are in fact breaking the law, and does not specify the complaints identified in the land management practices as being breaches of the 2018 Regulations. The letter appears to permit derogations from the 2018 Regulations, and fails to specify a clear pathway to compliance with the law within an appropriate timescale. Thus the claimant submits that the template letters do not show an appropriate and lawful approach to compliance with the 2018 Regulations.

116. Moving to the specific examples of farm inspection reports which are set out above, it is submitted by the claimant that the examples illustrate that the use of the template letter does not have compliance as its goal. Further when more detailed actions are specified, as in the more recent examples set out above, it is compliance with the Statutory Guidance which is targeted rather than compliance with the proper understanding of the 2018 Regulations.

117. Related to these points the claimant relies upon the identified differences between the defendant's interpretation of the 2018 Regulations and the provisions of the Statutory Guidance. Two particular features of section 2.2 of the Statutory Guidance are in the forefront of these concerns. The first feature is that section 2.2 of the Statutory Guidance focuses on a requirement for land managers to consider the soil and crop need for nitrogen "on an annual crop cycle" and for phosphorus in relation to target levels for soil and crop on land "over a crop rotation". These provisions do not reflect the defendant's interpretation of the 2018 Regulations. Furthermore, section 2.2 provides that even if the target levels for soil and crop on land over a crop rotation cannot be met, section 2.2 of the Statutory Guidance identifies that this can be appropriate where it is "not reasonably practicable to do so". Again, this is a derogation from the defendant's interpretation of the 2018 Regulations. The incorporation of the Statutory Guidance with these glosses and derogations amount to the defendant fettering its discretion by adopting an approach which is inconsistent with the law, and taken as a whole the actions of the defendant amount to an unlawful approach to enforcing the 2018 Regulations.

118. In response to these submissions the defendant contends that the material contained within Mr Crookshank's evidence demonstrates comprehensively that a responsible, appropriate and lawful approach to the enforcement of the regulations has been taken. A policy is in place, which is not criticised by the claimant, to guide the enforcement

of the regulations as a matter of discretion. The policy is lawful and the defendant is entitled to rely principally upon the provision of advice and guidance, in particular in the light of Mr Crookshank's evidence that in most cases the provision of advice and guidance leads to bringing land managers into compliance.

119. The defendant submits that the Statutory Guidance does not amend the 2018 Regulations and simply provides a guide to the use of the defendant's enforcement tools. It does not fetter the discretion of the defendant in the way it goes about undertaking its enforcement activities, and the correct approach is set out in the FAQ's which clearly identify the distinct roles of both the 2018 Regulations and the Statutory Guidance as enabling a proportionate approach to enforcement. Neither in the template letter, nor in the specific examples, nor the FAQ's is there any indication that the defendant is fettering its discretion in undertaking enforcement, and it is clear that in reality, and where necessary, the defendant goes beyond the Statutory Guidance where appropriate in order to enforce its interpretation of the 2018 Regulations.

120. In order to reach conclusions in relation to these competing submissions it is necessary at the outset to identify some important features of the law governing the exercise of a regulator's discretion in undertaking its enforcement activities. As the case of *R v Commissioner of Police of the Metropolis ex parte Blackburn* [1968] QB 118 establishes, albeit in that case in relation to a policy of the Commissioner of Police of the Metropolis, there is a duty to enforce the law placed upon such an officer with which the executive cannot interfere, leading to the conclusion that it is not possible for such an officer to have a policy of denying that they will ever prosecute a particular offence. The entitlement of a regulator or prosecutor to have a policy has not been questioned. Indeed in the case of *R v Addaway* [2004] EWCA Crim 2831 the failure of a prosecutor to comply with its own policy was relied upon by the Court of Appeal to conclude that a prosecution had been oppressive, and that as a consequence the appellant's conviction should be quashed, in circumstances where the Judge had refused to exercise a discretion to stay the proceedings.

121. Further consideration was given to these issues in the case of *R (Mondelly) v The Commissioner of the Police for the Metropolis* [2006] EWHC 2370 in which a majority of the Divisional Court upheld the caution which had been imposed upon the claimant by the police. The claimant contended that the imposition of the caution was in breach of relevant police policy which had been misunderstood by the inspector who administered the caution. Alternatively it was submitted that it was irrational for the caution to be administered. The policy in question was Metropolitan Police Service Notice 3/2004. In particular this document identified a policy in respect of whether to arrest or caution for simple possession of cannabis, other than in circumstances amounting to aggravating features of the offence specified in Standard Operating Procedures. The conclusions of the majority of the Divisional Court were set out in the judgment of Moses LJ in the following paragraphs:

> "43. These authorities establish:-
>
> i) Generally, the reluctance of the courts to intervene in relation to decisions to prosecute, even in the case of juveniles;
>
> ii) The reluctance of the courts to intervene in relation to the administration of cautions;

iii) A refusal to intervene save where the policy which it is suggested has been breached is clear and settled; and

iv) The breach is itself established.

…

Conclusion

46. The claimant starts with a profound difficulty. If he is right, then by the promulgation of Notice 3/2004, the Metropolitan Police Commissioner has rendered it unlawful for a police officer, presumably within the relevant metropolitan area, to arrest or caution anyone for simple possession of cannabis, absent the presence of one of the circumstances identified in the Standard Operating Procedures ("SOP"). This is a startling proposition particularly when Parliament expressly conferred a power of summary arrest on police constables at the very moment it re-classified cannabis. Any suggestion that arrest or caution is unlawful must be viewed in the context of both the general power of arrest conferred by S.24 of PACE and the explicit power conferred in relation to possession of cannabis conferred by the amendment in Section 3 of the 2003 Act.

47. Of course, any acknowledgement that a court may intervene to prevent a prosecution in some circumstance must carry with it an acceptance that the court may prevent prosecution for a crime of which a claimant may be guilty. Such an acceptance is implicit in any case where the court is prepared to consider the failure of a prosecuting authority to follow guidelines. But we are here dealing with the operational activities of the police. It might be thought risible to suggest that a police inspector, at 4.a.m, failed properly to analyse the interstices and relationship between the Notice 3/2004 and Home Office Circular 18/1994, before deciding to caution, and so acted unlawfully, were not the implications of the arguments so serious. But if the claimant is right, the inspector was acting unlawfully. Even before one reaches the point of analysing the policy on which the claimant relies, it is difficult to see how the dissemination of a notice could remove the legality of the exercise of the very power which Parliament had conferred on the same day.

48. This constitutes a fundamental reason why Mr Starmer QC's arguments cannot be accepted. He accepted that it was a necessary consequence of his submission that the arrest policy made the administration of the caution unlawful, that any prosecution of Mr Mondelly would have been unlawful as well. This he accepted would apply to any individual who was found in simple possession of cannabis where there were no aggravating circumstances as described in the SOP. Even if he were not arrested, he could not be prosecuted by the issuing of a

> summons. So the policy on arrest when read across to cautions, as Mr Starmer QC contended it should be, becomes a prohibition on prosecution. That is an utterly misconceived approach to the meaning and effect of the policy. It demonstrates powerfully why his approach to the arrest policy takes it several steps beyond its stated confines and purpose. There is nothing in it at all to suggest that the authors thought they were creating such a policy, let alone one which required the application of hindsight as Mr Starmer QC urged.
>
> 49. Were there to be a police/CPS policy that no one should be prosecuted for simple possession of cannabis unless it fell within the aggravating circumstances specified, and if that were said to make a decision to prosecute unlawful in such circumstances, it would be an unlawful policy itself. Parliament did not enact those aggravating factors into the offence of simple possession, and it is not for executive prosecution policy to change it. The implication of Mr Starmer QC's argument is that by policy, a police force or the Home Office, could suspend or dispense with part of the law as enacted by Parliament. The statutory power of arrest and the power to prosecute would become a mere power of seizure except if non-statutory and variable aggravating features were present. This would be akin to a policy not to prosecute for theft, and merely to retrieve stolen goods, unless their value exceeded £100, not far distant from the example of an unlawful policy given by Denning MR in *R v Commissioner of Police of the Metropolis ex parte Blackburn* [1968] QB 118, at 136."

122. The court went on to conclude that a proper understanding of the policy in question did not support any of the claimant's arguments in respect of the legality of the caution to which he had been made subject.

123. It follows from these authorities that it is a recognised and entirely lawful approach for a regulator or prosecuting authority to have a policy to guide the enforcement of the law for which it has responsibility. As was acknowledged by the Court of Appeal in *Secretary of State for Communities and Local Government v West Berkshire District Council* [2016] EWCA Civ 441, a policymaker is entitled to express a policy in unqualified terms and they are not required to spell out what the Court of Appeal described as a "legal fact" that the application of that policy will allow for the possibility of exceptions. Further, as the Court of Appeal recognised in that case, the exercise of a discretionary power requires the decision maker to bring their mind to bear on every case and not blindly follow a pre-existing policy without considering whether or not there is material at hand which might justify an exception to that policy.

124. Whilst, plainly, any law enacted to restrict or regulate a particular activity will be ineffective unless it is enforced, particular care needs to be taken by any court faced with a challenge in relation to decisions respecting prosecution or enforcement of that regulation. For instance, it is exceptionally rare for the court to intervene in prosecutorial decisions for the reasons given by Lord Bingham in *R(Cornerhouse research) v Director of the Serious Fraud Office* [2009] AC 756. A significant margin

of discretion is given to prosecutors when exercising the discretion to prosecute entrusted to them by Parliament.

125. A comparable attitude can be detected in the court's approach to allegations of a failure to properly enforce a regulatory requirement such as in the case of *R(SSE Generation Limited) v CMA* [2022] EWCA Civ 1472, [2022] 4 WLR 115. This case concerned a duty under the Directive 2009/72/EC which covers common rules for the internal market in electricity in member states of the EU, and in particular a duty to "ensure" compliance with the law on the part of commercial operators. The issue between the parties related to the method chosen by the regulator to bring the charging methodology into compliance, and in particular the incorporation by the regulator of a stop-gap methodology incorporating temporary and non-compliant methodology as a means of introducing full compliance in due course. The correct approach to evaluating the validity of this approach was set out by Green LJ, in a judgment with which the other members of the Court of Appeal agreed, in the following terms:

> "64**.** At base this appeal turns upon the duty of regulators, *once* non-compliance has come to light, to ensure observance with the law. There is a statutory duty on GEMA to both comply with the law and ensure compliance by its regulated community, which duty has not been changed by the exit of the UK from the EU. The existence of a duty does not however preclude the decision maker also having a discretion or power as to "*how*" to go about ensuring compliance; the two are not mutually exclusive. This flows from the proper interpretation of the legislative regime as a whole. For example, article 37 of the 2009 Directive refers to the taking of "*reasonable measures*" in the framework of the duty to ensure observance of the law (see para 32 above) indicating that there might be a range of different "*reasonable*" ways in which compliance can be secured. The conclusion of the judge however was that the GEMA Decision was unlawful because during the glidepath to adherence—the stop gap—an unlawful methodology would temporarily subsist and be incorporated into the Code. It was implicit in the judge's reasoning that there was no discretion or power for GEMA to do anything more than demand immediate or instantaneous observance, even if this was impossible to achieve in any realistic and practical sense and left the state of observance with the law in a worse situation. To prohibit the interim stage upon the basis that it reflects a degree of temporary (diminishing) non-observance begs the question of *what*, if the judge is correct, regulators are meant to do in a case such as the present in order to meet their statutory duty.
>
> 65**.** In my judgment under the relevant legislation GEMA had a power as to how it went about performing its duty to secure compliance with the law. A decision whether GEMA acted unlawfully in the exercise of this power is fact and context specific. Under EU law the test to be applied would be proportionality. It is unnecessary in this case to devote time to

> determining whether proportionality remains the right test or whether the test is simply one of domestic law rationality. In either case a relatively broad margin of judgment or discretion will be implied into the test and in my view both lead to the same end result."

126. In my view this case law demonstrates a number of key features in relation to a challenge of the kind which is before this court in respect of the lawfulness of the activities of a regulator in enforcing the regulatory requirements for which it has responsibility. Firstly, it is not open to a regulator to say that it refuses to enforce the law with which it has been entrusted with responsibility by Parliament. Secondly, it is open to a regulator to have a policy in relation to how it will go about enforcing the regulatory requirements for which it has responsibility. Having a policy is very likely to amount to good practice, and in going about its regulatory activities, in accordance with public law principles, the regulator will have regard to and apply its adopted policy unless, having scrutinised the particular circumstances of the case, there is good reason for departing from it. Thirdly, it follows that the regulator has a discretion to exercise in respect of ensuring compliance in each case, meaning that there may be a range of different acceptable or reasonable ways in which compliance can ultimately be secured. Fourthly, in considering the regulator's approach to this exercise of discretion the court will afford a broad margin of judgment given the responsibility for enforcement provided by Parliament and the expertise of the regulatory authority in the area which it has been entrusted to supervise.

127. Considering these principles in the present case it is clear that the defendant is intent upon enforcing the 2018 Regulations, and has set out a clear and proportionate approach to undertaking its enforcement activities in its "Enforcement and Sanctions policy". There is no dispute that in principle this policy provides an appropriate and proportionate approach to enforcing environmental control including the provisions of the 2018 Regulations. The essence of the claimant's concerns under grounds 1 and 2 relate to the detail of the way in which on the ground the defendant has undertaken enforcement of the 2018 regulations.

128. Dealing, firstly, with the claimant's contention in respect of the Statutory Guidance, I am not persuaded that the role of the Statutory Guidance has led to the defendant unlawfully fettering its discretion in relation to enforcement activity. It is undoubtedly unfortunate, and has not assisted the defendant's enforcement activities, that there has been a conflict in the interpretation of the 2018 Regulations between the defendant and the interested party. However, a significant by-product of these proceedings is, firstly, that that difference of opinion has been brought into the public domain for determination, and, secondly, that the defendant's internal documentation (including for instance the FAQ's) have been revisited, revised and refined to ensure that they have at their foundation the defendant's interpretation of the 2018 Regulations. It is clear in my view from the FAQ's and the internal supplementary guidance (including the flow chart) that the ultimate goal identified by the defendant's enforcement policies and procedures is to ensure that lawful compliance with the 2018 regulations and regulation 4(1)(a)(i) in accordance with its interpretation is achieved.

129. The interested party conceded during the course of argument that there was the potential for conflict between the appropriate interpretation of Regulation 4(1)(a)(i) of the 2018 Regulations and section 2.2 of the Statutory Guidance, in particular in relation to the

differences which have been identified above. In my view the key point is that the principles set out in the defendant's policies and procedures are designed to ensure that ultimately compliance with the 2018 Regulations as interpreted by the defendant is achieved. This conclusion is, in particular, reinforced by the evidence of Mr Crookshank which has been set out above, explaining how in practice the defendant uses a proportionate approach to enforcement to bring land managers into compliance.

130. In accordance with the legal principles which have been set out above there is clearly the need for the exercise of expert judgment in determining the correct response to identifies breaches of the 2018 Regulations. In my view an approach which is grounded in the correct interpretation of the 2018 Regulations for the purpose of achieving compliance, but which nonetheless has regard to the Statutory Guidance in the enforcement process, and which has as its goal the achievement of compliance with that correct interpretation is not one which is unlawful. This is particularly the case when it appears from the evidence that experience suggests that most satisfactory outcomes are achieved through the provision of advice and guidance rather than moving immediately to formal sanctions. Whilst the inconsistencies of interpretation between the defendant's approach and the contents of the Statutory Guidance is not ideal, bearing in mind the way in which the defendant's policies and its own guidance operates, I am not satisfied that that difference has led to any misdirection or illegality in the defendant's approach.

131. Turning to the detail complained about by the claimant I am not satisfied that the template letter, in the context of the other documentation related to enforcement, gives rise to any legitimate complaint as to the legality of the defendant's approach. Whilst it is suggested that the template letter is insufficiently specific both as to the need for compliance and, in particular, the timescales for coming into compliance, upon a fair reading of the template letter it does in reality include requirements which construct a timescale requiring the land manager to demonstrate that applications have been appropriately planned and compliance is achieved. The letter's requirements are to be placed in the context of further engagement with the land manager if the information is not provided.

132. Turning to the specific examples provided by the defendant of individual farm visits and actions taken this point is reinforced. In the first example, as set out above, the letter sent to the land manager essentially follows the structure of the template letter, but sets out specifically the deficits in the information required for properly informed nutrient management plans to be prepared and provided to the defendant. It then sets a timescale for the provision of that material by 31st January 2023. The letter goes on to describe the specific concerns and identifies the steps that are needed to be taken to address the shortcomings of the nutrient management plan. The letter also illustrates that in the light of these findings the defendant will now consider what enforcement action is appropriate.

133. In respect of the second example, the defendant set out in its letter specific concerns in respect of phosphorus and identified in some detail what was required in order to manage the amount of phosphorus on the land to ensure that the requirements of the regulations were being met. The letter noted that the actions required were agreed, and to be implemented immediately, together with noting that whilst this was a case to be dealt with by the provision of advice and guidance, in the event of further non-compliance enforcement action was not precluded. Both of these examples in my view

illustrate an appropriate regulatory response identifying the steps necessary to ensure that compliance with regulation 4(1)(a)(i) of the 2018 Regulations is achieved, and identifying time scales where matters were not being immediately addressed. The examples also illustrate a proportionate response to the use of enforcement tools consistent with the defendant's policy.

134. It is clear that in a number of respects matters have moved on in relation to the defendant's enforcement of the 2018 Regulations since these proceedings were intimated. Significant improvements have been made to the FAQ's and internal supplementary guidance published by the defendant to address issues associated with the disconnect between its interpretation of the 2018 Regulations and that to be inferred from the Statutory Guidance. The outcome has been a suite of policy documents and guidance for the use of the defendant's officers which is properly grounded in ensuring compliance with Regulation 4(1)(a)(i) of the 2018 Regulations, deploying a proportionate approach to those land managers who currently are not complying with the 2018 Regulations. In the circumstances, and addressing the material as it was presented at the time of the hearing, I am not satisfied that there is substance in the claimant's complaints in respect of the enforcement of the 2018 Regulations undertaken by the defendant. No doubt the clarification of the correct interpretation of the 2018 Regulations comprised within this judgment will provide further assistance in future.

135. Turning to ground 3 the claimant draws attention, as set out above, to the duty on the defendant to have regard to the protected status of the Wye and the requirement for it to be maintained in favourable conservation status. As set out above the impact of pollution on the water quality of the Wye and the consequences which have followed in relation to its nature conservation value are widely recorded and undisputed. The centrepiece of the claimant's submission is the contention that in reality the position in the present case is very similar to the situation addressed in the case of *Harris* which is set out above. There is a legal imperative for the defendant to have regard to the protection of the Wye SAC, applying the precautionary principle. The evidence as to the continuing problems with the conservation status of the Wye does not support the view that the defendant has had regard to its conservation status in taking enforcement decisions.

136. Whilst reliance is placed by the defendant upon the NMP and the work with other agencies and in other regulatory regimes it is submitted that the duty on the defendant to enforce the 2018 Regulations is, like the duty in *Harris,* not capable of delegation and the defendant must take responsibility for taking action in that connection. It is submitted that the evidence produced by Mr Crookshank does not support the notion that the specific requirements of the Wye SAC have been accounted for in the approach taken by the defendant to its enforcement activity. There is no evidence to support any suggestion that breaches of regulation 4(1)(a)(i) of the 2018 Regulations in the Wye catchment are treated any more seriously than breaches elsewhere.

137. In response to these submissions the defendant contends that, firstly, the situation in the present case is not analogous to the position in *Harris.* In the case of *Harris* the defendant was the sole body in relation to abstraction licenses which was accepted as being the sole potential influencer or cause of the deterioration in nature conservation sites within the sphere of influence of the water abstraction which was licenced. By contract in the present case the achievement of favourable conservation status in respect of the Wye SAC has to be addressed by a multiplicity of agencies, each of whom are

responsible for controlling the potential pollution of the Wye in different respects. The NMP described above, alongside the multi-agency activities which are occurring, are the appropriate vehicles to seek to ensure that pollution is tackled.

138. In relation to the specific actions undertaken by the defendant reliance is placed upon the evidence of Mr Crookshank which has been rehearsed above, in which he identifies the increased levels of farm and water sewage treatment work inspections, along with the defendant's approach to enforcement which specifically requires public interest factors be taken into account to include environmental effects on environmental protected areas within the Enforcement Sanctions policy.

139. In my view there is obvious force in the submission made by the claimant that it is only the defendant who is charged with the responsibility of enforcing the 2018 Regulations, and therefore that carries with it the responsibility to discharge the duty to have regard to the requirements of regulation 9(3) of the Habitat Regulations in undertaking that enforcement activity. That said, there is also in my view substance in the defendant's submission that there are distinctions to be drawn between the circumstances of the present case and the circumstances presented to the court in *Harris.* The case of *Harris* related to the impact upon a SAC arising from water abstraction pursuant to licences for which the defendant had sole responsibility. Thus, the impact of water abstraction upon the SAC was correctly concluded in that case to be the sole responsibility of the defendant. The present case concerns the impact upon the Wye SAC of pollution and in particular high concentrations of phosphorus.

140. As the evidence demonstrates, firstly, there are numerous potential sources capable of contributing to the phosphorus pollution in the Wye. As a consequence, action is required not only under the 2018 Regulations, but also under other important regulatory regimes, and the enforcement of the 2018 Regulations is not the only requirement to address the issues facing the Wye SAC. Other regulators identified with a requirement to address these issues include Natural England and Natural Resources Wales, Welsh Water and a range of local authorities. As the defendant points out, the issue of diffuse agricultural pollution is not an issue which is to be tackled solely by the enforcement of the 2018 Regulations, but also, as the enforcement correspondence indicates, by the supervision and enforcement of a range of other regulations for which the defendant has responsibility including agricultural activities regulated by the Environmental Permitting (England and Wales) Regulations 2016 (such as the storage of sewage sludge and spreading of waste materials on to land for agricultural benefit), the Environmental Damage (Prevention and Remediation) (England) Regulations 2015 and the Water Resources (Control of Pollution) (Silage, Slurry and Agricultural Fuel Oil) (England) Regulations 2010 in relation to standards for storing silage, slurry and agricultural fuel oil to minimise the risk of water pollution.

141. In this context I am satisfied that the circumstances are far closer to those described by Johnson J in paragraph 84 of *Harris,* namely that there is a matrix of competent authorities with overlapping regulatory responsibilities relevant to the discharge of the requirements of the Habitats Regulations in this case. In my view, the work upon the NMP demonstrated in the evidence, together with the proactive collaborative working between the regulatory authorities, demonstrates clearly that regard is being had to the requirements of the Habitats Regulations. Overall an approach is currently being taken which properly accounts for the specific requirements created by regulation 9(3) of the Habitats Regulations, and here it is the case that all of those competent authorities have

regard to the requirements of the Habitats Regulations and are playing their part in the collective efforts being undertaken through the NMP.

142. The question which then arises is as to whether or not, on the evidence, the defendant is complying with its duty to have regard to the requirements of the Habitats Regulations in operating its enforcement regime under the 2018 Regulations. I have addressed the concerns raised by the claimant under grounds 1 and 2 above, but as the claimant correctly points out ground 3 raises a separate and distinct legal requirement arising as a consequence of the designation of the River Wye SAC. Having reflected on the evidence produced by the defendant I am satisfied that the defendant has demonstrated that in its operation of its enforcement activities in respect of the 2018 Regulations it is having due regard to the requirements of the River Wye SAC for the following reasons. Firstly, in addition to the collaborative activities which include the partnership working under the NMP, the evidence of Mr Crookshank demonstrates a clear focus of investment in enforcement activity in the Wye catchment as set out above. The evidence of Mr Crookshank explains the recruitment of additional officers to conduct farm inspections and the use of satellite and drone technology to identify sources of diffuse pollution at the landscape scale. Additional resources are being devoted specifically to the Wye catchment in order to address the issues affecting its favourable conservation status, demonstrating in my judgement that regard is being had to the requirements of the Habitats Regulations, and they are being afforded the necessary priority.

143. Furthermore, the significance of harm to an environmentally designated area such as an SAC is, as set out above, specifically acknowledged within the defendant's Enforcement and Sanctions policy which, as noted above, leads the defendant to normally consider prosecution, formal caution or a variable monetary penalty when damage to a nationally protected habitat of this kind occurs. Although the claimant is concerned that notwithstanding the policy there may have been limited imposition of sanctions in the Wye catchment, in my view the defendant is entitled to observe that whilst the policy requires consideration of these formal sanctions, it does not suggest that pursuit of them in every case would be appropriate. As set out above, Mr Crookshank's evidence in relation to the 31% of inspections in the Wye catchment which gave rise to an identified breach of regulation 4(1)(a)(i) is that they all led to the relevant land managers receiving advice and guidance both on site and in the subsequent inspection report, and the evidence is that the provision of this advice and guidance is generally effective to secure compliance with the Regulations. I am unable to detect any flaw in this approach in the context of having regard to the requirements of the Habitats Regulations.

144. Taking all of these matters into account, for the reasons which have been set out above I am satisfied that the analogy which the claimant seeks to draw with the case of *Harris* is not altogether apt, and that the detailed evidence provided by the defendant, in particular in the witness statement of Mr Crookshank, demonstrates clearly that in its enforcement of the 2018 Regulations (and regulation 4(1)(a)(i)) the defendant has had regard to its duty under regulation 9(3) of the Habitats Regulations, and that in this respect its enforcement activity has been lawful.

Conclusion.

145. It follows that, on the basis of the materials before the court, the grounds of the claimant's application for judicial review do not succeed for the reasons set out above. It is now for the parties to propose the terms of an order to give effect to this judgment.