

NOTE: This summary is provided to help in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: www.judiciary.uk and <http://caselaw.nationalarchives.gov.uk/>

C.G. Fry & Son Ltd. v Secretary of State for Levelling Up, Housing and Communities and another

Press summary for hand-down of judgment, 28 June 2024

1. The central question in this case is whether the Conservation of Habitats and Species Regulations 2017 (“the Habitats Regulations”), properly interpreted, required an “appropriate assessment” before a local planning authority decided whether to discharge conditions on the approval of reserved matters, having previously granted outline planning permission, without such an assessment, for a development of housing on land close to the Somerset Levels and Moors Ramsar Site. The Court of Appeal has dismissed the appeal on all three grounds, concluding that the Habitats Regulations could, and in this case did, require an appropriate assessment at discharge of conditions stage.
2. The Habitats Regulations, which transposed into domestic law the Habitats Directive, require that “[a] competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which ... is likely to have significant effect on a [protected site] must make an appropriate assessment of the implications of the plan or project for that site” (reg.63(1)). The competent authority “may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the [protected site]” (reg.63(5)). Under national planning policy in paragraph 181 of the NPPF, Ramsar sites enjoy equivalent protection to sites designated under the Habitats Regulations. Reg.70 provides for the “assessment provisions” to apply “in relation to ... granting planning permission ...” (reg.70(1)). Reg.70(3) confirms that the application of reg.63 extends to the “outline planning permission” stage.
3. In 2015 outline planning permission was granted by Somerset Council for a mixed use development including 650 dwellings on land at Jurston Farm, near Wellington. The site is in the catchment area of the River Tone, which flows into the Ramsar site. No appropriate assessment under reg.63 of the Habitats Regulations had been undertaken when outline planning permission was granted, or subsequently at the reserved matters stage. After reserved matters had been approved for Phase 3, subject to conditions, Natural England issued an advice note identifying the potential adverse effects of increased nutrient loads, caused by new housing development, upon the integrity of the Ramsar site. If the conditions on the approval of reserved matters for Phase 3 of the development were discharged, the construction of that phase would become lawful. In the absence of an appropriate assessment under the Habitats Regulations, the council refused to discharge the conditions. C.G. Fry does not dispute that an appropriate assessment would have confirmed that the development would likely have adverse effects on the Ramsar site.
4. On ground 1 of the appeal: in the Court of Appeal’s view, Reg.63 is clearly designed to capture a wide range of “authorisations”, of differing kinds; hence the use of the expression “or other authorisation”. Any other interpretation would be incompatible with the words of the provision, inconsistent with the legislative purpose, and inimical to the precautionary principle. Reg.63

allows an appropriate assessment to be undertaken when the authority is making the final decision in a sequence authorising the development to proceed.

5. This understanding of reg.63 is consistent with the proper interpretation of reg.70. While reg.70(1)(a) and (c) provides that the assessment provisions apply “in relation to ... granting planning permission”, it does not state, or imply, that those provisions are inapplicable to any particular types of “consent, permission or ... authorisation” within the reach of reg.63 and relating to a grant of planning permission, such as reserved matters approvals or decisions to discharge conditions. Reg.70(3) stipulates the appropriate assessment of a project when an application for outline planning permission is being determined if there is a possibility of its authorising development likely to harm the integrity of a European site. It does not, however, exclude the requirement for an appropriate assessment to be undertaken either at the reserved matters stage or when a decision is being made on the discharge of conditions if this has not already been done, as it should have been, at the outline permission stage.
6. Taken together therefore, regs. 63 and 70 allow for, and can require, appropriate assessment to be undertaken at the final stage in a multi-stage consent process. If this were not so, there would be a gap in the regime for assessment, which would enable development to proceed with potentially harmful effects on a protected site, for lack of an assessment at the initial stage when outline planning permission is granted.
7. On ground 3 of the appeal: in the Court of Appeal’s view, C.G. Fry’s argument cannot be reconciled with the requirement in reg.63(1)(b) of the Habitats Regulations that the “implications of the ... project” are assessed, rather than the effects of any individual part or parts of it, and is inconsistent with the fundamental objective of the habitats legislation to avoid any harmful effects on the integrity of the protected site itself.
8. On ground 2 of the appeal: in the Court of Appeal’s view, in promulgating the policy in paragraph 181 of the NPPF, the Government was exercising its proper and accustomed role in producing national planning policy, which may then be a material consideration in decision-making. Once it is accepted that harmful effects on the Ramsar site were, and were known to be, a likely result of the generation of phosphates by C.G. Fry’s proposed development, one can see that the policy in paragraph 181 of the NPPF was a material consideration in the decision whether to discharge the outstanding conditions.
9. For the reasons given in its judgment, therefore, the Court of Appeal dismissed C.G. Fry’s appeal against the order of the High Court dismissing his challenge to the Secretary of State’s inspector’s decision to dismiss its statutory appeal.