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WWF-UK, THE ANGLING TRUST AND FISH LEGAL TAKE THE GOVERNMENT TO COURT TO STOP POLLUTION OF OUR MOST PRECIOUS RIVERS AND WETLANDS

Summary

On the 19th and 20th November, WWF-UK, the Angling Trust and Fish Legal are taking the Government to the High Court for its failure to protect the most precious rivers and wetlands in England.

Focusing on iconic places such as Poole Harbour in Dorset and the River Mease in the Midlands, our organisations hope to ensure the protection of 44 spectacular natural ‘crown jewels’ in England, which are currently suffering from significant agricultural pollution. These are vital for cherished species like the kingfisher, Atlantic salmon and white-clawed crayfish and they also provide a vital income for rural communities from tourism and recreational activities.

Not only are these 44 rivers and wetlands specially protected under the law but the Government is required to ensure that these are healthy by December 2015. It now admits that it will not meet this legal deadline. This is because it has not used the key regulation it designed, consulted and committed to use six years ago to tackle pollution from farms - Water Protection Zones (WPZs).

In fact, recent investigations by our organisations have revealed that the Government Ministers, Defra and the Environment Agency put the brakes on using this new regulatory power as early as January 2011, but failed to make its decision public. In what appears to be an ideologically driven move to avoid regulating farmers, they quietly side-lined WPZs allowing them to be used only as a ‘last resort’ when all other efforts had failed. This directly contravened the Government’s public policy position as well as Defra’s analysis which has repeatedly shown that voluntary action by farmers alone will not come close to dealing with the scale of the problem.

The effect of that decision is proving devastating for our most precious rivers and wetlands, which as a result may not now see improvements for years ahead. For this reason, WWF-UK, the Angling Trust and Fish Legal are seeking the help of the Court to ensure the Government takes the action that is needed to ensure these special places get the protection to which they are lawfully entitled.

This briefing outlines why our organisations are bringing this legal case against the Government and looks at:

1. Protected Areas and agricultural pollution
2. Government action to address agricultural pollution to date
3. The ‘Last Resort’ doctrine and the legal challenge



1

PROTECTED AREAS AND AGRICULTURAL POLLUTION

England's most precious rivers and wetlands, which include Poole Harbour in Dorset and the River Mease in the Midlands, are of international importance.

CURRENTLY ONLY 17% OF ENGLAND'S RIVERS AND 23% OF LAKES ARE CONSIDERED HEALTHY⁸

They provide habitats for some of our most threatened and unique species such as the bittern, kingfisher, avocet and otter and they are also vital for recreation and tourism¹. The natural equivalents of Stonehenge or the Houses of Parliament, they are part of a European network of Natura 2000 Protected Areas and as such are recognised under the law².

Yet despite their legal protection, these rivers and wetlands are facing many challenges including water companies taking too much water out, human modifications for flood defence and navigation and pollution from a variety of sources.

The most significant pressure on freshwater Protected Areas is pollution from farms³, with more than half (58%) affected⁴. This is caused when soil carrying nutrients from manures, fertilisers and pesticides run off farmland and into water courses. On a daily basis, chemicals, fertilisers and soil pour into our rivers and wetlands choking them in pollution and leading to algal blooms. This smothers the spawning grounds for Atlantic salmon and brown trout, which are just some of the species that need clean, well-oxygenated waters and gravel for them and their eggs to survive. Fish-eating birds such as divers, grebes and kingfishers also suffer as they rely on clean water to see their prey and relatively minor increases in nutrient loading can reduce its transparency.

IN ENGLAND AND WALES ALONE, FARMERS LOSE 2.9 MILLION TONNES OF SOIL FROM FIELDS EVERY YEAR -THE EQUIVALENT TO THE CONTENT OF 232,000 DOUBLE DECKER BUSES⁹

The cost of agricultural pollution:

Agricultural pollution leads to farmers losing valuable resources they need to sustain their livelihoods. For example, soil degradation costs farmers an estimated £1.2 billion per year in lost productivity, flood damage, reduced water quality and other costs⁵.

Other costs of agricultural pollution are estimated to be between £758 million to 1.3 billion⁶ a year and are borne by the water industry, the tax payer, angling groups, conservation groups, the shellfish industry and tourism.

Tackling agricultural pollution would not only reduce these costs but the Government's own figures show that getting 75% of rivers, lakes and wetlands healthy would benefit the economy by £8.5 billion⁷ through increased tourism, recreation, improved flood resilience and quality of life.

1. Please see our case study of Poole Harbour and the River Eden for more details.
2. Natura 2000 sites are legally designated by the UK Government under the EU Birds and Habitat's Directives. They are made up of Special Areas of Conservation (SACs) and Special Protected Areas (SPAs).
3. Environment Agency *Progressing towards WFD objectives – the role of agriculture* April 2014.
4. IPENS *Diffuse water pollution theme plan: Developing a strategic approach to diffuse water pollution for England's Natura 2000 sites* 2015. sciencesearch.defra.gov.uk/Default.aspx?Menu=Menu&Module=More&Location=None&Completed=0&ProjectID=16992
5. Defra, *Cost of Soil Degradation*, 2009. sciencesearch.defra.gov.uk/Default.aspx?Menu=Menu&Module=More&Location=None&Completed=0&ProjectID=16992
6. Defra Consultation. *New basic rules for farmers to tackle diffuse water pollution from agriculture in England: Impact Assessment*, September 2015. consult.defra.gov.uk/water/rules-for-diffuse-water-pollution-from-agriculture
7. Environment Agency. 2014. *A consultation on the draft update to the river basin management plan Part 3: Economic analysis*.
8. Environment Agency. *Water Framework Directive Classification 2014 progress update*. www.gov.uk/government/uploads/system/uploads/attachment_data/file/419090/WQ_trends_2009-2014_March2015.pdf
9. Defra Consultation. *New basic rules for farmers to tackle diffuse water pollution from agriculture in England: Impact Assessment*, September 2015. consult.defra.gov.uk/water/rules-for-diffuse-water-pollution-from-agriculture



2

GOVERNMENT ACTION TO ADDRESS AGRICULTURAL POLLUTION TO DATE

The Government has been aware of the harm caused by agricultural pollution for decades.

In 2008, Defra and the Treasury consulted on how best to tackle it and concluded that the best way to make progress was with a combination of existing voluntary and a new regulatory measure.

NATIONALLY, A THIRD OF WATER POLLUTION PROBLEMS ARE CAUSED BY AGRICULTURE AND RURAL LAND USE, WITH FARMING CONTRIBUTING AROUND 50-60% OF NITRATES AND 50% OF PHOSPHORUS IN WATER BODIES¹⁴

As a result, both voluntary measures such as the Catchment Sensitive Farming (CSF) scheme (aimed at engaging farmers through advice, grants and training)¹⁰ and a new regulatory tool called a Water Protection Zone (WPZ) was identified as essential¹¹. A WPZ was expected to be particularly helpful because it could be both bespoke to the local catchment area and it was mandatory, which was useful in circumstances where farmers were not willing to take voluntary action. Defra concluded the 2008 consultation: “Our [government] analysis showed that only an option with a WPZ in it, either alone or in combination, was capable of achieving the targeted reduction” in pollution¹². This also evaluated the cost implications on the agriculture sector of this combined approach (i.e. using both CSF and WPZs) and concluded it was the most cost effective way of tackling agricultural pollution.

This dual pronged approach was set out in the Government’s 2009 River Basin Management Plans (RBMPs) for approximately 5000 rivers and wetlands in the country, which included the 44 specially protected sites upon which this Court Case focuses. For these 44 sites the Government legally committed to ensuring these rivers and wetlands would be free of harmful levels of agricultural pollutants by 2015¹³.

10. CSF is part of Countryside Stewardship (CS), a broad scheme for biodiversity improvement within CAP funding.

11. WPZs were created in the Water Resource Act 1991 for a different purpose but were recreated in 2009 to deal with diffuse agricultural pollution - see The Water Resources Act 1991 (Amendment) (England and Wales) Regulations 2009.

12. Defra. *Government response on way forward following consultation on diffuse sources in England for the protection of waters against pollution from agriculture*, 17 March 2008.

13. Reached by reviewing all 11 English River Basin Districts 2009 Management Plans: Annex Ds for Protected Areas. www.gov.uk/government/collections/river-basin-management-plans

14. Defra Consultation. *New basic rules for farmers to tackle diffuse water pollution from agriculture in England: Impact Assessment*, September 2015. consult.defra.gov.uk/water/rules-for-diffuse-water-pollution-from-agriculture



3

THE “LAST RESORT” DOCTRINE AND THE LEGAL CHALLENGE

But what has happened in practice?

In October last year, the Government launched a consultation into its next round of RBMPs, to be published in December 2015.

These new RBMPs show that the Government no longer intends to meet the December 2015 deadline for most of these 44 Protected Areas¹⁵, noting more time is needed to stop pollution. Moreover, the RBMPs for these Protected Areas no longer include any reference to the use of WPZs, the tool that had been identified to tackle agricultural pollution. Our organisations immediately requested justification for this change from Government.

The resulting exchange in correspondence revealed a hitherto unknown document outlining a decision, taken behind closed doors by Ministers, Defra and the EA to prevent WPZs from being used¹⁶. The document, dated January 2011, set out how, going forward, the use of a WPZ would be used only as a ‘last resort’ when all other measures had been exhausted¹⁷. The document says: ‘WPZs do have a future role but this is as a last resort where other mechanisms are unlikely to deliver the required objective.’ This was despite the fact that the 2009 RBMPs clearly set out the need to use a WPZ in circumstances where it is the appropriate solution.

Moreover, further correspondence with the Government has not only revealed that this decision was taken without any up to date evaluation of the possible success of using a WPZ in any of these 44 sites, but it has also become clear that not a single WPZ has been implemented anywhere in England to tackle agricultural pollution over this six year period¹⁸.

Perhaps most worrying of all, the Government took this decision at the same time as its own evidence was showing how little progress could be made by relying on the voluntary CSF approach alone. The evaluation of CSF in 2011 found that the scheme had **no discernible impact** on reducing agricultural pollution or improving watercourse health¹⁹.

235,000 TONNES OF NITROGEN AND 8,391 TONNES OF PHOSPHORUS ARE ALSO LOST EVERY YEAR THAT WOULD OTHERWISE HELP SUSTAIN THE NUTRIENTS IN SOILS THAT ARABLE FARMING RELIES ON²⁰

15. Newly released drafts of RBMPs show that the Government only met the 2015 deadline for 5 of the 44 sites: www.gov.uk/government/collections/river-basin-management-plan-update

16. Letter correspondence from David Baxter, Deputy Director of Water Framework Directive at the Environment Agency to Rose O'Neill at WWF UK, 25 March 2015.

17. Environment Agency. Summary of WPZ Candidate Sites' Key Lessons Learnt, January 2011

18. Letter correspondence from David Baxter, Deputy Director of Water Framework Directive at the Environment Agency to Rose O'Neill at WWF UK, 25 March 2015.

19. Environment Agency. Catchment Sensitive Farming Phase 1 & 2 Evaluation Report, June 2011.

20. Defra Consultation. New basic rules for farmers to tackle diffuse water pollution from agriculture in England: Impact Assessment consult. defra.gov.uk/water/rules-for-diffuse-water-pollution-from-agriculture



More recent analysis reiterated these findings, with the EA's 2014 CSF report stating that the scheme for sediment and nutrient inputs had been only effective at maintaining **status quo** of sediment concentrations²¹. It also identified a particularly serious issue in relation to the nutrient phosphorus. The 2014 report identified that in the seven years that CSF has operated, levels had not reduced despite the fact they needed to decline by about 50% across England. The report also acknowledged that existing measures were inadequate to achieve necessary reductions, noting that 85 - 90% would need to be delivered via other measures (i.e. including WPZs).

Yet despite this significant analysis showing that voluntary action by farmers alone would not solve the problem of agricultural pollution, the Government put the brakes on the regulatory tool it designed and had at its disposal, directly contravening its own public policy position. It is the view of our organisations that the 'last resort' doctrine is thus ideologically driven behind a desire, at all cost, to use voluntary measures instead of tightening up regulation on farmers. We also do not believe that the Government is taking steps to use WPZs in the near future.

Given all the above, Leading Counsel has advised our organisations that the UK Government is in breach of the Water Framework Directive for failing to deploy WPZs - the primary regulatory measure it identified to deal with agricultural pollution set out in its 2009 RBMPs for these Protected Areas. For this reason, WWF-UK, the Angling Trust and Fish Legal are seeking the help of the Court to ensure the Government takes the action that is needed to provide these special places with the protection to which they are lawfully entitled.

EU to take UK Government to Court?

Our organisations are not alone in our concerns over the lack of Government action with regard to the state of the UK's rivers and wetlands. In October 2015, the European Commission issued legal guidance warning the UK Government of its failures to implement the WFD. These are the beginning of formal infraction proceedings and could lead to fines running into the millions. The UK is the only country across Europe that has been warned in this way²².

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