



## Casework Summary Report

### **Case Number (if relevant): CMS-379**

**Description:** Complaint regarding enforcement of the laws regulating diffuse nutrient pollution from agriculture and compliance with duties when carrying out assessment and approval of grassland derogations under the Nitrate Regulations in England.

### **Case Overview**

#### **Background/Complaint Summary**

The OEP received a complaint alleging a number of failures by the Environment Agency (EA) and Defra regarding the regulations together known as the Agricultural SIs<sup>1</sup>.

The complaint alleged that the EA has misdirected itself regarding its duty to gather information in relation to the Agricultural SIs (required under s.5 (2) of the Environment Act 1995). The complainants state this duty requires the EA to inspect and monitor farms as if it did not, it would be unable to carry out its functions under the Agricultural SIs.

Regarding enforcement, the complaint alleges the EA has abdicated its statutory obligations under the Agricultural SIs by deciding not to exercise its enforcement powers "in the vast majority of cases". The Agricultural SIs, create a range of requirements on land managers and failure to comply with these constitutes an offence for which the EA can commence enforcement action.

The complaint also alleged the EA has failed to carry out site-specific Habitats Regulations Assessment before granting grassland derogations under the Nitrate Regulations and that the EA is unlawfully failing to consult Natural England regarding the grant of individual grassland derogations. The Nitrate Regulations set out the requirements for occupiers of agriculture holdings within the boundaries of nitrate vulnerable zones (NVZs). These regulations state that areas within a NVZ can apply 170kg per hectare of nitrogen in livestock manure in each calendar year. Occupiers can apply for a grassland derogation and therefore use a higher limit of up to 250kg of nitrogen per hectare per year, providing 80% or more of the agricultural area of the holding is sown with grass. If granting the derogation is likely to have a significant effect on a Special Area of Conservation, Special Protection Area or other European site, the Environment Agency is required to carry out an assessment of the risks to the area, known as an appropriate assessment.

The complainant is concerned that these failures are resulting in widespread non-compliance with the Agricultural SIs by land managers and are potentially contributing to diffuse nutrient pollution which is a significant factor in the deterioration of sensitive

<sup>1</sup> The Agricultural SIs include the Nitrate Pollution Prevention Regulations 2015 ("the Nitrate Regulations"), the Water Resources (Control of Pollution) (Silage, Slurry and Agricultural Fuel Oil) (England) Regulations 2010 and the Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018, known as the Farming Rules for Water (FRfW).

habitats.

### **OEP Actions**

The OEP reviewed the information provided by the complainants and made further enquiries of the EA in which we requested details of: the actions which the EA takes to discharge its duty under s.5 Environment Act 1995 for the purpose of discharging its functions under the Agricultural SIs; the number of, and approach to, enforcement actions undertaken by the EA in relation to agricultural pollution; and information relating to the assessment and approval of grassland derogations, including details of their approach to assessing impacts of applications on European sites and Sites of Special Scientific Interest.

### **Conclusions and Outcomes**

The OEP concluded that whilst the EA has a duty under s.5(2) of the Environment Act 1995 to compile information relating to its pollution control powers and functions under the Agricultural SIs, the duty to compile information does not necessarily require the EA to monitor and inspect regulated premises.

The EA is afforded a broad discretion as to the exercise of its regulatory and enforcement powers. It is clear, both from the information provided with the complaint and further information requested from the relevant public bodies, that the EA appears to have taken some limited enforcement action in relation to the Agricultural SIs. The information returned to the OEP also indicates the EA takes a targeted, risk-based approach to inspection and enforcement of farms and has increased the number of inspections following an increase in funding in 2022. We have therefore concluded that at this time, there is no indication that the EA may have failed to comply with environmental law in respect of these issues.

Also relevant to this complaint is a recent Judicial Review case, *R (River Action UK) v Environment Agency (AC-2023-CDF-000045)* (referred to as the 'River Action Judicial Review'). The judgment<sup>2</sup>, which was handed down on 24 May 2024, did not find the EA's approach to be unlawful.

However, we concluded that the EA may have failed to comply with environmental law in relation to its obligations under the Nitrates Regulations and Habitats Regulations through their approach to Habitats Regulations Assessment of grassland derogation applications from 2016 until 2022. However, from information returned, we are satisfied a new approach has been adopted that may address our concerns.

In line with our Strategy and Enforcement Policy, given the indication that a new approach to assessment and approval of grassland derogations is being adopted, we determined we would monitor these changes to ensure they are compliant and implemented going forwards. Accordingly, we wrote to the EA setting out our conclusions and requesting confirmation that the EA will be carrying out site-specific Habitats Regulation Assessment for every grassland derogation application. We also requested details of the information that will be considered in carrying out these assessments, and confirmation that the EA has updated its approach to assessing likely impacts on SSSIs (under s.28 Wildlife and Countryside Act 1981).

<sup>2</sup> <https://www.judiciary.uk/wp-content/uploads/2024/05/River-Action-v-Environment-Agency.pdf>

The EA complied with our request, and from our assessment of the information received, we do not consider there to be an indication of an ongoing failure to comply with requirements under the Nitrates Regulations and Habitats Regulations. This is because the new approach uses site-specific data and screening to consider likely impacts of grassland derogations.