

Neutral Citation Number: [2026] EWHC 2488 (Admin)

Case No: AC-2025-LON-002236

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/10/2026

Before:

THE HONOURABLE MRS JUSTICE LIEVEN

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Between:

The King **(on the application of Timothy Charles Harris)**	**Claimant**
- and –	
Natural England	**Defendant**

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- -

Mr David Hercock and Mr Douglas Scott (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Claimant**
Mr Ned Westaway and Mr Gabriel Nelson (instructed by **Natural England**) for the **Defendant**

Hearing date: 25 June 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 09 October 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MRS JUSTICE LIEVEN

Judgment Approved by the court for handing down.

The Honourable Mrs Justice Lieven:

1. This is an application by Mr Timothy Harris (the Claimant) for judicial review of Natural England's (NE) failure to protect Catfield Fen (the Fen) pursuant to its duties under; Regulation 9(1) of the Conservation of Habitats and Species Regulations 2017 ("the Regulations"); and Article 6(2) of the Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive").

2. The Claimant was represented by Mr David Hercock and Mr Douglas Scott and the Defendant was represented by Mr Ned Westaway and Mr Gabriel Nelson.

3. The Fen is an area of around 63 ha that forms part of a low-lying wetland, located in the Ant Broads and Marshes Sites of Special Scientific Interest ("SSSI"), which itself forms part of the wider Broads Special Area of Conservation ("SAC"). NE is the statutory nature conservation body responsible for the regulation of the site, but it has no ownership over it.

4. The Fen is owned to the west by the Butterfly Conservation and is managed on its behalf by the Royal Society for the Protection of Birds ("RSPB"). The eastern part of the Fen is owned by the Claimant, who also owns adjoining land where he lives (at Catfield Hall). To the immediate north is an unclassified public road called Fenside ("Fenside" or "the Lane") that serves agricultural fields and four residential properties, including Catfield Hall.

5. The highway authority for Fenside is Norfolk County Council ("NCC"). To the immediate north of Fenside (and the Claimant's land) is farmland owned by Mr Andrew Alston. To the west of Mr Alston's land, still to the north of Fenside, is farmland owned by HE Drake & Sons (Mr Ian Drake). Mr Drake's and Mr Alston's fields in this location slope to the south towards Fenside and the Fen.

6. The principal concern raised by the Claimant in this case is the impact of agricultural run-off from Mr Alston's land onto Fenside and its onward progression through grips (land drains), dug by NCC, which allow water to move from Fenside into the north side of the Fen and thus into the SSSI and the SAC. In broad terms the Claimant says that phosphates and nitrogen are flowing from Mr Alston's fields across Fenside and through the grips into the Fen. In the Fen they cause eutrophication, by which the water becomes over enriched with nutrients causing rapid plant and algae growth, which depletes oxygen and harms aquatic life. This is harmful to the ecological integrity of the Fen.

7. Neither Mr Alston nor NCC were named as Interested Parties in the claim. However, NE sent both the papers in the claim, and neither has indicated a wish to be involved in the proceedings.

<u>The evidence on nutrient levels and actions at the Fen</u>

8. The Court had evidence from Mr Harris, Dr Parmenter (a chartered ecologist, who has been involved with collecting data from the Fen since 1991 and has been providing advice to the Claimant for some years) and Mr Bertholdt (the senior officer (freshwater) in the NE Norfolk and Suffolk Local Area Team). Mr Bertholdt's witness statements are dated 6 March and 22 May 2026.

9. There is an extensive history of concerns being raised about the condition of the Fen by the Claimant. On 15 April 2021 the Claimant's land agent, Mr Riches, emailed NE about the cutting of grips in the Lane which allowed runoff into the Fen. NE responded and apparently were intending to have a meeting with NCC, but this did not happen.

10. In early 2022 the Claimant started taking water samples from the Fen on the advice of Dr Parmenter.

11. In November 2022 Ms Iona Lake, Catchment Sensitive Farming officer at NE, visited Mr Alston. She followed up the meeting with an email which set out steps aimed at "*reducing the risk of surface run-off from the fields…*". This included potentially providing field buffer strips and autumn cover cropping on Mr Alston's land. It is clear from this email that the NE was well aware of the risk of agricultural run off from that land going into the sensitive water courses and the SSSI by November 2022.

12. On 28 April 2023 the Claimant again raised with NE the issue of the cutting of grips on Fenside and the runoff into the SSSI.

13. On 6 December 2023 Howland Associates (geotechnical engineers) produced a report, commissioned by the Claimant, on the surface water analysis at the northern part of the Fen. This was sent to NE in January 2024.

14. Samples were taken at eight locations, including five directly south of the Alston land. The pollution pathway from the Alston land to the SSSI was explained as follows;

    "During the collection of the water samples, the discharge of a light brown turbid run-off (overland flow) was recorded. This was derived from adjacent fields, as shown in photographs 6, 10 and 11. The run-off was able to cross Fenside and enter the northern part of the Fen, either by flowing over the verge (e.g. photographs 8, 9 and 11), or via drainage gulleys cut into the verge ("grips") (e.g. photographs 2, 3, 4 and 13)."

15. The conclusions in respect of phosphates were as follows:

    "Samples taken during a single rainfall event in October 2024 [sic but this must mean 2023] *clearly indicate that excess concentrations of phosphate are present within the ditch system in the north of the fen, and at concentrations between three and seventeen times the water quality target for the SAC."*

16. The position in respect of nitrogen was more variable, although there were a number of readings above target levels. Mr Bertholdt accepts that at the eight sampling points all showed phosphate levels exceeding target levels and four showed nitrogen levels exceeding target levels.

17. Mr Bertholdt suggests that the locations referred to by Howland, in the ditch to the north of the Fen, would not be considered to include the SSSI and SAC open water dyke notified feature. As I understand it this is because the dyke itself does not sustain the criteria for being a notified feature. However, Mr Bertholdt accepts in his second witness statement that; "*the sample points are in close hydrological connectivity with the notified dyke and other wetland features of the site".*

18. On 20 February 2024 Mr Gardiner (NE lead adviser -SSSIs/Field Unit ecologist) undertook a site visit on behalf of NE and on 21 February the first NE Enforcement Questionnaire was produced. This is an internal NE document, which forms an important part of the Claimant's case. It was signed by Mr Gardiner and Mr David White (Principal Advisor and Protected Sites lead, Norfolk and Suffolk). The key parts state that (my emphasis added);

    a. "*During high rainfall events, silt laden water gathers on the road (Fenside) that is located on the northern side of the Catfield Fen part of Ant Broads & Marshes SSSI. This water carries sediment and key nutrients that can impact on the site, primarily nitrates and phosphates. Mr Harris and his team, the RSPB, and the work undertaken by A F Howland Associates all show that these nutrients are finding their way into the site at elevated levels. This eutrophic water appears to mostly originate from the arable fields to the north of the road (A F Howland Associates), with clear pathways between silt laden water on the field edge, connectivity with Fenside, and connectivity via grips to the protected site. The fields referred to are owned by*

Mr Alston and Mr Drake (to the west). This appears the primary source of diffuse pollution into the site, but other sources may be involved, and some contaminants such as hydrocarbons may also be mobilised from the road itself (Parmenter). Observations on February 20th 2024 found frequent vehicle erosion on the road edge, which will add to mobilised sediment and nutrients."

b. The cutting of grips *"clearly exacerbates the issues on the SSSI and doesn't provide the long term solution."*

c. The site is "*one of the most important wetland sites in the country*" and is dependent on high quality water with low levels of nutrients.

d. It is accepted that "*the dyke network has connectivity with all other features present on the site".* This is stated twice in the questionnaire.

e. *"The enrichment has the potential to favour species benefiting from higher nutrient levels at the expense of those species requiring low nutrient conditions. Most species at Catfield are reliant on low nutrient conditions. This has the potential to shift the composition of the nationally and internationally important vegetation communities present across the site, with detrimental impacts on the species that depend upon them."*

19. The questionnaire set out a number of aggravating factors, including an awareness of the risks, action prompted by financial motives being possible and wider social and non-environmental impacts.

20. In terms of sanction Mr Gardiner recommended drawing up a suite of measure to significantly reduce nutrient enriched water entering the SSSI and working with landowners to reduce run off. If insufficient progress was made, then enforcement may be necessary.

21. Through 2024 the Claimant made numerous attempts to have a meeting with NE, but no meeting was set up.

22. On 12 August 2024 NE produced the Catfield Fen Pollution Reduction Plan. This sets out the issue as being phosphate and nitrate levels exceeding the SAC Water Quality targets at the Fen. It identifies overland flow pathways carrying phosphates and nitrates into the road during rainfall events. It states that the current ditches are not sufficient to prevent nutrient laden water from entering the Fen. A number of "*achievable actions*" are set out and examined – consideration of sediment accumulation ponds on Mr Drake's land; creating sediment fencing along the Lane with a temporary pond; providing vegetated grass buffer zones on Mr Drake and Mr Alston's land; dredge and increase ditch size on Mr Alston's land.

23. The Plan was updated in April 2025 "*to reflect the advice delivered to landowners*". It appears from this document that advice was delivered to the landowners. However, the only one of these actions which was proceeded with was the grass buffer on Mr Alston's land, which was then ploughed up in January 2025.

24. On 9 April 2025 Howland produced their second report. This recorded that;

"Overall, the data shows that the nutrient enrichment of the Northern Fen has not abated, with increased concentrations of nitrogen species (ammoniacal nitrogen, nitrate and nitrite) in January 2025 compared to October 2023, and broadly similar total phosphate and orthophosphate concentrations. An assessment of these results against pertinent environmental quality standards (EQS) indicates that the condition of the Northern Fen has deteriorated in terms of total nitrogen concentrations, such that these now "fail" a screening assessment using the EQS value for total nitrogen (the sum of ammoniacal nitrogen, nitrate and nitrite). In addition, the phosphate

concentrations remain significantly in excess of the EQS for the SAC (30 µg/l), with no significant improvement between October 2023 and January 2025."

25. At one of the sampling points directly to the south of the Alston land on the dyke side of the Lane, the recorded phosphate level was 400µg/l, when the standard is 30µg/l.

26. NE updated the Enforcement Questionnaire on 25 June 2025. The update records that NE had reminded NCC on a number of occasions that any work to the grips requires NE assent. The winter cover crop on the Alston land had been cut down in January 2025, and "*This results in little or no effective buffer on this land in the event of potential run-off in 2025/26".* In respect of evidence and witnesses the following is recorded;

"As outlined in incident description. Consultants – Howlands, Jo Parmenter & Mr & Mrs Harris have witnessed active run-off, with photographic evidence presented in the first Howlands report. Natural England staff Iona Lake, Maisie Jimson-Woods & Adrian Gardiner have all witnessed pathways from Mr Alston & Mr Drake's fields, sediment and water lying on the Fenside Road, movement of water off the road to roadside grips, and the potential pathways to the designated sites."

27. The Claimant commenced the judicial review on 4 July 2025.

28. In September 2025 NE decided to carry out its own sampling of water quality on the Fen. Unfortunately, its first sampling contained errors in the laboratory, so a second sampling had to be undertaken in February 2026. A detailed report was produced on 9 April 2026. In contrast to the Howland reports, which only sampled the northern part of the Fen, the sample points were taken by NE across the Fen. The key points that emerge from this report are as follows;

    a. The sampling results for phosphate concentrations are shown at Figure G. There was some confusion over what this shows but Mr Westaway accepted that all the sampling points showed exceedance of the 0.03mg/l standard. The two points on the northern dyke to the south of the Alston land showed red indicating 0.596 mg/l. This is an extremely high exceedance.

    b. The narrative records that there have been improvements since the 1970s. However, within the River Ant, Barton Broad and the wider catchment, total Phosphate levels still remain about two times the target level at about 0.06mg/l.

    c. The NE report then says;

    "The data presented in this report show that total P [phosphate] *levels are on occasions significantly elevated in a small number of locations towards the northern edge of Catfield Fen against the upland and Fenside road. There is little evidence to indicate these spikes in levels directly correlate with the rest of the site or persist within the wider ditch network across the site. There does not appear to be any discernible difference between the internal and external parts of the hydrological unit. Other data presented within this report indicates that levels have remained relatively stable, or moderately declining over the last 14 years for which we have comparable data. Ellenberg values for N (Appendix 1: Figure K) also indicate modest improvement in nutrient levels reflected in the ditch plant communities up to the last 17 years. The only survey area showing a modest increase was Sharp Street Fen. Changes in algal cover (linked to nutrient effects) across the site were variable, but at most sample points at very low levels, and commensurate with other nutrient effects observed. Whilst there does appear to be elevated nutrient levels on the upland edge, this does not currently appear to be transferring to much of the rest of the site, although clearly has the potential to do so, and to accumulate in effect over time.*

The macrophyte communities appear reasonably stable over time, and exceeds the target for species richness. The overall diversity of native aquatic species associated with ditch systems during 2025 and in recent years is very high. The most notable decline in the frequency or cover of species are those associated with the early successional stages of ditches."

d. The condition summary section concludes;

"*The reasons for unfavourability of the ditch feature within this hydrological unit can be addressed by continuing to work with interested parties to address actual and potential sources of diffuse pollution within the catchment. A routine, rotational programme of ditch management across the hydrological unit will address failures in shading and successional stage attributes."*

e. The position in respect of nitrogen levels is less clear cut. The report records that there appears to have been less historic decline in nitrogen levels and that it is only on the dykes to the upland edge (assume this is the northern edge) which exceed the annual mean.

29. The Claimant places reliance on the presence of Stratiotes aloides (water soldier) in the northern part of the Fen as evidence of eutrophication. This is an aquatic plant which is associated with high nutrient levels and eutrophication. The Claimant considers that these plants are squeezing out the other plants in the Fen. The NE report gives some support to this position;

"The presence of algae was also related to the dominance of water soldier Stratiotes aloides in some survey locations. Stratiotes was widespread within the internal system at Catfield and rare within the external system. Stratiotes made up the bulk of the aquatic vegetation in some locations, and was beginning to break down at the end of its growing season. In these locations, the Stratiotes is acting as a nutrient sponge through the summer then releasing it later creating a pulse of nutrients (and resulting algae) as it breaks down over a month or so in the late summer/ early autumn period. Where this nutrient release is associated with algal growth this suggests an imbalance in nutrient levels within the ditches. Stratiotes is native in Broadland and should be present in the ditches, forming large, lax plants in open stands as part of a diverse macrophyte community, not small, dense plants all packed together as was encountered in some survey stops. Stratiotes-algae cover may be more damaging than regular summer algae cover as dense Stratiotes blocks out the light almost entirely, and is thought to generate anoxic conditions (in which circumstances it can kill itself through bacterial rot). A summer algae cover will allow some light in, and provide time for herbivores to build up.

There is a potential link here with the legacy of nutrients that exist within the catchment and within the ditch systems, and the frequency of ditch management. Phosphate release in the Broads has been shown to predominantly occur over the summer with release from sediment already present within the water bodies (Phillips et al., 2015). It is then taken up by macrophytes, with the macrophytes dying back in late summer/ early autumn, and then recycling nutrients back into the system".

30. Mr Bertholdt in his witness statements accepts that there are significant breaches of the relevant target levels in the Fen, particularly for phosphate. However, he points to a historic decline in the phosphate levels (going back to the 1970s). As explained above, the sample points immediately adjacent to Fenside are not considered by NE to be part of the SSSI notified dyke feature, but are connected to the wider hydrological unit. However, he says that most sample points show stable or declining levels of phosphates between 2012-19. Overall, in respect of phosphates, he says that given the lack of data "*it is difficult to assess how the present state of Catfield Fen sits along either the "naturalised" system of the early 1900s or the "highly impacted system" of the 1970s*". He also suggests that total phosphate levels are consistent with long term decline in nutrient levels; that overall levels remain above the 0.03 target but below 0.06mg/l; there is no strong evidence of an increase in nutrient levels in recent years; and those locations with elevated phosphate levels are in the northern area adjacent to Fenside.

31. I note that when Mr Bertholdt refers to overall levels being below 0.06mg/l, this appears to be across the Fen as a whole, which is an area of 63ha.

32. In relation to nitrogen Mr Bertholdt says that there is a consistent pattern of improvement in "Ellenberg values" (a method of assessing impacts of enrichment on particular vegetation communities).

33. Mr Bertholdt in his second witness statement says;

    "57. Natural England accepts that diffuse pollution is a catchment wide issue and requires a strategic response. We also accept that the high nutrient levels recorded at the northern edge of Catfield Fen are a risk and action needs to be taken to mitigate said risk."

34. In that witness statement he refers to Mr Drake having put in place measures to prevent nutrient run off from his adjacent fields. He then says that NE "*has repeatedly sought to engage with Mr Alston, who has proved less responsive to CSF [Catchment Sensitive Farming] advice.*" He refers to Mr Alston's five year Countryside Stewardship Mid Tier Agreement coming to an end in 2027 and this providing an opportunity to include new measures.

35. In relation to NCC and the cutting of the grips, NCC sought assent in March 2026. NE took the view that there was insufficient information to allow for formal assessment and NCC were advised to withdraw the application. In the event NCC "*did not have time to withdraw the request for assent*", and it was deemed refused. As I understand the position both NCC and NE accept that NCC should have been required to seek assent since at least in 2021 if not before.

36. The grips remain in place although no new ones can be cut without NE's permission. Therefore, the pathway from Mr Alston's land across Fenside through the grips and into the Fen remains the same as it was in 2021, albeit possibly made easier by there now being more grips.

The law

37. NE is the nature conservation body in relation to England by Regulation 5(1)(b)(1) of the Regulations. The statutory duty upon which the Claimant relies is in regulation 9(1) of the Regulations, which states:

    "9.— Duties relating to compliance with the Directives

    (1) The appropriate authority, the nature conservation bodies and, in relation to the marine area, a competent authority must exercise their functions which are relevant to nature conservation, including marine conservation, so as to secure compliance with the requirements of the Directives.

    "(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""

38. Mr Westaway places considerable emphasis on the word "functions" and submits that NE's primary function in the present context is merely the giving of advice.

39. The relevant Directive is the Habitats Directive, and the duty relied upon therein is in Article 6(2);

    "Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats 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."

40. The Supreme Court considered the correct approach to the interpretation of the Habitats Directive in *CG Fry v Secretary of State for Housing Communities and Local Government* [2025] UKSC 35 at [50]-[51];

"[50] Further, it is well established in the European case law reviewed above that the Habitats Directive has to be interpreted in light of the precautionary principle, which again aims to ensure that vulnerable sites are accorded a high degree of protection. In substance, the precautionary principle reflects and gives expression to the purpose of the Directive.

[51] The purpose of the Habitats Regulations is to implement and follow the Habitats Directive in pursuing the same objective. Brexit has made no difference to this. There is nothing in the Withdrawal Act which affects the application of ordinary domestic law principles of interpretation so far as the Habitats Regulations are concerned. Although the Court of Appeal referred to provisions of the Withdrawal Act it is not necessary to examine them in this judgment since it is not suggested that the outcome of the appeal depends upon them."

41. Although in a different context [56] has some relevance to the approach to the duties under the Habitats Directive;

"[56] It is clear that the protective purpose of the Habitats Regulations and the precautionary principle would be defeated, rather than promoted and respected, if the Regulations are read as precluding any opportunity for an appropriate assessment to be carried out at a later stage in a multi-stage planning process, such as that in issue in the present proceedings, where the planning authority has for any reason (eg by oversight, misinterpretation of the law or being ignorant of relevant science or misunderstanding that science) failed to carry one out at the stage of assessing whether to grant outline planning permission. Therefore, in a case involving a potential impact on a European site where the Habitats Regulations have effect, application of a normal purposive approach to their interpretation and having regard to the precautionary principle leads to the conclusion that regulation 63 would apply to a decision to give reserved matters approval or to discharge conditions attached to such an approval where that would result in authorisation for the project to proceed. Giving the words of regulation 63 their ordinary and natural meaning in the context in which they appear leads to this result"

42. I note that *CG Fry* was concerned with the stage at which an appropriate assessment under the Regulations should be carried out. It was therefore concerned with the procedural obligations of assessment under the Regulations and the Habitats Directive, rather than with any substantive obligations. However, there is no doubt that in interpreting the obligations under the Regulations the precautionary principle applies. Mr Westaway accepts that the fact that Article 6(2) no longer has direct effect, makes no difference to the obligations placed upon NE.

43. The relevant statutory functions of NE relied upon by Mr Hercock are in the Wildlife and Countryside Act 1981 (WCA 1981).

44. Section 28G sets out the general duty:

"(1) An authority to which this section applies (referred to in this section and in sections 28H and 28I as "a section 28G authority") shall have the duty set out in subsection (2) in exercising its functions so far as their exercise is likely to affect the flora, fauna or geological or physiographical features by reason of which a site of special scientific interest is of special interest.

(2) The duty is to take reasonable steps, consistent with the proper exercise of the authority's functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest."

45. Section 28H(1) is the relevant provision by which NE accepts that NCC, as highway authority, should have given NE notice of its intention to cut the grips;

(1) A section 28G authority shall give notice to [Natural England] before carrying out, in the exercise of its functions, operations likely to damage any of the flora, fauna or geological or physiographical features by reason of which a site of special scientific interest is of special interest.

(2) Subsection (1) applies even if the operations would not take place on land included in a site of special scientific interest.

(3) In response to the notice referred to in subsection (1), [Natural England] may send a notice—

(a) saying that they do not assent to the proposed operations, or

(b) assenting to them (with or without conditions),

but if they do not send a notice under paragraph (b) within the period of 28 days beginning with the date of the notice under subsection (1) they shall be treated as having declined to assent.

(4) If [Natural England] do not assent, or if the authority proposes to carry out the operations otherwise than in accordance with the terms of [Natural England's] assent, the authority—

(a) shall not carry out the operations unless the condition set out in subsection (5) is satisfied, and

(b) shall comply with the requirements set out in subsection (6) when carrying them out.

(5) The condition is that the authority has, after the expiry of the period of 28 days beginning with the date of the notice under subsection (1), notified [Natural England] of—

(a) the date on which it proposes to start the operations (which must be after the expiry of the period of 28 days beginning with the date of the notification under this paragraph), and

(b) how (if at all) it has taken account of any written advice it received from [Natural England] , before the date of the notification under this paragraph, in response to the notice under subsection (1).

(6) The requirements are—

(a) that the authority carry out the operations in such a way as to give rise to as little damage as is reasonably practicable in all the circumstances to the flora, fauna or geological or physiographical features by reason of which the site is of special interest (taking account, in particular, of any such advice as is referred to in subsection (5)(b)); and

(b) that the authority restore the site to its former condition, so far as is reasonably practicable, if any such damage does occur."

46. Section 28P gives the relevant offences;

"28P.— Offences.
(1) ...

(2) A section 28G authority which, in the exercise of its functions, carries out an operation which damages any of the flora, fauna or geological or physiographical features by reason of which a site of special scientific interest is of special interest—

(a) without first complying with section 28H(1), or

(b) (if it has complied with section 28H(1)) without first complying with section 28H(4)(a), is, unless there was a reasonable excuse for carrying out the operation without complying, guilty of an offence and is liable [on summary conviction, or on conviction on indictment, to a fine].

(3) A section 28G authority acting in the exercise of its functions which, having complied with section 28H (1), fails without reasonable excuse to comply with section 28H(4)(b) is guilty of an offence and is liable [on summary conviction, or on conviction on indictment, to a fine].
....

(6) A person (other than a section 28G authority acting in the exercise of its functions) who without reasonable excuse—

(a) intentionally or recklessly destroys or damages any of the flora, fauna, or geological or physiographical features by reason of which land is of special interest, or intentionally or recklessly disturbs any of those fauna, and

(b) knew that what he destroyed, damaged or disturbed was within a site of special scientific interest is guilty of an offence and is liable [on summary conviction, or on conviction on indictment, to a fine].
...

(6A) A person (other than a section 28G authority acting in the exercise of its functions) who without reasonable excuse–

(a) intentionally or recklessly destroys or damages any of the flora, fauna, or geological or physiographical features by reason of which a site of special scientific interest is of special interest, or

(b) intentionally or recklessly disturbs any of those fauna, is guilty of an offence and is liable on summary conviction to a fine not exceeding level 4 on the standard scale."

47. The Claimant relies upon the range of NE's functions, including advice and guidance through tools such as warning letters, civil actions and ultimately criminal prosecution, as set out in section 28P, as set out above.

48. In this regard, it is noted that NE also has an incidental power under section 13(1) of Natural Environment and Rural Communities Act 2006 (NERCA 2006) to seek injunctions (*Natural England v Cooper* [2025] EWCA Civ 15). In *Natural England v Cooper*, the Court of Appeal explained that:

"105….. If a public body is given responsibility for performing public functions in a particular area, it will usually be implicit that it is entitled to apply for an injunction to protect its special interest in the performance of those functions (see [123] below). London County Council was such a case.

106. In my judgment, this principle applies to the responsibilities for the protection of the environment under the 2006 Regulations which Parliament entrusted to NE. Section 13(1) of

NERCA 2006 confers an incidental power on NE to apply for an injunction to protect its interest in the discharge of those responsibilities, or functions."

49. Mr Hercock places considerable reliance upon the decision of Johnson J in *R (Harris) v Environment Agency* [2022] EWHC 2264. This was a challenge to the Environment Agency's ("EA") review of water abstraction licences across the Broads SAC. The Claimant was the same person as in the present case. The case concerned the EA's duties under regulation 9(3) of the Regulations and the approach to Article 6 of the Habitats Directive.

50. At [47(6)]-[50] *Harris* states;

"47(6) Thus, article 6(3) ensures, prospectively, that a relevant plan or project is authorised only if it will not adversely affect the integrity of the site, whereas article 6(2) imposes a general protection obligation to avoid deterioration and significant disturbance: para 38.

48 Article 6(2) therefore imposes a proactive preventive requirement: Commission notice (C(2018) 7621) "Managing Natura 2000 sites: The provisions of article 6 of the Habitats' Directive 92/43/EEC", paras 3.2 and 4.5.1. Compliance with article 6(2) cannot be achieved by reacting to demonstrable deterioration. Anticipatory measures are required to prevent deterioration before it occurs: Commission of the European Communities v Ireland (Case C-418/04) [2007] ECR I-10947, paras 207–208. This is an aspect of the precautionary principle.

49 Thus, where it appears that there is a risk of deterioration of a protected habitat, article 6(2) of the Habitats Directive requires that "appropriate steps" are taken to avoid that deterioration: Grüne Liga Sachsen eV v Freistaat Sachsen (Case C-399/14) [2016] PTSR 1240, paras 41–44.

50 This means that where it becomes apparent that there may be a risk to a protected habitat or species as a result of the licensed abstraction of water, article 6(2) imposes an obligation to review the applicable licences: Grüne Liga, para 44. The review must be sufficiently robust to guarantee that the abstraction of water will not cause significant damage to ecosystems that are protected under the Habitats Directive: Grüne Liga, para 53."

51. The point that if there is a risk of damage that triggers a remedial duty is repeated in [98];

"98 On the other hand, the authorities are clear that it is not sufficient to wait until damage to a site occurs before taking remedial action (see paras 47–48 above). If there is reason to believe that there is a risk of damage then it is necessary to take remedial steps: Waddenzee [2005] All ER (EC) 353, para 37, and Grüne Liga [2016] PTSR 1240, para 42."

52. Both parties rely on [100] – [101];

"100 The Environment Agency may well be right that it is reacting appropriately where it becomes aware of evidence of a specific risk to a particular site. However, the factors set out in the previous paragraph show that the review of consents was not effective in ensuring that abstraction does not cause damage to protected sites and there thus remains a generalised risk from abstraction (particularly abstraction under permanent licences) across the entire SAC. Having regard to the precautionary principle, that is sufficient to trigger the article 6(2) duty (see paras 42 and 48–49 above). It would be contrary to the precautionary principle and the reasoning in Grüne Liga [2016] PTSR 1240 if article 6(2) were not triggered by the factors set out in the previous paragraph and could only be triggered once it becomes clear that a particular site is at risk by an identified mechanism from abstraction at a specific location. It is sufficient that a generalised risk has been established (as a result of the demonstration of flaws in the review of consents process) to require "appropriate steps" to be taken. What those steps might be depends on the particular circumstances, the expert advice of Natural England and the expert judgement of the Environment Agency. In some cases, very little may be necessary. For example, it might be possible to rule out

any risk at a particular site by showing that it is sufficiently far from any location where abstraction takes place under a permanent licence for abstraction to have any impact. Or it might be possible to rule out the prospect that abstraction at a particular location has any impact by applying the tools and models that were developed during the RSA programme. The steps taken must, however, be sufficiently robust to guarantee that abstraction of water does not cause damage to ecosystems that are protected under the Habitats Directive: Grüne Liga, para 53.

101 Further, the Environment Agency has a broad discretion as to the steps that should be taken to achieve that end. The cost of different options is a relevant factor that can legitimately be considered. A court will be slow to question the Environment Agency's expert assessment as to the steps that should be taken. It is, however, not open to the Environment Agency to take no steps—that is a breach of article 6(2)."

53. In *Grune Liga Sachsen v Freistaat Sachsen* [2016] PTSR 1240 the European Court of Justice was dealing with the German competent authority's failure to carry out an appropriate assessment, and the scope of the duty under Article 6(2). In [40]-[44] the ECJ deals with the scope of the duty under Article 6(2);

"40 The term "appropriate steps" contained in article 6(2) of the Habitats Directive implies that member states enjoy discretion when applying that provision.

41 It should nevertheless be recalled that an activity complies with article 6(2) of the Habitats Directive only if it is guaranteed that it will not cause any disturbance likely significantly to affect the objectives of that Directive, particularly its conservation objectives: Commission v Spain [2011] ECR I-11853, para 126 and the case law cited.

42 The court has also held that the very existence of a probability or risk that an economic activity on a protected site might cause significant disturbances for a species is capable of constituting an infringement of article 6(2) of the Habitats Directive, without a cause and effect relationship between that activity and significant disturbance to the species having to be proved: Commission v Spain, para 142 and the case law cited.

43 Accordingly, implementation of a project likely to affect the site concerned significantly and not subject, before being authorised, to an assessment in compliance with the requirements of article 6(3) of the Habitats Directive, may be pursued, after that project is placed on the list of SCIs, only on the condition that the probability or risk of deterioration of habitats or disturbance of species, which could be significant in view of the objectives of that Directive, has been excluded.

44 Where such a probability or risk might appear because a subsequent review of the implications or a plan or project for the site concerned on the basis of the best scientific knowledge was not carried out in the form of an "appropriate step" within the meaning of article 6(2) of the Habitats Directive the general obligation of protection referred to in para 37 above entails an obligation to carry out that review."

54. Mr Hercock places reliance on the reference in [41] to the need for a guarantee of there being no disturbance likely to affect the objectives of the Directive. And that a risk of disturbance is sufficient to constitute an infringement of Article 6(2), see [42].

55. In *R (River Action UK) v Environment Agency* [2025] PTSR 175 the Claimant argued that the EA had acted unlawfully in respect of its review of abstraction licences on the River Wye, and its failure to take enforcement action. Dove J drew some important distinctions between that case and *Harris*. At [139] he pointed out that the EA in *Harris* had sole responsibility for the impacts from water abstraction licences. However, in *River Action* there were a number of other regulators who had responsibility for the problems of diffuse agricultural pollution impacting on the Wye SAC, see [139-140];

"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 [2022] PTSR 1751 related to the impact upon an 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 (SI 2016/1154) (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 (SI 2015/810) and the Water Resources (Control of Pollution) (Silage, Slurry and Agricultural Fuel Oil) (England) Regulations 2010 (SI 2010/639) in relation to standards for storing silage, slurry and agricultural fuel oil to minimise the risk of water pollution."

Grounds of Claim

56. The Claimant advances one ground, NE's failure to protect the Fen in breach of its statutory duties, under Regulation 9(1) of the Regulations, and Article 6(2) of the Habitats Directive. However, that Ground divides into two limbs;

    a. First, on a correct interpretation of the duties under regulation 9(1) of the Regulations and Article 6(2) of the Habitats Directive, NE has failed to discharge those duties and continues to fail to do so. It has been in breach of those duties and continues to be in breach of them; and

    b. Secondly, assuming, which is disputed, that a margin of discretion is afforded to NE beyond simply choosing which steps it takes to achieve the outcome required by Article 6(2) of the Habitats Directive, then NE has still failed to discharge those duties and continues to fail to do so.

Submissions

57. Mr Hercock has two alternative arguments. Firstly, he submits that NE are under a duty under Article 6(2) to ensure that there is no deterioration of the SAC. Although NE have a discretion about what steps to take to achieve this outcome, it has no discretion over the time period and the need to take immediate action to prevent the risk of deterioration. As soon as the condition of the SAC drops below the requisite standard NE are under a duty to ensure that there is no risk or possibility of damage. NE are therefore in breach of their duty because they have had clear notice of the breach

of the relevant targets, particularly for phosphate, and the risk to the SAC, but their actions have been reactive and not anticipatory to deal with the risk.

58. Secondly, and less ambitiously, he submits that given the scale of the breaches of target levels, particularly in respect of phosphate, NE's actions were outside the range of reasonable responses, and they are therefore in breach of Regulation 9(1) and Article 6(2).

59. In respect of both arguments, he relies on NE's failure to act effectively in respect of engagement with Mr Alston in the light of the overwhelming evidence (much of it accepted) that agricultural run-off from his land is causing the excessive Phosphate and Nitrogen levels; the failure to engage with the consequences of NCC cutting grips into the Lane; and the failure of NE to take appropriate action to protect the Fen in the light of the sampling evidence and the presence of water soldiers.

60. He submits NE were on notice that there was a risk of agricultural runoff from the fields north of the Lane, leading to the deterioration of the SAC, from 2021, and had the specific evidence when the first Howland report was sent to them by the Claimant in January 2024.

61. He relies on the fact that NE first approached Mr Alston in November 2022 and raised with him the lack of mitigation measures on his land. At that stage NE were fully aware of the risk of runoff from his land. NE produced the Pollution Reduction Plan in August 2024 but took no active steps to ensure that the steps set out in it, e.g. buffer strips or dredging and increasing ditch size, were actually undertaken. The Plan was updated in April 2025. However, the only mitigation which could be said to have existed, the planting of a cover crop, was ploughed up in or about January 2025. The evidence is that Mr Alston has ignored the advice given by NE and taken no mitigation measures in respect of runoff from his fields.

62. Mr Bertholdt accepts that there are no mitigation measures in place and merely says that NE will continue to engage with Mr Alston. The reference to there being an opportunity to revisit the Stewardship Partnership in 2027 is both uncertain and far too long off to amount to lawful action.

63. NCC has cut at least 43 grips into the south side of the Lane, allowing water and sediment to run into the SAC, with NE taking no steps to stop this or to require NCC to seek assent, until very recently and only in reaction to this challenge. Mr Gardiner (NE) had emailed NCC on a number of occasions to remind them of the need to seek assent, but no assents were sought. NCC's only solution to excess runoff from the Alston fields onto the Lane was to cut more grips into the Fen. NE's Enforcement Questionnaires make clear the role of the grips in establishing a pollution pathway between the agricultural runoff and the impact on the SAC.

64. According to Mr Bertholdt it was agreed at the meeting on 12 February 2026 between NE and NCC that grips would continue to be cut for road safety reasons, and NE "*would explore further options with adjoining landowners for attenuation options*". Subsequently on 20 March 2026 NCC sought a blanket assent, which NE then said could not be determined because there was no "*SSSI assessment*".

65. Mr Hercock submits that the absence of assessment merely highlights the failure of NE to act over the five years since the Claimant's land agent first raised the impact of cutting the grips on the SAC in 2021.

66. NE first undertook their own testing in late 2025, and because that was partially defective, the first reliable testing by NE was produced in May 2026. This was five years after the problems were first raised with them. Prior to the commencement of the proceedings NE's position was that it was not required to undertake its own testing.

67. Overall NE's response, both in terms of the lack of any practical action and their failure to carry out investigations in a reasonably prompt manner, shows the breach of their duty under Article 6(2) and that their response was outside the reasonable range.

68. Mr Hercock did not argue that that NE were obliged to take any specific course of action. He pointed to a range of actions they could take in order to meet their statutory duties. This included, but was not limited to, commencing a prosecution under the WCA 1981 against Mr Alston, or seeking civil sanctions against him. Mr Hercock also relied upon the power of NE to seek an injunction as set out in *Natural England v Cooper*.

69. Mr Westaway submits that NE is not in breach of any duty, and that its response to the situation at the Fen falls within the range of reasonable responses, particularly given the broad discretion as to what appropriate steps are to be taken.

70. NE accepts that the existence of a risk of deterioration within the SAC is sufficient to trigger the duty under Article 6(2). However, the Claimant is wrong to jump from engagement of the duty to there being a breach as soon as that risk exists and is not immediately removed or effectively mitigated.

71. The existence of a risk only places an obligation on the public body to take appropriate steps. It is clear from *Harris* at [100] that appropriate steps could be very limited and from *Grune Liga* at [40] that the public authority has a broad discretion as to what are appropriate steps. In *Keir v Natural England* [2021] EWHC 1059 at [43] the Court accepted that any such decision under the Regulations was subject only to *Wednesbury* rationality.

72. What is appropriate will be informed by the level of the risk; the nature of the source; the relevant functions in play and the role of other bodies (see *River Action*). It is therefore necessary to consider both the timing and the nature of the steps taken by NE.

73. The caselaw does not support an analysis that as soon as a risk is known to have arisen there is a breach if the statutory body fails to eliminate any risk. He submits that the true ratio of *Grune Liga* is that once a risk is known there is an obligation to take appropriate steps, and that can include undertaking a review, see [44]. The existence of a risk merely gives rise to an obligation on the public body to take appropriate steps, and it is clear from *Harris* at [100] that appropriate steps could be very limited and that the decision is a matter of discretion which entirely depend on the particular circumstances.

74. In determining whether NE has taken appropriate steps the standard to be applied is *Wednesbury,* and the court should give a broad margin of appreciation to the expert judgement of NE see *Keir v Natural England* at [43]:

    "43. It is well-established that the court affords an enhanced margin of appreciation to judgments of a scientific expert deciding issues of the kind raised by reg.55(9)(b). Furthermore, a challenge to the rationality of a judgment on the application of planning or environmental controls faces a high hurdle (see e.g. R. (on the application of Newsmith Stainless Ltd) v Secretary of State for the Environment, Transport and the Regions [2017] P.T.S.R. 1126 ; R. (on the application of Mott) v Environment Agency [2016] 1 W.L.R. 4338 ; R. (on the application of Spurrier) v Secretary of State for Transport [2020] P.T.S.R. 240 at [170]–[179]; R. (on the application of Plan B Earth) v Secretary of State for Transport [2020] P.T.S.R. 1446 at [177]; R. (on the application of BACI Bedfordshire Ltd) v Environment Agency [2020] Env. L.R. 16 at [98]–[99]). In the present case, the reasoning of NE challenged by the claimant involved evaluative judgment and matters of degree, dependent upon expert technical opinion."

75. The same point was made by Sales LJ in *Smyth v SSCLG* [2015] EWCA Civ 174 at [78];

"A further issue arising from Mr Jones's submissions concerns the standard of review by a national court supervising the compliance by a relevant competent authority with the legal requirements in Article 6(3) of the Habitats Directive. Although the legal test under each limb of Article 6(3) is a demanding one, requiring a strict precautionary approach to be followed, it also clearly requires evaluative judgments to be made, having regard to many varied factors and considerations. As AG Kokott explained in para. 107 of her Opinion in Waddenzee, the conclusion to be reached under an "appropriate assessment" under the second limb of Article 6(3) cannot realistically require the attainment of absolute certainty that there will be no adverse effects; the assessment required "is, of necessity, subjective in nature". The same is equally true of the assessment at the screening stage under the first limb of Article 6(3). Under the scheme of the Habitats Directive, the assessment under each limb is primarily one for the relevant competent authority to carry out."

76. Mr Westaway relied on ***River Action*** to distinguish ***Harris*** and argued that the present case was closer to that in ***River Action*** because NE did not have sole responsibility for problems caused by agricultural run off. He submitted that NE had relatively limited functions and was not responsible for wider issues relating to agriculture and land management including under the Reduction of Agricultural Diffuse Pollution (England) Regulations 2018 or the Nitrate Pollution Prevention Regulations 2015. NE's relevant functions were limited to advice and support through the Catchment Sensitive Farming Scheme (CSF); non-statutory mechanisms through the Diffuse Water Pollution Plans (prepared with the EA) and enforcement functions under the WCA 1981.

77. In respect of the alleged failure to take enforcement action Mr Westaway submits that NE first had operative notice of the potential issue when it received the first Howland report. However, Howland had only monitored in the dyke adjacent to the Lane, and not across the Fen, so it was not possible to tell whether the high phosphate levels did impact on the wider SAC. The northern dyke would not itself support protected habitats so damage at this location would not meet notification requirements.

78. The concerns raised were taken seriously, and NE went on site visits and completed the Enforcement Questionnaire. The matter was escalated to the enforcement officers who took the view that no causal link could be established which showed damage to the SAC.

79. He submitted that the evidence from NE's own monitoring across the Fen, produced in April 2026, did not show that the condition of the SAC was "actively deteriorating". Although NE accept that Article 6(2) is engaged because of the level of risk to the SAC, there is not sufficient evidence that the overflow from the north of the site is causing harm to the wider site.

80. In respect of the evidence of the water soldiers in the northern part of the SAC, these merely reflect a legacy of pollution and do not provide a clear indication of significant harm to the SAC.

81. In respect of the grips, NE have now made entirely clear to NCC that they cannot continue to cut the grips without assent under the WCA 1981. When NCC made an application for assent on 20 March 2026 this was rejected by NE because insufficient information had been given.

Conclusions

82. The Claimant's first limb of the Ground in my view imposes too high an obligation on NE. Mr Hercock submits that NE was and remains in breach of its duty under Regulation 9(3) and Article 6(2) as soon as it was first alerted to the risk of harm to the SAC and failed to take any active steps to remedy the breach, including by undertaking appropriate investigations. NE have to be given time to investigate the situation, and then determine what are appropriate steps to take. It also fails to appreciate that appropriate steps must necessarily include steps to investigate the alleged risk. There is therefore inevitably a spectrum of reasonable responses, including investigation and assessment, which will be highly fact specific and where the time reasonably required will inevitably vary.

83. *CG Fry* makes clear that a duty under Article 6(2) is a high duty to which the precautionary principle applies, see [50]. However, what are appropriate steps is a matter of judgement for the regulator, subject to normal public law duties. *Grune Liga* and *Harris* establish that the duty arises where there is a risk shown, rather than where a breach of relevant standards has already been established, but it does not follow that a breach of NE's regulatory duties of substantive action arises at the same time, or even directly thereafter. In both those cases the breach in question was the failure to carry out the appropriate assessment, rather than a failure to carry out substantive measures. That difference is relevant because it may, depending on the facts, be reasonable for a regulator to take longer to determine what substantive interventions it will make, rather than time for carrying out an initial assessment of the risk and the harm so that it can assess appropriate steps.

84. In *Harris* Johnson J stated that there was a general protection obligation to ensure that deterioration did not occur. However, that does not mean that there is an automatic breach of the regulatory duty as soon as there is a failure to act and there is any evidence of deterioration. Whether there is such a breach must depend on whether appropriate steps have been taken, which in turn depends on the level of NE's knowledge, the level of harm and what steps have actually been taken. These are all, to some degree, a matter of judgement and professional consideration.

85. For these reasons I reject the Claimant's first limb, that the NE were in breach from the time they received the first Howland report. This takes too mechanistic approach to the Regulations and the Habitats Directive and fails to properly appreciate the scope of the regulator to consider and determine what are appropriate steps.

86. However, when considering the second limb, whether NE have acted irrationally in failing to take any, or at least further steps, to prevent deterioration of the SAC, it is highly relevant to take into consideration both the precautionary principle and the scope of professional judgement.

87. NE were on notice of damage to the Fen from both phosphates and nitrogen, probably from agricultural run off, since 2021 when Mr Riches emailed them. They then had clear evidence of the probable pathway of harm from early 2024 with the first Howland report. The level of their knowledge and assessment of the pollution pathway and the impact on the SAC is made clear by the February 2024 Questionnaire. No subsequent information has changed the basic analysis in that document, that the phosphates and nitrogen are running off the Alston fields through the grips into the SAC. That the grips are exacerbating the problem, and that the enrichment of the Fen causes harm.

88. Mr Westaway submits that there were various problems with the Howland reports, in particular that they only surveyed the northernmost edge of the Fen and the dyke in particular. However, even accepting that the Howland report was not itself sufficient for NE to take further steps, NE then waited nearly two years to undertake an effective survey of its own.

89. In any event, it appears from NE's own Questionnaire and notes of meetings with Mr Alston, that NE had taken the view that the source of the risk to the SAC was likely to be emanating from Mr Alston's land, and the agricultural practices undertaken there, since 2021. The principal problem identified by all the surveys is that of phosphate pollution. Neither the documentary material nor Mr Westaway in submissions could point to any alternative source of phosphates in the ditch on the edge of the SAC other than agricultural run off from Mr Alston's land. Agricultural run off is well known to be a significant cause of phosphate and nitrogen pollution. The pathway is obvious, both from observation and the most basic level of common sense. Phosphates used on the farmland, runs off the Alston field, into the Lane, through the grips cut by NCC and into the ditch. The ditch is then connected through watercourses (some of them presumably seasonal) into the rest of the SAC.

90. The only alternative source of phosphate which NE can point to is agricultural run off from Mr Drake's fields. However, these lie to the west and are significantly further away from the sample

points which are showing the highest levels of phosphate in the ditches. No pathway has been suggested which would establish run off from those fields causing the exceedances shown in the various survey samples.

91. Therefore, the pathway for the phosphates (and nitrates) entering the northern dyke in the SAC seem to be wholly incontrovertible.

92. Mr Westaway submits that NE have taken the appropriate steps, by carrying out the 2026 survey, engaging with Mr Alston and, albeit belatedly, requiring NCC to give notice of its intention to cut the grips. However, preventing NCC from cutting the grips is, on no rational analysis, a solution to the problem. All that happens is that rainwater (polluted with phosphates) then floods the Lane. This is a situation which NCC, quite properly, have sought to avoid. Again, this is all made clear in the Questionnaire and NE do not seek to suggest that the grips actually offer any solution.

93. As I understand it, though the position is far from clear, NE's reason at the present time for not taking any further steps is that it has not been established that the phosphate pollution in the northern dyke is leading to a "deterioration" across the whole of the rest of the Fen. Therefore, Mr Westaway submits that it is reasonable for them to take no further steps until further testing and consideration is undertaken.

94. In my view this approach is not in accordance with NE's statutory duties, and the approach set out in the caselaw. There is no doubt that a large part of the Fen is in breach of relevant target levels for both phosphates and nitrogen. This is established, and not in dispute, from the figures set out above. Further, there is no realistic doubt that phosphates and nitrogen are entering the Fen from Mr Alston's land, by crossing the Lane, as I have explained above. Further again, NE accept that there is a pathway through dyke system, from the northern dyke into the rest of the Fen.

95. The Directive does not require there to be "deterioration" from some earlier low point, before a duty to take some action arises. The trigger for the precautionary principle to arise, and there to be a duty to take some action is simply to avoid further deterioration and disturbance to the species.

96. The duty in some cases may merely be one of further investigation (e.g. by survey), but in my judgement, given the clarity of the evidence (as set out above) and the degree to which NE actually accept the evidential position, the duty on NE here is to take some active steps to protect the SAC.

97. There may be a difficult question as to what those active steps are, and Mr Hercock did not seek an order for specific steps at this stage. That is a matter for a later point in these proceedings. All I do at this stage is find that there has been a breach of Regulation 9(1) and Article 6(2) for the reasons set out above. What further orders, if any, I should make will be a matter for further submissions.