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Cambridge
Conservation
Initiative

Owned by
everyone?

The wonder, plight and
future of chalk streams

Opportunities - Water and the Law

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This presentation will cover ...

At the sharp end:

–*Harris & Anor v Environment Agency* [2022] EWHC 508 (Admin)

–*River Action v Environment Agency and Secretary of State for Environment, Food and Rural Affairs* [2023]

Strategic protection:

–An Environmental Rights Act and the Right to a Clean and Healthy Environment

Harris & Anor v Environment Agency [2022] EWHC 508 (Admin)

- Catfield Fen SSSI part of Broads SAC, Broadlands SPA and Ramsar site
 - SAC - calcareous fens and alluvial forests (priority habitats)
 - SPA - Bittern, Ruff, and Marsh Harrier
- Low rainfall, drought and groundwater abstraction
- Mr and Mrs Harris (owners of Catfield Fen) concerned about water abstraction in the Norfolk Broads
- Concerned in particular about the EA's decision to limit its investigation into the effect of 240 licences for water abstraction to only three SSSIs (EA can revoke licences ss. 52 and 53 WRA 1991)
- Issued claim for JR



Harris & Anor v Environment Agency

Claimant's case:

- EA in breach of Art 6(2) Habitats Directive to avoid the deterioration of protected habitats and disturbance of protected species
- Art 6(2) has effect in domestic law by Reg 9(3) Conservation of Habitats and Species Regulations 2017, which requires the EA to “have regard” to the Habitats Directive
- Irrespective of the effect of Reg 9(3) Habitats Regulations, Art 6(2) is enforceable by the domestic courts (after *Waddenzee*)
- EA's decision not to conduct a more expansive investigation into the impact of 240 licences for water abstraction was irrational



EA's case:

- Accepts that it must have regard to Art 6(2) and maintains that it has done so in reasonably deciding to limit its investigation of the impact of 240 abstraction licences to three SSSIs
- Disputes Art 6(2) has direct effect in domestic law beyond the obligation to “have regard to” it
- Acting compatibly with Art 6(2)
- Not acting irrationally



•Permission for Judicial Review granted by Justice Chamberlain

Harris & Anor v Environment Agency

- 6 September 2022 - Justice Johnson found EA had breached Art 6(2) Habitats Directive (and Reg 9(3) of the Habitats Regulations 2017)
- EA also acted irrationally because work to stop damage from water abstraction was limited only to very small parts of the Broads SAC, when it was aware that much wider areas of the SAC were potentially equally impacted

Key points arising from the judgment (1):

- Ongoing enforceability of Articles 6(2)-(3) Habitats Directive post Brexit - Art 6(2) has continuing “direct effect”, i.e. it stands independently of the Habs Regs 2017 and is directly enforceable by the domestic courts against public bodies (para 94)
- So even if Parliament amends the Habs Regs 2017, Art 6(2) is still enforceable against public bodies (same would apply to the HRA provisions of Art 6(3) of the Habitats Directive)



Harris & Anor v Environment Agency

Key points arising from the judgment - 2:



Clarity on the meaning of the legal duty on all competent authorities (i.e. public bodies) under Reg 9(3) of the Habs Regs 2017 to “*have regard to the requirements of the Habitats and Birds Directives*” in exercising their functions

- Although the language “have regard to” normally merely means “to consider” and “to depart from [it] if there is good reason to do so”, in this case the duty is stricter because the duty is to have regard to “the requirements” of the Directives and “requirements” are mandatory
- Where the EA (and by implication any public body) is solely charged under legislation with regulating / licensing an activity (in this case water abstraction) which threatens a SAC (so that if that public body does not act to protect the SAC then no other body can do so instead) then “have regard” to the Directives’ requirements means “must discharge” those requirements (paras 80-87)



Harris & Anor v Environment Agency

Key points arising from the judgment (3), (4) and (5):

- It is not sufficient to wait until damage to a site occurs before taking remedial action – if there is a risk of damage then it is necessary to take sufficiently robust remedial steps to address the danger (precautionary principle) (para 98). EA had not taken sufficient steps here to prevent the risk of harm to the SAC (para 104)
- A lack of financial resources within a public body is not a valid justification for failure to comply with its Art 6(2) /Reg 9(3) duty: *“Resources may be relevant to the decision as to how to discharge the Article 6(2)/regulation 9(3) obligations, but they are not relevant to the question of whether to discharge those obligations”* (paras 101 and 104)
- Confirmation that:
 - (i) the Habs Regs 2017 continue to have effect in domestic law post-Brexit (para 56)
 - (ii) the Habs Regs 2017 Regulations must be interpreted in accordance with retained (i.e. pre-Brexit) EU caselaw and retained (i.e. pre-Brexit) principles of EU law (para 51)
 - (iii) the precautionary principle is a retained general principle of EU law (para 59)

River Action UK v Environment Agency (CO/936/2023)

- River Wye - one of UK's best-loved rivers and a designated SAC (Water courses of plain to montane levels with the *Ranunculion fluitantis* and *Callitriche-Batrachion* vegetation), white-clawed crayfish, salmon and trout
- Wye heavily polluted and suffering from prolonged algal blooms – not at FCS (“Unfavourable – Bad”)
- Major contributor - spread of organic manure and artificial fertiliser onto the agricultural land from which water flows into the Wye, especially the spreading of chicken manure
- “Agricultural diffuse pollution” – excess nitrogen (“N”) and phosphorus (“P”) arising from the manure spreading washes from soils saturated with N and/or P and enters the Wye
- RePhoKUs Study - 60-70% of the total P load now comes from agriculture





River Action UK v Environment Agency (CO/936/2023)

Legislative framework

- The Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018 (‘the Farming Rules for Water’) seek to limit diffuse agricultural pollution by prohibiting applications of “organic manure or manufactured fertiliser” to farmland to ensure they do not raise nutrient levels above what is “needed by the crop and the soil”:
 - Reg 4 – Land managers must ensure applications do not exceed the needs of the soil/crop or give rise to agricultural diffuse pollution
 - Reg 11(1) - anyone who fails to comply with the requirements of Reg 4 commits an offence
 - Reg 14 - the EA has the function of enforcing the FRfW
 - Reg 15(1) - Defra is empowered to issue guidance to the EA in respect of its enforcement of the FRfW
 - Reg 15(2) in the exercise of its functions, EA is required to have regard to any such guidance
- Article 6(2) of the Habitats Directive and *Harris v EA*

River Action UK v Environment Agency (CO/936/2023)



- EA's (draft) position in internal policy and 'FAQs' states that applications of organic manure or manufactured fertiliser to which regulation 4(1)(a) applies should not exceed the needs of the crop or land **as they are at the time of the application**
- EA's approach to enforcement of the FRfW subject to SoS Statutory Guidance on Regulation 4(1) of the 2018 Regulations issued March 2022
- Guidance allows land managers to have planned applications that do not exceed the crop and soil needs for N **over an annual cycle** and that avoid raising the soil P index above target levels for the soil and crop **over a rotation** (which may take a number of years)
- Adopted EA policy and FAQs follow the Defra Guidance: *"EA will not enforce Reg 4 so long as the requirements of the Statutory Guidance are met and for as long as the Guidance is in place"*
- EA required to "have regard" to the requirements of the Habitats Directive, but EA Policy and FAQs make no reference to the Habitats Directive or Habs Regs 2017



River Action UK v Environment Agency (CO/936/2023)

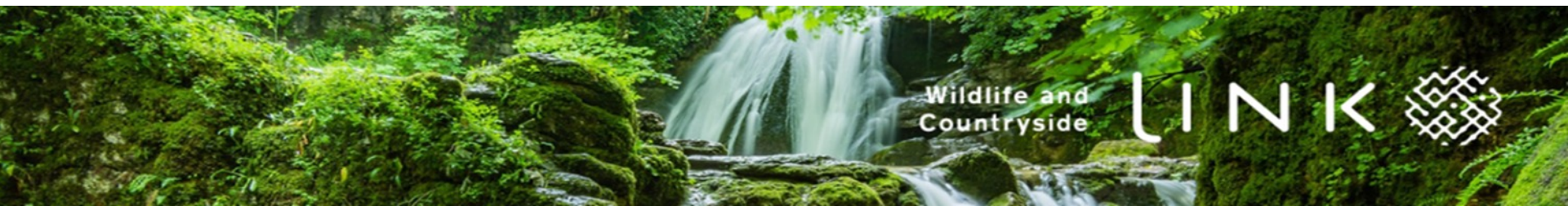
- As a result, EA unlawfully under-enforcing the FRfW and perpetuating the problem of nutrient run-off in the Wye SAC
- River Action UK issued JR claim in March 2023:
 - **Ground 1:** EA enforcement of the FRfW based is on an interpretation of the legislation that it itself acknowledges is erroneous
 - **Ground 2:** EA has unlawfully fettered its discretion by slavishly following the guidance issued by Defra and/or by misdirecting itself that it was required by law to follow that guidance
 - **Ground 3:** EA in breach of Reg 9(3) of the Habs Regs 2017 because its enforcement policy has unlawfully failed to have regard to the requirements of the Habitats Directive in the way it has decided to exercise its function of enforcing the FRfW



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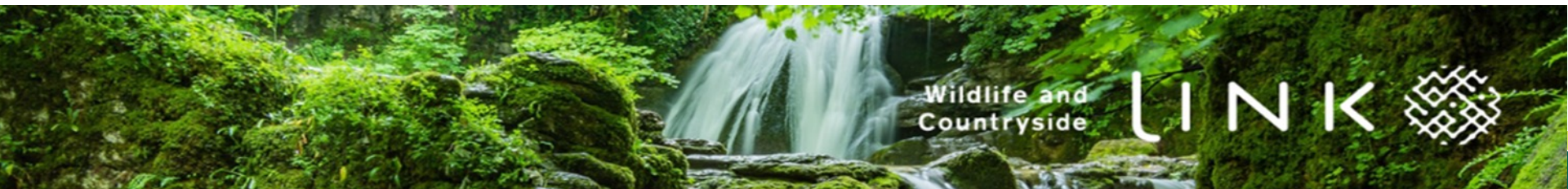
Environmental Rights Act

- Environment in crisis - habitat loss, species extinction, sewage in rivers, polluted air, devastating impacts of climate change
- People feel let down by public bodies and a Government actively promoting climate busting energy and transport schemes and undermining nature and pollution protections
- WCL proposal - an Environmental Rights Bill to create a legal right to a healthy environment for everyone; and to strengthen the ability of citizens to hold public bodies to account when it comes to the environment, pollution and climate change
- United Nations Resolution recognising the human right to a clean, healthy and sustainable environment (July 2022), subsequently underpinned the Global Biodiversity Framework agreed at UN COP15 in December 2022



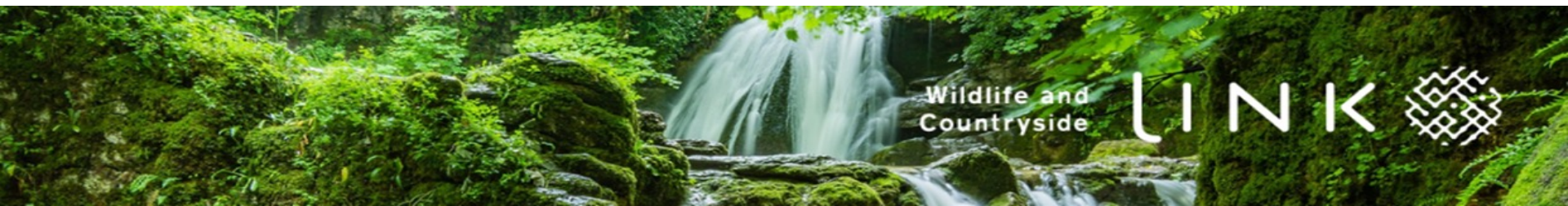
Environmental Rights Act

- UNECE Aarhus Convention - ratified by the UK in 2005 but only ever partly implemented in the UK
- Article 1 - Right to a Healthy Environment (Part 1)
- Enforcement - public authorities required to act in a way which is consistent with the right to a healthy environment:
 - Do not weaken relevant international standards
 - Seek to ensure that environmental standards, including targets laid down under s. 1 Environment Act 2021, are met in full
 - Seek to take into account relevant environmental improvement plans adopted under s.8 of the Environment Act 2021
 - Ensure regulatory standards are upheld, including through the enforcement of environmental protection



Environmental Rights Act

- Three pillars of the Aarhus Convention:
 - Right of access to environmental information (Part 2)
 - Right to public participation in environmental decision-making (Part 3)
 - Right of access to environmental justice (part 4)
- Promote environmental democracy and transparency, ensuring that the UK meets its international environmental obligations and commitments
- Prevent the watering down of environmental standards through the failure to enforce or to disclose relevant information and through the persecution of those seeking to protect the environment for the public good
- Bill drafted by David Wolfe KC and Kate Cook of Matrix Chambers
- One of Wildlife & Countryside Link's Five Manifesto asks for 2030 to be launched in June 2023





Thank you



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