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Your Ref:
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Birketts LLP



National Permitting Service - Water Resources
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Dear Sirs

Our Client: Andrew Alston

Renewal of abstraction licences AN/034/009/08 ("Plumsgate Road") and AN/034/0009/019 ("Ludham Road")

We are, as you are aware, solicitors to Andrew Alston and have been advising him in relation to the renewal of two time limited abstraction licences AN/034/009/08 ("Plumsgate Road") and AN/034/0009/019 ("Ludham Road") since 2010 (collectively referred to as "the licences").

We are instructed to write this letter in response to the Draft Determination Report issued by the Environment Agency ("EA") which stated that the EA was 'minded to' refuse both renewal applications due to a potential in combination effect with the AWS abstraction on the integrity of the site at Snipe Marsh. Mr Alston is disappointed and concerned with the draft decision which will, if made final, have a devastating effect on his business and the local rural community as a whole. The EA have been provided with Mr Alston's Financial Impact Report which outlines the economic and social impact of the removal of the licences for Mr Alston, local farmers, producers and the community of Catfield and surrounding areas.

This letter accompanies and is in support of the response prepared by Mr Alston. We ask that should you have any questions arising from Mr Alston's report or the evidence supporting it that you direct these to Mr Alston in the first instance.

The purpose of this letter is to concentrate on our concerns regarding the legal and procedural aspects of the renewal process for both licences.

We note the detailed and helpful chronology set out in the Draft Determination Report. We have set out below further events in chronological order which we consider should be taken into consideration.

Chronology of relevant events (not detailed in the Draft Determination Report)

The Ludham Road abstraction was granted in 1988 and the Plumsgate Road licence in 1986.

In or around 2001 the Broads Authority (BA) started to graze Snipe Marsh with welsh ponies. *The introduction of grazing and changes in the grazing regime (including type of stock or intensity or*

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seasonal pattern of grazing and cessation of grazing) is listed as an operation likely to damage the special interest of Ant Broads and Marshes SSSI. In a letter dated 8 October 2014 Dr Wanda Fojt confirmed that the presence of an S24 species was identified at Snipe Marsh in the Broadland Fen ecological Survey in 2007. The NE when responding to Mr Alston's questions regarding the grazing of Snipe Marsh have said that grazing will not affect S24. We consider the EA are required when undertaking the appropriate assessment to take into account the potential effects to the integrity of the site from the current site management.

On 4 February 2004, Mr Alston wrote to [REDACTED] at the EA following the Anglia Water ("AWS") test pump in September 2003 enclosing a copy of his piezometer readings from his Ludham borehole for 2003, we enclose a copy of this letter for your information. Mr Alston informed the EA that there was a 'blip' in the piezometer in week ending 29 September 2003, which coincided with the AWS test pump. Mr Alston expressed his concern stating *'My main concern is that my ability to irrigate my farm in the future is not jeopardized by the new pumping regime at Anglian Water's borehole in Ludham. With the Environment Agency's Review of Consents in 2006 and the CAMS process starting shortly, I feel I must make my findings known to you, so that my farming business, which relies heavily on my ability to abstract water to irrigate crops, is not put at risk'*. It is understood that no action was taken on this information supplied by Mr Alston. This letter demonstrates Mr Alston's transparency, careful monitoring of his piezometers and responsible approach to abstraction. The letter also notified the EA of the importance of the licences for Mr Alston's farming business.

It is important to note that whilst our client noticed a blip on the piezometer relating to the AWS test pump in 2003, all the evidence Mr Alston has gathered during the consultation stage does not indicate that abstraction has any effect on Snipe Marsh. We refer you to Mr Alston's report in this regard.

In 2004 and subsequently in 2006 during the Review of Consents, Snipe Marsh was deemed insufficiently important in terms of its environmental features to be included in the Review of Consents. However, 10 years later after a further 10 years of abstraction, in response to Appendix 12, NE and the BA have raised concerns for the first time that there is a risk from abstraction to the integrity of the Snipe Marsh. The concerns are not supported by scientific evidence but Mr Alston is left facing the almost insurmountable task of providing sufficient scientific research within the one month consultation period to show that there is no adverse effect from abstraction. Had the information provided by Mr Alston in 2004 following AWS test pump been taken with the same caution as the concerns now raised by BA and NE, it is not unreasonable to assume that scientific studies would have been undertaken and if it was found that there was actually an effect from the AWS abstraction it would have been stopped many years earlier. Mr Alston is aware that the EA are in talk with AWS and are proposing to remove the AWS licence, we suggest that if there is a problem this is somewhat belated.

In late 2008 or early 2009 the BA installed a new sluice to the west of the southern end of the southern section of Crome's Broad. The sluice under the Habitats Directive would be deemed a plan or project and as such an assessment of likely significant effect should have been carried out. It appears that only a planning application was submitted and not a Habitats Directive compliant assessment. This sluice along with a number of other water control methods actively control the water levels on the marsh preventing river and flood water entering lower grazing marshes, which naturally would have occurred.

It is apparent from the NE response dated 11 December 2014 to 'Alston 2014a' that the effects of the water control methods is unknown. *'To objectively summarise the water levels and controls in place for this area, the water and land levels through the whole drained level, from Sharp Street to Ludham Bridge, would need to be surveyed accurately and comprehensively, rather than selecting the individual elements that are highly variable and subject to different management regimes. On top of*

this are the differing land management objectives, which sit adjacent to each other but require different water level regimes.

It is alarming that the NE and BA in response to Mr Alston's question were not able to provide him with ~~the~~ an objective and comprehensive survey of the water and land levels. It is therefore apparent that no such survey has been carried out, which we deem as unacceptable as interference with the natural movement of water across a site will ultimately effect the condition of a site in some way.

On 4 October 2010 we on behalf of Mr Alston wrote to EA copying the letter to NE to raise Mr Alston's concerns that the perceived long term drying which had been identified by the landowner was in fact relating to significant changes in management of the man-made system, we enclose a further copy of this letter for your information. The letter suggested that an investigation into site management should be undertaken as well as a topographical survey. To our knowledge an independent topographical survey has not been carried out on units 11 and 35 as the EA or their consultants are not permitted access to the site. While the EA have reached the draft decision that there is no risk from abstraction to Catfield Fen, Mr Alston remains concerned that the NE will not agree with EA, as is seemingly the case throughout this process, and that different issues may be raised as a reason to prevent the renewal of the licences. We therefore consider that in the best interests of the site full on site investigations should be undertaken by an independent consultant into the effects of the current management regime.

Habitats Directive and Precautionary Principle

The Habitats Directive Art 6(3) provides;

"Any plan or project not directly connected with or necessary to the management of site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment if its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

'Likely significant effect'

Art 6(3) requires a staged approach. Firstly the competent authority, in this case the EA, must reach a decision on whether the plan or project will have a 'likely significant effect' on the conservation objectives of the site. European Court in the case of Waddenzee [2005] 2 C.M.L.R. 31 interpreted the first sentence of art 6(3) as meaning *'that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects'*

The requirement that the decision be based on objective information, presupposes that there is evidence available and that it is either independent or that there is a consensus of agreement. The decision of likely significant effect, which took the licences into the Appropriate Assessment, was based upon evidence that there was a long-term trend of drying at Catfield Fen with specific reference to units 3 and 11. The issue had initially been raised to the EA by NE and was resulting from Compendium of ecological and eco-hydrological evidence from Catfield Fen. The Compendium was a series of reports supplied to NE by the owners of Catfield Fen and included on site evidence. The letter from NE which accompanied the Compendium in 2011 and which was co-signed by the

landowners stated; *'In NE's view, any future Appropriate Assessment would not be able to conclude that local water abstraction was not having an adverse effect on the integrity of The Broads SAC'*. The EA commissioned an independent report on the hydrological and hydrogeological functioning of the site and its sensitivity to water abstraction. The report was prepared on the assumption that Catfield Fen was drying out, this we can only assume was in reliance on the advice from NE. The Amec report was prepared without access to the privately owned Catfield Fen. It is noteworthy that the EA or their consultants have not been permitted access throughout this process to the units owned by Mr and Mrs Harris.

We are concerned that the only evidence taken from onsite as to the perceived long term drying trend was not objective and that the landowners by denying access to the site prevented the gathering of objective on-site evidence. NE now no longer believe that there is a problem with drying of the fen, despite their earlier statement referenced in the paragraph above. The EA have reached the draft decision that there is no risk to the integrity of units 3 and 11 from abstraction either alone or in combination.

It is doubtful whether the decision reached by the EA that there was a 'likely significant effect' was made from an objective study of the available scientific evidence as it was clearly guided by a mistaken belief emanating from the NE which had made an arbitrary decision on incorrect evidence received from the landowner of units 3 and 11. Accordingly we suggest that the decision was not in accordance with the Habitats Directive.

'Appropriate Assessment'

At the Appropriate Assessment stage a competent authority may only authorise a plan or project, if they have made certain it will not adversely affect the integrity of that site. The requirement for certainty is explained as a situation where no reasonable scientific doubt remains as to the absence of such effects. If there is scientific doubt then EU law requires that the precautionary principle applies.

The precautionary principle is founded on Article 191 (2) of the Treaty of the Functioning of the European Union and is enshrined in Art 6(3) of the Habitats Directive. In an attempt to clarify the precautionary principle, its principles and implementation, the Commission of the European Union issued, 'The Communication from the Commission on the precautionary principle' (Brussels, 02.02.2000). The communication provides guidelines to competent authorities on how the precautionary principle should be implemented and provides that recourse to the precautionary principle *'must not be disproportionate to the desired level of protection and must not aim at zero risk, something which rarely exists'* and *'that every decision must be preceded by an examination of all the available scientific data and, if possible, a risk evaluation that is as objective and comprehensive as possible. A decision to invoke the precautionary principle does not mean that the measure will be adopted on an arbitrary or discriminatory basis'*.

The European Court of Justice case of Waddenzee [2005] 2 C.M.L.R. 31 reinforced the need for identification of risks with scientific evidence, and the court ruled *'an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect, the site's conservation objectives, must be identified in the light of the best scientific knowledge in the field'*

The requirement for proportionality also emanates from Art 5 (5) of the Treaty on the European Union which requires... *'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'*.

Accordingly it is fundamental that when undertaking an Appropriate Assessment and considering the implementation of the precautionary principle that the risks are identified using all the best available scientific evidence available, that the evidence supporting the decision must be objective and comprehensive, that the competent authority must not be aiming for zero risk, that any action must be proportionate to the risk and the decision must not be arbitrary.

Scientific Evidence and objectivity

The necessity for the decision to be based on the objective study of the best scientific evidence in the field is fundamental to Art 6(3) of the Habitats Directive and the precautionary principle.

This process should have been led by scientific evidence and the objective study of it, however instead the process appears to have been driven by unsubstantiated claims of abstraction causing various and constantly evolving adverse effects. On each occasion expense has been incurred studying the perceived problem and on each occasion the claims have been shown to be incorrect.

The decision in respect of Snipe Marsh has been made without recourse to all the available scientific evidence. The issue of Snipe Marsh was belatedly added into the Appropriate Assessment by the BA and NE in April 2014 without supporting evidence. It is not acceptable that the decision in respect of Snipe Marsh has been seemingly rushed so as to avoid the litigation threatened by Mr & Mrs Harris and in doing so giving Mr Alston the near insurmountable task of obtaining scientific evidence to support his position in 28 days.

The EA failed to consider water level data from their own monitor at Crome's Broad. This information was owned and available to the EA but had not been used. The EA finally provided Mr Alston with this information on 12 December, 3 days before the end of the consultation period. It is unacceptable that this information was not included in the first instance and secondly that the EA took so long to provide the data to Mr Alston. There is also further evidence available from AWS which was not sought.

BA have accepted in their letter dated 11 December 2014, that to objectively summarise the water levels and controls in place the whole site would need to be surveyed accurately and comprehensively. We suggest that a comprehensive survey of this type would be beneficial.

It is unacceptable that whilst the Compendium provided by the landowner of units 11 and 35 was able to influence NE and the process, the letter and evidenced submitted on behalf of Mr Alston on 4 October 2010 (discussed above) regarding changes in historic site management and a request for an investigation in terrestrialisation and for a topographic survey were seemingly overlooked by NE. The EA confirmed in a letter dated 24 October 2014 that in respect to Mr Alston's concerns of territorialisation *'It would first be for Natural England to identify that the process of terrestrialisation was taking place. Remedial action could then be agreed between Natural England and landowner'*. The letter further confirms that the EA have been unable to carry out a topographic survey of Catfield Fen due to access restrictions. The disparity of the treatment of the two parties by NE is unacceptable for a statutory body who should be acting objectively. It appears that the decisions have been made arbitrarily throughout this process on the possible causes of the perceived effect at Catfield Fen without recourse to independent scientific evidence.

It also appropriate to question why the landowner who has widely publicises his concern for the integrity of the site from the effects of abstraction has denied access to the site to the EA and their independent contractors. This approach is unhelpful at the very least and could prevent the identification of the cause of an issue, if such an issue exists.

Zero risk

The Commission as stated above guide that a competent authority should not be aiming for zero risk. There is real concern that throughout the process that the EA and advising bodies have been requiring Mr Alston to prove that there is no risk from abstraction to the integrity of the Fen. We remind the EA of the Commission guidelines in this respect.

Proportionality

The EU guidelines are clear, the precautionary principle must be proportional to the risk. The EA can evidence that there is no effect alone from the licences; it is only when the licences are considered in combination with the AWS that a 'potential' (not identified) risk to the integrity of Snipe Marsh is believed to be present. The issues raised by NE and BA at Snipe Marsh are vague and are not supported by scientific evidence or data, and following a comprehensive study may be resolved as there not being an issue at all, as has occurred at Catfield Fen. However it appears that the determination has been rushed further to threats of legal action received from Mr & Mrs Harris' lawyers. The EA as a result have not undertaken a comprehensive study of the site and all available evidence.. The presence of an actual risk therefore remains unidentified as does the potential cause.

However, whilst the risks of harm at Snipe Marsh are unidentified the risk to Mr Alston and the businesses that use the licences are identifiable, actual and fundamental. Even now prior to the final decision being made the potential non-renewal of the licences is taking effect. Cropping rotations have changed and some businesses have made the decision not to sow irrigated crops. We refer you again to Mr Alston's Financial Impact which details the effect of the non-renewal on the businesses, families and local community which rely on the ability to irrigate. Apart from the economic and social effects, there will also be environmental effects with land being taken out of HLS and organic production.

We question the rationale and proportionality of the non renewal of the licences now which are deemed not to have an effect alone on the integrity of Catfield Fen, simply on the basis there may potentially be an in combination effect with the AWS abstraction. The AWS abstraction is we understand likely to be stopped in the coming years and already rarely pump their full allowance. Whilst it would seem that once the AWS had ceased Mr Alston would be free to reapply for the licences, the losses would already have been suffered, the salad and potatoes growers will have found and invested in irrigation on alternative land elsewhere. There is also the overwhelming sense that at that point further issues would be raised in an effort to prevent the continuation of abstraction at Catfield Fen.

Further we consider it disproportional that the licences are being considered together in respect of Snipe Marsh. Plumsgate Road is deemed not to have an effect alone or in combination at units 3 and 11, to which it is closest to, yet it is still being proposed that it should not be renewed on the basis it will effect Snipes Marsh. We suggest that this is not proportionate to the perceived risk and should be reconsidered.

We consider that proportional and pragmatic approach to the risk would be to renew the licences for a further 2 year period, require more comprehensive monitoring at Snipe Marsh and to pursue the stopping of the AWS abstraction. The EA have shown that there is no alone effect from the abstractions and so the period of risk would be time limited and manageable. The perceived risk is based on AWS full abstraction volume, this we understand is very rarely used due to problems with ochre in the water. Concerns regarding water levels and water quality could be managed by utilising the water control mechanisms around the site.

We refer the EA to Mr Alston's Financial Impact report and ask that they consider the issue of proportionality again when reaching their final decision.

Summary

Mr Alston recognises that the EA have since this process began invested heavily in this process. The criticisms within this letter are not made lightly but arise out of real concern that there has been failings within the process which will result in an unjust result for my client. A result which will have dire financial consequences for him, his family, local agricultural businesses, their families and the community but will potentially have no impact on the integrity of the Broads SAC.

We consider that any decision made must be based on and supported by comprehensive and objective scientific evidence, that the decision made must be proportional to the identified risk. A failure to make a decision on these grounds would be outside the requirements of the Habitats Directive.

Yours faithfully



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