

Case Name: *Misbourne Environmental Protection Ltd, R (On the Application Of) v Environment Agency* [2021] EWHC 3094 (Admin) (19 November 2021)

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Commentary:

The High Court has refused permission to bring a judicial review ('JR') to the Environment Agency's ('EA') decision in April 2021 to grant the necessary consents under the statutory regime enacted in the High Speed Rail (London – West Midlands) Act 2017 for the construction of a twin tunnel in the Chilterns in relation to works for HS2 Phase One between London and the West Midlands. The proposed tunnel will run below groundwater and at two points pass under the River Misbourne.

A compliance assessment in HS2's application for the necessary consent concluded that the impacts of the tunnel construction on the Mid-Chilterns Chalk groundwater resource were "localised, limited and temporary". However, the claimant (a private company with an interest in protecting the river and surrounding environment) argued that there were a number of features of the geology and the proposed construction methods that meant that this conclusion in the compliance assessment was wrong as a matter of law under the Water Framework Directive (WFD). In particular, the claimant alleged that the tunnel boring machines would fracture the chalk, risking water loss from the River Misbourne and lowering the water in the aquifer. In addition, the claimant raised concerns that the grout used in the boring process could pollute the water.

The claimant advanced three arguments in their JR challenge.

The first argument (Ground 2) challenged how the Compliance Assessment had categorised the impacts of the work as "temporary", avoiding a trigger of the obligation to prevent deterioration of the status of bodies of surface water in Article 4(1) of the WFD which the Claimant asserted was irreconcilable with the Bund CJEU judgment on the WFD. Concluding that that this ground was unarguable, the High Court found that Bund was not authority for the proposition that that any deterioration of water quality triggered Article 4(1). The High Court held there had to be a change in the 'status' of the water body and that the concept of "status" must involve more than some purely transitory effect, however significant it might be. As to the judgement over what period of time the effect must last for it to amount to a risk to the deterioration of the status of the water body triggering Article 4(1) of the WFD, the High Court concluded that the 3 year period proposed by HS2 and agreed to by the EA was not unlawful in the particular circumstances of the case and pointed out that the Claimant's arguments on this ground strayed into a challenge to the exercise of HS2/the EA's professional judgment as to the extent of the risk, and how long it might last which the High Court considered were not matters for JR.

The second argument (Ground 4) alleged that the EA wrongly failed to require a

discharge permit in respect of the grout that was produced by the tunnelling process. The Claimant argued that the EA should have required HS2 to apply for an environmental permit under the Environmental Permitting (England and Wales) Regulations 2016 ('EPR') and, without such a permit HS2, was in breach of the relevant requirements in Regulation 12 and Schedule 22 of the EPR. The High Court considered the decision whether a discharge permit was required for the discharge of the grout through the tunnelling process was a technical decision for the EA to make as regulator and concluded that the relevant documentation submitted by HS2 in support of the application demonstrated that HS2 had fully considered all the relevant matters in reaching its conclusions in its assessment. As such, the High Court was satisfied that HS2 and the EA had properly considered the risk of discharge and the risk of it getting into the groundwater.

The third argument (Ground 1) alleged that the EA had failed to properly consider cumulative impacts of the proposed works and, in particular, that the compliance assessment should have been updated to take into account the loss of polluting slurry in an incident at the new shaft at Chalfont St Peter. In concluding this ground was also unarguable, the High Court found that there was no legal requirement under the statutory scheme to carry out a cumulative assessment of all the work together and, as such, this was therefore an issue in respect of which there was a considerable measure of professional judgement to be exercised. Accordingly, and on that basis, the High Court accepted HS2's argument that the shaft event was not legally connected to the EA's decision under challenge. The High Court noted it was thoroughly investigated by experts who reported to HS2 upon it and stated, most importantly, that the works in respect of the shafts were different in nature to those used in tunnelling.

Accordingly, permission to bring the JR was refused by the High Court at the renewal hearing.

Case summary prepared by Paul Arnett