

**WATER RESOURCES ACT 1991, SECTION 43**

**WATER RESOURCES (ABSTRACTION AND IMPOUNDING) REGULATIONS  
2006, REGULATIONS 12-13**

**APPEALS BY ANDREW ALSTON AGAINST THE DECISION OF THE  
ENVIRONMENT AGENCY DATED 8 MAY 2015 TO REFUSE APPLICATIONS  
FOR THE RENEWAL OF ABSTRACTION LICENCES AT PLUMSGATE ROAD  
AND LUDHAM ROAD, CATFIELD, NORFOLK**

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**APPELLANT'S OPENING STATEMENT**

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1. The Alston abstractions at Plumsgate Road and Ludham Road in Catfield date back to 1986 and 1988 respectively. They enable irrigation of salad and pre-pack potato crops between the months of April to October. Without such irrigation, those crops would not be viable and there would be significant economic consequences, not simply for Mr Alston personally but in terms of GDP and jobs.
2. The level of the Alston abstractions are dwarfed in scale by the Anglian Water abstraction at Ludham Road, which is over 500% greater than the two Alston abstractions combined. The future of the Anglian Water abstraction will be considered as part of the Environment Agency's RSA (Restoring of Sustainable Abstraction) programme, which is scheduled to happen deliberately after the outcome of these appeals are known. The EA would have you shut down Mr Alston's abstractions before it is decided whether the very much larger Anglian Water abstraction will continue at its current level or be significantly reduced.
3. When the EA issued its 'minded to' decision in 2014, the sole basis on which it proposed to refuse to grant the abstraction licence applications was due to the then-alleged impact that they could have on Snipe Marsh. That allegation was belatedly withdrawn on the eve of exchange of proofs of evidence.

4. The EA's final decision in 2015 also alleged that the Alston abstractions, if renewed, would potentially have an adverse effect on Catfield Fen from the perspective of water chemistry. The 'minded to' decision had indicated the EA's view that the average change in pH due to all the abstractions (including Anglian Water) was just 0.1pH units – and that (unsurprisingly, given the relative sizes of the Alston and Anglian Water abstractions) the effect of the Alston abstractions alone "*were an order of magnitude less than the average in-combination change of 0.1 pH units*".<sup>1</sup> However, in express reliance on material produced in 2014 by Pyne and Barendregt, the EA decided that there was uncertainty about the relationship between abstraction and the perceived spread of *sphagnum*, which in turn was perceived to have the potential knock-on effect of harmful vegetation change due to acidification (at SSSI units 3 and 11 – although the focus appears to be on the former). The EA considered that this justified, indeed necessitated, refusing the licences on this basis too.
5. In its rebuttal evidence the EA has revealed that it had only used a summary of the 2014 Pyne and Barendregt work. Having now read the full version, the EA has largely disowned this work as unreliable – a conclusion which the Appellant's expert Mr Dodds shares.
6. We are therefore left in a situation where the original basis of refusal (Snipe Marsh) and the subsequent supplemental basis of refusal (the 2014 Pyne and Barendregt work) have both been abandoned by the EA as grounds on which to refuse the licences. Nonetheless, the EA persists in resisting these appeals based, it seems, largely on the basis that the rate of *Sphagnum* spread is greater than would be expected to occur naturally and therefore abstraction cannot be ruled out as having an effect. This despite (i) it being common ground that *Sphagnum* spread is a natural occurrence and that there are a number of other potential triggers for it and (ii) the EA continuing to accept that the impact of all licensed

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<sup>1</sup> Decision Document, internal p.52, Bundle Vol 1 p.287.

abstraction on pH is “small” (and thus the effect of the Alston abstractions alone even smaller).<sup>2</sup>

7. The legal principles governing the issues in these appeals turn principally upon the proper interpretation of the Habitats Directive, which is implemented in England by the Conservation of Species and Habitats Regulations 2010 (“the Habitats Regulations”). Agreement has been reached between the Appellant on many aspects of the legal framework, and this is set out in the Statement of Common Ground to which you are respectfully asked to refer.
8. For present purposes I wish to highlight the following points in particular:
  - a. First, the focus is on whether the abstractions will have an adverse impact on the integrity of the Broads SAC and Broadland SPA viewed as a whole. The SAC/SPA is made up of 28 SSSIs. The objection in the present case relates to 2 units within a single SSSI (the Ant and Broad Marshes SSSI) which is comprised of a total of 35 units. Of the 2 units in question, one (Unit 11) is currently recorded as enjoying “Favourable” conservation status. At Unit 3, the important fen orchid population about which so much has been written in the proofs of evidence has, overall, substantially increased in recent times.
  - b. Secondly, the precautionary principle means that you need to be satisfied beyond “reasonable scientific doubt” that there will be no adverse impact - but, importantly, that does not equate to “absolute certainty”. Nor does the precautionary principle mean one needs to abandon common sense, fail to subject the competing evidence to proper scrutiny before reaching a conclusion, and/or take the view that the mere existence of disagreement between experts of itself means that the Habitats Directive test cannot be satisfied. The European

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<sup>2</sup> Decision Document, p.53 – Bundle Vol 1 p.288.

jurisprudence makes clear that the test can be satisfied where the decision-maker is subjectively certain even where others disagree.<sup>3</sup>

- c. Thirdly, one point of dispute between the Appellant and the EA is whether temporary and reversible, as opposed to lasting and irreparable, effects are consistent with a conclusion that there will be no adverse impact on the integrity of the EU habitat. The Appellant submits that they are, and that in this context it is relevant to consider whether a short-term temporary authorisation will allow the abstractions to proceed for an interim period without lasting and irreparable effects. Notably, it appears that the licences would in any event have an end date of 31 March 2018 to tie into the Broadland Rivers Catchment Abstraction Management Strategies Common End Date.<sup>4</sup> This means that by the time your decision is issued, what is at stake in reality is unlikely to be more than one and a half summers' worth of abstraction (bearing in mind that the licenses cover the months of April to October only). The Appellant will submit that there cannot conceivably be any lasting and irreparable effects of allowing the Alston abstractions to continue for this very limited period. That will then allow a joined-up approach to the question of 'what happens next' having regard to the future of the much larger Anglian Water abstractions in the vicinity, and in the meantime further monitoring can be undertaken.

9. Applying these principles, the evidence on behalf of the Appellant will show that the appeals should be allowed on the basis that there will be no adverse impact on the integrity of the SAC/SPA. In particular, and without prejudice to the generality of their evidence:

- a. Mr Dodds' evidence will demonstrate that the contribution that the Crag water (from where the abstractions are drawn) makes to the

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<sup>3</sup> See e.g. *Waddenzee* at AG107.

<sup>4</sup> See the Decision Document at Bundle Volume 1 p.264.

water balance at the 'top' of Catfield Fen is minimal. Other sources of water are far more influential.

- b. Dr Painter's evidence will demonstrate that the presence and spread of *Sphagnum* happens naturally, and can be ecologically beneficial, and that it will continue to spread and require management so as to ensure an appropriate balance with the other features of Catfield Fen even if the Alston abstractions are required to cease. As already noted above, the fen orchid colony at Catfield Fen has increased despite the spread of *Sphagnum* and there is no evidence that the *Sphagnum* has thus far caused any other impact to the integrity of the SAC/SPA - or that renewing the Appellant's licence until 31/3/18 will make any conceivable lasting difference compared to not doing so.

10. For similar reasons there would be no harm to the SSSI or to Ramsar features.

11. Further and in any event, the Appellant argues in the alternative that even if you decide that adverse effect on integrity of the habitats cannot be ruled out, there are imperative reasons of overriding public interest justifying a renewal of the licences until 31/3/18. This requires balancing the extent of the risk and the extent of the potential harm against the extent of the public interest in renewing the licences. If nowhere else, this is the point at which a sense of perspective is required: the allegation levied against the Appellant is a small risk of harm to a small proportion of the SSSI and SAC/SPA - set against that are the jobs and GDP that will be lost if the abstractions have to stop, as well as environmental impacts if, as Mr Collison predicts, the salad crops that Catfield could no longer provide to the UK market would instead be sourced from outside the UK. On this analysis the balance favours renewal and this would be consistent with the statutory tests. You need not be put off by the potential for a (non-binding) opinion having to be sought from the European Commission before issuing a

decision on this basis – this is a tried and tested procedure and has historically tended to result in the Commission issuing a favourable opinion.<sup>5</sup>

12. Finally, there is no merit in the criticisms made by the Harris’ witnesses of the model used by Amec and the EA to test the impact of the abstractions. Insofar as that dispute between the Harris and the EA needs to be dealt with, it is adequately addressed in the written evidence and the Appellant’s team does not propose to expend valuable inquiry time on the issue – unless you direct otherwise, our focus will be on the EA’s decision under appeal and the remaining threads which it relies on to defend that decision despite having abandoned a large part of its previous reasoning.

**CHARLES BANNER**

**Landmark Chambers**

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**London**

**EC4A 2HG**

**19 April 2016**

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<sup>5</sup> See e.g. *Sweetman* at AG66.