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

Tuesday, 17th June 2025

Before:
FORDHAM J

- -

Between:

THE KING (on the application of ALISON CAFFYN)	**Claimant**
- and –	
SHROPSHIRE COUNCIL	**Defendant**
– and –	
L J COOKE & SON	**Interested Party**

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David Wolfe KC, **Peter Lockley** and **Barney McCay** (instructed by Leigh Day) for the Claimant
Piers Riley-Smith (instructed by Shropshire Council) for **the Defendant**
Sioned Davies (instructed by Birketts LLP) for the **Interested Party**

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Hearing dates: 30.4.25 & 1.5.25
Draft judgment: 4.6.25

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Approved Judgment

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FORDHAM J

This Judgment was handed down remotely at 10am on 17.6.25 by circulation to the parties or their representatives by email and by release to the National Archives.

FORDHAM J:

Introduction

1. This case is about the approach taken by a local planning authority (LPA) to the environmental effects of proposed intensive poultry units (IPUs) at a Shropshire farm. There are 20 million chickens in Shropshire, says the Claimant. That's a guess, says the Council. But some helpful context is found in these reasons, given by the Council for issuing October 2018 Interim Guidance on assessing habitats impacts:

> ***[i] The very high number of permitted intensive livestock units in Shropshire …; [ii] An increase in the number of planning applications submitted per year for … livestock units, which produce ammonia emissions; [iii] A relatively high number of internationally and nationally designated wildlife sites … protected by law and/or planning policy: [iv] 'Clusters' of [intensive livestock units] existing and proposed in proximity to designated wildlife sites; [v] Very high background levels of ammonia in the county with examples of international wildlife sites already at c. 200% to 600% of their Critical Levels or Critical Loads (ie. the levels of ammonia and loads of nitrogen deposition above which species will be lost and habitats damaged)…***

Domestic Regulations

2. Five sets of domestic regulations are relevant. The first two feature directly, imposing relevant duties on planning authorities. The other three feature indirectly, conferring enforcement functions on the Environment Agency (EA). Each set implemented an EU Directive, now standing as "retained EU law" and "assimilated law".

   i) The EIA Regulations. The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 2017 (2017/571) implemented the EIA Directive 2011/92/EU. They were considered in R (Finch) v Surrey County Council [2024] UKSC 20 [2024] PTSR 988 at §9.

   ii) The Habitats Regulations. The Conservation of Habitats and Species Regulations 2017 (2017/1012) implemented the Habitats Directive 92/43/EEC. They were considered in R (Wyatt) v Fareham BC [2022] EWCA Civ 983 [2023] PTSR 1952 at §8.

   iii) The EP Regulations. The Environmental Permitting (England and Wales) Regulations 2016 (2016/1154) implemented Directive 2008/1/EC. They were considered in R (Squire) v Shropshire Council [2019] EWCA Civ 888 [2019] Env LR 36 at §6. They require operators of regulated facilities to hold an Environmental Permit (EP) and operate in accordance with its terms.

   iv) The ADP Regulations. The Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018 (2018/151) implemented Directive 2000/60/EC. They were considered in R (River Action) v EA [2024] EWHC 1279 (Admin) [2025] PTSR 240, cited in R (NFU) v Herefordshire Council [2025] EWHC 536 (Admin) at §73. They impose duties on managers of agricultural land, including as to the application of organic manure. There is a Code of Good Agricultural Practice (COGAP) produced by DEFRA and the EA, which addresses the application of livestock manures on farmland (see Squire at §7).

v) The Nitrate Regulations. The Nitrate Pollution Prevention Regulations 2015 (2015/668) implemented the Nitrate Directive 91/676/EEC. They impose duties on occupiers of land designated as a nitrate vulnerable zone (NVZ), including limits on the amount of nitrogen from organic manure that may be applied. The COGAP stands as a statutory code for NVZs, dealing with controlled water and minimizing its pollution and setting out "the rules that restrict the quantity of livestock manure and organic manures you can apply" (Squire at §7).

Parallel Control Regimes

3. The National Planning Policy Framework (NPPF) says at §201 that, where processes and emissions are subject to separate pollution control regimes, an LPA "should assume that these regimes will operate effectively" (Finch §107, Squire §67). Such parallel control regimes can be relevant to mitigation (Finch §108). But an LPA must take care not to treat the existence of another regime as a basis for "confining" and "limiting the scope" of an assessment which the LPA is statutorily obliged to conduct (Finch §§106, 108). As has been recognised in the context of LPAs and watercourses, there are a "wide range of regulatory regimes" which can contribute to tackling issues of pollution (NFU §73).

Issues

4. The parties have agreed these three issues for me to decide:

> ***Issue (1): Whether the Council was required to carry out an adequate assessment of the effect of the spreading of manure (whether in (i) raw or (ii) digestate form) on third party land, and did in fact carry out such an assessment.***
>
> ***Issue (2): Whether the Council acted unlawfully by imposing a condition which failed to prevent the spreading of manure on land and thus failed to address concerns about the environmental effects of the development.***
>
> ***Issue (3): Whether the Council failed to carry out a lawful appropriate assessment before granting the permission (i) by determining the significance of some of the development's impacts by reference to thresholds, (ii) by failing to carry out a lawful in-combination assessment of those impacts, and/or (iii) by assuming incorrectly that the development's air scrubbers would be continually operational.***

Open Justice

5. The planning reference, which was read out in open court, is 17/05151/EIA. Its use unlocks online access to the planning documents. The parties agreed an arrangement by which all skeleton arguments and bundles were obtainable electronically on request, by any member of the press or public who wanted better to understand this case, from an email address read out in open court. A CVP video link, set up for remote court attendance at the request of the press, was extended to members of the public.

The Parties

6. The Council is the LPA. The target for judicial review is a decision of its Northern Planning Committee (the Committee) on 14 May 2024, leading to a grant of planning permission on 16 May 2024. The Committee had previously considered the planning application on 10 October 2023 and 7 November 2023. Each time, it had a detailed

Officer Report (OR) written by planning officers: OR1 (October 2023), OR2 (November 2023) and OR3 (May 2024). OR3 was a 37-page document whose lead author was the principal planning officer (Kelvin Hall). It appended a 5-page Habitats Regulations Assessment (HRA2) dated 16 March 2024, written by the Council's planning ecologist (Sophie Milburn), replacing an assessment (HRA1) of 30 October 2023. The target decision adopted the reasoned recommendation in OR3, imposing the 20 recommended planning conditions. Planning policies identified and addressed in OR3 included: the NPPF; CS5 (Countryside and Greenbelt), CS17 (Environmental Networks); CS18 (Sustainable Water Management); MD7B (General Management of Development in the Countryside); and MD12 (Natural Environment). OR3 assessed that the grant of planning permission would be compatible with all of these.

7. The Claimant lives in Ludlow. She is a researcher working on rural land issues. Her 2020 PhD at Cardiff University involved research into planning applications for IPUs in Herefordshire and Shropshire. That thesis, and her three published academic journal articles, discuss the environmental impact of IPUs. She submitted objection letters to the Council dated 9 January 2023 and 8 May 2024.

8. The Interested Party is the applicant for planning permission. It farms 210 acres (84.99 hectares) at North Farm, Felton Butler (SY4 1AS). Its proposal involves the construction and operation of 4 poultry buildings, 8 feed bins, a biomass store and amenity building, with landscaping and tree planting. The development site is 9 hectares. The project would take 5.5 hectares of arable land out of agricultural use (leaving 79.49 hectares). There would be 200,000 chickens on site, producing an annual 3,600 tonnes of poultry manure, containing 66,000kg of nitrogen. The original planning application was on 23 October 2017. Key documents include: an October 2017 Environmental Statement with an Ammonia Report; a March 2021 revised Environmental Statement with a Manure Management Plan; and a 16 October 2023 Addendum Environmental Statement with a 13 October 2023 revised Ammonia Report. These were prepared by Roger Parry & Partners LLP, with the Ammonia Reports being written by AS Modelling & Data Ltd.

<u>Reconsultation</u>

9. OR1 recommended the refusal of planning permission. The Committee (10 October 2023) deferred any decision, to allow representations and give the Interested Party an opportunity "to provide the information required". After the Addendum Environmental Statement (16 October 2023), revised Ammonia Report (13 October 2023) and an email from Roger Parry & Partners (27 October 2023), OR2 recommended the grant of planning permission. The Committee (7 November 2023) deferred any decision, to allow for reconsultation "in accordance with EIA legislation and procedures", given the Interested Party's submission of additional information. An 8-page objection letter (December 2023) was written by Marches Planning & Environment on behalf of Peter and Pippa Geddes. OR3 summarised the materials for Committee Members.

<u>Environmental Permit (EP)</u>

10. On 24 August 2018, the EA had issued an EP to the Interested Party in respect of the proposed IPUs at the site. OR3 §§6.8.2 to 6.8.4 said this:

> ***6.8.2 Relationship between planning and permitting processes: It is understood that there is an [EP] in place which has been issued by the [EA] and which authorises the poultry operation under the [EP Regulations]. This EP would regulate the day to day general management of the operation, including any pollution incidents, and noise and odour issues. Paragraph 194 [now 201] of the NPPF states that the focus of planning decisions should be on whether the proposed development is an acceptable use of land, rather than the control of processes or emissions (where these are subject to separate pollution control regimes). It adds that planning decisions should assume that these regimes will operate effectively.***
>
> ***6.8.3 The [EP] regime is designed to prevent pollution and includes pollution from odour and noise. The definition of pollution contained within the [EP Regulations] includes emissions that may "cause offence to human sense or impair or interfere with amenities or other legitimate uses of the environment". As part of the permit application process the applicants are required to carry out a risk assessment of potential impacts. The [EA]'s guidance on Intensive Farming Risk Assessment for [EPs] advises that the applicant must assess if emissions of odour, noise, dust & aerosols and ammonia are likely to affect receptors. The [EA] can refuse a permit application if it considers the environmental impact to be unacceptable or if the information provided is not adequate to determine the application.***
>
> ***6.8.4 Nevertheless the EIA regulations require that likely effects of the development on the environment are identified and taken into consideration in the decision-making process. These effects will include matters that are also regulated by the EA.***

Environmental Impact Assessment (EIA) Duties

11. The case starts with watercourses. EIA duties apply to planning permission for IPUs with 85,000-plus birds (EIA Regulations Sch 1 §17(a)). EIA is a "process" which includes the preparation of an "environmental statement", with consultation, publication and notification (reg.4(1)). EIA must "identify, describe and assess in an appropriate manner" the "direct and indirect significant effects" of a proposed development on factors including population and human health; biodiversity, with particular attention to species and habitats protected under the Habitats Directive; and land, soil, water, air and climate (reg.4(2)). An "environmental statement" is a statement which includes "a description of the likely significant effects of the proposed development on the environment" and "of any features of the proposed development, or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment" (reg.18(3)(b)(c)). Reg.3 prohibits the grant of planning permission "unless an EIA has been carried out in respect of [the] development". A golden rule is that whether an LPA "has sufficient information for the purposes of EIA … is essentially a matter of judgment for that authority, subject only to review on *Wednesbury* principles" (R (Swire) v Canterbury City Council [2022] EWHC 390 (Admin) at §77).

Water Receptors

12. The Environmental Statement (c.12) identifies these potential sensitive receptors: surface water; principal aquifer groundwater abstractions; nearby rivers; catchments and river flows; aquatic species; and ecological systems. It describes the Interested Party's farmland by category depending on proximity to watercourses (§12.7.3). The site is 2.6km from the River Severn at Montford, "a classic example of an under-fit stream of Osage type" (§10.9). A key concern raised by the Claimant was about other river catchments, where the nitrogen and phosphate from the poultry manure could end up.

Spreading Manure on Land

13. The Environmental Statement explains (§12.7.2) that "the leaching of nitrogen from fields to watercourses has severe implications upon water quality". Poultry manure can be spread on farmland, acting as a fertiliser and reducing fertiliser costs (Squire at §7). The Environmental Statement and Addendum describes the controls in the ADP Regulations, the Nitrate Regulations and the COGAP. Spreading manure on land has environmental implications for watercourses, as well as environmental implications in terms of odour and dust (which overlap with "amenity"). In 2019 the Council lost the Squire case relating to IPUs and the odour and dust implications of spreading raw manure on farmland (§15 below).

Nitrate Vulnerable Zone (NVZ)

14. As the Environmental Statement records, the Interested Party's farm is within a designated NVZ (§12.7.2), "due to groundwater containing, or potentially containing, nitrate concentrations of greater than 50mg/l" (§12.4.4). There are "N max limits" (§12.7.5):

> ***Part 4 of the [Nitrate] Regulations establishes a limit on the amount of nitrogen (from manufactured nitrogen fertiliser and crop available nitrogen from livestock manures) that can be applied to specified crops. The N max limits for the specified crops allow a range permitted adjustments to the application limits, however for the purpose of this report, the lowest limit of 170kgN/ha has been used.***

Squire

15. Squire concerned the Council's September 2017 grant of planning permission for four IPUs at Mr Bower's farm at Tasley. An annual 2,322 tonnes of poultry manure would be produced. The raw manure "would be disposed of by spreading it on farmland close to residential areas on the west side of Bridgnorth" (§3). Some would be spread on Mr Bower's own farmland, within an NVZ (§20). But 1,151 tonnes would be "exported" to be spread on third party farmland outside the NVZ (§§20, 60, 73). Squire preceded the ADP Regulations, but included consideration of the COGAP (§7). As Mr Riley-Smith and Ms Davies emphasise, Squire was squarely about the failure to address the effects of "odour and dust" arising from the inevitable disposal of the raw poultry manure (§§1, 39). There was no issue about impacts on watercourses.

16. The grant of Mr Bower's planning permission was quashed by the Court of Appeal (§82). That was because the EIA was deficient, incomplete, non-compliant and unlawful; vitiating (as invalid) the grant of planning permission (§§62, 69, 80). The environmental effects of odour and dust, from the off-site storage and spreading of manure, were EIA "indirect effects" of the proposed development (§39). The facility was inevitably going to produce manure, all of which would be spread as a fertiliser on agricultural land in the local area (§65). These "indirect effects" had not been properly assessed (§69). There was no "coherent assessment" or "foundation" for the views expressed by the Council's public protection officer and planning officers (§§71-74), each of whom had described no significant impacts on the surrounding area (§34). These four things were no answer:

i) The Environmental Statement was no answer. It addressed odour and dust arising only from the poultry buildings (§§63, 66). It did not discuss arrangements for third party land or specify that land (§65).

ii) Reliance placed on EA control through Mr Bower's EP was no answer. It left unaddressed activities on third party land (§67), which the Permit did not control (§§50-52) and which the Agency would not be policing (§§22, 60).

iii) The Manure Management Report with its reliance on COGAP was no answer. It did not identify the third party land; nor the areas of nearby housing; nor the impact of odour and dust. The Court said this (at §§64, 67):

> ***The Manure Management Report … calculated the tonnage that would need to be exported for spreading on a "neighbouring arable farm" and the area of land required, given the restrictions applying in [NVZs]. It stressed the need to keep accurate records for the exported manure. It pointed out that the manure was to be covered in suitably sited heaps before being spread. And it acknowledged the importance of adhering to the guidance in the COGAP. It did not, however, identify the third party land on which, it estimated, 1,151 tonnes of manure was going to be spread each year, and any areas of housing nearby. Nor did it attempt any assessment of the impact of odour and dust arising from that activity on that land, wherever it was.***
>
> ***The Manure Management Report touched upon measures by which harmful effects on the environment might be reduced. But it did not consider what measures were likely to be applied on third party land, in what form such measures might be imposed as requirements attached to the planning permission—whether by conditions or by a planning obligation under s.106 of the Town and Country Planning Act 1990—or how effective they were likely to be in reducing the effects of odour and dust.***

iv) The Manure Management Plan (to which the Manure Management Report referred: see §60) was no answer. It did not yet exist; it would apply only to Mr Bower's land; and it provided no assurance on odour and dust, relating only to "the risk of the manure leaching or washing into groundwater or surface water" (§§60, 68, 77).

Finch

17. Finch was decided on 20 June 2024, a month after the target decision in this case. In Finch, the Supreme Court decided that the grant of planning permission for an onshore oil-extraction project was unlawful (§174). That was because the "likely indirect effects" of the project had not been assessed within the EIA. Those effects were the climate effects of the greenhouse gas releases from the combustion of the processed oil as fuel. The EIA "process" duty (§15), with its public and participatory purposes (§§3, 18, 63), required the climate impacts of the greenhouse gas releases to be included within the planning authority's decision-making. The planning authority had unlawfully confined its consideration to releases directly from within the site boundary (§101). Finch endorsed Squire, as a working illustration of downstream likely indirect effects (§161). Features of the Finch case included these. First, that it was inevitable that the extracted oil would be processed and burned as fuel (§§7, 45, 123), meaning no indeterminacy regarding future use (§§121-122). Secondly, that the greenhouse gases, to be released from the inevitable combustion of the processed oil, could reliably be quantified (§§7, 81, 123). Thirdly, that the environmental harm was not locationally

contingent, and would be the same wherever in the world the inevitable combustion took place (§§103, 114).

Causation

18. The Supreme Court emphasised the importance of identifying applicable "criteria" as a matter of "law" (Finch §§54-56). One criterion was causation. It was held that the "effects of a project" raised "a question of causation" (§65); that "indirect effects" has a "wide causal reach" (§83); that the "indirect effects" have to be "likely" (§§72-78) as "effects which evidence shows are likely to occur" (§167). The test is causation. There is no test of "sufficient causal connection" (§§59-60, 132); no test of being "part of the proposed development" (§§36(a), 129); and no test of whether effects are too "remote" (§129). Processing did not break the chain of causation (Finch §§126, 129). The strongest test of causation is met where the project is "both a necessary and sufficient condition" for the occurrence of the effects (§69). That test was met in Finch (§79). It was left open (§§73, 79) whether it would suffice to meet a less stringent test of proximate cause in the ordinary course of events (§§70-71). There was room for evaluative judgment in asking whether "indirect effects" are "likely" (§78).

Capability of Meaningful Assessment

19. A second criterion was that effects must be "capable of meaningful assessment" (Finch §167). There must be a sufficiency of evidence, on which to base a determination that a "potential effect" is "likely" (§§74-75); on which a reasoned conclusion could properly be based (§§76-77); to identify the likely significant effects and the measures that can be taken to mitigate them (§§108-109). The "potential effect" must not be a matter of "speculation or conjecture" (§74). It must not remain "elusive, contingent and speculative" (§§167-168), for "conjecture and speculation have no place in the EIA process" (§77). So, it might be "impossible to assess … the likely quantity of … emissions" (§135). There might be "insufficient information available on which to make a reasonable assessment of the relevant impacts" (§138). There may be an indeterminacy regarding future use (§§121-122). A future use might be "so conjectural that no realistic estimate could be made of … emissions arising from such use" (§122). Or it may be necessary "to know where the emissions will occur to assess their environmental impact" (§114). There was room for an evaluative judgment in asking whether "indirect effects" are "capable of assessment" (§78).

LPA's Evaluative Judgment

20. In relation both to causation (whether an effect is likely) and capability of meaningful assessment, Finch emphasised the evaluative judgment belonging to the LPA as primary decision-maker. Lord Leggatt said this (Finch §78):

> ***There is here an area of evaluative judgment involved in determining the scope of an EIA. Judging whether a possible effect of a project is likely and capable of assessment may, depending on the circumstances, be a matter on which different decision-makers, each acting rationally, may take different views.***

Spreading Manure (OR3 §6.8.17)

21. Concerning the spreading of manure on farmland, officers concluded (§6.8.17):

> ***Manure management: The spreading of poultry manure on farmland raises implications in terms of potential amenity and environmental impacts. Following concerns raised by officers on this the applicant has submitted a Manure Management Plan (MMP). This states that the applicant currently buys in fertiliser to spread on the land together with some poultry manure. The recently-submitted Environmental Statement Addendum includes further details of proposals for manure management. The applicant has now confirmed that all manure arising from the proposed operation would be exported off site to an anaerobic digester or other licensed waste management facility for treatment. Officers consider that this satisfactorily addresses the manure management issue and a planning condition can be imposed to require that such export takes place.***

Planning Condition 19

22. This is the condition referred to in OR3 §6.8.17 and in Issue (2):

> ***19. (a) All manure arising from the poultry buildings hereby permitted shall be taken off site to an anaerobic digester or other suitable disposal or management facility. (b) Records of the destination of each load of manure arising from the poultry buildings hereby permitted shall be made and these shall be made available to the local planning authority on request. Reason: To minimise adverse impacts on residential amenity and avoid pollution to groundwater.***

Anaerobic Digestion

23. Planning Condition 19 refers to "an anaerobic digester". The Committee was told that emissions from an anaerobic digester would be regulated by the EA through an EP (OR3 §4.1.7). I was shown this definition in the ADP Regulations (reg.2(1)):

> ***"anaerobic digestion" means the mesophilic and thermophilic biological decomposition and stabilisation of biodegradable waste which – (a) is carried on under controlled anaerobic conditions, (b) produces a methane-rich gas mixture, and (c) results in stable sanitised material that can be applied to land for the benefit of agriculture or to improve the soil structure or nutrients in land.***

Digestate

24. Digestate is the resultant "stable sanitised material that can be applied to land for the benefit of agriculture or to improve the soil structure or nutrients in land" (reg.2(1)(c)). The ADP Regulations define "organic manure" to include "anaerobic digestates", "a product of anaerobic digestion". The Claimant's letter of objection (8 May 2024) cited a hyperlinked report of the House of Commons Environmental Audit Committee 2022 on Water Quality in Rivers. She filed that report in these proceedings, as a repository of footnoted information. It records that "anaerobic digestate" contains "phosphates and nitrates" which are "beneficial in balanced quantities" but which "can … pollute soil and the water environment when they exceed the capacity of crops and the wider environment to use and process the nutrients" (§80); that livestock farmers use "potential mitigations" including sending manure to anaerobic digesters "to generate renewable energy and produce digestate byproduct to spread on land as a fertiliser" (§102), and that "the majority of the phosphorus and nitrogen remain in the digestate" (§103).

The Story Behind Planning Condition 19

25. There were four stages. The first stage involved the Interested Party's plan to spread all of the raw manure (3,600 tonnes) on its farmland. The "main limitation" was the "availability of land", but it was asserted (in text present in the March 2021

Environmental Statement) that "manure arising from the proposed development" would be "applied to the land … within the control of the applicant", who had "sufficient land" (§§12.7.9, 12.7.12). Leaving aside odour and dust (and "amenity"), this was a non-starter. Using the N max limit of 170kgN/ha, what was needed was 388.23 hectares. The Interested Party only had 79.49 hectares. Spreading had "amenity" and "environmental impacts", with "concerns … raised by officers" (OR1 §6.8.12).

26. The second stage involved proposed manure management, sending raw poultry manure to an anaerobic digester. The March 2021 Environmental Statement said (§§12.7.9, 12.7.12) "all manure will be exported off site to AD plants". This was, in principle, acceptable to planning officers and the environmental protection team (EPT). Officers said (OR1 §6.8.13) "the export of the manure arising from the proposed operation and its use in an anaerobic digester would be acceptable in principle in preference to it being spread directly onto farmland." EPT told the meeting on 10 October 2023 (OR3 §4.1.7):

> ***This application indicates that additional manure from the poultry sheds will be sent to a regulated anaerobic digestion plant, emissions from such plant will also be regulated by the [EP] regime and therefore [EPT] do not have concerns regarding offsite environmental impacts due to manure disposal. It is recommended that it is a condition of any consent that manure is disposed of via a regulated AD plant… In summary, [EPT] does not have concerns regarding potential off site impacts because of the proposed development assuming an appropriate manure management condition is applied…***

But there was a gap. The March 2021 Manure Management Plan said:

> ***Should manure not be able to be exported to the AD Plant at Wykey, the manure will be exported by Gamber Logistics Limited …***

Officers explained (OR1 §§6.8.12 and 6.8.13, 7.2):

> ***6.8.12 The spreading of poultry manure on farmland raises implications in terms of potential amenity and environmental impacts. Following concerns raised by officers on this the applicant has submitted a Manure Management Plan (MMP). This states … that it is proposed that all manure produced from the proposed broiler units would be exported to an Anaerobic Digestor plant at Wykey. The MMP includes a letter from the operator of this plant confirming that they are willing to remove and store the manure as soon as the birds are taken from the sheds, and that the manure would be used as feedstock for the anaerobic digester, which utilises this to generate heat and electricity. The MMP states that in the event that AD facility is not available the manure would be exported by Gamber Logistics Ltd. It is not clear what would then happen to the manure once it has been exported by this company. It is understood that Gamber Logistics Ltd. is a company that specialises in cleaning services; litter trading; and potato supply chain management and trading.***
>
> ***6.8.13 … The application proposes that the manure would be exported to a specific AD plant. However it is not considered that the application proposes an acceptable contingency arrangement for the management of poultry litter should the specified anaerobic digester option not be available. There is no mechanism put forward for ensuring that, in the event of an alternative option being required, such as may be necessary if the Wykey AD operator no longer wishes to accept the waste, all manure produced would be satisfactorily managed and that its use would not raise potentially significant impacts. The application is therefore deficient in relation to this and it is not possible to conclude that the use of the manure would not give rise to adverse environmental impacts on local amenity and in relation to pollution. The proposal is therefore in conflict with Core Strategy policies CS6 and CS18.***

> ***7.2 The proposals put forward for the management of manure arising from the operation are insufficient and do not demonstrate to a satisfactory degree that this indirect effect of the development would not give rise to adverse environmental impacts on local amenity and in relation to pollution.***

27. The third stage closed the gap. But not immediately. The 16 October 2023 Addendum (§3.2) allowed for the spreading of raw manure on land (emphasis added):

> ***we shall now address the issue of chain of custody. The proposal is to export the excess manure to Gamber Logistics by way of the manure management plan in support of the application, and both parties are also willing to do this by Section 106. Gamber Logistics are based in England, as are the AD plants proposed to supply manure to and the farm land to be used for manure application and digestate application…***
>
> ***The poultry manure is to be exported to Gamber Logistics for use in AD plants and upon land in England as detailed in the Manure Management Plan and if required by Section 106 secures the movement of excess manure away from the site. We also highlight that the Regulation in England being the 2018 [Agriculture Pollution] regulations detailed above do control the application of phosphates to land. The EA would be fully responsible for the adherence of Gamber Logistics to the [ADP Regulations]. Gamber Logistics are not prohibited from undertaking the spreading of manure being livestock manure or digestate to land as part of normal agricultural operations in England provided that it is in adherence with the [ADP Regulations].***
>
> ***The use of planning conditions relating to the movement of manure off site to Gamber Logistics protects the Council's position in that if manure is not exported to Gamber Logistics enforcement controls would be available to the LPA including breach of conditions notices, enforcement notices, stop notices and planning injunctions. The aforementioned provides the LPA with a chain of custody as required by [Natural Resources Wales].***

The gap was closed by the email of 27 October 2023 from Roger Parry & Partners:

> ***I write to confirm that all manure arising from the proposed operation would be exported off site to an anaerobic digester or other licensed waste management facility for treatment. I will provide the updated manure management plan on Monday.***

Although no updated manure management plan followed, but the email of 27 October 2023 satisfied officers (OR2 at §§4.2.1, 5.2):

> ***4.2.1 Manure management. The Environmental Statement Addendum includes further details of proposals for manure management. This advises that it is proposed to export manure to Gamber Logistics for use in either AD plants or for spreading onto farmland. Officers have advised the applicant that, under the EIA regulations, there is a requirement to undertake an assessment of indirect effects, such as relating to odour and dust, which may arise from spreading of manure onto farmland. This matter was confirmed under a recent Court of Appeal judgement [ie. Squire]. No assessment has been provided and therefore this element of the proposal has not been properly addressed. In order to address this the applicant has now confirmed that all manure arising from the proposed operation would be exported off site to an anaerobic digester or other licensed waste management facility for treatment. Officers consider that this satisfactorily addresses the manure management issue.***
>
> ***5.2 … the proposals put forward for the management of manure arising from the operation are now satisfactory***

28. The fourth stage was Planning Condition 19. The idea of a planning condition had originated from EPT on 10 October 2023. No proposed condition was in OR2. Planning Condition 19 featured in OR3 (§6.8.17), the planning ecologist advising (§4.1.6):

> ***In relation to water pollution, no manure arising from the poultry sheds will be spread on the land; it is taken to a licensed waste treatment. This is covered with [Planning Condition 19].***

The Claimant's Case on Farmland-Spreading (Issue (1))

29. Issue (1) is whether the Council was required to carry out an adequate assessment of the effect of the spreading of manure on third party land in (i) raw or (ii) digestate form; and whether it carried out such an assessment. Mr Wolfe KC, Mr Lockley and Mr McCay advanced an argument whose essence, as I saw it, was as follows. The Council was required – but failed – to carry out an assessment of the watercourses effects of spreading manure on third party land, in raw and in digestate form. Just as in Squire (§15 above), the EIA was deficient and the grant of planning permission invalid. The EIA did not identify the third party land; nor the water receptors; nor the river catchments. The impacts on watercourses from nitrate and phosphate were "likely indirect effects" of the proposed IPUs. The facility was inevitably going to produce manure. It was inevitably going to be spread as fertiliser, whether in raw or digestate form. These "likely indirect effects" were capable of meaningful assessment, just as were the effects of the dust and odour from the spreading on the unknown third party land in Squire.

    i) As to raw manure, the Environmental Statement and Addendum identified a pollutant (66,000 kg of nitrogen). Insofar as the environmental effects of spreading manure were considered at all, the focus was on North Farm: the watercourses; the NVZ; the soil; the phosphate soil indexes. This never broadened out to third party land: no land was identified; no watercourses or catchments; no arrangements for spreading of manure. That is why, in the context of the Gamber Logistics gap, officers advised (OR2 §4.2.1) that "no assessment has been provided". There was a description of parallel control regimes, but their existence was no justification for "confining" and "limiting the scope" of the assessment (Finch §§106, 108). Still less, given the recognised "clear evidence" ("undisputed evidential position") as to why it cannot be assumed that these regimes have proved effective to prevent environmental harm (NFU at §§59, 67, 73 and 81).

    ii) As to digestate, the environmental effects were completely unassessed and overlooked. Digestate-spreading was the ordinarily occurring consequence of the development. Indeed, it was inevitable (see Planning Condition 19). Processing of raw manure into digestate was no answer (Finch §§126, 129). The effects are capable of meaningful assessment. The Interested Party could be pinned down as to specific destinations; or there could be an assessment taking a worst-case scenario, including phosphates. EPT (10 October 2023), planning officers (OR1 §6.8.13; OR2 §4.2.1; OR3 §6.8.17), and the planning ecologist (12 March 2024) all treated digestate-spreading effects as beyond scope; as though anaerobic digestion eliminates downstream indirect effects. Digestate replaces one perilous source of nitrogen and phosphate (raw manure) with another (digestate). These indirect effects needed to be brought within the scope of the EIA. The Claimant's first letter of objection (9 January 2023) squarely said (emphasis added):

    > ***Water pollution – while current applications state the manure from new sites will be taken away from an IPU to anaerobic digestor sites <u>there is no assessment of how digestate is to be disposed of</u>. The volume of poultry manure from the over 20 million birds in the county must be immense and most of it will still be being spread to land***

> ***either raw or as digestate. There appears to be limited work underway to assess the impacts of this on the Severn catchment and the riverine environment and wildlife.***

Her second letter (8 May 2024) squarely said (emphasis in the original):

> ***The applicants, and the planning officer, argue that sending all the manure from this site to an AD unit is sufficient to dismiss water pollution concerns. But <u>there is just as much phosphate and nitrate in digestate as in poultry manure</u>. So unless the Committee put some condition on the AD operator to ensure none of it is spread within the catchment then it will still be contributing to the nutrient problems in watercourses. Poultry manure has much higher levels of phosphate than other livestock manures. There is also the potential problem of operators exporting from the Severn catchment into the Wye catchment.***

No identifiable evaluative judgment by planning officers explains why the scope of assessment did not extend to digestate. That is unreasonableness by a demonstrable flaw in reasoning (<u>Finch</u> §56): an unexplained leap failing to justify an evaluative conclusion (<u>R (Friends of the Earth) v Secretary of State for Energy Security and Net Zero</u> [2024] EWHC 995 (Admin) [2024] PTSR 1293 at §127).

<u>The Raw Manure Point (Issue (1)(i))</u>

30. In relation to the spreading of raw manure on third party land, I am unable to accept the Claimant's submissions. There was a legal sufficiency of information and of assessment within the decision-making. Planning officers, EPT and the planning ecologist all addressed their minds to these effects. Each was satisfied as to the sufficiency of the information. There was full and public transparency, facilitating participatory engagement. The story behind Planning Condition 19, imposed "to avoid pollution to groundwater", shows clear consideration of these environmental effects, The Environmental Statement focused primarily on the Interested Party's land. But it also gave a bigger picture: classifications for spreading of organic manures; risks of pollution of groundwater and surface water from nitrogen (that leaching of nitrogen from fields to watercourses has "severe implications upon water quality") and from phosphorous (that "excessive phosphorous application can lead to eutrophication of watercourses, ultimately killing aquatic life"); risks of nutrient pollution from raising soil levels "above recommended limits"; "potential sensitive receptors" being any "principal aquifer groundwater abstractions and nearby rivers via baseflow, aquatic species/ecological systems"; environmental standards for water quality and hydromorphology; relevant policy on avoiding an "unacceptable risk to quality of groundwater or surface water" whether "in this or other regions"; issues relating to NVZs. The Addendum addressed environmental effects in the context of the Gamber Logistics contingency plan. Unlike the odour and dust from offsite storage and spreading in <u>Squire</u> (at §67), the information here did assess and consider "measures … to be applied to third party land", in the "form" of a planning condition designed to be effective, based on an assessed understanding of implications for spreading of raw manure on farmland. On these points, I accept the submissions of Mr Riley-Smith and Ms Davies. The Council carried out a legally adequate assessment of the effect of the spreading of raw manure on third party land. On Issue (1)(i), the claim fails.

<u>The Digestate Point (Issue (1)(ii))</u>

31. I have found the position as to the spreading of digestate on third party land much more difficult. Mr Riley-Smith and Ms Davies submitted, in essence as I saw it, as follows.

No information or assessment were needed. The anaerobic digester was a mitigation measure, unlike the oil refinery in Finch. The spreading of digestate was not inevitable, unlike the combustion in Finch. The watercourses impacts are nothing like greenhouse gases (Finch), with no meaningful standardised assessment possible. All control would necessarily have been lost. There are a host of variables, as to where, when and how of spreading digestate. The information, and the assessment, were legally adequate. There was no unreasonableness as to either. Sufficiency of information was a matter of judgment for the authority (Finch §78; Swire §77). The Environmental Statement and Addendum considered the impact of organic manure, including digestate, including the nitrate worst-case scenario of this NVZ. The Council knew that digestate was not nitrate-free or phosphate-free; and that spreading digestate was environmentally no worse than raw manure. Planning Condition 19 ensured that all raw manure would be in regulated hands, with permissible reliance on the mitigation of parallel control regimes. And, even if there was unlawfulness, it is highly likely that the outcome would not have been substantially different, with further information or wider assessment.

32. In the end, I have been unable to accept these submissions. I have been persuaded by the submissions on behalf of the Claimant. In my judgment, there was an unlawful absence of assessment as to digestate within the decision-making. My reasons are as follows:

i) There is everything to suggest that planning officers thought they were undertaking an EIA which extended to the indirect environmental impacts of spreading raw manure on third party land. But there is nothing to suggest that they thought it extended to digestate. The contents of OR3 strongly indicate that they thought the environmental effects of the spreading of digestate did not need to be confronted. But no document – whether promulgated, filed or disclosed – records or reflects any evaluative judgment about digestate effects. The Court has received no explanation. I received witness statement evidence from the Council about biomass boilers and HRA2. There was witness statement evidence from the Interested Party about the Environmental Statement. There was also nothing in OR3. That is striking. When planning officers came to write OR3, they recorded the following as among many "objections" (OR3 §§4.2.9, 4.2.10):

> ***No assessment as to how digestate produced by the AD plant taking the manure would be disposed of.***
>
> ***Waste would be sent to an anaerobic digester and these create a concentrated digestate that is often spread on land; this contributes to pollution loads in water and air. This waste will not be controlled by an [EP] and should therefore be included in the environmental statement.***
>
> ***As noted by officers, there is a requirement to undertake an assessment of indirect effects, such as relating to odour and dust, which may arise from the production of digestate and spreading of this onto farmland. This matter was confirmed under a recent Court of Appeal judgment [ie. Squire]. No assessment of this digestate waste has been provided.***

These three unanswered points are the only references to digestate in OR3.

ii) The absence of any identifiable evaluative judgment leaves the Finch causation criterion (whether the effects on watercourses of spreading digestate were "likely indirect effects") and the Finch "capability of meaningful assessment" criterion stand unaddressed. The target decision pre-dated the Supreme Court's identification of those criteria and its correction of previously-held views: about "sufficient causal connection"; about being "part of the proposed development"; about whether effects are too "remote"; and about processing breaking the chain of causation (§18 above).

iii) The Council – through Mr Riley-Smith – has emphasised that the anaerobic digester constitutes a "mitigation" measure, unlike the oil refinery in Finch. The problem with that submission is that it is akin to saying that the processing of raw manure into digestate breaks the chain of causation. That approach (and that reasoning, if it was the reasoning) is legally flawed: processing does not break the chain of causation (Finch §§126, 129). Finch approved Squire. And Lord Leggatt embraced a situation involving "intermediate steps between the production of manure and its use as fertiliser". He thought that such steps would make the spreading of the manure "as fertiliser" an even closer analogy with the burning of the extracted and processed oil (see Finch §162).

iv) I accept that "digestate" was described in the Addendum, controlled under the ADP Regulations. I accept that this could be seen as bringing in all the information about the impacts of excessive nitrates and phosphates, as with raw manure. I do not know whether that it how it was viewed. And what I cannot accept is that this means the EIA undertaken by the Council extended to addressing the environmental effects of spreading digestate. EIA is a process of information plus assessment, to "identify, describe and assess" the indirect significant effects.

v) In the end, the defence mounted by Mr Riley-Smith and Ms Davies – in my judgment – must turn on the Finch criterion of capability of meaningful assessment. They argue that the effects of spreading digestate on farmland are necessarily matters of "speculation or conjecture", being "elusive, contingent and speculative" (Finch §§74, 167-168). I accept that in Finch the Supreme Court was able to say it was obvious – whatever the evaluative view of the LPA – that greenhouse gas emissions from the combustion of the processed fuel met the criteria of causation and capability of meaningful assessment. Spreading digestate is not said to have inevitable intrinsic environmental impacts, for example because all farmland is already saturated with nitrogen and phosphate. There is contingency. But the same is true of raw manure, including as to the effects of odour and dust. There was contingency in Squire, where the location of the third party land was unknown. Yet those were indirect effects within the EIA, as the Court of Appeal decided in Squire, a decision endorsed in Finch.

vi) My fundamental difficulty is this. The Finch criteria are questions which start with the Council and its officers. Theirs is the latitude for evaluation. There is no identifiable evaluation to which I can afford that latitude. And I am quite unable to say that the environmental effects of spreading digestate on farmland are incapable of meaningful assessment. The answer may be that meaningful assessment can – and may need to be – at a relatively high level of generality. EIA needs to be practical and effective; but also realistic and not excessively burdensome. EIA is also about confronting environmental implications. To test the logic, suppose vast installations are being approved, generating vast volumes of environmentally damaging by-products. If spreading raw manure on unidentified third party land can be confronted and assessed – as the Court of Appeal thought was needed in Squire and I have held has happened in this case – then why not digestate? It is striking to act decisively to minimise pollution of watercourses in relation to the Gamber Logistics gap (Planning Condition 19) and to claim to be able to say nothing at all about digestate. It is not obvious to me that no meaningful way could be devised of confronting and thinking about the likely indirect effects. The Council and Interested Party say a nitrates worst-case scenario was known. But if it was confronted within the EIA, how was it confronted?

vii) The legislation entrusts the primary decision-making – including as to the scope of EIA – to the LPA. In Finch, Lord Leggatt explained that there are situations involving "potential reasons why the view might reasonably be taken that it was not necessary to include an assessment of such impacts", including "that there was insufficient information available on which to make a reasonable assessment" (§138). I can agree that Mr Riley-Smith and Ms Davies have, through their submissions, identified "potential reasons". What they cannot, in my judgment, do is to point to any such consideration having taken place. The key point is in Finch at §78, on which the Council has relied. It is within the "area of evaluative judgment" for the decision-maker to take its own, reasonable view as to whether possible effects are "capable of assessment". But I do not have any reasoned explanation of a position on this, from planning officers. I am quite unable to uphold as reasonable the drawing of a line, when I have no reasoned evaluation as to why it was drawn. Where – at least in the circumstances of the present case – there is an unaddressed evaluative question belonging to the primary decision-maker, the right course is to quash the decision and remit the matter for reconsideration of that question. In terms of reasonableness review, this is a gap in reasoning which vitiates the approach to EIA in law. I am unpersuaded that the decision would inevitably have been the same; or that the outcome for the Claimant is highly likely to have been the same. I propose to quash the grant of planning permission and remit the matter so that this aspect can be the subject of evaluation. Having failed to address the legal criteria of causation and capability of reasonable assessment, the Council failed to carry out a legally adequate assessment of the effect of the spreading of digestate on third party land. On Issue (1)(ii), the Claimant therefore succeeds.

Leeds

33. In Leeds City Council v Secretary of State for Communities and Local Government [2009] EWHC 1014 (Admin) a decision as to retrospective planning permission raised issues about (i) car parking and (ii) rear garden amenity space (see §16), under a planning policy (§7). The planning inspector decided both issues were solvable by a single planning condition ensuring sufficient front of property off-street parking (§§17, 20). The claim that the inspector had "acted irrationally" succeeded (§§21, 38). The decision was quashed and remitted for reconsideration (§38). The inspector had "accepted the validity" of the rear garden amenity space point (§28), as a particular objection which could be met by a condition (§35); but had failed "to ensure to a standard of rationality that such condition or conditions [were] indeed adequate to meet the particular objection" (§35). He identified the solution as front of property off-street parking, but failed to ensure that solution (§29). The planning condition (§17) did not

adequately meet the concern (§31), because it did not go far enough (§34). Nor were the reasons legally adequate (§39). Leeds is an illustration of a decision which is unreasonable in public law terms, because the response is not reasonably suitable to achieve the identified objective.

The Planning Condition Point (Issue (2))

34. Issue (2) is whether the Council acted unlawfully by imposing a condition which failed to prevent the spreading of manure on land and thus failed to address concerns about the environmental effects of the development. Mr Wolfe KC, Mr Lockley and Mr McCay advanced an argument whose essence, as I saw it, was as follows. As in Leeds, the Council acted unlawfully. It imposed Planning Condition 19, a condition incapable – to a reasonableness standard – of adequately meeting the particular objection which was identified and accepted. That objective was protection against the environmental effects of spreading manure on land. Planning Condition 19 is not reasonably suitable to achieve the identified objective, applying the governing standard of reasonableness. It is not reasonably capable of being a "mechanism … for ensuring that … all manure produced would be satisfactorily managed and that its use would not raise potentially significant impacts" (OR1 §6.8.13). It is also unlawfully vague, uncertain, inadequate and unenforceable. It lacks a "sensible or ascertainable meaning" (Hulme v SSCLG [2011] EWCA Civ 638 §13(c)). Breaches are incapable of being established in an objective way (Squire §50). It is, in practice, unenforceable and therefore unreasonable (Bromsgrove DC v SSE (1988) 56 P & CR 221, 224).

i) First, there is the digestate. The objection was the environmental effects of spreading manure on land. The objective was the protection of groundwater, reflected in the stated reason ("to … avoid pollution to groundwater"). Planning Condition 19 does not meet this objection or achieve this objective, because it does not prevent digestate being spread on land.

ii) Secondly, there is raw manure. Planning Condition 19 requires manure being taken "off-site" and "to" an anaerobic digester or other facility. On its legally correct interpretation, this fails to prevent the spreading of raw manure. Taking raw manure "to" a facility is consistent with raw manure being taken "from" thar facility for spreading on farmland. Resolving an ambiguity by resort to extrinsic material (see Trump International Golf Club Ltd v Scottish Ministers [2015] UKSC 745 [2016] 1 WLR 85 at §33, citing R v Ashford Borough Council, ex p Shepway DC [1999] PLCR 12 at 19C-20B) reinforces this, given the Interested Party's description of the Gamber Logistics gap. Condition 19 does not require processing (cf. Squire at §67), which is action of a third party on land neither within the Interested Party's control nor within the application site (Davenport v Hammersmith and Fulham LBC (1999) 78 P & CR 421 at 425; R v Rochdale MBC, ex p Tew [2000] Env LR 1 at 34-39), securable only by s.106 condition.

iii) Thirdly, there are alternative facilities. Planning Condition 19 does not require that the raw manure go to an anaerobic digester. The "other suitable disposal or management facility" is vague and leaves environmental effects unresolved.

35. I have been unable to accept these submissions. On this part of the case I accept the submissions of Mr Riley-Smith and Ms Davies. On the natural and ordinary meaning viewed in context and with common sense (see Lambeth LBC v SSHCLG [2019]

UKSC 33 [2019] 1 WLR 4317 at §§15-19; DB Symmetry v Swindon BC [2022] UKSC 33 [2023] 1 WLR 198 at §66), Planning Condition 19 does not permit the Interested Party to arrange to take raw manure "to" an anaerobic digester, so that someone else can take it away and have it spread on farmland. The phrase "all manure … shall be taken … to an anaerobic digester" means taken "for treatment". That makes sense of having it taken there; of "other suitable disposal or management" facility; and of the stated reason. There is no ambiguity. If there were, OR3 §6.8.17 (§21 above) spells out that "exported" off site is to an anaerobic digester or other licensed waste management facility "for treatment", with this planning condition imposed to require "such export". The essential purpose of Planning Condition 19 was to prevent the spreading of raw manure on land. That was the Gamber Logistics gap. There is a direct correlation – and certainly suitability to a public law reasonableness standard – between objective and response. Planning Condition 19 is appropriately careful not to purportedly obligate a third party operator on its own land. The Interested Party's onus would be to take such steps as it reasonably can: cf. the EP in Squire at §50. The description "or other suitable disposal or management facility" allows lawful flexibility – building in lawful evaluative judgment – for an alternative without a variation. Even without reading in "for treatment", the natural and ordinary meaning in context and with common sense requires an "anaerobic digester" itself to be "suitable". The Council could act if raw manure were taken to a facility and untreated. I see nothing unlawfully vague, uncertain, inadequate or unenforceable. Breaches are capable of being established objectively. The Council lawfully imposed a condition to prevent the spreading of raw manure on land, reasonably suitable to address its gap-closing objective. On Issue (2), the claim fails.

Habitats Regulation Assessment (HRA) Duties

36. Turning from watercourses to habitats, Article 6(3) of the Habitats Directive contains two duties in respect of designated sites. They are repeated in reg.63(1) and (5) of the Habitats Regulations. First, this "appropriate assessment" duty:

> ***Any plan or project not directly connected with or necessary to the management of the 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 of its implications for the site in view of the site's conservation objectives.***

Secondly, this "site integrity" prohibition:

> ***In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of [Article 6(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.***

The reference to Article 6(4) is to a derogation for projects necessitated by imperative reasons of overriding public interest (reg. 64). Reg.63(6) provides this:

> ***In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given.***

37. The site integrity prohibition is informed by ("in the light of") the appropriate assessment. The assessment must be "appropriate to the task in hand", namely "to

satisfy the responsible authority that the project will not adversely affect the integrity of the site" (Wyatt at §124). The HRA duties apply to an LPA (reg.70). They are an aid to effective environmental decision making, not a legal obstacle course: R (Sahota) v Herefordshire Council [2022] EWCA Civ 1640 at §38. A golden rule is that whether an LPA "has sufficient information for the purposes of … HRA is essentially a matter of judgment for that authority, subject only to review on *Wednesbury* principles" (Swire at §77).

Other Farms

38. The IPUs would be at North Farm (200,000 birds) under the planning permission of 16 May 2024 (ref. 17/05151/EIA), and after obtaining the EP on 24 August 2018. Five other farms will feature below. Painsbrook Farm (64,000 birds) obtained planning permission from the Council on 24 May 2023 (planning ref. 22/03828/EIA). It obtained an EP from the EA on 18 December 2023 for 96,000 birds (EA ref. CP3028SR). Burlton Lane Farm (48,000 birds) obtained planning permission from the Council (planning ref. 18/04877/FUL). Huffley Farm obtained planning permission from the Council in July 1994 (planning ref. SA/94/0339), with no bird limit. It obtained an EP variation from the EA on 25 February 2021 (EA ref. SP3636MN) to increase from 160,000 to 170,000 birds. Red House Farm obtained an EP variation from the EA in October 2020 (EA ref. MP3430WS). Ensdon Farm obtained an EP variation from the EA in October 2020 (EA ref. QP3538WP).

Air Scrubbers

39. The Interested Party's proposal was changed to incorporate air scrubbers reducing ammonia emissions (OR3 §§1.1, 4.1.2). The planning ecologist explained that "air scrubbers are considered a Best Available Technique" (BAT) and recommended planning conditions requiring that they be "operational and maintained in accordance with manufacturer's recommendations" (OR3 §4.1.6). The revised Ammonia Report described them (OR3 §6.6.6). NRA2 described them (§3.2) and the conditions (§3.5(3)). HRA2 used a more "precautionary" 2ppm (parts per million) for ammonia (revised Ammonia Report §3.5.1), when using them. Planning Conditions 5, 13 and 17 are:

> ***5. Prior to the commencement of the development a scheme shall be submitted in writing detailing contingency measures to be adopted to in the event that the operation of one or more of the scrubbing units is not possible, such as plant breakdown, and set out procedures to ensure that the time without the use of air scrubbing is minimised. The poultry rearing operation shall be undertaken in accordance with the approved scheme.***
>
> ***13. Prior to first beneficial use of the development, evidence (prepared by a suitably qualified industry professional) shall be submitted to the LPA to confirm that the air scrubbers as detailed in [the Ammonia Report and other documents] have been installed and are fit for purpose. The air scrubbers shall be maintained and operated thereafter, in accordance with the manufacturer's instruction for the lifetime of the development.***
>
> ***17. No birds shall be brought to any of the rearing units hereby permitted, unless the associated air scrubbing unit is in effective working order.***

Ammonia Emissions (OR3 §6.6.7)

40. As to designated sites and ammonia emissions, officers concluded (§6.6.7):

> ***The modelling and assessment demonstrate that, with the proposed mitigation in place, the impacts on the Fenemere Ramsar/SSSI would be insignificant. In relation to the [HRA], it is considered that the project is unlikely to result in a significant effect on this designated site. This conclusion is subject to the area of tree planting being not less than 3.01 hectares. [HRA2] is included as Appendix 1 to this report. This concludes that subject to the mitigation proposed, the proposed development alone, or in-combination with any other projects, would not result in adverse effect on site integrity on Fenemere or Hencott Pool. Subject to the conditions recommended by the ecologist, it is considered that the previously-raised ammonia impact issues have been addressed, and that the proposal complies with relevant policies …***

Wyatt

41. In Wyatt (at §9), the Court of Appeal identified ten "basic points" which emerge from the domestic and Luxembourg authorities. These are particularly relevant:

    i) The HRA duties rest with competent authorities and not with the courts. Whether a project will adversely affect the integrity of a designated site is always a matter of evaluative judgment for the competent authority, which the court is neither entitled nor equipped to make for itself. The role of the court is to undertake not its own assessment, but a supervisory review of the performance by the authority of its HRA duties. See Wyatt §9(1).

    ii) In the exercise of its supervisory jurisdiction, the court must be wholly satisfied that the competent authority's performance of its HRA duties was lawful. It must satisfy itself of the lawfulness of the authority's consideration of the scientific soundness of the appropriate assessment. See Wyatt §9(2).

    iii) When reviewing the performance by a competent authority of its HRA duties, the court will apply ordinary public law principles, conscious of the nature of the subject-matter and the expertise of the competent authority itself. If the competent authority has properly understood its HRA duties, the court will intervene only if there is some *Wednesbury* error in the performance of that duty. Given the demanding requirement inherent that the competent authority ascertain that the project "will not adversely affect the integrity of the European site", the court's examination of the authority's performance of its duty will be suitably exacting within the bounds of its jurisdiction. See Wyatt §9(3).

    iv) A competent authority is entitled, and can be expected, to give significant weight to the advice of an expert national agency with relevant expertise in the sphere of nature conservation, such as Natural England. Although the authority may lawfully disagree with, and depart from, such advice, if it does so, it must have cogent reasons for doing so. Further, the court for its part will give appropriate deference to the views of expert regulatory bodies. See Wyatt §9(4).

    v) The site integrity prohibition embodies a "precautionary principle" which requires a high standard of investigation. See Wyatt §9(6).

    vi) What is required of the competent authority is a case specific assessment in which the applicable science is brought to bear with sufficient rigour on the implications of the project for the protected site concerned. A lawful HRA "cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned". See Wyatt §9(10).

Two Ramsar Sites

42. Committee Members were told of designated sites within influencing distance of the development site (OR3 §6.6.4). Two have featured in the arguments. These "Ramsar" wetlands of international importance are treated as designated sites (see CG Fry & Son Ltd v SSLUHC [2024] EWCA Civ 730 [2024] PTSR 2000 at §10). They were described as follows in HRA2. First, Fenemere (16.34ha), approximately 7.4km north-east of the development site. Fenemere is a particularly rich and interesting mere with eutrophic water; having importance for its rich aquatic invertebrate fauna; and included within Ramsar Phase 1 for its open water, swamp, fen, wet pasture and carr habitats with the species cicuta virosa and thelypteris palustris. Secondly, Hencott Pool (11.5ha), approximately 10km east of the development site. Hencott Pool is mostly swamp carr on very wet peat dominated by alder alnus glutinosa and common sallow salix cinerea with frequent crack willow salix fragilis; with a rich flora of fen plants; and included within Phase 2 for its carr habitat and the species carex elongata and cicuta virosa.

"Unfavourable" Conservation Status

43. Article 1(e) of the Habitats Directive provides that a designated site's "conservation status" is "favourable" when its natural range and areas are stable or increasing, the structure and functions necessary for its long-term maintenance exist and are likely to continue for the foreseeable future, and the conservation status of its typical species is favourable (see Article 1(i)). In the Dutch Nitrogen case (Case C-293/17) [2019] Env LR 27 (7 November 2018), Advocate General Kokott said (at §AG57) that for site "integrity … not to be adversely affected", the site "needs to remain at a favourable conservation status". She said it was "difficult, if not impossible, to accept values that are higher than the critical loads" (at §AG62). The Court (CJEU) said where conservation status is "unfavourable, the possibility of authorising activities which may subsequently affect the ecological situation of the sites concerned seems necessarily limited" (at §103). Lieven J has described this "limited scope for approval of additional damaging effects" as having "brought an effective halt to new development in areas … in unfavourable condition in terms of water quality objectives" (NFU at §20). The "unfavourable status" of a designated site does not, however, change the HRA duties by raising the applicable "level of certainty" or the "standard of review" (Wyatt at §51).

"Critical Levels" and "Critical Loads"

44. Each Ramsar Site has an identified "critical level" for ammonia and "critical load" for nitrogen deposition (OR3 §4.1.6). The "level" of ammonia (NH_3) is measured as a weight (µg) per cubic metre (m^3) at any given time (ie. µg/m^3). The "load" of nitrogen (N) is measured as a weight (kg) per hectare per year (ie. kg-N/ha/y). In HRA2, Ms Milburn used "the most precautionary critical levels (1µg)" for Fenemere and Hencott Pool (ie. 1µg/m^3); and "critical loads" of 10kg-N/ha/y. The revised Ammonia Report said:

> ***Critical Levels are defined as, "concentrations of pollutants in the atmosphere above which direct adverse effects on receptors, such as human beings, plants, ecosystems or materials, may occur according to present knowledge" (UNECE). Critical Loads are defined as, "a quantitative estimate of exposure to one or more pollutants below which significant harmful effects on specified sensitive elements of the environment do not occur according to present knowledge" (UNECE) … For sites where there are sensitive lichens and bryophytes present, or***

where lichens and bryophytes are an integral part of the ecosystem, the Critical Level is 1.0 µg-NH3/ m³ as an annual mean. Critical Loads for nutrient nitrogen are set under the Convention on Long-Range Transboundary Air Pollution. They are based on empirical evidence, mainly observations from experiments and gradient studies. Critical Loads are given as ranges (eg. 10-20 kg-N/ha/y); these ranges reflect variation in ecosystem response across Europe…

45. In Dutch Nitrogen, the CJEU recorded (at §28) the Dutch referring court's observation that "exceeding the critical deposition value means that the risk of the quality of habitat types being negatively affected by the acidifying and eutrophying effects of nitrogen deposition cannot be ruled out in advance"; and (at §31) that "critical deposition values constitute limits above which there is a risk of the quality of the habitat being significantly affected by the polluting and acidifying effects of nitrogen deposition". AG Kokott discussed "critical loads" and said a "competent national court" may need to "review … whether the critical loads or other values are so scientifically sound that, if they are complied with, all reasonable scientific doubt can be excluded that the integrity of the sites concerned is not adversely affected" (at §§AG62, 64).

Already "Critical"

46. In the present case, both Ramsar Sites are recognised as already being above their critical levels (ammonia) and critical loads (nitrogen deposition). The Marches objection said the "APIS reports" showed they were "already exposed to ammonia and nitrogen in substantial exceedance of critical loads and levels". Mr Wolfe KC showed me the Fenemere's APIS (Air Pollution Information System) load of 36.7kg (against the critical load of 10kg-N/ha/y) and level of 3.109µg/m³ (against the critical level of 1µg/m³).

The 2023 Guidance

47. The planning ecologist applied "the current guidance adopted by Shropshire Council … endorsed by Natural England and the EA" as "the basis of assessment for poultry applications" (OR3 §4.1.6). This November 2023 Guidance explains (§§1.1, 1.4, 1.5):

This document provides guidance on how to assess the impacts of ammonia emissions and associated nitrogen deposition arising from planning applications for intensive livestock units … on … 'designated sites'… Recent interim guidance [May 2022] has been issued by Natural England and the [EA] with regards to their assessment of air quality risk for planning applications and [EPs] respectively which could have a likely significant effect on international sites. Their guidance acknowledges that at the moment there are differing approaches to thresholds of insignificance with regards to air quality pollutants, however it is stressed that the agencies are working together currently so that in the long-term alignment is hoped to be achieved. In addition, Natural Resources Wales have also updated their guidance, which is available online. Shropshire Council have therefore taken the decision to update the guidance it originally published in 2018. This new guidance is partly informed by the latest guidance published by Natural Resources Wales and Natural England but adapted and expanded to be in line with approaches and guidance for other sectors (such as industry and transportation), as well as published best practice guidance documents published by the Institute of Air Quality Management and the Chartered Institute of Ecology and Environmental Management.

Natural England

48. In its HRA duties, a competent authority must consult Natural England and have regard to any representations which it makes (Habitats Regulations reg.63(3)). Natural England's primary focus, described in the May 2022 interim guidance, is to provide the

best available advice to conserve, enhance and manage the natural environment. Natural England is identified in Wyatt §9(4) as an expert national agency with relevant expertise in the sphere of nature conservation, to whose advice a competent authority is entitled, and can be expected, to give significant weight. Committee Members were told that Natural England had "endorsed" the 2023 Guidance (OR3 §4.1.6). As to this project (§4.1.5), Natural England had originally responded on 12 May 2021 describing information in relation to air quality impacts as insufficient to enable a substantive response; having been reconsulted on 21 September 2023 and 10 November 2023, no further comments had been received.

The HRA2 Method

49. The planning ecologist applied the 2023 Guidance. She included the Ramsar Sites, taking their critical level (1µg/m³ ammonia) and critical load (10kg-N/ha/y).

i) Ms Milburn used the latest update of APIS background levels of ammonia and nitrogen. APIS background levels include contributions of projects over a 3-year dataset period, with a cut-off date at the end of year 2 (here, 31 December 2020).

ii) Ms Milburn assessed the "process contribution" (PC) for North Farm (the Interested Party's development) as 0.069% of Fenemere's critical level; 0.054% of Fenemere's critical load; 0.065% of Hencott Pool's critical level; and 0.051% of Hencott Pool's critical load.

iii) Ms Milburn identified "other plans or projects". This was Step 4 of the Guidance (§50 below). They needed to be within 10km of the Ramsar Site. They needed to be "Post-APIS Projects" (my phrase): after the cut-off date (31 December 2020).

iv) For Fenemere Ms Milburn identified two Post-APIS Projects: Painsbrook Farm (whose PC was 0.01% of Fenemere's critical level and 0.03% of Fenemere's critical load); and Burlton Lane Farm (whose PC was 0.08% of Fenemere's critical level and 0.6% of Fenemere's critical load). Adding these to North Farm's PC gave a "combined process contribution" (CPC) of 0.159% of Fenemere's critical level and 0.684% of Fenemere's critical load.

v) For Hencott Pool, Ms Milburn identified one Post-APIS project: Painsbrook Farm (whose PC was 0.07% of Hencott Pool's critical level and 0.05% of Hencott Pool's critical load). Adding that to North Farm's PC gave a CPC of 0.135% of Hencott Pool's critical level and 0.101% of Hencott Pool's critical load.

vi) Ms Milburn now compared these CPCs (0.159%, 0.684%, 0.135% and 0.101%) with the threshold of 1% of critical levels/critical loads. This was Step 9 of the Guidance (§52 below). The CPCs were all well below that threshold. On that basis, Ms Milburn concluded that an appropriate assessment had concluded that there would be no adverse effect on integrity of either of the Ramsar Sites.

Step 4: Identifying Post-APIS Projects

50. Step 4 of the 2023 Guidance ("Search for other projects") says "consideration must be given as to whether the project needs to be assessed 'in-combination' with other ammonia emitting projects". It says (the paragraph numbering replaces bullet points):

Only those projects (or plans) which are 'live' at the time of the assessment should be taken into account for an in combination assessment and therefore include:

[i] Plans or projects currently subject to an application for consent (eg. a validated planning application, pending a decision).

[ii] Projects that are subject to an outstanding appeal.

[iii] Projects that have been approved, but which have not yet started operating and the planning permission is still valid.

[iv] Projects that are not in the current APIS background. (Ammonia background concentration and nitrogen background deposition from APIS are given as an average over three years. If projects started operating, or were given consent, after 31 December of the second year of the current three-year APIS average they will not be in the background and will, therefore, need to be taken into account in an in-combination assessment).

Applicants are advised to contact the ecology team at Shropshire Council in order to identify any other projects or plans which should also be considered as part of the assessment…

51. Ms Milburn recorded this within HRA2, as her Step 4:

ARE THERE ANY OTHER PROJECTS OR PLANS THAT TOGETHER WITH THE PROJECT BEING ASSESSED COULD AFFECT THE SITE (PROVIDE DETAILS)? Yes. Planning applications pending a decision, permitted developments yet to be built and permitted developments which came into use after the last update of the APIS background levels which would give rise to ammonia emissions/nitrogen deposition on the above designated sites.

These references to "permitted" were to planning permissions, not EPs. As has been seen (§38 above): Painsbrook Farm (64,000 birds) obtained planning permission on 24 May 2023; Burlton Lane Farm (48,000 birds) obtained planning permission prior to HRA2. Ms Milburn gave this explanation (OR3 at §4.1.6):

[EA] permits. Environmental permitting is a separate system to the planning system. Permits are often given for larger numbers of livestock than are actually present on the site (to allow for growth within an existing permit without having to reapply). Permits do not need to be considered as part of in-combination assessments.

Step 9: Applying the 1% Threshold to CPCs

52. Step 9 of the 2023 Guidance ("Screening project in-combination") explains where to find the relevant critical level (CLe) and critical load (CLo). It says:

If the [CPC] is >1% of CLe/CLo proceed to Step 10 [ie. Exceedance check in-combination].

If the [CPC] is <1% of CLe/CLo the proposal is considered unlikely to have a significant effect on designated sites as a result of ammonia emissions and NO FURTHER ASSESSMENT IS REQUIRED.

The 1% Threshold Point (Issue (3)(i))

53. Issue (3)(i) is whether the Council failed to carry out a lawful appropriate assessment before granting the permission by determining the significance of some of the development's impacts by reference to thresholds. Mr Wolfe KC, Mr Lockley and Mr McCay advanced an argument whose essence, as I saw it, was as follows. It was unlawful and a breach of HRA duties to use the Step 9 threshold of 1% of critical levels

and critical loads, to assess likely significant effect on the designated sites. This approach allows a further deterioration of sites already having unfavourable conservation status. It "assumed" that, where a proposed project's "combined air quality impacts" do not exceed 1% of the critical levels and critical loads, the proposal would not "adversely affect the integrity of the site" (reg.63(6)). The exceedance of critical levels and critical loads, and the already unfavourable status, restrict what is permissible. It is "difficult, if not impossible, to accept values that are higher than the critical loads" (Dutch Nitrogen at §AG62). The "possibility of authorising activities which may subsequently affect [their] ecological situation" is "necessarily limited" (Dutch Nitrogen at §103). There is "limited scope for approval of additional damaging effects" (NFU at §20). Even if a threshold of acceptability is lawful, it cannot be lawful in the case of a designated habitat at which there is an exceedance of the critical level or critical load. What is required is an "individualised assessment" (Dutch Nitrogen at §94) in which the conservation status of the two Ramsar Sites is a key point. On an examination which is "suitably exacting" (Wyatt at §9(4)), the Court cannot "satisfy itself" as to "the lawfulness of the authority's consideration of the scientific soundness of the appropriate assessment" (Wyatt at §9(2)).

54. I have been unable to accept these submissions. The 1% threshold is an evaluative tool for questions about "likely … significant effect", "activities [which] affect the ecological situation of the sites concerned", and "additional damaging effects". It is applied to a relevant CPC. I was shown no authority which says or suggests that threshold values are unlawful; nor that critical levels/ loads are unlawful reference points. In Wealden DC v SSCLG [2017] EWHC 351 (Admin) [2017] Env LR 701, Jay J recognised room for a "de minimis threshold" of "no appreciable effect" (§50). He said "competent authorities are quite entitled to use threshold levels and values in order to eliminate from further consideration de minimis environmental impacts which, on scientific evidence, fall short of engendering any relevant risk" (§53). He considered the "yardstick" which broadly equated to "1% change in critical loads/levels (§§60-62). That was not unlawful. What was unlawful was a failure to aggregate two relevant effects (§66, 96, 108). Benchmarks can involve judgment rather than pure arithmetic (Wyatt §76). In Dutch Nitrogen AG Kokott spoke of no "likely … significant effect" (§AG105) as being "suggested, prima facie" by a PC which would "correspond to only very small fractions of the critical loads", including 0.23% and 0.2% (§AG106). She recorded (§AG108):

> ***the German … Federal Administrative Court is much more generous in determining a de minimis threshold for nitrogen deposition. According to that court, there is a consensus among specialists that, where the habitats concerned have very high initial loads, additional loads of no more than 3% of the critical load are incapable of bringing about significant changes to the current status or of restricting considerably the restoration of a favourable status. There is no need to decide here whether this finding made by the German court is compatible with Art.6(3) of the Habitats Directive. It is nevertheless a further indication that in any case the much lower Netherlands threshold values and limit values can be scientifically justified.***

In Dutch Nitrogen, Dutch "national programmatic legislation" (see Wyatt at §71) exempted from individualised approval those projects whose nitrogen deposition was below a threshold value (Dutch Nitrogen §105). The CJEU held that a "threshold value" approach – even applied systemically and "in advance" – was lawful, adding that it would be for a "national court" to be "satisfied" that the approach involves "no reasonable scientific doubt" as to the lack of adverse effects on the integrity of sites (§112).

55. I have been supplied with no basis for finding that the 1% threshold is unlawful. The Marches objection (December 2023) refers to lower percentage thresholds, by reference to the Joint Nature Conservation Committee, advocated "to account for future development below assessment thresholds". The 1% threshold is Step 9 within the 2023 Guidance, endorsed by Natural England and the EA. It is applied to the CPC, including other Post-APIS Projects from Step 4. It is known to derive from Natural England, the "expert national agency" whose expertise is expected to be given significant weight (Wyatt at §9(4)). As the Marches objection, on which the Claimant relies, says:

> ***Natural England applies a threshold of 1% of critical level or load for screening of development with the potential to affect protected sites.***

Members were told (OR3 §4.1.6):

> ***Threshold levels. Shropshire Council uses the 1% threshold set out in Natural England and the [EA]'s joint Air Quality Risk Assessment Interim Guidance (May 2022) and Natural Resources Wales' Guidance Note 020. Also, the Institute of Air Quality Management's A guide to the assessment of air quality impacts on designated nature conservation sites (May 2020) states that:… The 1% threshold has become widely used throughout the air quality assessment profession to define a reasonable quantum of long term pollution which is not likely to be discernible from fluctuations in background/measurements … For example, for many habitats, 1% of the critical load for nitrogen deposition equates to a very small change of less than 0.1 kgN/ha/yr, well within the expected normal variation in deposition…***

The May 2022 joint interim guidance of the EA and Natural England explains the rationale for an "insignificance threshold" – "a de minimis" – of 1% of critical level/ load. It is a reduction from the 4% threshold previously used by the EA. As has been seen, it is also one-third of the German threshold (Dutch Nitrogen §AG108). I have been given no basis for finding that the Council's "consideration of the scientific soundness of the appropriate assessment" was unlawful (Wyatt at §9(2)). The Council did not fail to carry out a lawful appropriate assessment before granting the permission although it determined the significance of some of the development's impacts by reference to thresholds. On Issue (3)(i) the claim fails.

56. I have dealt with the issue on its substantive legal merits. But I add these procedural footnotes. In Wealden there was a clear collateral attack on the methodology used in a Natural England advice (see §6), and Natural England was a party who provided relevant underlying documents (§§5, 107). In Wyatt, there was a clear collateral attack on a Natural England advice note (see 1957G), and Natural England was again a party. In River Action, there was a clear collateral attack on statutory guidance issued by the Secretary of State (see 244B), and the Secretary of State was a party. Mr Wolfe KC told me that he was criticising Step 9 as a "problematic methodology", but disavowed mounting any "freestanding collateral challenge" to the lawfulness of the Guidance. If the Claimant wanted to attempt an unlawfulness attack based on an absence of "scientific soundness" (Wyatt §9(2)), alleging a "reasonable scientific doubt" (Dutch Nitrogen §112), this needed to be clear, supported by evidence (I was shown none), and with an appropriate hearing (not the half day added for the entirety of Issue (3)).

The APIS Background Levels Point (Issue (3)(ii) Part 1)

57. Issue (3)(ii) is whether the Council failed to carry out a lawful appropriate assessment before granting the permission by failing to carry out a lawful in-combination

assessment of those impacts. Mr Wolfe KC, Mr Lockley and Mr McCay advanced two distinct arguments. The essence of the first argument, as I saw it, was as follows. HRA2 unlawfully used APIS background levels at the Ramsar Sites. In the 13 October 2023 revised Ammonia Report, AS Modelling & Data Ltd said these (being "modelled" and not "measured") "cannot be considered valid"; and (source data being commercially confidential) "must be assumed to be inadmissible for planning decisions". Those cogent observations stand unrebutted. On an examination which is "suitably exacting" (Wyatt at §9(4)), the Court cannot "satisfy itself" as to "the lawfulness of the authority's consideration of the scientific soundness of the appropriate assessment" (Wyatt at §9(2)). And there is a demonstrable flaw or unexplained gap in the reasoning (Finch §56).

58. I have been unable to accept these submissions. On this part of the case, I agree with Mr Riley-Smith and Ms Davies. The APIS background levels in HRA2 use the designated source for the baseline position, from which Post-APIS Projects were identified at Step 4. They feature in published Guidance, endorsed by Natural England. The language of "valid" and "inadmissible" were in a report, itself using APIS data, itself for the planning process. The Marches letter of objection addressed the revised Ammonia report but did not contest the APIS background levels. Marches appended five APIS reports, on which they (and Mr Wolfe KC) relied, to show current exceedances of the critical loads and levels (§46 above). No case has been built – or evidenced – as to why APIS background levels lacks "scientific soundness"; still less so as to be unlawful; nor with what supposed alternative. The Council did not fail to carry out a lawful appropriate assessment before granting the permission although it carried out an in-combination assessment of those impacts by using APIS background levels. On this first part of Issue (3)(ii) the claim fails.

The Post-APIS Projects Point (Issue (3)(ii) Part 2)

59. Here is the essence, as I saw it, of the second distinct argument of Mr Wolfe KC, Mr Lockley and Mr McCay. Members were told that the project "alone, or in-combination with any other projects, would not result in adverse effect on site integrity" (OR3 §6.6.7). But Ms Milburn (at Step 4) identified only Painsbrook Farm and Burlton Lane Farm as relevant Post-APIS Projects. Her error was fixating on projects needing new planning decisions and excluding projects needing new EP decisions. Historically, planning permissions in Shropshire have not limited the numbers of birds at IPU projects, but EPs have. When an enlarged IPU project needs a varied EP but not a new planning permission, the project brings new "cumulative effects", which are capable of being "identified for meaningful assessment" (cf. R (Together Against Sizewell C Ltd) v SSESNZ [2023] EWCA Civ 1517 [2024] Env LR 22 at §60). The enlarged project presents exactly the same real-world peril to the protected habitats (ammonia in the air). Real-world proliferation concerns lie behind the Guidance. Step 4 brings in projects not included in the APIS background levels, and the language of "consent" includes a new or varied EP. That means the Council failed to follow its own guidance. The HRA duty, to assess likely significant effects "in combination with other plans or projects" (reg.63(1)(a)), is broad and unqualified. That means the Council misdirected itself as to its statutory duty. The Claimant drew attention to the proliferation of IPUs. The Marches objection listed "applications for new or varied [EPs] for poultry installations within 10km of the application site since 2020". Ms Milburn's reasoning (OR3 §4.1.6: §51 above) squarely, but incorrectly, relied on a parallel control regime. Points made in Ms Milburn's witness statement evidence cannot alter that. That would be impermissible contradiction, changing the advice to the Committee (cf. R (Watermead Parish Council) v Aylesbury Vale DC [2017] EWCA Civ 152 [2018] PTSR 43 at §35; R (United Trade Action Group Ltd) v TFL [2021] EWCA Civ 1197 [2022] RTR 2 at §125). There was no lawful or reasonable basis for having narrowed the Step 4 enquiry to confine it to Post-APIS Projects with a new planning decision. On an examination which is "suitably exacting" (Wyatt §9(4)), the Court cannot "satisfy itself" as to "the lawfulness of the authority's consideration of the scientific soundness of the appropriate assessment" (Wyatt §9(2)). There was a clear lacuna (Wyatt §9(10)). There was also a demonstrable flaw in the reasoning constituting public law unreasonableness (Finch §56).

60. In response, Mr Riley-Smith and Ms Davies submitted, in essence as I saw it, as follows. Ms Milburn's approach involved each application that could act in combination with the proposed development being considered in detail, which cannot have been the wrong approach. Ms Milburn made a reasonable evaluative judgment, as to why the separate EP regime applying a different approach was not an appropriate comparator. Her approach is supported by the 2023 Guidance and by national guidance from appropriate statutory bodies. Information about EP projects would not allow for a reasoned conclusion. It exemplifies the vice of limitless study which might yield possibly useful information (see RSPB at §§22, 88). There was, and is, no credible evidence of any real, rather than hypothetical, risk (see R (Boggis) v Waveney DC [2009] EWCA Civ 1061 at §37). There was no legal error. But even if there was, it lacked materiality.

61. Materiality is distinct (§62 below). I start with legal error in the Step 4 exclusion of EP projects (§§49iii-v, 51 above). On this question, I have been persuaded by the

Claimant's submissions. Nobody showed me any authority on point. Here are my reasons:

i) The HRA duty (appropriate assessment) is expressly framed by reference to likely significant effect "in combination with other plans or projects" (reg.63(1)(a)). The wording and purpose is that real-world in-combination impacts are confronted. Each project may – if viewed in isolation – be assessed as benign and granted consent. Environmental protection is about real-world effects and the environmental reality takes effects of plans and projects when viewed together. Established projects are factored into APIS background levels. The function of Step 4 is to bring in other relevant plans or projects. Nothing in reg.63(1)(a) – or in Article 6(3) – limits "other plans or projects" to those with which the individual competent authority is concerned. Take a geographical divisional of labour. Suppose a designated site near the border of two LPAs. APIS background levels will include established projects from both sides of the border. Each LPA must consider Post-APIS Projects in its neighbouring LPA's area. Now take a vertical division of labour. Smaller IPU projects get consent from one body. Bigger IPU projects get a different consent from another body. Each body would need to consider Post-APIS Projects within the decision-making scope of the other. Otherwise, there would be a lacuna. Real-world, in-combination effects would be missed. To the habitat and its species, there is no material distinction based on who hands out the permit. As Jay J said of the unlawful failure of in-combination aggregation in <u>Wealden</u> (at §§93, 108), "the nitrogen dioxide is the same".

ii) Ms Milburn's helpful witness statement gives the concrete example of Huffley Farm (§38 above), with its open-ended July 1994 planning permission (no restriction as to the number of birds). Huffley Farm had an EP, restricted to 160,000 birds. It then obtained an EP variation on 25 February 2021 (ref. SP3636MN) for an increase to 170,000 birds (as it happens). That is a real-world expanded project. It is a project for which the Council previously gave planning permission. The real-world effects of increased ammonia from new IPUs at Huffley Farm in fact fall within the scope of an extant planning permission from the Council. Huffley Farm's old EP-permitted 160,000-bird operation was factored into the APIS background level. If the Huffley Farm increase from 160,000 to 170,000 birds had pre-dated the cut-off (31 December 2020), it too would have factored into the APIS background level. Inclusion in the APIS background level is not about who gave the permit.

iii) Viewed in this regulatory and environmental protection context, I am unable to accept that an LPA acts lawfully when it excludes consideration of real-world increases in ammonia from Post-APIS Projects, just because expanded IPU projects needed a new EP decision rather than a new planning permission. Yes, the Guidance applies only where the Council is itself dealing with an application for planning permission. But the natural and ordinary meaning in the statutory context of Step 4 of the 2023 Guidance (§50 above) is not confined to projects involving a new or varied planning permission. The language at [i] is "consent", not planning permission. The language at [iv] is unqualified: "Projects that are not in the current APIS background". The "ecology team" can advise. This is what Natural England approved. Even consulting "the Local Planning Portal" to find "details of other ammonia sources" (cited by Ms Milburn's witness statement from Natural Resources Wales's GN 020) would find Huffley Farm. The purpose of Step 4 is to identify relevant projects not included within the APIS background level, because they are too recent. All of which fits with the statutory provisions. It also fits with the proliferation concerns (§1 above).

iv) Mr Riley-Smith claims support in "national guidance" and Ms Milburn's witness statement says her "separation" of EPs is "reflected" in NPPF §201 about parallel control regimes (§3 above). This reasoning is legally flawed. The existence of a parallel control regime – or another competent authority – is not a basis for confining and limiting the scope of an assessment which the LPA is statutorily obliged to conduct. Still less, where the whole point is to identify real world, in-combination effects. If each competent authority or species of competent authority considers only its own consented projects, there will be a disjointed habitats lacuna, in a holistic-effects protection regime. The idea that the EA is left to protect habitats would also be inconsistent with evaluating North Farm, or including Painsbrook Farm or Burlton Lane Farm. They all have or would need EPs. Ms Milburn's approach did not involve each application that could act in combination, but each planning application. That is the wrong approach. It is not a question of another regime as a "comparator", but other project as ammonia contributors.

v) I certainly accept that there are practical and evaluative decisions to be made as to how to identify and include other projects which are Post-APIS Projects. Each project can have its own nature, size and design; and its own mitigation measures. There may or may not be available screening or assessment documents. Practical decisions will have to be made about the limits of a reasonable enquiry. But this fits with what has been called proactive collaborative working between competent authorities with overlapping regulatory responsibilities (River Action §141). Evaluative judgments will have to be undertaken. Caution is needed, to avoid double-counting. Ms Milburn helpfully illustrates how 64,000 birds at Painsbrook Farm are within the planning permission of 24 May 2023 (22/03828/EIA), so the new EP of 18 December 2023 for 96,000 birds is a further 32,000 birds, which would need a new planning permission. Ammonia counts once. Some evaluative judgments may need to be reasonably broad-brush. Practical decisions and evaluative judgments belong to the Council, its planning ecologist and its planning officers, as to which the judicial review court affords a principled respect and exercises a principled restraint (Wyatt §9(1)-(3)). Here, there is clear contemporaneous reasoning (§51 above). It relied on the EP Regulations as "a separate system". This reasoning was confining the enquiry to Post-APIS Projects requiring new or varied planning permission. That was an error of law.

vi) There is no absence of credible evidence of real risk. The HRA2 methodology and Ms Milburn's Step 4 recognise the importance of bringing in a Painsbrook Farm and a Burlton Lane Farm, because such projects may matter. That is the point of in-combination assessment. Ms Milburn's reasoning recognised the idea of projects needing a new or varied EP, since that it what she was deliberately excluding. If that exclusion was unlawful, the environmental protection objectives of appropriately assessing "in-combination" effects were undermined by an error of law. There was an unlawful lacuna. My conclusion that the approach to Step 4 involved an error of law in excluding Post-APIS Projects subject to EP but not planning decisions. That means the claim must succeed on this second part of Issue (3)(ii), unless the error of law lacked materiality.

The Materiality Point (Issue (3)(ii) Part 2 cont.)

62. Ms Milburn's witness statement evidence seeks to assist the Court as to the practical implications of the exclusion of EP decisions at Step 4. She describes her enquiry to identify relevant EP decisions, and has found Huffley Farm. She then sets out how her factual information fits with the objectively-identifiable criteria in Step 4 of the 2023 Guidance. I proceed with caution. But such evidence may be appropriate and reliable. Ms Milburn has identified projects which involved EP variations but no expansion in numbers of birds at the IPUs. She makes an important geographical point, about the need for projects to be within 10km from the Ramsar Site (see OR3 §4.1.6), rather than within 10km of the planning application site (the list in the Marches letter of objection). This geographical point rests on an objectively-identifiable criterion within Step 4. Ms Milburn then makes a temporal point, about the cut-off (31 December 2020) for Post-APIS Projects. That date is another objectively identifiable feature of the methodology. But the evidence here goes off the rails. It changes the way Post-APIS Projects are described. The underlining below is emphasis added:

i) Ms Milburn's witness statement says "I screened out the permits that were determined before December 2020 (as any impacts from these will be in the APIS background) …" That includes Huffley Farm (increase from 160,000 to 170,000 birds) with its EP variation of 25 February 2021. It excludes Red House Farm and Ensdon Farm, each of which (Ms Milburn's identifies) obtained an EP variation in October 2020. Ms Milburn does not tell me how many birds were added in the expansions at those farms. Nor when the expanded projects became operational. If any of the parties held that information, it was not disclosed to the Court.

ii) I can find no evidence to support an assertion that a Red House Farm or an Ensdon Farm would be "in the APIS background" by reason of having its EP "determined" before 31 December 2020, if it were not yet operational. The Marches letter of objection spoke of when a relevant development "commenced operation". Material from APIS says: "Typically, emission sources are considered to be in APIS background if they were operational by 31 Dec of the mid-year within the three-year average". When I look to the objectively-identifiable criteria, Step 4 within the 2023 Guidance (§50 above) says at [iv]:

> ***If projects started operating, or were given consent, after 31 December of the second year of the current three-year APIS average they will not be in the background and will, therefore, need to be taken into account in an in-combination assessment.***

Ms Milburn's own Step 4 (§51 above) was:

> ***ARE THERE ANY OTHER PROJECTS OR PLANS THAT TOGETHER WITH THE PROJECT BEING ASSESSED COULD AFFECT THE SITE (PROVIDE DETAILS)? Yes. Planning applications pending a decision, permitted developments yet to be built and permitted developments which came into use after the last update of the APIS background levels which would give rise to ammonia emissions/nitrogen deposition on the above designated sites.***

iii) Ms Hamilton's witness statement (6 March 2025) for the Claimant says inclusion in the APIS background depends on whether a project was "operational" by 31 December 2020. She also describes the sort of case in which it may be expected to matter: if an EP were granted on, say, 1 September 2020, it might take several months for the operator to put in place the measures needed. There has been no factual rebuttal. It is a description which would fit with Red House Farm and Ensdon Farm (EP variation on October 2020).

iv) Mr Riley-Smith makes a submission. He says this point – about the need to look not "at granted permits" but "at whether those permits were operational" – does not present credible evidence of a real risk (Boggis §37) and exemplifies the vice of limitless study which might yield possibly useful information (see RSPB at §§22, 88). I am unable to agree. Ms Hamilton's point was answering Ms Milburn's description. Each was addressing what would have been included within the parameters of the methodology. It is Ms Hamilton whose description fits Step 4.

v) That leaves a point about the headroom between the CPCs (0.159%, 0.684%, 0.135% and 0.101%) and the 1% threshold (Stage 9). Ms Milburn expresses the view that this headroom would comfortably allow for the Huffley Farm 10,000 birds, viewed against the 312,000 birds (North Farm, Painsbrook Farm and Burlton Lane Farm) for Fenemere and the 262,000 birds (North Farm and Painsbrook Farm) for Hencott. I am in no position to evaluate bird numbers and distance from Ramsar Sites. And this evidence cannot assist me, once the focus moves beyond Huffley Farm, because the wrong temporal line has been taken.

vi) I am unable to agree with Mr Riley-Smith and Ms Davies that the legal error was "immaterial": first, at common law (that the same decision was inevitable); or secondly, under s.31(2A) of the Senior Courts Act 1981 (that it is highly likely that the outcome would not have been substantially different). I prefer that sequence (seen also in R (Strack) v SSEFRA [2024] EWCA Civ 420 [2024] PTSR 1728 at §§94, 116). Huffley Farm alone has been included, using a changed temporal criterion, leaving aspects unanswered and unevidenced. On questions of materiality, it is the defendant who bears the onus. It is right to focus on an objective assessment of the decision-making process (Pearce v SSBEIS [2021] EWHC 326 [2022] Env LR 4 at §152), rather than trying to "predict what the public body would have done" in a "hypothetical … world" (R (Bradbury) v Brecon Beacons National Park Authority [2025] EWCA Civ 489 at §74).

63. On this second part of Issue (3)(ii) I find that the Council failed to carry out a lawful appropriate assessment before granting the permission, failing to carry out a lawful in-combination assessment of the development's impacts, because of a material error of law in excluding Post-APIS Projects subject to EP but not planning decisions.

The Air Scrubbers Point (Issue (3)(iii))

64. Issue (3)(iii) is whether the Council failed to carry out a lawful appropriate assessment before granting the permission by assuming incorrectly that the development's air scrubbers would be continually operational. Mr Wolfe KC, Mr Lockley and Mr McCay argued in essence, as I saw it, as follows. The Ammonia Report (13 October 2023) used ammonia modelling, recording that "the modelling … assumes that the scrubbers are

100% operational". In the real-world, that would not be the case. Planning Condition 3 recognised situations in which "operation … is not possible, such as plant breakdown". The Marches objection pointed out: "A worst-case scenario, to provide the certainty required by the Habitat Regulations, would have allowed for underperformance and breakdown of the air scrubbers". HRA2 and the planning ecologist's advice (OR3 §4.1.6) accepted and relied on the modelling data, recording that "the scrubbers should be operational and maintained in accordance with manufacturer's recommendations". This breached the Wyatt §9(10) standard requiring that an appropriate assessment "cannot have lacunae", must be "complete" and remove "all reasonable scientific doubt". And the position cannot legitimately be saved by inadmissible witness statement evidence about planned expeditious changing of scrubbers in the event of a breakdown.

65. I have been unable to accept these submissions. On this part of the case I agree with Mr Riley-Smith and Ms Davies. Nobody – the Committee, planning officers or the planning ecologist – was "assuming incorrectly" that the air scrubbers would be continually operational. The absence of any such assumption underpinned Planning Condition 5. The required scheme necessitates procedures minimising the time to deal with a breakdown (and the witness statement evidence is a benign practical explanation of what is already obvious). It was relevant modelling which assumed continual operation. That was known and understood. There was an appreciation of the difference made by air scrubbers. There was no Swire unreasonableness or Wyatt unlawfulness in not requiring further modelling based on possible down-time. There was no unlawful lacuna or incompleteness. The Council did not fail to carry out a lawful appropriate assessment before granting the permission, although relevant modelling assumed that the development's air scrubbers would be continually operational. On Issue (3)(iii) the claim fails.

Conclusions

66. I have found in favour of the Council and the Interested Party, as follows. (1)(i) The Council carried out a legally adequate assessment of the effect of the spreading of raw manure on third party land. (2) The Council lawfully imposed a condition to prevent the spreading of raw manure on land, reasonably suitable to address its gap-closing objective. (3) The Council did not fail to carry out a lawful appropriate assessment before granting the permission although (i) it determined the significance of some of the development's impacts by reference to thresholds, (ii) it carried out an in-combination assessment of those impacts by using APIS background levels, and (iii) relevant modelling assumed that the development's air scrubbers would be continually operational. The claim fails on those points.

67. I have found in favour of the Claimant, as follows. (1)(ii) Having failed to address the legal criteria of causation and capability of reasonable assessment, the Council failed to carry out a legally adequate assessment of the effect of the spreading of digestate on third party land. (3)(ii) The Council failed to carry out a lawful appropriate assessment before granting the permission, failing to carry out a lawful in-combination assessment of the development's impacts, because of a material error of law in excluding Post-APIS Projects subject to EP but not planning decisions. The claim succeeds on those points. I propose to quash the grant of planning permission.

Order

68. The parties were agreed as to the appropriate order, having received this judgment in draft. No further matters was raised. I will order: (1) The Claimant's claim for judicial review is granted. (2) The planning permission granted on 16 May 2024 with reference in 17/05151/EIA is quashed. (3) The Council shall pay the Claimant's costs of £35,000.