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## **Habitats Assessments**

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Habitats Assessments  
R (Wyatt) v Fareham Borough Council  
[2022] EWCA Civ 983

The Court of Appeal has confirmed the limited role of courts in reviewing assessments made by authorities under the Habitats Directive and noted that the precautionary principle in this context does not require absolute certainty that all risks can be avoided. Permission for a development near the Solent was challenged on the basis of its potential adverse effect on a nearby Special Protection Area, vulnerable to harm from excess nutrients entering the water system. The challenge failed at first instance (see (2021) 206 SPEL 92) and the appeal was also unsuccessful.

#### Issues and Decision

Sir Keith Lindblom set out a number of key points that he felt emerged from the wealth of case-law in this area. He noted that carrying out the assessment required under the Habitats Directive was a task for the authority responsible for authorising a project, not the courts, whose role was simply to ensure that the authority acted lawfully. In doing so, the court should not undertake an alternative assessment but apply standard public law principles in reviewing the authority's decision, respecting the expertise of the authority and of the expert bodies it was required to consult. The assessment had to be carried out in compliance with the precautionary principle and the project could be authorised only where it was beyond reasonable doubt that there would be no adverse effects. However, adherence to the precautionary principle did not require absolute certainty, nor always a consideration based on a worst-case scenario. The assessment of the scientific evidence and of whether there was reasonable doubt would always be a matter of judgment in a particular case.

Applying this approach, the court did not consider that the planning authority had failed to meet its legal obligations. It had made rational choices that included application of the precautionary principle and the way it exercised its judgment did not fall foul of the unreasonableness or irrationality test that would justify judicial intervention.

The relevant guidance published by Natural England, dealing with estimating nutrient loads entering the water system, was also called into question, but the status of such guidance was emphasised. It did not create any legal requirements or tests, was not mandatory, and even stated on its face that it was "one way" of approaching the issue, not the only means of undertaking the assessment. Since it did not authorise or approve any unlawful conduct, the guidance itself could not be challenged as unlawful.

A separate ground of challenge, arguing that the decision had not been made in accordance with the development plan also failed after detailed consideration of how the plan had been presented and discussed.

#### Comment

When decisions based on assessments made under the Habitats Directive are challenged, the courts have repeatedly shown their reluctance to become involved in any discussion of the substantive issues. Methodology, guidance and assessment of the scientific evidence are all matters to be left in the hands of the relevant authorities, who are entitled to considerable deference in view of their expertise, and only when there are procedural flaws or an authority can be shown to have acted unreasonably will the court intervene. The task facing any party challenging a decision is a heavy one.

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