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## Precautionary Principle

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Precautionary Principle  
*R (Wyatt) v Fareham Borough Council*  
[2021] EWHC 1434 (Admin)

The grant of planning permission for a development was challenged on the basis that an insufficiently precautionary approach had been taken on the issue of nitrate pollution. This argument was rejected by the court which examined what the precautionary approach required in the face of uncertainty of the impact on the environment.

#### Background and Argument

The approval of development around the Solent has been severely restricted because of the adverse effect of increased nitrogen deposits (e.g. through wastewater and run-off) on the region's Special Areas of Conservation and Special Protection Areas. These are already suffering because of high nitrogen levels promoting excessive algal growth, damaging the features which the legal designations are seeking to protect. The restrictive approach is required in line with the "*Dutch Nitrogen case*" (Case C-293/17) that reiterated the obligation on authorities to protect such conservation areas, including from the impact of raised nutrient levels that alter the existing habitat.

In this case planning permission was granted for eight houses but challenged on several grounds. The most significant related to the claim that the assessment of the "nitrogen budget" had not been undertaken on a sufficiently precautionary basis. This claim rested on the use of average figures on the occupancy of houses to determine the likely contribution of the site to nitrogen levels through additions to the wastewater system and on the level of uncertainty over various elements of the development's impact.

#### Decision

The court agreed that a precautionary approach did have to be adopted and that establishing with sufficient certainty the absence of an adverse effect on protected areas was a pre-condition of granting permission for this site. Such an approach was embedded in the relevant planning advice from Natural England, calling for precautionary rates to be adopted for the variables in the nutrient budget calculations and a further precautionary buffer to be added as well. That advice had been followed, but if it was legally flawed, decisions based on it could not survive. The court considered, though, that weight should be given to the views of the expert bodies, exercising its own supervisory role on the basis of standard tests for judicial review.

Here it was held that the approach taken could not be viewed as inappropriate. The claimant's argument, it was said, ultimately amounted to claiming that the presence of any scientific uncertainty should prevent all decisions in favour of development. Instead, the uncertainty was to be addressed by applying precautionary rates to key variables, allowing reasonable scientific certainty to be reached that there would not be adverse outcomes. That was the role of the precautionary principle. The average figures chosen here could not be impugned and a further cushion was provided by the additional buffer that also had to be taken into account. In view of its supplementary role, the fact that there might be uncertainty over how the size of that buffer was determined did not prevent the overall approach being seen as sufficiently precautionary.

#### Comment

The meaning and impact of the precautionary principle is a long-standing matter of debate. This case confirms the courts' reluctance to get drawn into such arguments and the deference given to

the advice of expert bodies. Absolute certainty is usually impossible in dealing with the natural world, but the courts' view of precaution does not require the avoidance of all risk. So long as there is a justification for the assertion that precaution has shaped the official approach, it will be a high hurdle to show that decisions are unreasonable or irrational.

An overlapping case dealing with another small development also failed to the extent that it relied on the same main arguments. However it succeeded on the basis that certain documents had not been made properly available in advance of a key meeting of the council's planning committee as required by statutory rules (*R (Save Warsash and the Western Wards) v Fareham Borough Council* [2021] EWHC 1435 (Admin)). It is easier to persuade a court to intervene in the familiar territory of procedural flaws than on the less travelled ground of scientific argument and precaution.

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