



Casework Summary Report

Case Number (if relevant): CMS-379

Description: Compliance with obligations imposed on the Secretary of State for Environment, Food and Rural Affairs under the Nitrate Pollution Prevention Regulations 2015 (the 'Nitrate Regulations').

Case Overview

Background/Complaint Summary

The OEP received a complaint alleging a number of failures by the Environment Agency (EA) and the Department for Environment, Food and Rural Affairs (Defra) regarding the regulations together known as the Agricultural SIs¹. During our assessment of this complaint, the OEP identified additional concerns regarding compliance with monitoring and reporting obligations imposed on the Secretary of State for Environment, Food and Rural Affairs (referred to as Defra Secretary of State) under the 'Nitrate Regulations', as well as the legal basis for offering derogations under the same regulations.

The Nitrate Regulations are the primary means by which the EU Nitrates Directive (Council Directive 91/676/EEC) was implemented in England. The aim of the Directive is to reduce the amount of nitrates from agriculture entering waters from agricultural sources, through an Action Programme of controls on the use and management of manures and fertilisers in areas designated 'nitrate vulnerable zones' (NVZs).

The Nitrate Regulations places a number of duties on the Defra Secretary of State to monitor the effectiveness of the restrictions introduced through the Regulations², to review the extent to which the objectives of the Regulations have been achieved and to review the extent to which they remain appropriate³. The Secretary of State must also publish a report of the review, the first of which was due before 31 March 2020.

Under Regulation 40A of the Nitrate Regulations, the Secretary of State must also prepare a report on the implementation of these Regulations for each relevant period. The first report under Regulation 40A is due by 30 June 2024. However, this replaces previous obligations to submit reports to the European Commission under Article 10 of the Nitrates Directive.

¹ The Agricultural SIs include the Nitrate Pollution Prevention Regulations 2015 ("the Nitrate Regulations"), the Water Resources (Control of Pollution) (Silage, Slurry and Agricultural Fuel Oil) (England) Regulations 2010 and the Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018, known as the Farming Rules for Water (FRfW).

² Regulations 36(7) and 39, The Nitrate Pollution Prevention Regulations 2015

³ Regulation 40, The Nitrate Pollution Prevention Regulations 2015

Periodically undertaking evaluation of legislation and reporting on the findings is important to see in good time whether the law is working as intended and to allow for wider scrutiny. In this case, it is also a legal requirement.

Additionally, the OEP identified concerns regarding the offering of derogations in relation to the amount of nitrogen which can be applied to land. The EU Nitrates Directive introduced a legal limit of 170 kg nitrogen per hectare per year to be applied to land in NVZs. Previously, it was a requirement to inform the European Commission if a Member State is to allow a different amount of nitrogen to be applied, and to set out a justification on the basis of criteria which will be assessed by the Commission.

The Commission issued Decision 2013/781/EU on 31 December 2016 which allowed the application of livestock manure in the UK up to a limit of 250 kg nitrogen per hectare per year, under certain conditions. This was applied in England through Regulation 36 of the Nitrate Regulations. Under this regulation, land managers can apply to the EA for a derogation in a case where 80% or more of the agricultural area of the holding is sown with grass. Derogations have been granted on an annual basis since the introduction of Regulation 36. This decision expired in 2016 but it was not clear what the legal basis was for continuing to offer derogations after that time.

OEP Actions

The OEP requested information from Defra including details of steps taken to meet current monitoring, review and reporting obligations under the Nitrate Regulations as well as historic obligations under the relevant EU legislation. We also asked for copies of reports submitted to the European Commission as well as those which are required to be published under the Nitrate Regulations. The OEP also requested details of the legal basis for offering grassland derogations following the expiry of the relevant Commission Decision.

Conclusions and Outcomes

From the information returned, the OEP determined that Defra may have failed to comply with environmental law in relation to the continued authorisation of grassland derogations following the expiry of Commission Decision 2013/781/EU on 31 December 2016. This is because between 1 January 2017 and 31 December 2020, it appears that Defra continued to authorise grassland derogations in the absence of a legal basis to do so. Between 2017 and 2020, there was no legal basis in domestic law for granting such authorisations and the Commission did not grant a further derogation following expiry of the 2013 Decision on 31 December 2016.

However, following EU Exit, the Floods and Water (Amendment etc.) (EU Exit) Regulations 2019/558 amended Regulation 36 of the Nitrate Regulations so that from 1 January 2021, there is a legal basis in domestic law for Defra to continue to grant authorisations for grassland derogations. This is therefore a historic failure that no longer has relevance to domestic legal arrangements in England concerning the authorisation of grassland derogations. In view of this, the OEP has decided not to take further action in relation to this aspect.

In relation to monitoring and reporting obligations, the information returned to the OEP confirmed the Defra Secretary of State did not meet his obligations to review the regulations, and publish a report of that review, under Regulation 40 of the Nitrate

Regulations by 31 March 2020. However, Defra is now progressing a post-implementation review of the Nitrate Regulations and has committed to publishing the relevant reports later this year.

From the information provided and publicly available information we determined there is no indication of a serious failure to comply with historical obligations to monitor and report to the European Commission on implementation of the Directive under Article 10.

In accordance with our Strategy and Enforcement Policy, we will be monitoring the Secretary of State/Defra's compliance with reporting requirements under Regulations 39, 40 and 40A going forward.