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Please ask for Mr Harris

Our ref: AJH/Latchmore

Your ref:

28 May 2012

Dear Sirs

Proposed claim for judicial review

1) To the defendants:

Mr S Hodgson, Chief Executive, Forest Enterprise England
Miss A Barnes, Chief Executive, New Forest National Park Authority
Mr D May, Official Verderer, New Forest Verderers
Mr D Webster, Acting Chief Executive, Natural England

2) Claimants

Professor John Shepherd, Postbox Cottage, Blissford, Fordingbridge, SP6 2HY
Ms Fiona Macdonald, Holly Cottage, New Road, Mockbeggar, Ringwood, Hampshire BH24 3NJ

3) With reference to the Latchmore Brook Wetland Restoration Project

4) The matter being challenged

As you are aware from recent correspondence, Professor Shepherd and others, representing the Friends of Latchmore action group, oppose your decision to undertake and proceed with the Latchmore Brook wetland restoration project without having undertaken any site-specific assessments of the ecological and hydromorphological status of the Brook, or any comparative assessments of the risks and benefits of alternative methods (including doing nothing) for remediating any problems that such surveys might have discovered. The project involves importing 10 000 tons of gravel to fill in much of the existing stream bed in order to relocate it to an alternative course a few yards away and is clearly a potentially damaging operation.

Professor Shepherd has repeatedly asked for

- a) detailed reports and documentation of any site specific investigations which you have been unwilling or unable to produce
- b) answers to 25 questions put to the Official Verderer and the other partners of the New Forest HLS scheme in a letter dated 25 February 2012 which you have failed to provide
- c) an assurance that you would suspend further work (due to be resumed in July 2012) which you have repeatedly refused, most recently in a letter dated 30 April 2012 to

Professor Shepherd from Mr K Penfold, Acting Deputy Surveyor, Forestry Commission.

I have therefore been instructed by the claimants listed above to inform you that it is their intention to lodge a claim for judicial review of the following matters:-

5) **The Issue**

The question at issue is whether or not a generic Environmental Impact Assessment of an area as large and diverse as the New Forest is a satisfactory basis for deciding whether or not, to what extent, and in what manner to attempt to determine and undertake work to remediate any deficiencies in the hydromorphological and ecological status of specific watercourses and wetlands, such as the Latchmore Brook. The claimants maintain that a generic assessment is inherently an inadequate basis for such decisions, and therefore seek to challenge the following specific decisions:

- a) **The decision** by the voting members of the Board of the New Forest Higher Level Stewardship (HLS) Scheme to proceed with major reconstruction works i.e. the Latchmore Brook wetland restoration project, within the New Forest (being a protected area under UK and EU legislation) as part of the New Forest HLS Scheme without appropriate site-specific environmental impact or comparative assessments of the likely damage or benefits, contrary to UK & EU legislation and DEFRA guidance for the management of Sites of Special Scientific Interest. This decision appears to be undocumented but to have been taken early in December 2011.
- b) **The decision** by Natural England to delegate all survey and assessment work to the Forestry Commission, the principal operational agent of the Wetland Restoration component of the HLS Scheme, without ensuring that appropriate site-specific environmental impact or comparative assessments of the likely damage or benefits were undertaken by the Forestry Commission, and to give their consent to the project in the absence of any such relevant information. The date of this decision is not known.

We are aware that the dates of some of the decisions being challenged may fall outside the normal time limit for claims for Judicial Review, and intend to submit an application for waiver of the time limit on the grounds that the decisions were not publicised and that the claimants were not aware of these decisions until they received information from the Forestry Commission in late March and early April 2012.

The grounds for these challenges are:

That the New Forest is a highly protected environmentally sensitive area, being:

- 1) a Site of Special Scientific Interest under the Wildlife & Countryside Act 1981 and the Natural Environment and Rural Communities Act 2006
- 2) a Special Protected Area under the EU Birds Directive 1979 ([EC Directive on the conservation of wild birds \(79/409/EEC\)](#))
- 3) a Special Area for Conservation under the EU Habitats Directive 1992 ([Council Directive 92/43/EEC on the Conservation of natural habitats and of wild fauna and flora](#))
- 4) a designated wetland site of international importance under the Ramsar Convention on Wetlands (http://www.ramsar.org/cda/en/ramsar-home/main/ramsar/1_4000_0)

All of this legislation imposes specific requirements, and also a general duty of care, on all persons and organisations, to preserve and protect the general environment, habitats, flora and fauna of areas protected by it. This includes a duty to ensure that activities undertaken within such areas do not significantly or unnecessarily damage these attributes of the protected areas.

This duty is generally discharged by undertaking comparative assessments of risks and benefits, and environmental and ecological impact assessments of proposed activities, as required by the EU Environmental Impact Assessment regulations (<http://ec.europa.eu/environment/eia/home.htm>) and

the Strategic Environmental Assessment Directive, implemented in the UK by the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004 No. 1633). The conditions under which such assessments are required are specified in the UK by the Conservation of Habitats and Species Regulations 2010, SI No. 2010/490).

In the case of the wetland restoration projects (and specifically the Latchmore Brook project) being undertaken under the New Forest Higher Level Stewardship Scheme a generic Environmental Impact Assessment (EIA) for the whole of the New Forest was published in 2006. However, the New Forest is a very diverse environment composed of 584 distinct SSSI units, and wetland habitats are moreover universally recognised as being highly site-specific. The generic EIA of 2006 contains no assessment of the environmental problems, or the likely risks and benefits of any specific restoration measures, for any specific locations, and makes no mention of the Latchmore Brook in particular. It is therefore wholly insufficient as a basis for any decisions on the adequacy or appropriateness of any specific works in any specific location.

In the absence of any site-specific comparative assessments of risks and benefits, and environmental and ecological impact assessments of proposed restoration activities, there is no rational basis for deciding whether or not such activities are necessary, permissible or desirable, or for deciding whether or not to grant consent for such activities to take place.

The claimants submit that the decision not to undertake such site-specific assessments was both irrational and illegal since it contravened the Conservation of Habitats and Species Regulations 2010 (SI No. 2010/490) section 21, and that all subsequent decisions by the HLS partners to proceed with and by Natural England to consent to projects involving such wetland restoration works in the absence of such assessments are similarly illegal, irrational and unreasonable.

6) The action that the defendant is expected to take

The remedies that will be sought are as follows

- a) An injunction preventing further work on the Latchmore Brook project with immediate effect.
- b) A prohibitory order preventing resumption of further work on the Latchmore Brook project unless and until all necessary site-specific comparative and environmental impact assessments have been undertaken, completed and published, and the results of these assessments demonstrate that restoration is necessary and desirable, that the proposed means of restoration is reasonable and justifiable, and that the benefits would exceed the damage done.
- c) A mandatory order requiring the Partners of the New Forest HLS Scheme to carry out and publish necessary and appropriate site-specific comparative and environmental impact assessments for all present and future wetland restoration projects within the New Forest, and ensure that all plans for such projects conform to the outcome of such assessments provided that they demonstrate that restoration is necessary and desirable and that the benefits would exceed the damage done, and that the plans are designed to minimize the damage and risks to the environment, habitats, flora and fauna of the areas concerned.

7) The details of the legal advisers, if any, dealing with this claim

Mr. Anthony Harris of Anthony Harris & Company, Elmhurst House, 17 Elm Avenue, New Milton, Hampshire BH25 6HE (reference: 1LAT001)

8) The details of any interested parties

The Secretary of State for the Environment, Fisheries and Rural Affairs, being the parent Department of State of all of the public bodies concerned, is an interested party and has been sent a copy of this letter

9) The details of any information sought

- a) The date on which it was decided not to undertake any site-specific environmental impact or comparative assessment of the likely damage or benefits of wetland restoration projects to be carried out as part of the New Forest Higher Level Stewardship (HLS) Scheme
- b) The date on which Natural England decided to delegate all survey and assessment work for HLS wetland restoration projects to the Forestry Commission, although no site-specific survey or assessment work had been undertaken or was planned
- c) All documents, reports, minutes of meetings, correspondence and emails relating to the evidence supporting a rational basis for these decisions

10) **The details of any documents that are considered relevant and necessary**

- a) Copies of all detailed and definitive maps and plans of the proposed works on the Latchmore project, including the final versions.
- b) Copies of all the main contracts for the work.
- c) Copies of documents recording all decisions to undertake and to proceed with the Latchmore project and confirming that all the partners in the HLS scheme consented to the decisions taken by the voting members of HLS.
- d) Copies of any and all site and species-specific environmental surveys and assessments that may have been undertaken for the Latchmore Brook.
- e) Copies of all formal consents given by Natural England relating to the project, and all documents, reports, minutes of meetings, correspondence and emails relating to the evidence base for those consents.

11) **The address for reply and service of court documents**

Anthony Harris & Company, Elmhurst House, 17 Elm Avenue, New Milton, Hampshire BH25 6HE

12) **Proposed reply date**

The claimants request a response to this letter by 15 June 2012 at the latest. They hope that the meeting now scheduled for 6 June with an independent Hydromorphologist to which they have already agreed will help to clarify the present status of the stream and the need for any remedial work to be done. However there are other issues relating to the assessment of the risks and benefits of any work that may be deemed to be necessary and desirable, and there is insufficient time to resolve these before work is due to be resumed in July. If you are prepared to suspend the work planned for this summer on the Latchmore Brook so that these and the other issues that have been raised can be properly investigated, the claimants will be happy to participate in an alternative means of resolving this dispute such as a substantive mediation process involving independent experts in Hydromorphology, Ecology and Environmental Law.

Yours faithfully

Anthony Harris & Company