



Neutral Citation Number: [2025] EWHC 536 (Admin)

Case No: AC-2024-LON-002553

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**  
**PLANNING COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 10/03/2025

Before :

**Mrs Justice Lieven DBE**

Between :

**THE NATIONAL FARMERS' UNION**

**Claimant**

and

(1) **HEREFORDSHIRE COUNCIL**  
(2) **SECRETARY OF STATE FOR LEVELLING UP,  
HOUSING AND COMMUNITIES**

**Defendants**

and

**RIVER ACTION UK**

**Intervener**

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**Mr Ned Westaway** (instructed by **Shakespeare Martineau**) for **The Claimant**  
**Mr Richard Kimblin KC** (instructed by **Herefordshire Council Legal Services**) for the **First Defendant**  
**Ms Heather Sargent** (instructed by **Government Legal Department**) for the **Second Defendant**  
**Dr David Wolfe KC and Mr Peter Lockley** (instructed by **Leigh Day Solicitors**) for the **Intervener**

Hearing dates: **11 and 12 December 2024**

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## **Approved Judgment**

This judgment was handed down remotely at 10.30am on 10 March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LIEVEN

Richborough

**Mrs Justice Lieven DBE :**

1. This is a challenge to the lawfulness of policy W3 of the Herefordshire Minerals and Waste Local Plan (“MWLP”) brought by the Claimants, the National Farmers Union (“NFU”). The First Defendant is the unitary Local Planning Authority for Herefordshire (“LPA”), the Second Defendant is the Secretary of State (“SoS”) who found the Plan to be sound, subject to the recommended Main Modifications. The Intervener, River Action UK, is a non-governmental organisation concerned in the water quality of river networks in the United Kingdom.
2. The NFU were represented by Ned Westaway. The LPA was represented by Richard Kimblin KC. The SoS was represented by Heather Sargent, and the Intervener was represented by David Wolfe KC and Peter Lockley.
3. The NFU is an Employer’s Association formed and registered under the Trade Union and Labour Relations (Consolidation) Act 1992, representing the farming industry. The NFU is concerned about the serious impact of the policy W3 on the agricultural sector in Herefordshire.
4. The Intervener is a charity that campaigns against river pollution. It has launched campaigns calling for improvements to the water quality in the River Wye, with a particular focus on the recent proliferation of Industrial Poultry Units (“IPU”) in Herefordshire and the resulting increase in volumes of chicken manure which is said to lead to nutrient run-off and thus river pollution. I granted permission for the intervention on 9 December 2024.
5. There are five Grounds which were pursued at the final hearing:
  - a. Ground One: unjustified extension of policies in the MWLP to address agricultural materials that fall outside the definition of “waste” in the Planning Acts.
  - b. Ground Two: irrational and / or improper extension of policy requirements to the whole agricultural unit within which development takes place.
  - c. Ground Three: irrational extension of nutrient neutrality requirements, not supported by Natural England.
  - d. Ground Four: failure to consult the Claimant at Regulation 19 stage, which caused substantial prejudice.
  - e. Ground Five: failure to provide adequate reasons on principal important controversial issues.
6. Ground One in particular somewhat shifted during the course of the hearing. The issues which appear to arise in the case are now:

Ground One:

  1. Does Policy W3 of the MWLP, read with the Glossary, unlawfully extend beyond the definition of “waste” in s.117(1) Planning and

Compulsory Purchase Act 2004 (“PCPA”) and s.336(1) Town and Country Planning Act 1990 (“TCPA”), by reference to the Waste Framework Directive (“WFD”)?

2. Does the exclusion of non-hazardous agricultural or forestry material from the definition of waste only apply when (i) such material does not harm the environment or endanger human health and/or (ii) such material is actually spread on land?

Ground Two:

3. Is Policy W3(1)(b) lawful having regard to the principles in *Newbury v Secretary of State* [1981] AC 578?
4. Does para.6.2.25 of the supporting text apply to the interpretation of Policy W3(3) such that demonstrating nutrient neutrality for proposals on agricultural holdings would be interpreted as applying to the whole agricultural unit?
5. If so, is Policy W3(3) read together with para.6.2.25 unlawful having regard to the principles in *Newbury*?
6. If not, is para.6.2.25 compatible with Reg.8(2) of the Town and Country Planning (Local Planning) England Regulations 2012 (“2012 Regulations”)?

Ground Three:

7. What was Natural England’s position on the extent of justifiable nutrient neutrality controls in the River Wye catchment?
8. Was it irrational and/or unreasoned for the LPA to adopt Policy W3(3), read with the Glossary, in terms which sought nutrient neutrality in areas beyond the River Lugg catchment and including nitrate inputs?

Ground Four:

9. Was the NFU substantially prejudiced by the failure to consult it as required by Reg.18(2) of the 2012 Regulations?

Ground Five:

10. Were legally adequate reasons given in relation to:
  - a. The application of Policy W3 to agricultural waste and/or
  - b. The overlap/duplication with other controls on agricultural management?
7. The first three Grounds all raise a general submission by the NFU that the LPA has illegitimately sought to extend planning control through the mechanism of Policy W3

into areas which are beyond the proper remit of a MWLP. The NFU makes the overarching point that most agricultural activities fall outside the scope of planning control and there are wide permitted development rights for agricultural development. It argues that the LPA has sought, through policy W3, to control the otherwise lawful agricultural methods including the use of manure, and of the operation of livestock units.

8. It is accepted by the LPA that W3 is an unusual policy because it does seek to control the disposal of agricultural waste, but that is lawful and wholly justified on the facts of the case, and in particular the problem that large scale agriculture, especially IPUs, have created within Herefordshire.

### The Policy

9. W3 as adopted states:

***“Policy W3 Agricultural waste management including for livestock units***

*1. Waste management method statements will be required for proposals for livestock unit(s) on agricultural holdings that:*

*a. for non-EIA development, demonstrates that both natural and non-natural wastes generated by the proposed development will be appropriately managed both on and off-site; or*

*b. for EIA development, demonstrates that both natural and non-natural wastes generated by the whole agricultural unit will be appropriately managed both on and off-site.*

*2. Anaerobic digestion will be supported where its use is to manage only natural wastes generated primarily on the agricultural unit within which it is located.*

*3. All proposals for livestock unit(s) and anaerobic digestion and any other waste management proposals on agricultural holdings within the River Wye SAC or the River Clun SAC will be required to demonstrate at least nutrient neutrality.”*

10. The Glossary to the Plan defines “agricultural waste” as:

*“Includes a variety of substances such as pesticides containers, oil and silage wrap, as well as slurry which result from activities including horticulture, fruit growing, dairy farming, livestock breeding, seed growing, grazing and nurseries.”*

11. The background to policy W3 is the river network in Herefordshire and concerns about the water quality in those rivers. This background is set out in a witness statement of Victoria Eaton, a senior planning officer with the LPA.
12. Stretches of the Rivers Wye, Lugg and Clun are Special Areas of Conservation (“SACs”) with substantial portions of their catchments in Herefordshire. This

designation provides the highest level of protection for their conservation features. The water quality within these rivers is a sensitive local issue and a matter of strategic importance within Herefordshire and beyond. There are nutrient targets for the rivers in question.

13. The context for policy W3 is well known locally because of the issue of river pollution. High levels of nutrients cause accelerated growth in certain aquatic plants, resulting in algal blooms and eutrophication. The River Wye and River Clun SACs are particularly affected by this problem. The River Lugg flows into the River Wye and its catchment is part of the River Wye SAC. It is the River Lugg part and the River Clun SAC that are currently exceeding their water quality objectives. The River Clun SAC only covers a small area to the north of Herefordshire. It has serious water quality problems due to both nutrient levels and sediment.
14. In 2010 the conservation status of the River Wye SAC was “unfavourable-recovering”. In 2023 that status was downgraded to “unfavourable – declining”. That category is defined as follows:

*“The feature is not being conserved, and will not reach favourable condition, unless there are changes to the management or external pressures and this is reflected in the results of monitoring over time; with at least one of the mandatory attributes not meeting its target (as set out in the site specific FCT) with the results not moving towards the desired state. The longer the feature remains in this poor condition, the more difficult it will be, in general, to achieve recovery.”*
15. Ms Eaton explains that the decline has been due to high levels of nutrients, primarily phosphates in the Wye, and phosphates and nitrates in the Clun. Nutrients come from a variety of different sources but according to a Natural England and Environment Agency study in November 2021, 66% of the total phosphate load in Upper Wye and Lugg sub-catchments came from agriculture.
16. Significant action is being taken, and Ms Eaton explains that Dŵr Cymru Welsh Water is investing £100 million in wastewater discharges. The point source discharges from wastewater treatment add 83 tonnes of phosphate per year to the water environment, whereas agricultural losses add 225 tonnes of phosphate per year to the water environment. The more improvements undertaken in respect of wastewater, the greater the percentage contribution to the phosphate load from agriculture.
17. In addition to the protected status of the SAC and the legal obligations in respect of its conservation objectives, there is a related development issue. There has been a housing moratorium in parts of Herefordshire which are within the catchment of the failing SACs, because of the legal consequences of the water quality problems.
18. The River Wye Nutrient Management Plan (“NMP”) has been developed between partner agencies, including the LPA, over an extended period. Mr Kimblin stressed the importance for the LPA of the NMP and the role it has in allowing housing development to proceed.

19. In 2014 the NMP and related Phosphate Action Plan were drawn up by a group of stakeholders. This aims to meet the requirements of a Habitats Regulation Assessment to conclude no adverse effects on integrity of the SAC and thus be relied upon as strategic mitigation and development might proceed. The NMP identifies agriculture as the source of the vast majority of diffuse phosphate load in the SAC catchments.
20. In 2018 the *“Dutch Nitrogen Case”* ([C-293/17] and [C-294/17], *Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu v College van gedeputeerde staten van Limburg and Stichting Werkgroep Behoud de Peel v College van gedeputeerde staten van Noord-Brabant*), held that where a site is failing in its water quality objectives there is limited scope for approval of additional damaging effects. This brought an effective halt to new development in areas which were in unfavourable condition in terms of water quality objectives.
21. Subsequently Natural England wrote to Herefordshire Council setting out their position in July and August 2019. The second letter stated that “... *in our view, reasonable scientific doubt remains as to whether the Nutrient Management Plan can provide appropriate mitigation.*” Following this correspondence, Herefordshire Council prepared a position statement titled ‘Current Development in the River Lugg catchment Area’. This was updated in March 2020 by ‘Position Statement – Development in the River Lugg Catchment Area’. This recognised that the River Wye SAC NMP would need to be reviewed.
22. As an interim approach, the River Lugg Position Statement sets out the potential for a positive appropriate assessment that will enable development to proceed. This would be in a situation “*on Natural England’s advice, where it can be demonstrated that development is nutrient neutral (where avoidance / mitigation measures included in the plan or project, counterbalance any phosphate increase from the plan or project), or would lead to ‘betterment’.* Proposals will need to provide appropriate evidence for this.”
23. The interim approach also includes advice in relation to drainage from fields in the red zone (shown on the plan accompanying the Position Statement). This advice concludes that where a number of criteria are met, and there would be no pathway for impacts, there would be no need for further Habitat Regulations Assessment. Also in March 2020, Herefordshire Council published both ‘Guidance Notes and Checklist for applicants / agents relating to HRA and planning applications’ and ‘Frequently Asked Questions Relating to the Development in the River Lugg Catchment’.
24. Ms Eaton sets out that the social and economic consequences of the water quality issues have been substantial in large parts of Herefordshire. This has not just led to a reduction in the development of new homes, but also loss of tax and grant revenue and impacts on the ability to fund infrastructure. House builders have been closely involved in the NMP and the LPA’s work, and have played a significant role in finding mechanisms to bring about neutrality in nutrient inputs from new development.
25. Mr Kimblin relies heavily on this background for the justification for W3, which is accepted to be an unusual policy. He points to the interlocking approach of the LPA in order to achieve development in the County, by working with all stakeholders and by developing both the NMP and the WMLP.

26. It was in the light of this background that the LPA sought to promote policy W3. As part of the preparation of the Publication Draft Plan the LPA commissioned a report from environmental consultants, Hendeca, in March 2020 and subsequently updated. At para 2.4.1 that Report stated:
- “2.4.1 As recognised at paragraph 2.6.30 of the Preparing the Draft Plan Report 2018, it is unusual to include a policy relevant to agricultural waste within a development plan document; however, ‘it is relevant here as Herefordshire is a unitary authority that has a strong agricultural sector.’”*
27. The process of producing a Local Plan is a long and complex one and was made even longer by the Covid Pandemic, which slowed the process down between 2020-21. In August 2017 the LPA produced an Issues and Options consultation. In January 2019 the draft MWLP was published and consulted upon. A regulation 18 consultation was undertaken pursuant to regulation 18 in January – March 2019.
28. On 28 January 2019 the NFU made a consultation response. I will refer to the detail of this and of the various communications with Natural England below under Ground Four.
29. In January 2021 the publication draft MWLP was published. There was regulation 19 consultation between April – May 2021, however the NFU were not consulted (or notified) at this stage, apparently through error by the LPA.
30. On 22 March 2022 the WMLP was submitted for examination and various documents were published on the website and deposited in local libraries.
31. In October 2022 a Main Issues Paper was published setting out the LPA’s responses to the Inspectors’ questions.
32. Examination hearings were held in November 2022.
33. On 22 December 2022, after the examination hearings had ended, the NFU made representations on the plan, and detailed representations on W3 were made on 6 March 2023.
34. In June – August 2023 there was consultation on the Main Modifications. On 18 August 2023 the NFU made representations on the Main Modifications.
35. On 31 October 2023 the Inspectors’ Report (“IR”) was produced. The Plan was approved by the LPA on 8 March and adopted on 11 March 2024. I will set out the relevant parts of the IR under the specific Grounds.

### Legal Framework

### Planning Functions

36. S.113(3)(a) of the PCPA allows a legal challenge to be made “on the ground that [...] the document is not within the appropriate power”.

37. The MWLP was prepared and adopted pursuant to (and in accordance with) Part 2 of the PCPA and the 2012 Regulations.
38. S.15 of the PCPA requires the LPA to prepare and maintain a “*local development scheme*” (“LDS”), which inter alia must specify the “*local development documents*” (“LDDs”) that are to be “*development plan documents*” (“DPDs”) and “*the subject matter and geographical area to which each [DPD] is to relate*”.
39. S.16 of the PCPA requires a county council, where there is a district council, to prepare and maintain a “*minerals and waste development scheme*” for any part of their area for which there is a district council. Mr Westaway accepts that this requirement does not apply to the LPA, which is a unitary authority.
40. S.17(3) of the PCPA states that the LPA’s LDDs “*must (taken as a whole) set out the authority’s policies (however expressed) relating to the development and use of land in their area*”.
41. S.17(7) of the PCPA provides that regulations under that section may prescribe:
- “(za) which descriptions of documents are, or if prepared are, to be prepared as local development documents;*
- (a) which descriptions of local development documents are development plan documents;*
- (b) the form and content of the local development documents;*
- (c) the time at which any step in the preparation of any such document must be taken”.*
42. S.19 of the PCPA states inter alia that DPDs must be prepared in accordance with the LDS; that each LPA “*must identify the strategic priorities for the development and use of land in the authority’s area*”; and that “[p]olicies to address those priorities must be set out in the [LPA’s DPDs] (taken as a whole)”. In preparing a DPD or any other LDD, the LPA must have regard (inter alia) to any other LDD that it has adopted.
43. Reg. 2(1) of the 2012 Regulations defines “local plan” as meaning “*any document of the description referred to in regulation 5(1)(a)(i), (ii) or (iv) or 5(2)(a) or (b), and for the purposes of section 17(7)(a) of the [PCPA] these documents are prescribed as development plan documents*”. Regulation 5 of the 2012 Regulations explains which documents are to be prepared as LDDs (regulation 5(1)); and which documents are to be prepared as LDDs if they are prepared (at all) (regulation 5(2)). There is no mention of “waste” within regulation 5.

#### Definition of Waste

44. Central to Ground One is the definition of “waste” within the Planning Acts. The meaning of ‘waste’ in England is the same as in the EU WFD (s.336 TCPA).

#### Waste Framework Directive (2008/98/EC)

45. A number of the recitals to the Directive are relevant to the interpretation of the articles arising in this case:

*“(6) The first objective of any waste policy should be to minimise the negative effects of the generation and management of waste on human health and the environment. Waste policy should also aim at reducing the use of resources, and favour the practical application of the waste hierarchy.*

...

*(8) It is therefore necessary to revise Directive 2006/12/EC in order to clarify key concepts such as the definitions of waste, recovery and disposal, to strengthen the measures that must be taken in regard to waste prevention, to introduce an approach that takes into account the whole life-cycle of products and materials and not only the waste phase, and to focus on reducing the environmental impacts of waste generation and waste management, thereby strengthening the economic value of waste. Furthermore, the recovery of waste and the use of recovered materials should be encouraged in order to conserve natural resources. In the interests of clarity and readability, Directive 2006/12/EC should be repealed and replaced by a new directive.*

...

*(22) There should be no confusion between the various aspects of the waste definition, and appropriate procedures should be applied, where necessary, to by-products that are not waste, on the one hand, or to waste that ceases to be waste, on the other hand. In order to specify certain aspects of the definition of waste, this Directive should clarify:*

- *when substances or objects resulting from a production process not primarily aimed at producing such substances or objects are by-products and not waste can be taken only on the basis of a coordinated approach, to be regularly updated, and where this is consistent with the protection of the environment and human health. If the use of a by-product is allowed under an environmental licence or general environmental rules, this can be used by Member States as a tool to decide that no overall adverse environmental or human health impacts are expected to occur; an object or substance should be regarded as being a by-product only when certain conditions are met. Since by-products fall into the category of products, exports of by-products should meet the requirements of the relevant Community legislation; ...”*

46. ‘Waste’ means any substance or object which the holder discards or intends or is required to discard”: Article 3(1) WFD.
47. ‘Disposal’ “means any operation which is not recovery even where the operation has as a secondary consequence the reclamation of substances or energy.”, See Article 3 (19). Annex I sets out a non-exhaustive list of disposal operations including deposit

into or on to land (e.g. landfill, etc.) and land treatment (e.g. biodegradation of liquid or sludgy discards in soils, etc).

48. By Article (2)((1)f) WFD ‘faecal matter’ is excluded from the scope of the WFD in these terms:

*“faecal matter, if not covered by paragraph 2(b), straw and other natural non-hazardous agricultural or forestry material used in farming, forestry or for the production of energy from such biomass through processes or methods which do not harm the environment or endanger human health.” [emphasis added]*

49. Therefore whether or not ‘faecal matter’ falls outside the scope of waste controls is contingent on there being no environmental harm. This is consistent with Article 13, see below.

50. Article 5 deals with “By-products”. As relevant it states:

*“1. A substance or object, resulting from a production process, the primary aim of which is not the production of that item, may be regarded as not being waste referred to in point (1) of Article 3 but as being a by-product only if the following conditions are met:*

- (a) further use of the substance or object is certain;*
- (b) the substance or object can be used directly without any further processing other than normal industrial practice;*
- (c) the substance or object is produced as an integral part of a production process; and*
- (d) further use is lawful, i.e. the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts.”*

51. Article 13 WFD is headed ‘Protection of human health and the environment and provides:

*“Member States shall take the necessary measures to ensure that waste management is carried out without endangering human health, without harming the environment and, in particular:*

- (a) without risk to water, air, soil, plants or animals;*
- (b) without causing a nuisance through noise or odours; and*
- (c) without adversely affecting the countryside or places of special interest.” [emphasis added]*

52. The Waste (England and Wales) Regulations 2011 (“2011 Regulations”) apply, as amended by the EU Exit Regulations of 2019. Part 6 is concerned with duties of

planning authorities. The preparation of a minerals and waste local plan is a planning function under the 2011 Regulations, see Regulation 17. A planning authority must have regard to Article 13 of the WFD when exercising its planning functions to the extent that those functions relate to waste management, see Regulation 18.

53. The question of what is “waste” in relevant circumstances to this case has been addressed in two cases: *Commission v Spain* [C-121/03] and *Brady v Environmental Protection Agency* [C-113/12]. Both cases were dealing with earlier versions of the WFD.
54. In *Commission v Spain* the European Court of Justice (“ECJ”) was considering the 1975 WFD {Directive 75/442} version of the WFD:

*“60. As the Spanish Government correctly maintains, livestock effluent may, on the same terms, fall outside classification of waste, if it is used as soil fertiliser as part of a lawful practice of spreading on clearly identified parcels and if its storage is limited to the needs of those spreading operations.*

*61. Contrary to the Commission’s submissions, it is not appropriate limit that analysis to livestock effluent used as fertiliser on land forming part of the same agricultural holding as that which generated the effluent. As the Court has already held, it is possible for a substance not to be regarded as waste within the meaning of Directive 75/442 if it is certain to be used to meet the needs of economic operators other than that which produced it (see, to that effect, Saetti and Frediani...)*

...

*65. In this case, as regards, first, the slurry generated by the livestock farms, it is clear from the contents of this case-file that the slurry is used as an agricultural fertiliser in the context of rules for spreading in accordance with good agricultural practice laid down by the Autonomous Community of Catalonia. The persons running those farms are not therefore seeking to discard it, with the result that the slurry is not ‘waste’ within the meaning of Directive 75/442.”*

55. In *Brady v Environmental Protection Agency* the Court of Justice of the European Union (“CJEU”) was again considering the 1975 WFD. The issue under Question 1 was whether pig slurry was “waste” or a by-product for the purposes of the Directive. The following section of the judgment is relevant:

*“43. In light of the guidance provided by the case law as set out above, it must be held that effluent generated by an intensive pig farm, which is not the product primarily sought by the pig farmer and any recovery of which by spreading as fertiliser must, as is apparent in particular from the sixth recital in the preamble to Directive 91/676 and the mechanism established by that directive, involve the taking of special precautions owing to the potentially hazardous nature of its composition from an environmental point of view, is, in principle, waste (see, by analogy,*

*Commission v Italy (C-194/05) [2007] ECR I-11661 at [35] and the case law cited, and Commune de Mesquer [2008] 3 CMLR 16 at [41]).*

44. However, it is also clear from the case law of the Court that, in certain situations, goods, materials or raw materials resulting from an extraction or manufacturing process, the primary aim of which is not their production may be regarded not as a residue, but as by-products, which their holder does not seek to “discard”, within the meaning of the first subparagraph of art.1(a) of Directive 75/442, but which he intends to exploit or market on terms advantageous to himself in a subsequent process – including, as the case may be, in order to meet the needs of economic operators other than the producer of those substances – provided that such re-use is not a mere possibility but a certainty, without any further processing prior to re-use and as part of the continuing process of production (see, inter alia, Commission of the European Communities v Spain (C-121/03) [2005] ECR I-7569 at [58]; Commission v Italy (C-194/05) [2007] ECR I-11661 at [38] and Commune de Mesquer [2008] 3 CMLR 16 at [42]).

45. As regards, more specifically, livestock effluent such as that at issue here, the Court has already held that it may fall outside classification as waste if it is used as soil fertiliser as part of a lawful practice of spreading on clearly identified parcels and if its storage is limited to the needs of those spreading operations (*Commission v Spain (C121-03) [2005] ECR I-7569 at [60]*).

46. The Court has also stated that it is not appropriate to limit that analysis to livestock effluent used as fertiliser on land forming part of the same agricultural holding as that which generated the effluent. It is possible for a substance not to be regarded as “waste” within the meaning of Directive 75/442 if it is certain to be used to meet the needs of economic operators other than the operator which produced it (Commissioner v Spain (C121/03) [2005] ECR I-7569 at [61]).

47. It is for the national courts, taking account of the guidance provided by the Court’s case law and all of the circumstances of the situation on which they have to give judgment, to determine whether a by-product actually exists, while ensuring in this regard that classification as a by-product is limited to the situations that fulfil the conditions recalled in [44] of the present judgment.

48. So far as concerns determining that the re-use of the slurry stored pending spreading is sufficiently certain, it is to be pointed out first of all that, as follows from the case law recalled in [45] and [46] of the present judgment, the mere fact that such re-use will not, as a matter of fact, become absolutely certain until the spreading operations envisaged have in fact taken place through action by the third-party purchasers concerned does not preclude classification as a by-product.

49. What subsequently happens to an object or a substance is not in itself determinative of its nature as waste, which, in accordance with

*art.1(a) of Directive 75/442, is established on the basis of whether the holder of that object or substance discards it or intends or is required to discard it (Commission v Italy (C-194/05) [2007] ECR I-11661 at [49] and [50] and the case law cited).*

50. *It should indeed be pointed out in this regard that, if the referring court were to come to the conclusion that the re-use of the slurry envisaged by Mr Brady is, in this instance, sufficiently certain for the slurry to be considered, while stored by him and until it is actually delivered to the relevant third parties, a by-product which the person concerned seeks not to “discard” within the meaning of the first subparagraph of art.1(a) of Directive 75/442 but to exploit or market, that would not at all affect the fact that the slurry may, in some circumstances, become waste after its delivery, in particular if it were to become apparent that it is ultimately discharged by those third parties into the environment in an uncontrolled manner, in conditions which enable it to be regarded as waste (see, to this effect, Commission v Spain (C-416-02) [2005] ECR I-7487 at [96]).*

51. *In such a case, account should be taken of the fact that, according to the Court’s case law, the person who is in fact in possession of products immediately before they become waste must be regarded as having “produced” that waste within the meaning of art.1(b) of Directive 75/442 and thus be categorised as its “holder” within the meaning of art.1(c) of that directive (see, in particular, Commune de Mesquer [2008] 3 CMLR 16 at [74]).*

52. *For the purposes of determining whether the re-use of the slurry through spreading by other farmers, as envisaged by the appellant in the main proceedings, is sufficiently certain to justify its storage for a period other than the necessary for its collection with a view to disposal, it is incumbent, on the other hand, on the referring court, as is apparent from the case law recalled in [45] of the present judgment, to satisfy itself, in particular, that the plots of land of those farmers on which that re-use is to take place are, from the outset, clearly identified. Such identification is capable of showing that the quantities of slurry to be delivered are in principle actually intended to be used for the purpose of fertilising the plots of land of the farmers concerned.*”

[emphasis added]

56. It is worth highlighting that *Brady* was concerned with a specific proposal and not a policy document, and therefore it refers to a level of certainty which was capable of being established on the facts of the case.
57. The NFU accepts that the EU Commission’s ‘Guidance on the interpretation of key provisions of Directive 2008/98/EC on waste’ is contrary to its approach to whether faecal matter is waste. The Guidance states:

**“2.4.4 Processes which do not harm the environment or endanger human health**

*The provision ‘not harming the environment or endangering human health’ applies to the entire paragraph, namely any use of the specified materials in agriculture or forestry, as well as their use to produce energy.*

*The minimum standard for not harming the environment or endangering human health is compliance with the standards of EU environmental legislation.”*

### Ground One

58. Mr Westaway made three headline points which are relevant to all the Grounds. Firstly, agricultural activities are not generally subject to planning control, s.55(2)(e) TCPA excludes agricultural use from the change of use provisions. The General Permitted Development Order gives fairly wide permitted development rights to agricultural development.

59. Secondly, agricultural activities are comprehensively regulated by non-planning statutory regimes, here through the environmental protection and permitting regimes. He points to the fact that policy W3 seeks to regulate not merely development on the agricultural unit, but also the agricultural activities thereon, which fall within the environmental regulation regime. He referred to the River Actions case at [105]:

*“105. Firstly, in my view the claimant and the defendant are right to emphasise the importance of the purpose of these regulations, widely advertised in the consultation materials and also explained in the Explanatory Note, to reduce diffuse agricultural pollution giving rise to significant risks of deterioration in water quality by avoiding the risks of application of nutrients surplus to requirements of the soil and crop leaching or running off and giving rise to diffuse pollution. In principle, the furtherance of that purpose is more likely to be achieved by planning for the needs of the soil and crop on the land at the time when the application is to take place. It is more likely to be furthered as an objective on the basis of known soil and crop needs at the time of the application, rather than forecast or potential crop needs that might arise from some future notional but as yet unimplemented crop cycle or rotation. Interpreting Regulation 4(1)(a)(i) of the 2018 Regulations in this way is in my view consistent with the clear purpose of enacting this legislation, to ensure that applications of organic manure or manufactured fertiliser are tailored to the known and established needs of the existing soil and crops so as to avoid the risks of overprovision and subsequent leaching or run-off of unabsorbed nutrients into water courses giving rise to environmental damage. Thus, it is clear in my view that the purpose of the regulation supports the claimant and the defendant's interpretation.”*

60. Mr Westaway relies upon [194] of the December 2023 NPPF which states:

*“194. The focus of planning policies and decisions should be on whether 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). Planning decisions should assume that these regimes will operate effectively. Equally, where a planning decision has been made on a particular development, the planning issues should not be revisited through the permitting regimes operated by pollution control authorities.”*

61. Thirdly, he refers to the distinction drawn in the PCPA between a Local Plan and a MWLP.
62. Ground One has somewhat changed over the lifetime of the challenge. Originally the NFU were arguing that W3 was outside the powers of the LPA under the PCPA because the policy applied to livestock units and these did not fall to be regulated by a “waste plan”. However, Mr Westaway did not pursue this point in his skeleton argument having accepted that the LPA is a unitary authority and therefore undoubtedly has the power to make planning policies that regulate livestock units because s.16 PCPA does not apply to it.
63. The second and remaining limb of Ground One is that W3 and the definition of “agricultural waste” in the Glossary extends the scope of the policy to agricultural “waste” which is outside the remit of a Waste Local Plan. In his Skeleton Argument Mr Westaway submitted that: *“It is never appropriate for a waste local plan to impose controls on activities that produce or use such “waste” as it cuts against the definition of waste as prescribed by law”*. However, during the hearing Mr Westaway appeared to resile from the breadth of that submission and accepted that in some circumstances naturally occurring agricultural products, such as chicken manure, could be waste. His position was rather that the LPA had failed to properly define, or put its mind to, what could or could not be waste under the WFD definition.
64. Mr Westaway submits that “natural agricultural materials” (as defined in Article 2(1) (f)) are not generally waste for the purposes of the WFD because they are not discarded but used in farming. He makes a further, but I think distinct, submission that there is a strong regulatory regime that governs the matters about which the LPA is concerned.
65. He relies upon Article 5 of the WFD, which covers “by-products”, submitting that the effect is that if that Article applies then the material is not waste.
66. Mr Westaway relies upon *Commission v Spain* at [65] that slurry generated by livestock farms and used as an agricultural fertiliser is not a waste. In relation to *Brady* he submits that it cannot be the case that manure falls in and out of the definition of waste depending on the stage of the activities. Whereas here, there is general evidence of the intention to use the manure for agricultural purposes, and taking a practical approach, the manure should be treated as falling within the exception in Article 2(1)(f). It is not necessary on the case law to be certain as to the reuse. He submitted in reply that the real problem was that the LPA and the Inspectors had not turned their mind to whether the material was waste and to the approach in *Brady*. I note however that the NFU’s position, including up to the oral hearing, was that the agricultural manure was simply not waste. It was only during the course of the hearing that Mr Westaway faced up to the difficulties that the analysis in *Brady* posed to his case.

67. He submits that any agricultural material produced is subject to a strict regulatory regime outside the planning regime. It should therefore be assumed that such products will not harm the environment. He relies on [194] of the 2023 NPPF which refers to assuming these regimes will operate effectively. It therefore follows that the caveats in Article 2 and 5, about the products not causing harm to the environment, must be assumed to be met. He submits that this follows from the structure of the WFD that seeks to introduce clarity into the distinction between waste and non-waste, see Recitals 4, 5 and 22.
68. Dr Wolfe led the response to Ground One, and his submissions were supported by Mr Kimblin and Ms Sargent. However, the broadest points against Mr Westaway's argument were taken by Ms Sargent.
69. She submitted that there is nothing in the PCPA which restricts the scope of the LPA extending the Plan beyond the TCPA (and therefore WFD) definition of "waste". The definition does not operate to circumscribe the LPA's powers in s.19(1) PCPA, but merely says that the development plan documents must be "*prepared in accordance with the local development scheme*", and thus again does not limit the LPA's powers. The local development scheme does not purport to limit the definition of "waste". Therefore even if the WMLP went beyond the WFD definition of waste it would not make policy W3 unlawful.
70. Dr Wolfe dealt with the definition of waste and the structure and purpose of the WFD. He submitted that the agricultural waste, in particular livestock manure, that the LPA is concerned about, is well capable of falling within the statutory definition, even if Ms Sargent's argument is wrong. River Action produced evidence from Charles Watson, its Chairman, and Professor Neil Ward. It is not the function of this Court to determine issues of fact or planning judgement, but I do not understand there to be a dispute about the fundamental point that the chicken manure at the heart of the LPA's reasoning for W3 is capable of causing environmental harm, and is on occasion removed from the site of the IPU to be used on other agricultural units.
71. His submissions fall into two parts. Firstly, he says that the spreading of chicken manure causes "environmental harm", certainly within Herefordshire, and as such is "waste" within the WFD. Secondly, whatever the ultimate fate of the manure it is "waste" in the hands of the IPU manager when it is produced and up to the point that it is sold or transferred to a third party, as will generally be the case within Herefordshire, i.e. it is spread elsewhere.
72. Dr Wolfe submits, both from the evidence of Mr Watson and the wider supporting material for the policy, that the spreading of chicken manure is causing environmental harm, or at the very least is causing the risk of environmental harm. That is the case despite the fact that there is a regulatory regime in place to protect water quality. It is not necessary to assume that another regulatory regime works effectively when the evidence clearly establishes that it does not do so. He relies on Thornton J's summary of the relevant approach in Vanbrugh Court Residents' Association v London Borough of Lambeth [2022] EWHC 1207 (Admin) at [23]:

*"[A] local planning authority is entitled to place reliance upon the effective operation of the other regulatory regime(s) in determining an application for planning permission. However, it cannot simply ignore*

*the issues in question. It must assess them sufficiently so as to be able to satisfy itself that the other regulatory regime is capable of regulating the relevant issues. If it is not satisfied, then consent must be refused. The existence of the other regulatory regime is a material planning consideration, to be weighed in the balance. Gateshead MBC v Secretary of State for the Environment 1995 Env. LR 37 at [44] & [49] and R(Bailey) v Secretary of State for Business, Enterprise & Regulatory Reform [2008] EWHC 1257 (Admin) at [13]).”*

73. To assume that the regulatory approaches currently being taken are effective to prevent environmental harm would be contrary to the undisputed evidential position. He prays in aid that as noted by Dove J in *R (River Action) v Environment Agency* [2024] EWHC 1279 (Admin) [86] – [90], since 2014 there has been a NMP in place in relation to the Wye SAC, adopted and overseen by a multi-agency Nutrient Management Board. The NMP identified “a wide range of regulatory regimes ... all of which could contribute to tackling the issue of phosphate pollution of the Wye” [90], and moreover, a “River Wye Statutory Officers Group has been established to assist in ensuring that participants collectively use their statutory powers and resources to achieve the requirements of the relevant legislation” [87]. And yet for all of these efforts, a decade on from the adoption of the NMP, the problem of water quality remains as acute as ever.
74. Dr Wolfe further submits that even if there was full compliance with the existing environmental regulation it would not be sufficient to return the Wye SAC to favourable conservation status. However, I do not consider it is necessary for me to reach any determination on this issue for the purposes of deciding this case.
75. For these reasons it cannot be assumed that disposal of chicken manure from IPUs will not cause environmental harm, and therefore the various caveats in the WFD for faecal matter remaining waste if it causes environmental harm, in particular in Article 2(1)(f), continue to apply.
76. The second limb of River Action’s submissions is that Article 2(1)(f) does not apply because it applies to “faecal matter...used in farming...”. The exclusion does not apply at point of production of the manure because it cannot be assumed that it will be “used in farming”. The IPU manager might choose to dispose of the manure in another way, for example by disposal to third party or to an anaerobic digester for disposal. Mr Watson explains that the majority of IPUs in Herefordshire do not dispose of chicken manure by spreading on their own land because they are specialist poultry producers.
77. Therefore the NFU proposition must be that Article 2(1)(f) applies because the IPU manager can assume that the manure will be used in farming which causes no environmental harm, when the evidence does not support such an assumption. Dr Wolfe submits that such an approach is contrary to the structure and purpose of the WFD, which places an obligation on member states to ensure that waste is managed in a way that does not harm the environment.
78. He relies on *Brady* for the proposition that faecal matter may be classified as a by-product but only where the reuse “is not a mere possibility but a certainty, without any further processing prior to re-use and as part of the continuing process of

*production*” [44]. Any reuse must be “*sufficiently certain*”, see [48] and the plots of land must be clearly identified [52] and there must be firm commitments as to the use as fertiliser [53].

79. Dr Wolfe submits that in the light of these high tests for faecal matter not to be waste, it is entirely lawful for the LPA in its WMLP to have a policy which seeks to control and prevent environmental harm from the chicken manure, even if in some cases it may ultimately, when used on farmland, no longer be “waste” for the purposes of the WFD.
80. In my view it is clear that this Ground should fail. I accept Ms Sargent’s broad submission that the First Defendant in WMLP is not bound to restrict the scope of the Plan to “waste” as defined in s.336 TCPA and the WFD. Mr Westaway relies on s.19(1) PCPA but that merely says “*development plan documents must be prepared in accordance with the local development scheme*”. However, the LDS does not circumscribe the definition of waste. Mr Westaway submits that it is a “Waste... Plan” and therefore the policies must all refer to waste as defined in the Planning Acts. However, I cannot see that as a matter of law this follows. The issue is not in the name of the Plan, but whether the LPA were lawfully entitled to include policy W3. Therefore I accept that the Ground fails at this first initial hurdle.
81. Further and in any event, I agree with Dr Wolfe’s submissions on both limbs. It is apparent from the Recitals and Article 13 of the WFD that the overall purpose of the WFD is to reduce and prevent environmental harm. The exclusions to the definition of waste in Article 2(1)(f) is made expressly subject to no harm to the environment. An approach which assumed no environmental harm on the basis of a regulatory regime which beyond any doubt had failed to protect the environment from harm would be contrary to the statutory purpose. I note what is said at [194] of the 2023 NPPF, but to the degree that the LPA in adopting W3 are not assuming that the regimes will operate effectively, there is clear evidence to support their approach. There is therefore good reason, as set out copiously in the documentation, to depart from [194] of the 2023 NPPF.
82. The exclusion of faecal matter in Article 2(1)(f) applies when the matter is used in farming. It follows from *Brady* that if there is a high level of confidence that it will be used in farming, and that it will not cause environmental harm, then the exclusion applies at the point of production. There might be arguments on particular cases as to the degree of confidence that is required, and issues around geographical movement. As Mr Kimblin said, there might be a case specific argument on particular application that there was sufficient certainty as to onward use as to fall within the principles in *Brady*.
83. But on the facts of this case, which is a challenge to a policy, in circumstances where it is necessarily speculative as to where and for what purpose the chicken manure will be used, and whether it is likely to cause environmental harm, there is nothing unlawful about W3. W3 is necessarily forward looking, as is any policy, and that imports an inevitable degree of uncertainty. In the light of the purposes of the WFD to reduce environmental harm, it would be very odd not to be able to have a policy which took into account that uncertainty. It is an obligation under Article 13 to take steps to ensure that waste management is carried out without harming the environment and W3 is one way of doing this.

## Ground Two

84. Ground Two is that policy W3(1)(b) and W3(3), read with paragraph 6.2.25 of the Supporting Text, are unlawful under the principles in Newbury v Secretary of State for the Environment [1981] AC 578 and contrary to “fundamental principles of planning law”. The House of Lords states at 599H:

*“The power to impose conditions is not unlimited. In Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government [1958] 1 Q.B. 554 Lord Denning said, at p. 572:*

*"Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."*

*As Lord Reid said in Mixnam's Properties Ltd. v. Chertsey Urban District Council [1965] A.C. 735, 751, this statement of law was approved by this House in Fawcett Properties Ltd. v. Buckingham County Council [1961] A.C. 636.*

*“It follows that the conditions imposed must be for a planning purpose and not for any ulterior one, and that they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them.”*

85. The complaint is that under W3(1)(b) livestock units that are Environmental Impact Assessment (“EIA”) development (but not others, addressed under Policy W3(1)(a)) will be required to demonstrate in method statements, that “natural and non-natural wastes generated by the whole agricultural unit” are “appropriately managed”. By W3(3) livestock units will have to show they are nutrient neutral. Any condition that made this requirement would be unlawful, as contrary to the principles in Newbury.
86. Mr Westaway submits that there is no rational justification for this requirement, it is being promoted for an ulterior purpose (i.e. to extend nutrient neutrality) and it does not fairly and reasonably relate to the permission being sought. I note that by the time of reply Mr Westaway was no longer pursuing rationality, but that was clearly part of his original case.
87. He submits that the EIA is of the development for which consent is sought, not for the use of the wider agricultural unit. It appears from the LPA’s responses at paragraph 102.3 of its Main Issues Statement on Main Matter 7 that the policy was developed to seek to have “a greater impact bringing forward nutrient neutrality solutions from the agricultural sector”. He submits that statement reveals the impropriety of the approach. It is seeking to extend the policy approach of nutrient neutrality across the entire agricultural unit, which Mr Westaway submits is a unit of occupation irrelevant to planning. He makes the point that the agricultural unit may be very much more

extensive than the planning unit upon which the development is located, and may incorporate many separate planning units.

88. Further, Supporting Text paragraph 6.2.25 refers to the entire agricultural unit showing nutrient neutrality.

89. Para 6.2.25 of the Supporting Text to Policy W3 states that:

*“[t]o accompany all development proposals, applicants will be required to demonstrate the approach to farming within that agricultural unit that contributes to achieving at least nutrient neutrality. The approach may take more than one form and might comprise either physical works and/or changes to the farming method within that unit.”* [emphasis added].

90. He submits that these references show that the LPA is using the policy and the supporting text to achieve an “ulterior purpose”, namely nutrient neutrality across a wide area that is unrelated to planning permission sought. He submits that this paragraph of the Supporting Text “crosses an important boundary” by extending the policy beyond the application site itself.

91. Mr Westaway’s attack focuses to a considerable degree on the wording of paragraph 6.2.25, which he alleges extends the policy to an illegitimate degree by requiring nutrient neutrality across the entire agricultural unit. He relies upon the judgment of Holgate J (as he then was) in *New Dawn Homes v SSLG* [2016] EWHC 3314 at [41]:

*“41. By contrast, Mr Crean QC did accept that it had been permissible for the explanatory text accompanying HOU13 to supply a definition of “affordable housing”. It does so in some considerable detail. He accepted that although “affordable housing” is not defined in the policy itself, the provision of a definition in the explanatory material does not fall foul of the principles laid down in Cherkley. The Claimant accepts that the definition of “affordable housing” does not impermissibly cross the boundary from providing interpretative assistance to laying down impermissibly an additional policy requirement absent from the policy itself.”*

92. However, Mr Kimblin relies on *R (Cherkley Campaign) v Mole Valley DC* [2014] EWCA Civ 567, which deals with the approach to supporting text to development plan policy. At [16] Richards LJ said:

*“16. Leaving aside the effect of the saving direction, it seems to me, in the light of the statutory provisions and the guidance, that when determining the conformity of a proposed development with a local plan the correct focus is on the plan's detailed policies for the development and use of land in the area. The supporting text consists of descriptive and explanatory matter in respect of the policies and/or a reasoned justification of the policies. That text is plainly relevant to the interpretation of a policy to which it relates but it is not itself a policy or part of a policy, it does not have the force of policy and it cannot trump the policy. I do not think that a development that accorded with the*

*policies in the local plan could be said not to conform with the plan because it failed to satisfy an additional criterion referred to only in the supporting text. That applies even where, as here, the local plan states that the supporting text indicates how the policies will be implemented.”*

93. The Inspectors at IR 113 did raise a concern about the scope of this policy, saying W3 should not apply to “the entire agricultural holding”. Mr Westaway submits that this did not lead to any change in the text or material change to the policy. However, I note that in IR 113 the Inspectors say that Main Modification 64 provides all the necessary modifications to the policy which are required for “effectiveness”, and refers to removing the reference to “betterment”.
94. Mr Kimblin, on behalf of the LPA, submits that there is nothing irrational about requiring a management plan to show that the waste management proposed is appropriate. This is particularly the case for EIA development, which will necessarily be very large scale, with considerable potential environmental consequences. The challenge is on the grounds of irrationality, and that is necessarily a high test, particularly in the field of a specialist decision maker. Here, the requirements of W3 are necessary, essentially for the reasons set out under Ground One; founded in the WFD and proportionate in requiring appropriate waste management.
95. Mr Kimblin and Ms Sargent point out that the environmental effects, as assessed through the EIA process are necessarily focused on environmental effects beyond the application site. This is the nature of “indirect effects”. Therefore assessing and controlling what happens to the agricultural waste arising from the livestock unit is plainly a relevant matter for planning control. Indeed it would be unlawful to fail to assess and address environmental effects of a livestock unit while ignoring the existing or intended use and effects.
96. Paragraph 6.2.24 of the supporting text explains the scope of what is being required. In respect to paragraph 6.2.25 Mr Kimblin accepts that it may be “trying to do too much”, but submits that on the authority of *Cherkley* that does not make policy W3 unlawful. The policy must be read on its own terms. Main Modification 64 makes clear, if it was not clear before, that the policy applies to the proposals, and does not require nutrient neutrality across the entire agricultural unit.
97. Ms Sargent points to the explanation for making the requirement for a waste management method statement across the unit, in the LPA’s Main Issues Statement at paragraph 102:

***“Question 102: What are the reasons for requiring assessment of wastes from the whole agricultural unit in the case of EIA development?”***

*Response:*

*102.1 The management of agricultural wastes, particularly those that contribute phosphates to the River Wye SAC catchment, is a key issue within Herefordshire.*

*102.2 The requirement to extend the waste management method statement across the whole agricultural unit in the case of EIA development is providing a clear and proportionate threshold for the scale of assessment required. If the proposed development at the agricultural unit is EIA development, then it is very likely to constitute major development and can be reasonably concluded to have a more significant impact. Consequently it is considered appropriate to extend the need for a waste management method statement across the whole unit and not just in relation to the proposed development.*

*102.3 In short, it provides a reasonable opportunity to have a greater impact bringing forward nutrient neutrality solutions from the agricultural sector.”*

98. Mr Kimblin submits that W3(1)(b) does not require nutrient neutrality across the agricultural unit, all that it requires is appropriate management. The reference in paragraph 6.2.25 of the Supporting Text does not, and cannot, change the meaning of the policy itself, see the reference to Cherkley above.
99. In my view policy W3 does not offend the principles in Newbury. Dealing first with W3(1)(b) the justification for requiring a method statement showing that all waste from the agricultural unit will be appropriately managed, where there is an application for EIA development, is very clear. This would be major development with significant likely environmental effects, so it is wholly reasonable for the LPA to be concerned about the overall management of waste generated. This is, in my view, no more than considering the cumulative impacts of the proposed development.
100. In respect of the nutrient neutrality requirement in W3(3), the policy itself is clear that the requirement applies to the development proposal and not to the agricultural unit as a whole. I accept the LPAs’ submission that to the degree that this was not clear, it was made clear by Main Modification 64 and the removal of reference to “betterment”.
101. In my view there is sufficient flexibility in paragraph 6.2.25 of the Supporting Text to not cut across the meaning of W3(3) in any event, and the text remains the right side of the Cherkley line. However, to the degree that it might be read to be extending W3 illegitimately to impose a requirement for nutrient neutrality across the entire agricultural unit, then this judgment makes the position clear. W3(3) only applies to the proposal under consideration and not the entire unit, although the method statement required by W3(1)(b) applies to the entire unit.
102. Mr Westaway submits that I should grant relief for paragraph 6.2.25 to be struck out of the Plan. However, for the reasons set out above, I do not consider that to be required in order to make the Plan lawful.
103. For these reasons there is no unlawful extension by the policy of matters that would be prohibited by the principles in Newbury.

### Ground Three

104. The complaint here is that Natural England's position was that nutrient neutrality was only justified on the upper reaches of the River Wye catchment, i.e. the River Lugg area and only limited to phosphate pollution. It is submitted that the LPA acted unlawfully in requiring nutrient neutrality for the entire LPA area.
105. In order to understand the issue at the heart of this Ground it is necessary to understand the role that nutrient neutrality had within Herefordshire.
106. In respect of nutrient neutrality, there were a number of parallel actions and initiatives after the *Dutch Nitrogen Case*. That case had a significant impact on the ability to bring forward development proposals, particularly those for housing. Natural England were involved in developing a national nutrient neutrality scheme that could be accepted by all stakeholders and thus break the deadlock on development. Natural England's replies to the Herefordshire MWLP consultation has to be seen in the context of the sensitivities around those broader national discussions.
107. On 24 May 2021 Natural England wrote to the LPA on the regulation 19 consultation as follows:

**"Minerals and Waste Local Plan**

**Agricultural Waste**

**Para 7.2.27 and 7.2.28**

*We offer support to the references made here.*

*This includes a waste management method statement to be submitted with all applications for livestock unit(s) on agricultural holdings, and the agricultural sector contributing to achieving at least nutrient neutrality. "It is important that the agricultural sector makes a real contribution to achieving at least nutrient neutrality, if not betterment, in the River Wye SAC.*

*This reference is welcomed and encouraged."*

108. On 6 September 2022 Natural England wrote again on the MWLP:

**"Summary**

*Natural England ("NE") advise that the nutrient neutrality ("NN") requirement should be removed from policies W4 Wastewater management and M3, M4 and M5 on minerals workings. We agree with requiring NN in policy W3 Agricultural waste, and note the council's decision to apply this across the Wye catchment.*

*Since discussions regarding the plan in July 2021, NE's position on NN has moved on. NN has emerged as a way to mitigate the impacts of residential development in 'failing' catchments. Housing developers can calculate their phosphate (or nitrogen) output using a simple calculator and offset that. In April 22, NE rolled this out as a national approach across 'failing' Habitats sites catchments in England. Herefordshire*

*Council is also currently developing a calculator for agricultural applications, through its Agriculture SPD. There are concerns that applying NN to matters other than these would not be possible, and also is not appropriate and could risk undermining the national approach.*

...

### ***W3 Agricultural Waste Management***

*We are satisfied that nutrient neutrality is more appropriate here and satisfies with the changes put forward in the main modifications.*

### ***Applying nutrient neutrality across the Wye catchment***

*Regarding the Council's paper on Nutrient neutrality – approach in the MWLP; if the council wishes to take this approach then this is the council's decision. As a part of your evidence you may wish to speak to the Environment Agency as there have been some exceedances seen on the Wye very recently."*

109. Essentially, the point being made by Natural England was that in relation to nutrient neutrality on the River Wye, that was a matter for the LPA.
110. On 21 August 2023 Natural England wrote:

#### ***"Nutrient neutrality***

#### ***The River Wye SAC***

*Natural England's nationally developed approach to nutrient neutrality only applies to residential developments in catchments that are failing their water quality objectives for nutrients.*

*The application of nutrient neutrality across the whole of the River Wye SAC catchment in Herefordshire as opposed to solely to the parts of the SAC which are failing their water quality objectives for nutrients has not been advised by NE. The decision to apply a nutrient neutrality approach across the Wyte catchment in its entirety has been taken by Herefordshire Council. The application of nutrient neutrality to developments other than residential type has also been taken by Herefordshire Council. Natural England acknowledges that it is a priority for Herefordshire Council to ensure that the quality of the watercourses in the Wye SAC catchment are not further degraded by nutrient pollution from new developments.*

#### ***The River Clun SAC***

*The plan includes numerous new references to the River Clun SAC and requires nutrient neutrality in the Clun catchment. We advise that development in the River Clun SAC catchment cannot currently rely on nutrient neutrality to meet with the requirements of the Habitats Regulations. Due to the River Clun SAC being so far above its targets*

*for phosphates, nitrates and suspended solids, using pollution reduction measures to deliver nutrient neutrality rather than site restoration could undermine the ability to restore the site.”*

111. In these circumstances Mr Westaway submits that the LPA were acting irrationally to have a policy which required nutrient neutrality beyond the area advised by Natural England. The genesis of nutrient neutrality was the Habitats Regulations and the need to rule out adverse effects on the SAC. That had been dealt with by Natural England’s advice on the River Lugg part of the catchment. There was therefore no justification to extend the requirement beyond that specific area.
112. He relies upon *R (Wyatt) v Fareham BC* [2023] PTSR 1952 per Lindblom LJ at [9(4)] as to a competent authority giving significant weight to the advice of an expert national agency:
- “9(4) 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 (see the judgment of Sales L.J. in Smyth , at paragraph 84, and the first instance judgment in R. (on the application of Preston) v Cumbria County Council [2019] EWHC 1362 (Admin), at paragraph 69 ). The authority may lawfully disagree with, and depart from, such advice. But if it does, it must have cogent reasons for doing so (see the judgment of Baroness Hale in R. (on the application of Morge) v Hampshire County Council [2011] 1 W.L.R. 268, at paragraph 45 , the judgment of Sales L.J. in Smyth , at paragraph 85, and the first instance judgment in R. (on the application of Prideaux) v Buckinghamshire County Council [2013] Env. L.R. 32, at paragraph 116 ). And the court for its part will give appropriate deference to the views of expert regulatory bodies (see, for example, the judgment of Lord Justice Beatson in R. (on the application of Mott) v Environment Agency [2016] 1 W.L.R. 4338, at paragraphs 69 to 77 ).”*
113. Mr Westaway also submits that the approach of the LPA was inconsistent because a similar approach to nutrient neutrality is not taken in the Local Plan. Therefore the agricultural sector impacted by W3 is being dealt with differently from other aspects of development.
114. As Mr Kimblin submits, that legal hurdle for a challenge such as this is a high one, see *Newsmith v SSETR* [2001] EWHC 74 per Sullivan J at [6]. He points out that Natural England did not object to W3, and indeed in the Statement of Common Ground stated that they agreed with nutrient neutrality in Policy W3 and raised no objection to the reference to the River Wye SAC as a whole.
115. As is set out above, in 2010 the status of the SAC had been “unfavourable – recovering” but by 2023 it was “unfavourable – declining”. Therefore the need for higher standards was clear. The LPA’s justification for extending the nutrient neutrality requirement to the entire catchment was set out in their response to Inspector’s question 2:

*“There was also discussion with NE about the geographic area over which the test of achieving ‘at least nutrient neutrality’ could be extended. NE’s position was that this test can only be applied in projects that would link to a SAC catchment that was failing its water quality objectives. The Council considers that the approach in the MWLP of requiring nutrient neutrality from development proposals with the River Wye SAC generally, should be retained. This is because the upper River Wye SAC catchment (above its confluence with the River Lugg) has been close to failing its water quality objectives in recent years and the Plan seeks to play a material role in reducing nutrient release into the River Wye SAC in its totality.”*

116. Mr Kimblin points out that Natural England were working nationally on the consequences of the Dutch Nitrogen Case and the need to find a way to allow development to come forward wherever possible. It was therefore focusing on developing a national scheme that was acceptable to a broad range of stakeholders. Natural England was clear that it was open to the LPA to take a local approach so long as that was justified on the facts and before the Inspectors. They made this clear in the letter of 6 September 2022 where in respect of nutrient neutrality they said *“if the Council wishes to take this approach then this is the council’s decision”*.

#### Ground Four

##### Consultation

117. The issue here is that the NFU was not consulted at the regulation 19 stage of the process, and Mr Westaway submits that material prejudice follows from that failure. The LPA accept that the NFU was not consulted at that point, but say that there was no prejudice because materially the same points were made at both earlier and later stages, and the NFU’s issues were fully dealt with.
118. The scheme of consultation for a Local Plan is set out in the 2012 Regulations. The first stage is in regulation 18 which provides for certain bodies to be notified of a proposed Plan and to invite them to make representations.
119. Regulation 19 provides for further consultation before a local plan is submitted to the Secretary of State under s.20 PCPA 2004. Regulation 19(b) states:

#### ***“Publication of a local plan***

*19. Before submitting a local plan to the Secretary of State under section 20 of the Act, the local planning authority must—*

*...*

*(b) ensure that a statement of the representations procedure and a statement of the fact that the proposed submission documents are available for inspection and of the places and times at which they can be inspected, is sent to each of the general consultation bodies and each of the specific consultation bodies invited to make representations under regulation 18(1).”*

120. Section 20 PCPA sets out the process for independent examination of the plan. Section 20(5) and (6) provide:

***“20 Independent examination***

...

*(5) The purpose of an independent examination is to determine in respect of the development plan document—*

*(a) whether it satisfies the requirements of sections 19 and 24(1), regulations under section 17(7) and any regulations under section 36 relating to the preparation of development plan documents;*

*(b) whether it is sound; and*

*(c) whether the local planning authority complied with any duty imposed on the authority by section 33A in relation to its preparation.*

*(6) Any person who makes representations seeking to change a development plan document must (if he so requests) be given the opportunity to appear before and be heard by the person carrying out the examination.”*

121. Section 113 covers challenges to the validity of plans. Section 113(6) provides that the High Court shall only exercise its powers to quash or remit a plan if *“the interests of the applicant have been substantially prejudiced by a failure to comply with a procedural requirement.”*
122. The factual position in respect of the consultation is as follows. The NFU was consulted at the regulation 18 stage on the Consultation Draft and responded to that consultation on 28 February 2019. It is common ground that there was then an error by the LPA and they were not consulted at the regulation 19 stage therefore did not respond at that stage, before the Examination. There is thus no doubt that there was a procedural error, the only issue being whether it caused substantial prejudice within the meaning of s.116(6)(b) PCPA.
123. It is also accepted that the NFU did respond on 22 December 2022 and then in a detailed letter at the Main Modifications stage on 6 March 2023.
124. At the heart of this Ground lies what consultation responses the NFU did make, and the degree to which policy W3 changed during its passage to adoption. The consultation draft WMLP of January 2019 said at policy W3:

***“Policy W3: Agricultural waste management***

*1. Planning permission for agricultural development will be permitted where it is demonstrated that:*

*a. for non-EIA development, both natural and non-natural wastes generated by the proposed development will be appropriately managed both on and off-site; or*

*b. for EIA development, both natural and non-natural wastes generated by the whole agricultural unit will be appropriately managed both on and off-site.*

*2. Anaerobic digestion will be permitted where its use is primarily intended to manage natural wastes generated on the agricultural unit within which it is located.”*

...

### ***Agricultural Waste***

*7.2.10. Herefordshire is a large, predominantly rural county; the agriculture and food/drink processing sector are recognised to have a large influence on waste arising. Whilst natural agricultural waste is not usually appropriate as a matter for a waste local plan, due to the local distinctiveness of Herefordshire, policy W3 has been prepared to address both natural and non-natural agricultural wastes.”*

125. On 28 February 2019, the regulation 18 stage, the NFU said:

#### ***“Detailed comments:***

*Page 3-5. As raised above the paragraph relating to agricultural wastes should be clarified in order to make it clear that manures, slurries and some crop residues are not classed as wastes.*

*Page 7-5. In paragraph 7.2.10 you note that natural agricultural waste is not usually an appropriate matter for a waste local plan. As agricultural manures are excluded from the Waste Framework Directive references to them within this plan should be removed. The use and application of agricultural manures and slurries are separately regulated by the Environment Agency under a variety of legal frameworks, these would include Nitrate Vulnerable Zones and Farming Rules for Water to name just two. Therefore the addition of manures and slurries to the Waste Local Plan is an unnecessary duplication of existing regulation.*

...

*It may also be considered unreasonable, in light of NPPF Para 35(a-d) to expect that all developments within the Wye SAC deliver a net reduction in nutrient discharges, particularly if they do not fall within the parameters of the guidance set out by Natural England. Permitted development as well as other developments outside of the SAC would not normally be required to demonstrate nutrient neutrality.”*

126. There was then the regulation 19 stage, at which the NFU were not consulted. After the Examination the NFU wrote to make representations on the Plan on 22 December 2022:

*“We are concerned that the requirements within this document, particularly Policy W3: Agricultural Waste Management, will curtail the industry’s ability to replace aging infrastructure and invest in buildings that enable them to reduce phosphate losses to water e.g. new livestock housing and manure stores.*

*Furthermore, while the NFU supports the use of waste management plans we would challenge the categorisation of slurry and manure as a waste product. The plan itself acknowledges this in para 7.2.11 “Whilst natural agricultural waste is not usually appropriate as a matter for a waste local plan, due to local distinctiveness of Herefordshire, policy W3 has been prepared to address both natural and non-natural agricultural wastes.”*

*Slurries and manures are a valued resource and are therefore not appropriate for inclusion as a waste within a Minerals and Waste Local Plan Document.*

*Contrary to chapter 3, para 16 (f) of the current National Planning Policy Framework, the requirements for a waste management method statement are potentially a duplication of reporting already compiled by farming businesses for Environment Permitting and Farming Rules for Water Compliance. This requirement has the potential to add significant additional costs for businesses seeking to invest in infrastructure that delivers an environmental and water quality benefit.*

*It is not the purpose of planning policy to dictate how an individual business should be run in any sector. Any local planning authority attempting to do so through either policy or through condition attached to planning permission would be acting ultra vires and be open to a legal challenge. Para 35(b-d) of the NPPF calls for policy to be justified, effective and consistent with other national policy and 7.2.28 could be interpreted in a manner that curtails growth in the agricultural sector, potentially requiring destocking in order to release new livestock housing that could be required for other legislative reasons (e.g. animal health and welfare). This will have the unintended consequence of tying the industry to outdated livestock housing and restraining growth and the adoption of new farming practices by forward thinking farming businesses.”*

127. The Inspectors responded by letter stating:

*“Thank you for your letter of 22 December 2022. We note your comment that Herefordshire Council only recently raised the content of the Minerals and Waste Local Plan Publication Draft with yourselves, but the Council’s records indicate that the NFU was consulted on 12 April 2021. Unfortunately we cannot take your letter into account in the*

*examination because it was received after the consultation had closed. However, there will be consultation on main modifications to the Plan in the coming months and the NFU will have the opportunity to comment ...”*

128. In June 2023 there was a consultation on the Main Modifications and the NFU made detailed representations. These included that: *“manures and slurries are not a ‘waste’ and should not be considered as such. It is not legally correct for the Plan to refer to manures and slurries as ‘waste’ as it contravenes national policy and also contravenes national legislation.”*, and *“[T]he whole of the River Wye SAC is not at this time subject to the requirements or restrictions of nutrient neutrality or the conditions of such designations.”*

129. The NFU cited its three key concerns:

- *“It is not legally compliant in line with the National Planning Policy Framework (2021) and the overarching framework which it provides to support all industries in line with legal and regulatory compliance.”*
- *“It would not be effective in supporting the environmental benefits which could be achieved through improvements delivered by the agricultural industry across Herefordshire through the development of existing infrastructure. The plan would therefore prevent sustainable development in the farming sector.”*
- *“It will in its current format if implemented directly contravene its objectives of preventing adverse impacts, compliance with legal and regulatory frameworks, promotion of adaptation, resilience and economic development. In particular it will implement the inappropriate classification of agricultural manures and slurries as a waste which grossly underrates their value as an agricultural product, vital to a sustainable farm business. The use of organic manures and slurries is part of the solution for farm business to reach net zero by 2040 and to reduce reliance on manufactured in-organic fertilisers.”*

130. The Inspector’s Report dealt with nutrient neutrality at IR 83-87. It said:

*“83. Within the River Wye SAC, the River Lugg, is failing its conservation objectives because of nutrient loading. The River Clun SAC is also in unfavourable condition, being well above its targets for phosphates, nitrates and suspended solids. The River Wye, above its confluence with the River Lugg, is not currently failing its conservation objectives, but the Council has concerns that there is potential for this to happen on the basis of nutrient discharge. The condition of these designated sites and the potential for further harm to occur justifies the approach taken in the key development criteria for some of the allocated mineral sites which require that proposals demonstrate at least nutrient neutrality.”*

131. And W3 at IR 110-116:

*“110. The Council has advised that it is producing a new Herefordshire Local Plan, which will replace the Core Strategy when it is adopted. The Council will need to signpost this policy in that Local Plan and in advice to developers of livestock units as its location within the Minerals and Minerals and Waste Plan will not be immediately apparent to promoters of such development. Policy W3 requires amendment to clearly state the requirement for waste management method statements.*

*111. NE’s advice is that where there is only a limited pool of measures available for addressing targets, these should be used to bring the designated site into favourable condition rather than enabling growth. This advice is directed primarily at housing development rather than waste development.*

*112. There would be a need for HRA of proposals affecting European designated sites and site-specific mitigation measures could be employed to demonstrate no adverse effect. The extent to which site restoration measures could be relied upon would vary according to individual circumstances, and the provision of site-specific measures would not necessarily undermine the restoration of sites.*

*113. Because agricultural related waste is a significant contributor to nutrient discharges it is necessary to include a requirement in Policy W3 for each proposal, but not the entire agricultural holding, to demonstrate nutrient neutrality. The policy needs to be clear as to this requirement. MM64 provides all the necessary modifications to the policy which are required for effectiveness. The deletion of the word “betterment” and its replacement with “at least nutrient neutrality” has been agreed between the Council and NE. A requirement for all proposals to demonstrate betterment has not been justified. This does not mean that individual proposals cannot aim to achieve betterment or that this would not be taken into account as a material consideration in planning applications.”*

132. The NFU then responded to the consultation on Main Modifications with a detailed response:

*“MM64 (Policy W3) - We are concerned that the requirements within this document, particularly Policy W3: Agricultural Waste Management, will curtail the industry’s ability to implement infrastructure upgrades and improvements. Preventing such investments will minimise any efforts to reduce phosphate losses to water, reduce ammonia emissions, and other environmental, animal health and welfare benefits associated with upgrading infrastructure. e.g., new livestock housing, manure and slurry stores.*

*The proposed modification removes the reference to betterment as was previously stated. This is not a sound modification to put in place as it will in fact do the opposite to what this plan is intending to achieve by*

*hindering environmentally impactful improvements from being adopted, rather than being able to upgrade any aging infrastructure to newer buildings that are built with environmental benefits in place, which are able to meet the demands of our changing climate, buildings will have to remain as they are. This modification will therefore result in a negative impact on the environment as potential for beneficial improvements will be forgone.*

*Betterment – For agricultural businesses across England, the ability to have the consideration of betterment taken into account when submitting a planning application is vital. In cases where improvements to existing housing, manure/ slurry storage and livestock handling facilities is possible, the ability to do so can aid the delivery of significant environmental benefits which in many cases, such as the Slurry Infrastructure Grant (SIG), exceed current regulatory requirements.*

*Where betterment falls short of achieving a perceived and acceptable level of risk reduction, as exemplified by nutrient neutrality, we would ask that due consideration of the proposed significant reductions are considered rather than rejected to avoid forgoing what in many cases can be a significant improvement. The NFU is working with Natural England and the Environment Agency to develop improved guidance on betterment that will support the delivery of significant improvements on farm, which also support national ambitions to protect the environment.*

*Regulatory compliance: Agricultural businesses are, in some cases, required to implement improvements, adaptations or remedial work on existing infrastructure in line with the Environment Agency's (EA) advice led approach to enforcement to promote compliance with agriculture regulations such as SSAFO. This policy indirectly contradicts the EA's statutory duty to enforce compliance by preventing the implementation of improvements.*

*Article 84.b of the National Planning Policy Framework states that - Planning policies and decisions should enable: b) the development and diversification of agricultural and other land-based rural businesses. Per our understanding of this policy, the proposed views of this document will directly contravene this framework in lieu of any ability to apply consideration of betterment to provide a reasonably practicable method of meeting planning policy requirements, which would support the development and diversification of agricultural businesses.*

*Furthermore, this modification is not justified as it goes so far as to completely contradict the ambitions of Government funded grants such as Countryside Stewardship and the Slurry Infrastructure Grant. These grants are intended to enable farm businesses to deliver environmental improvements and therefore public benefit through the improvement of existing on farm facilities.*

*The application of this approach has the potential to directly hinder the progression of the local agricultural businesses and wider economic*

*development.*

*Positively prepared – The plan in its current state prevents applicants from fulfilling the environmental objectives of sustainable development as set out in in Para. 8 of the NPPF (2021): Applicants must be able to carry out sustainable development so that they can minimise pollution, whilst mitigating and adapting to climate change, all forming part of the move towards a low carbon economy. The plan will not allow for farming, a large part of Herefordshire’s land use to do this, and is based on short-term, rather than long term evidence of what the sector can provide to reduce pollution.*

*As previously stated in this response, the plan grossly misidentifies slurry and manure as purely a waste product and not realising the environmental benefits that proper management can provide.*

*Existing livestock units may not be able to demonstrate nutrient neutrality, but this should not stop them from accessing grants. In addition, grants such as the Slurry Infrastructure Grant have profound benefits for reducing the likelihood of any phosphate run off as it enables farms to expand, replace or build additional purpose built slurry storage facilities which have been designed to ensure no leaching can occur. Defra has recently launched a further £10 million grant which is available for cattle farmers to upgrade existing buildings. The modification proposed is therefore neither justified or effective as it could completely preclude Herefordshire farmers from accessing the grant. We would like to clarify the planner’s definition of waste for the context of these amendments. It is extremely difficult to assess the requirement to demonstrate nutrient neutrality when it is our understanding that many of the ‘wastes’ in agricultural production referred to in this document are not legally classed as waste. For example, manure and slurry are not wastes when used directly to improve soil or support crop growth on agricultural land. The reason for this is that animal faeces are a by-product of keeping animals and make up a traditional fertiliser where other fertilisers may be regarded as a substitute.*

*Furthermore, while the NFU supports the use of waste management plans we would challenge the categorisation of slurry and manure as a waste product. The plan itself acknowledges this in para 7.2.11 “Whilst natural agricultural waste is not usually appropriate as a matter for a waste local plan, due to the local distinctiveness of Herefordshire, policy W3 has been prepared to address both natural and non-natural agricultural wastes.”*

*This modification is also not consistent with national policy. Contrary to chapter 3, para 16 (f) of the NPPF (2021), the proposed requirements for a waste management method statement are potentially a duplication of reporting already compiled by farming businesses for Environment Permitting, Farming Rules for Water compliance and the Water Framework Directive. This requirement has the potential to add*

*significant additional costs for businesses seeking to invest in infrastructure that delivers an environmental and water quality benefit.*

*It is not the purpose of planning policy to dictate how an individual business should be run in any sector. Any local planning authority attempting to do so through either policy or through condition attached to planning permission would be acting ultra vires and be open to a legal challenge. Para 35(b-d) of the NPPF (2021) calls for policy to be justified, effective and consistent with other national policy and this modification could be interpreted in a manner that curtails growth in the agriculture sector, potentially requiring destocking in order to release new livestock housing that could be required for other legislative reasons (e.g. animal health and welfare). This will have the unintended consequence of tying the industry to livestock housing which will over time become outdated and require updating, therefore restraining growth and the adoption of new farming practices, technology and best available techniques therefore forgoing potential environmental improvement.*

*They must also be used as part of a lawful operation to be classed as a non-waste. For example, use complies with the Nitrates Directive and takes place on clearly identified parcels of land without prior processing. Storing and spreading of organic manures is regulated by the Water Framework Directive as well as Farming Rules for Water and for the majority of Herefordshire, the Nitrate Vulnerable Zone applies in which the regulations of producing, storing and spreading of organic manures is clearly defined and regulated. Increasing the level of compliance, will only duplicate records and add unnecessary complexity and cost.*

*Demonstrating that all livestock units and anaerobic digestions plants within the Wye SAC are nutrient neutral is going beyond national guidance as nutrient neutrality is only required within the Lugg catchment. We do however accept that development outside the Lugg catchment, but still within the Wye SAC, should not adversely affect the SAC status, therefore reduced justification for the development should be required. Permitted development as well as other developments outside of the SAC would not normally be required to demonstrate nutrient neutrality.*

*We are also concerned if one element of a farming enterprise is to change, the whole holding is to demonstrate nutrient neutrality which is disproportionate to the proposal.*

*B4. Please set out what change(s) you consider necessary to the main modifications to make the Minerals and Waste Local Plan legally compliant or sound. It will be helpful if you are able to put forward your suggested revised wording of the policy or text.*

*MM64 – We would like to reiterate that manures and slurries are not a ‘waste’ and should not be considered as such. It is not legally correct*

*for the Plan to refer to manures and slurries as 'waste' as it contravenes national policy and also contravenes national legislation.*

*Replacing the mandate for improvement with a focus solely on achieving at least nutrient neutrality diminishes the potential of agricultural projects to showcase their capacity for generating benefits that surpass any negative effects or consequences.*

*For the plan to be positively prepared and be compliant with the aspirations of the NPPF (2021) betterment needs to be reintroduced into Policy W3 and a weighted argument for projects. The NFU would like to see the policy say:*

*“3. Proposals will be supported where they can demonstrate betterment of nutrient discharges within the River Wye SAC and the River Clun SAC or, demonstrate a contribution towards nutrient neutrality within the River Lugg SAC catchment and River Clun SAC.”*

*Note: The whole of the River Wye SAC is not at this time subject to the requirements or restrictions of nutrient neutrality or the conditions of such designations.*

*Definition of betterment: Clear and effective guidance on the conditions which stipulate betterment, should be provided as part of the references within this document to ensure clarity of requirements as part of any planning submission.”*

133. Mr Westaway submits that it was particularly important that the NFU were consulted properly because it is accepted that the extension of the policy to cover agricultural waste was “unusual” and “innovative”, as is set out in the Hendeca Report quoted above at paragraph 26. This meant that the “soundness” of the policy needed to be properly considered by the Inspectors.
134. Secondly, the failure to consult at the regulation 19 stage deprived the NFU of the opportunity to raise the issues at the Examination, a critical stage of the process which included a lengthy period to produce written representations and a right to appear at the Examination. He submits that regulation 19 is the critical stage for consultation on a Local Plan, with a suite of specific duties included in regulations 23 and 24 of the 2012 Regulations. Participation at the Examination and the ability to make the points in front of the Inspectors is key to being able to explain the issues.
135. Further he submits that the consultation at Main Modifications stage, after the Examination, was expressly limited to the Main Modifications and not the original text. He refers to the Procedural Guide for Local Plan Examinations, produced by the Planning Inspectorate, which in respect of this stage states:

*“6.9. The precise arrangements for public consultation will vary from case to case but will follow these general principles:*

- it will be made clear that the consultation is only about the proposed MMs and any policies map changes (and no other aspect*

*of the plan), that they are put forward without prejudice to the Inspector's final conclusions, and that all representations made will be taken into account by the Inspector;*

- *the consultation document will include all the proposed MMs, making no distinction between those originally proposed by the LPA and those proposed by the Inspector or others;*
- *if the LPA wish to include additional modifications in the consultation document, they should be clearly distinguished from the MMs and it should be made clear that they are not before the Inspector for consideration;*
- *the nature and duration of the consultation should reflect that of the consultation held at Regulation 19 stage, where appropriate. This means it should last at least six weeks."*

136. Thirdly, Mr Westaway submits that there are a number of substantial concerns about the soundness of the policy which the NFU would have wished to raise in its regulation 19 representations. In particular he sets out:

- a. The extension of the MWLP to address agricultural material that is (at least generally) excluded from control as waste, such as manure and silage, and lack of justification for such an extension ("the waste definition issue"). Mr Westaway submits that the approach to the definition of waste goes directly to the soundness of the plan and was not addressed in the Inspector's report.
- b. The inclusion within a MWLP of policies directed at development that is not wholly or mainly used for waste or minerals purposes, and so it is not appropriate in a minerals and waste plan, in particular as regards livestock units ("the county matters issue").
- c. The unsound duplication in the MWLP of existing non-planning regulatory controls ("the duplication issue"). Again he says this goes to the soundness of the plan, and the Inspectors did not deal with the guidance in para 194 of the NPPF.
- d. The inappropriateness of extending planning controls to the whole agricultural unit in which development takes place ("the agricultural unit issue").
- e. The inappropriateness of the extension of nutrient neutrality requirements to agricultural development and wider agricultural activities ("the nutrient neutrality issue"). The extension of nutrient neutrality requirement to the entire agricultural unit were only introduced in the 2021 version of W3. The NFU's submissions on the extent of the impact on agricultural operations was not before the Inspectors.

137. Mr Kimblin relies on *Cooper Estates Strategic Land Limited v Royal Tunbridge Wells Borough Council* [2017] EWHC 224 (Admin) at [26]:

*“26. The public examination of a plan is not an Inquiry into objections raised by individual parties. The Planning Inspectorate’s document “Procedural Practice in the Examination of Local Plans” makes that clear. The examination is structured around the issues which the Inspector has identified as crucial for his judgment on the soundness of the plan. It alerts parties to the Inspector’s proactive and inquisitorial role; representations do not dictate the structure or focus of the examination. If contentions do not assist him to reach a judgment on the soundness of the plan, he will not spend time at the hearings on them. The hearings are only part of his examination of the soundness of the plan.”*

138. Mr Kimblin submits that the NFU had engaged in the Plan process and were fully aware of the issues that arose in Herefordshire around water quality and the impact of agricultural waste. The points that they were making were essentially the same from the regulation 18 stage and at the final Main Modifications stage.
139. Ms Sargent went through each of the points Mr Westaway relies upon to show that they had been raised and considered. The “waste definition issue” is the point that lies at the heart of Ground One, namely that naturally occurring agricultural waste is not waste under the WFD and should not be included in a WMLP. This was expressly raised in the regulation 18 response, as set out above. The NFU further commented on this issue on the 18 August 2023 letter.
140. The “county matters issue”, is that a WMLP should not include a policy on livestock units. But as Ms Sargent points out, the NFU is no longer pursuing this argument. It is therefore difficult to see how it could have properly been successful before the Inspectors at the Examination stage.
141. The “duplication issue” is the argument that having a policy on agricultural waste in the WMLP duplicates other environmental controls and regulations. The NFU accepts that this was raised in its regulation 18 response in which it submitted that:

*“[t]he use and application of agricultural manures and slurries are separately regulated by the Environment Agency under a variety of legal frameworks, these would include Nitrate Vulnerable Zones and Farming Rules for Water to name just two. Therefore the addition of manures and slurries to the Waste Local Plan is an unnecessary duplication of existing regulation.”*

142. The response went on to note that agricultural phosphates and water quality in the county were “being addressed by the Environment Agency and also by the farming community” and that “[t]o duplicate the best practice recommendations within the Local Waste Plan goes beyond the scope of the planning system”. In relation to Policy W3 specifically, the NFU’s regulation 18 response stated “[w]e believe that it is disproportionate to require all agricultural developments to supply information on the management of manures and slurries as this area is already highly regulated and this matter is beyond the scope of the planning system”.

143. This issue was also raised in the Main Modifications response, where express reference was made to paragraph 16(f) of the NPPF: “[w]e are also concerned if one element of a farming enterprise is to change, the whole holding is to demonstrate nutrient neutrality which is disproportionate to the proposal”. The Inspectors also addressed it, reasoning at IR 113 that:

*“[b]ecause agricultural related waste is a significant contributor to nutrient discharges it is necessary to include a requirement in Policy W3 for each proposal, but not the entire agricultural holding, to demonstrate nutrient neutrality. The policy needs to be clear as to this requirement. MM64 provides all the necessary modifications to the policy which are required for effectiveness...”*

144. On the “nutrient neutrality issue”, the subject matter of Ground Three, Ms Sargent points out that numerous points were made by the NFU on this issue. In its regulation 18 response the NFU submitted that agricultural phosphates and water quality in the county were being addressed by the Environment Agency and also by the farming community and that “[t]o duplicate the best practice recommendations within the Local Waste Plan” went beyond the scope of the planning system.
145. I accept the LPA’s submissions on this Ground. The starting point is that pursuant to s.113(6) PCPA the NFU can only succeed if they suffered “substantial prejudice” by reason of the accepted procedural error of not consulting them at the regulation 19 stage.
146. I accept that regulation 19 is an important stage in the procedural process and the ability to respond to that consultation includes elements which do not exist at prior or subsequent stages. In particular, the right to appear at the Examination and the time allowed for detailed and considered responses to be submitted. However, to determine whether there is substantial prejudice it is necessary to consider to what degree there were further matters which the NFU could have raised that were not in practice before the Inspectors. In doing this exercise it is important to have in mind that the Inspectors’ function is an inquisitorial one and that they are expert Inspectors, who can be taken to be knowledgeable about the context of issues before them. The mere fact that the NFU might have provided more detail and could have made oral submissions is not of itself sufficient to establish substantial prejudice.
147. Therefore I reject Mr Westaway’s overarching submission about the prejudice from not being consulted at the regulation 19 stage. It is essential to look at the various specific points he raises and consider whether in respect of each of them there were material matters which were not before the Inspectors which might reasonably have led to a different outcome.
148. The first is the definition of waste issue. As Ms Sargent says, this was raised by the NFU in the letter of 28 February 2019. The issue was again raised in the Main Modifications response of 18 August 2023. Although the NFU might have said more in written representations to the Inspectors and in oral submissions, the issue was squarely before them. To the degree that the NFU argues the Inspectors did not deal with the issue that is a matter for Ground Five and the reasons challenge.

149. However, in any event, the question of whether it was open to the LPA to treat animal manure as “waste” is one of law. All the legal points in advance of the NFU’s position have been put before the Court under Ground One. For the reasons given above the LPA’s approach to waste was legally correct. It follows that the Inspectors, if properly advised, should have rejected the NFU’s submissions on this point in any event.
150. The second matter is “county matters”, namely that the livestock units could not be included in the WMLP because it is a “county matter”. However, that point is no longer being pursued by Mr Westaway. Therefore the NFU cannot have been substantially prejudiced by not being able to pursue it at the regulation 19 stage.
151. The third matter is that of alleged “duplication” of controls. Again, this was raised in the letter of 28 February 2019 in clear terms. It was also raised in the Main Modifications response, with express reference to the NPPF. The Inspectors dealt with the justification for policy W3; *“because agricultural related waste is a significant contributor to nutrient discharges it is necessary to include a requirement in Policy W3 for each proposal...”*. In my view there is no possibility in the light of the evidence about agricultural manure having a significant role in the diminution of water quality of the Inspector’s rejecting or further modifying W3 in the light of further submissions on this issue.
152. The fourth matter is nutrient neutrality. Again the NFU said that agricultural phosphates and water quality were being dealt with by the Environment Agency in the regulation 18 response. In the Main Modifications response at paragraph 39.6-7 they expressly referred to the requirement for nutrient neutrality across the Wye catchment as being too broad and disproportionate, and argued against “betterment”. The Inspectors had the information about Natural England’s position. Therefore again, I cannot see any realistic possibility that the Inspectors’ conclusions would have changed with further submissions.
153. For all these reasons I do not think that NFU were significantly prejudiced by the accepted procedural error. I reject this Ground.

#### Ground Five

154. Mr Westaway submits that the Inspectors (and thus the SoS) failed to give legally adequate reasons in respect of the principal important controversial issues namely:
- a. The appropriate scope of the MWLP as regards agricultural waste, in particular having regard to the legal definition of “waste”.
  - b. The soundness of Policy W3 in light of existing regulations and the duplication of the policy with those controls, having regard among other things to the 2023 NPPF [16], [35] and [194].
155. There is no dispute about the legal principles. The standard that applies is that set out in *South Buckinghamshire DC v Porter* [2004] UKHL 33 at [36]. However, the Courts have been clear that a Local Plan Inspector’s Report does not have to deal with each issue raised by an objector as the Inspector is carrying out an inquisitorial function. In *Cooper Estates v Royal Tunbridge Wells BC* [2017] EWHC 224 at [26]-[29] Ouseley J said:

*“26. The public examination of a plan is not an Inquiry into objections raised by individual parties. The Planning Inspectorate’s document “Procedural Practice in the Examination of Local Plans” makes that clear. The examination is structured around the issues which the Inspector has identified as crucial for his judgment on the soundness of the plan. It alerts parties to the Inspector’s proactive and inquisitorial role; representations do not dictate the structure or focus of the examination. If contentions do not assist him to reach a judgment on the soundness of the plan, he will not spend time at the hearings on them. The hearings are only part of his examination on the soundness of the plan”.*

156. In CPRE Surrey v Waverley BC [2019] EWCA Civ 1826 Lindblom LJ (as he then was) observed at [76] that:

*“[g]enerally at least, the reasons provided by an inspector’s report on the examination of a local plan may well satisfy the required standard if they are more succinctly expressed than the reasons in the report or decision letter of an inspector in a s.78 appeal against the refusal of planning permission.”*

However, that does not detract from the need to provide an intelligible explanation of how the key issues are resolved.

157. Mr Westaway focuses on two particular issues which he says are not properly grappled with in the reasons – the definition of waste and the duplication of existing controls, as referred to in NPPF para 16(f).
158. Mr Kimblin and Ms Sargent point not just to the IR itself, but also the reasoning set out in the background documentation that was well known to the Inspectors and parties.
159. Ms Sargent submits that there was no obligation on the Inspectors or the LPA to respond expressly to NFU’s representations on the meaning of “waste”. The MWLP set out at para 6.2.11 of the supporting text to policy W3 the basic rationale for the policy. The Inspector’s Main Issue 6, and IR 110-116 set out the Inspectors’ views on the justification for the policy.
160. Further, Mr Kimblin relies upon the March 2020 detailed response to the draft Plan, set out in the Hendeca Report, as well as the further submission documents and the Main Issues Statement. The reasons for the policy were therefore eminently clear in the LPA’s documentation.
161. In respect of nutrient neutrality, the Inspectors’ reasons are fully set out at IR 17-19, which refers to the work that had been done between the Environment Agency and other bodies concerning nutrient neutrality within the River Wye SAC. IR 83-87 deals specifically with nutrient neutrality and the reasons for extending it across the River Wye catchment.
162. IR 110-116, as set out above, deals with the justification for policy W3. The Inspectors plainly accepted that agricultural related waste, inter alia animal manure,

was at least capable of being waste. In any event these paragraphs must be read together with the earlier paragraphs.

163. In my view the reasons here were legally adequate. As is clear from Cooper it is appropriate to take into account not merely the IR but also the background documents, which were available to the NFU and which explained in detail the rationale and justification for the policy. On the definition of waste issue, the focus on the environmental harm from agricultural manure is clear from the background documents. It is also important that the argument being raised, that animal manure should not be treated as waste, is ultimately a legal issue which has been determined under Ground One. Therefore even if the IR did not deal with all aspects of the legal argument, that matter has now been determined by the Court with full reasons.
164. In respect of nutrient neutrality, the justification for the policy is set out in detail in the IR, as well as in the background documents.
165. I therefore reject this Ground and the application as a whole.

Richborough