

PARISH OF SALTWOOD



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Date: 9 April 2022
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Appeal to ICO against the Environment Agency's decision to release to me only unreasonably heavily redacted versions of two Reports requested by me under Freedom of Information Legislation

Basic Case

The extent of the redactions is unreasonable and completely frustrates the reasons why this information was requested in the first place making it impossible to challenge Environment Agency decisions. Moreover, the reasons given by the Environment Agency for these redactions contradict the criteria established for the security of sensitive information and its own practice in relation to the release of other documents and related information.

Timeline

2 September 2021 – Freedom of Information request (number #787878) submitted to Environment Agency seeking release of the Section 10 Engineer's Report, dated 10 April 2020, on Mill Leese Flood Storage Area (FSA), Saltwood, CT21 4QU.

29 November 2021 - Environment Agency provided a very heavily redacted copy of the Section 10 Report (and also included a similarly heavily redacted copy of the Section 12 Engineer's Report on Mill Leese, dated 12 May 2021, since I had previously requested this in an email direct to a member of the Environment Agency staff before submitting my Freedom of Information request). The Environment Agency also initiated an internal review into their failure to respond to my Fol request within the required timescale (their reference for this review is KSL 231622 CG).

6 December 2021 – I informed the Environment Agency that I was dissatisfied with their response and was inclined to raise the issue with the Office of the Information Commissioner.

7 December 2021 – The Environment Agency informed me that they were treating my email of 6 December as a request for a further internal review.

3 February 2022 – The Environment Agency informed me that they had completed their further internal review (their reference KSL 243745 CG) and provided copies of the Section 10 and Section 12 Reports, still unreasonably heavily redacted, but with some very minor additional text now included.

Supporting Documentation included with this Appeal:

The Section 10 and 12 Reports - the additional previously redacted text, referred to in their email of 3 February, are highlighted in yellow.

A pdf of the email trail between myself and the Environment Agency between 27 August 2021 and 3 February 2022.

A spreadsheet, provided by the Environment Agency, giving details of water levels at Mill Leese FSA between 2009 and 2021.

Vegetation Management Plan Version 1

Vegetation Management Plan Version 3 (redacted by Environment Agency).

Vegetation Management Plan Version 3, (unredacted).

Vegetation Management Plan Version dated 20 September 2021.

Environment Agency letter to me dated 3 February 2022.

Environmental Information Regulations 2004, Section 12.

UK National Protocol for the Handling, Transmission and Storage of Reservoir Information and Flood Maps 2018.

Environment Agency letter to landowner's solicitors dated 26 August 2021.

Environment Agency submission to East Kent Magistrates Court on 10 October 2021.

Environment Agency letter to me dated November 2021.

Background

Mill Leese FSA (at National Grid Reference TR 165 360) is situated in a shallow valley in Saltwood in an Area of Outstanding Natural Beauty. A very small stream runs through the bottom of the valley and a public bridleway crosses the bottom of the valley. At its southwest boundary the valley is blocked by an 18 metre high, 300 metre long, 180-year old disused railway embankment. A culvert runs under the embankment allowing water to flow from the valley into the, also very small, Mill Leese stream.

The FSA was created by Shepway District Council (now Folkestone and Hythe District Council) in the mid-1990s after flooding in Hythe caused by a storm that saw 100mm of rain fall in just two hours. Most of the flooding was the result of surface drains being unable to cope with the volume of water but some was attributable to water run-off uphill from Hythe. This storm was described as a “1-in-500 year” event.

The FSA was designed to be able to impound up to 63,307m³ of water. This design was intended to be sufficient to cope with a “1-in-1,000 year” flood event (para 9.1 of the Section 10 Report). A hydrobrake controls the egress of water from the valley through the culvert on the very rare occasions that heavy rainfall leads to a significant build-up of water in the FSA. A spillway was also provided as part of the FSA that would allow water to flow through the culvert if water levels threatened to exceed the design level of 63,307m³.

The Environment Agency took over management Mill Leese from Folkestone and Hythe District Council in 2006 and has provided water level records from March 2009 to August 2021 (see spreadsheet).

The FSA is legally classified as a “large raised reservoir” under section A1(3) of the 1975 Reservoirs Act because it is “capable” of impounding 25,000m³. It is, therefore, subject to regular inspections by independent Engineers (Section 10 and Section 12 of the Reservoirs Act require these reports). However, in practice, the FSA is “a dry flood storage area, filling only during periods of high flows” (paragraph 6.1.3 of the Section 12 Report). Despite its legal classification as a “reservoir”, this description would not be applied to it in any common-sense, everyday usage.

In fact, based on the Environment Agency figures (see attached spreadsheet and comments in Environment Agency email dated 29 November 2021), the level of water temporarily impounded in Mill Leese FSA has **never** overtopped the spillway. The highest level recorded by the Environment Agency was in March 2020 when the water reached 32.776mAOD (Above Ordnance Datum – essentially above mean sea level), which meant it just reached the bottom of the spillway tower with a further 2 metres remaining before it could have reached the top of the tower. The overwhelming majority of the occasions when water was impounded in the FSA resulted in levels just at or slightly above the level of the banks of the stream and would not even submerge the public bridleway. Moreover, the Environment Agency has confirmed (see email dated 29 November 2021) that, in almost 12 years for which records exist, the total time that water levels have been above 29.5mAOD (i.e. just at the top of the banks of the stream) is a mere 80 hours. As the Environment Agency official commented, this “illustrates how quickly the levels rise and then fall at the site”.

This background is relevant because, although the FSA is dry for almost all of the time and the railway embankment has –so far as is known- never been called upon to hold back water, Engineers' recommendations for maintenance of the site have, according to the Environment Agency, included substantial works to the embankment to fell trees and prevent regrowth of saplings. This would result, over time, in the removal of almost all trees. These recommendations are, allegedly, intended to ensure that the integrity of the embankment would not be compromised if the hydrobrake and spillway tower became blocked during a period of exceptionally heavy rain, resulting in water levels surpassing the top of the spillway and rising up the side of the embankment. This "additional margin of safety" envisages water levels rising up to approximately 10 metres above the top of the spillway (which has never occurred) and also envisages a grotesquely improbable total of up to 392,000m³ potentially being impounded, i.e. up to six times more water being held back than is provided for in the "1-in-1,000 year flood event" for which the FSA was designed.

These recommendations for tree felling on the embankment and the prevention of natural regrowth, now incorporated in an Environment Agency Vegetation Management Plan, have prompted great concern within the local community over loss of amenity in an area popular with walkers and loss of habitat for wildlife, which currently provides nesting areas for birds and a home, and sanctuary, for eleven species of bats that are, of course, legally protected.

In order to reach their own judgement, the local community want to know what were the factors, and what were the lines of logic, that led the Engineers to make such, apparently far-reaching, recommendations for a site that had so little chance of posing a hazard, based on past experience and the extraordinarily remote likelihood of even the most extreme weather conditions leading to Mill Leese FSA having to impound water at levels being predicated by the Engineers and reflected in the successive Environment Agency Vegetation Management Plans. This desire is shared by the Parish Council that I chair, Saltwood's three District Councillors, our Kent County Councillor and our local Member of Parliament.

The continued refusal of the Environment Agency to "unredact" those parts of the Engineers' Reports that would give an insight into the Engineers' thinking and the assumptions they made, unreasonably frustrate the perfectly legitimate attempts by local residents and their political representatives to make their own informed judgements about the necessity for the work planned by the Environment Agency.

Environment Agency Contradictions

An Environment Agency letter to me of 3 February 2022 maintains that all the information withheld in the Engineers' Reports has been correctly redacted since its disclosure would "adversely affect public safety and also national security". It cites Regulation 12(5)(a) of the Environmental Information Regulations 2004 (EIR) as the basis for withholding this information, based on guidance in the, non-statutory, UK National Protocol for the Handling, Transmission and Storage of Reservoir Information and Flood Maps 2018 (the National Protocol) produced by the UK Reservoir Safety Liaison Group which comprises representatives from government agencies operating or supervising reservoirs in the four UK nations.

Section 12(2) of the EIR states that “a public authority shall apply a presumption in favour of disclosure” of information. Nonetheless, it “may refuse to disclose information to the extent that its disclosure would adversely affect international relations, defence, national security or public safety” (EIR Section 12(5)(a)). On this basis, the Section 10 and 12 Reports have been very heavily redacted. The Environment Agency claims that this is being done in accordance with National Protocol guidance. The National Protocol recognises reservoirs are likely to be “critical infrastructure” and that disclosing potential vulnerabilities might constitute a risk that could be made use of by, for example, terrorists. Consequently it states, in paragraph 15, that “the EIR require that a test of the public interest in disclosure be conducted before any exception is applied (there is a greater presumption in favour of disclosure than under FOI)”. But it goes on to state, in paragraph 16, that “National security should only be used as a reason for not disclosing information when deemed genuinely necessary, and retention or redaction of information must be justified. Adherence to this protocol maximises the disclosure of information to the public, whilst maintaining control of sensitive information. Considerations in favour of and against disclosure cannot be prejudged; one size does not fit all. The public interest must be considered in relation to each specific case.”

Annex 1 of the National Protocol sets out advice on types of information that should either be withheld, or may be disclosed subject to vulnerability checks and omitting vulnerabilities or -the very smallest category - should generally be disclosed. But the National Protocol perforce addresses issues relating to every type of reservoir in the UK (in England alone there were 2,097 so-called “large raised reservoirs” as at 31 December 2020). Consequently, guidance that is appropriate in relation to reservoirs that permanently impound enormous quantities of water and would pose an obvious risk to life and property if they failed or were deliberately damaged, may very well be inappropriate for “reservoirs” such as Mill Leese FSA that impound no water at all except on vanishingly rare occasions (water has been impounded at Mill Leese in the last almost 12 years for only 0.0008% of the time – 80 hours as a percentage of 105,120 hours in 12 years – so, less than one thousandth of 1%).

Despite the clear National Protocol guidance that “one size does not fit all”, the Environment Agency appears to have adopted a rigid approach of refusing disclosure of any information that might be construed, however tenuously, as falling within the categories of information set out in Annex 1 of the National Protocol. This conclusion is reinforced by several pieces of correspondence from the Environment Agency.

- On 26 August 2021 a senior lawyer at the Environment Agency wrote to the solicitors representing the landowner and said, inter alia, “The Inspecting Engineer has written a section 10 report for Mill Leese dated April 2020. This, as with the section 12 statement, is a very confidential document and we do not release it under Freedom of Information legislation for national security reasons, as I am sure you will appreciate.”
- The Environment Agency’s submission to East Kent Magistrates Court on 10 October 2021 in relation to an application for a warrant to carry out works stated, inter alia, in paragraph 5.h. “The Reports are not published on the grounds of

national security in accordance with the provisions of the Reservoirs Act 1975 (Capacity, Registration, Prescribed Forms, etc. (England) Regulations 2013 and subsequent guidance in the National Protocol for the Handling, Transmission and Storage of Reservoir Information and Flood Maps.”

[**Comment:** the reference to the Reservoirs Act etc. Regulations 2013 was a red herring; it is not an authority to refuse publication].

- In an Appendix of a letter to me, dated November 2020, the Environment Agency wrote “Factors in favour of withholding the information relate to the issues around national security, and public safety. We have very clear guidance (informed by intelligence from the security services) that supports our decision making in relation to the release of reservoir and dam information. We apply this guidance consistently to all such requests for information, and ensure we account for any wider contextual changes through our application of the public interest test.” [**Comment:** the use of the word “consistently” in this context strongly implies that the Environment Agency applies a single approach to all such requests and therefore does not follow the National Protocol guidance that “Considerations in favour of and against disclosure cannot be prejudged; one size does not fit all”].
- In a letter to me dated 3 February 2022 the Environment Agency wrote “It is vital that we do not expose any vulnerabilities of any reservoir into the public domain, as making such a disclosure would compromise public safety and national security at the reservoir at a time of heightened security threat.” [**Comment:** the use of the expression “any vulnerabilities of any reservoir” also implies a standardised approach to requests for information].

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This, apparently, dogmatic approach to denying requests for information from the Section 10 and 12 reports – where the interest of the local community has plainly been focussed solely on the recommendations concerning vegetation management at Mill Leese – is bizarre when contrasted with other Environment Agency actions. As a result of other Freedom of Information requests, the Environment Agency has released Version 1, Version 2, Version 3 (redacted), Version 3 (unredacted) and a , presumably, final version dated 20 September 2021 of a Vegetation Management Plan recommended by both the Inspecting and Supervising Engineers.

These plans go into considerable detail about the vegetation management planned over a five year period, including tree felling and the effect on wildlife habitat. Moreover, I, with the landowner and other local representatives, have attended two on-site meetings with Environment Agency staff (in August and September 2021 – a further on-site meeting took place later, which I could not attend) where the Vegetation Management Plan and the reasons behind it were discussed at length. Despite having received this extensive information, it is still important to the local community to be able to know what the Engineers said in their reports about the rationale for the vegetation management they wished to see carried out.

It is also noteworthy that Environment Agency staff themselves had, at one stage, significant reservations about the Engineers’ recommendations. In Version 1 of the Vegetation Management Plan, dated 23 February 2021 they wrote “We note the

requirements of the section 12 and 10 reports. However, we are challenging the Matter of Maintenance contained within the Section 10 report of April 2020 section 13.4 a; *the long-term aim should be that the entire embankment is covered in grass where possible and only managed large trees remain*. We believe that this aspiration is not deliverable within the constraints we have (ecological, AONB and landowner resistance). Instead, we plan to manage diseased and dangerous trees upon the embankment, keep the crest clear of woody vegetation and remove fallen timber that lies on the upstream facing slope, below the exceedance line. Recent monitoring of bat activity, in support of this winter's works, have revealed the presence of numerous bats of various species using the embankment as a foraging and navigational resource. We feel that extensive tree works will threaten the habitat of protected species (see report in appendices)".

The Environment Agency's approach to redacting reports has also engendered mistrust among the local community. The landowner obtained Version 3 of the Vegetation Management Plan during the summer of 2021 but it was very heavily redacted. When this was challenged at the on-site meeting in August, "security issues" was given as the reason for so much text being deleted. A few days after these exchanges, having clearly thought better of it, an unredacted version was provided. On examination, it was clear that "security" played no role whatsoever in the redaction. The deleted text reflected management nervousness about proceeding with the work in the face of opposition from the landowner, the likely need for consultation with the District Council and, crucially, blacking out an entire appendix, written by their own ecologist, detailing the importance of this woodland for bats and warning that "the trees and vegetation cannot legally be removed and replaced by grassland".

Finally, a proposal made to senior Environment Agency officials by our local Member of Parliament, at the on-site meeting in September 2021, that the Agency should use the mechanism provided for in Section 19 of the Reservoirs Act to refer the Engineers' recommendations on vegetation management to an independent civil engineer for a "second opinion" was never acted upon.