LEIGH DAY

Registered office
Panagram
27 Goswell Road
London
EC1M 7AJ

DX 53326 Clerkenwell
020 7650 1200
postbox@leighday.co.uk

leighday.co.uk

UK Offices
Chesterfield
Leeds
Liverpool
London
Manchester

Secretary of State for Environment, Food and Rural Affairs
Seacole Building
2 Marsham Street
London
SW1P 4DF

Correspondence.section@defra.gov.uk;
thetreasurysolicitor@governmentlegal.gov.uk

EMAIL: rgama@leighday.co.uk; jeriksen@leighday.co.uk

TELEPHONE: 020 7650 1200

YOUR REF:

OUR REF: RGA/JEK/00002204/4

DATED: 22 May 2025

LETTER BEFORE CLAIM

Dear Secretary of State

In a proposed application for judicial review

1. We write this letter in accordance with the Pre-Action Protocol for Judicial Review.

2. If we do not receive a satisfactory response to this Letter Before Claim within 14 days (i.e. by 5 June 2025), we reserve the right to commence judicial review proceedings without further notice.

A. The Defendant

3. The proposed defendant is the Secretary of State for Environment Food and Rural Affairs (address as above).

B. The Claimant

4. The proposed Claimant is Surfers Against Sewage (**"SAS"**).

5. The details for the proposed Claimant are: Surfers Against Sewage, Wheal Kitty Workshops, St Agnes, Cornwall, TR5 0RD.

C. Reference details

6. Our case reference is: RGA/JEK/00002204/4.

7. Please provide your case reference by return.

D. The details of the matter being challenged

8. The Claimant challenges the Consultation Response published on 15 March 2025 insofar as it purported to set out the Government's response to its consultation on proposed Core Reform 2 to the Bathing Regulations 2015 including (as we

understand it) embodying the Secretary of State's decision as to what action the Government will now take on Core Reform 2. That document discloses an unlawful failure to consider consultation responses conscientiously and/or a failure to give reasons for the decision taken to proceed with Core Reform 2.

9. The Claimant also notes its concern regarding any proposed implementation of Core Reform 2 by way of statutory instrument given that it is an acknowledged departure from EU law. No explanation has been provided by the Secretary of State as to the basis for making this change by way of regulations. See further para 34 below.

E. Details of any Interested Parties

10. We do not consider there to be any Interested Parties to the claim. If you disagree, please provide the names and addresses of the proposed Interested Parties by return, alongside your reasons for doing so.

F. The issue

i. Relevant factual background

The Consultation

11. On 12 November 2024, the Secretary of State published proposals outlining potential reforms to the Bathing Water Regulations 2013, which were made to implement the 2006 Bathing Water Directive.[1] The consultation closed on 23 December 2024. One of the three "Core Reform" proposals put forward was *"including the feasibility of improving a site's water quality to at least sufficient"* – "Core Reform 2".

12. The Consultation Document explained by way of background that:

> "Bathing waters are currently managed under the Bathing Water Regulations 2013 (hereafter, 'the Regulations') which apply to both England and Wales. The Regulations transposed the 2006 EU Bathing Water Directive into domestic law and were assimilated into UK law under the Retained EU Law (Revocation and Reform) Act 2023.
>
> Following final designation as bathing waters, coastal and inland waters are monitored by the Environment Agency (EA) in England and Natural Resources Wales (NRW) in Wales respectively. Water quality sampling and testing is used by local authorities to inform public health messaging on the health risks associated with bathing and identify where improvements are necessary. There have been changes in how and where people use bathing waters since the Regulations were introduced. In their current form, the Regulations take a generally 'one-size-fits-all' approach to bathing water designations, water quality monitoring and the de-designation process.
>
> There may be advantages to reforming the Regulations to allow for greater consideration of site-specific factors in these processes. The purpose of

[1] https://consult.defra.gov.uk/water/bathing-water-reforms-consultation/ https://consult.defra.gov.uk/water/bathing-water-reforms-consultation/supporting_documents/Bathing%20Waters%20Final%20Consultation%20document.pdf

> the Regulations is to ensure the protection of public health through the use of monitoring and classifications. It is the government's intention to pursue an increase in the designation of safe bathing water sites.
>
> For these reasons, Defra and the Welsh Government are consulting on potential reform measures to improve the current Regulations and increase flexibility. This consultation seeks views on 3 proposed reforms as well as 9 technical amendments to improve the use of EA and NRW resources and bring the Regulations in line with modern sampling practices. [...]"

13. The Consultation Document also explained that (emphasis added):

> "Popular coastal and inland waters that attract a large number of bathers can be designated as bathing waters under the Regulations.
>
> Designating a site as a bathing water means **the site will be subject to a programme of water quality monitoring by 'appropriate agencies'** - the EA in England, and NRW in Wales. Their focus is to work collaboratively with partners including local authorities, water companies and local landowners to identify any pollution sources and to put in place actions to address these issues, bringing social, economic, leisure and health benefits."

14. Thus, designation leads to a programme of improving the quality of bathing water. It is the impetus to achieve improvement. Designation works – as the Secretary of State set out in the Consultation Document: *"Designation, monitoring and effective coordinated action has had a positive impact on water quality at sites used by the public across the country. In the 2023 season, 96% of bathing waters in England met the minimum standards, with 90% classified as 'good' or 'excellent', compared to 45.7% in 1995, despite the classification criteria becoming stricter in 2015. In Wales, 98% of bathing waters met bathing water quality standards in 2023, with 92% classified as 'good' or 'excellent'."*

15. Core Reform 2 was described as to: *"Include the feasibility of improving a site's water quality to at least 'sufficient' as a criterion for final designation. This would avoid poor value for money, by limiting expenditure where water quality improvement is not feasible or proportionate."* Page 13 of the Consultation Document explained that this reform would (emphasis added):

> "**Amend the Regulations so that the feasibility of improving a site to bathing water to at least 'sufficient' standard** (on cost and deliverability grounds) becomes a criterion that can be taken into account where necessary before a decision is made whether to fully designate the site as a new bathing water.
>
> • Allow physical safety and environmental protections to be considered before final designation.
>
> • **Set out how this assessment of feasibility will work and what evidence will be considered in non-statutory Defra and Welsh Government guidance on** the bathing water designation process published and made available to the public on GOV.UK and GOV.WALES once the Regulations are amended.

16. Thus, at this point, the Secretary of State seemingly envisaged Core Reform 2 being implemented by a mix of legislative amendment and non-statutory guidance. Legislative amendment was required first because (emphasis added):

> "**Currently the Regulations do not allow for any consideration of existing water quality, physical safety to the public, environmental protections and the costs associated with improving water quality to bathing water 'sufficient' standard.** This means sites are designated without a clear view of the likely costs, deliverability and benefits of improving the water quality to bathing water standard, and whether it would be feasible or proportionate to attempt to do so. In accordance with the Regulations, the EA or NRW have a duty to attempt to coordinate local investment actions to improve water quality to bathing water 'sufficient' standard following final designations where water quality is poor. This duty applies even when it is unclear whether investment will result in substantive improvements to water quality.
>
> We propose to mitigate these risks by amending the Regulations so that physical safety, environmental protections and the feasibility of improving the water quality of a bathing water site to at least 'sufficient' standard (on cost and deliverability grounds), becomes a criterion that can be taken into account when deemed necessary. This would be before a final designation decision is made. In doing so we will avoid poor use of resources at an early stage, allowing more strategic investment into sites where value for money can be achieved. This reform will provide an understanding of water quality prior to final designation that can be used to inform the public of health risks. It may also provide local stakeholders with useful information on likely sources of pollution from the outset. [...]."

17. This would result in substantial changes to the potential process (emphasis added):

> "EA and NRW will publish detailed processes and public facing guidance for how sites will be assessed, including assessment criteria and cost-benefit thresholds... It is likely that some of the following elements, when deemed appropriate, would need to be included in the process to enable Defra and the Welsh Government to decide whether the likely costs, deliverability and benefits would warrant designation of the site as a bathing water:
>
> • An initial triage stage whereby applications are assessed using desk-based analysis and limited historic/existing/initial sampling data to gauge their potential to achieve compliance with bathing water 'sufficient' standard and identify cases that **are highly likely to meet 'sufficient' standard or higher**. **These sites will be considered for final designation**.
>
> • For sites that are not identified as likely to meet 'sufficient' standard or higher, water quality monitoring at the site may take place for at least one season to assess water quality and variations.
>
> • **Once sampling data is gathered, sites that meet bathing water 'sufficient' standard will be considered for final designation.**
>
> • For sites that do not reach the minimum standard, the gap to compliance could be estimated. These data would then be used as inputs to a cost-benefit assessment to determine the suitability of final designation.

• Applicants would be kept informed at agreed intervals throughout this process."

18. It was acknowledged that Core Reform 2 carried potential risks – but the explanation of them focussed on the purely financial (emphasis added):

> "**This reform does present financial risks in the form of disincentivising investment for sites with poor water quality, reducing the likelihood of them improving.** The lack of designation for some sites might also mean a reduction in funding for the protection of the natural environment around sites. Additionally, there may be costs to relevant authorities to carry out additional pre-designation monitoring and assessment of sites.
>
> However, this reform will allow more strategic use of local and national resources by avoiding sunk costs and poor value for money, this also serves to protect public health, by not designating sites which can't be improved to at least 'sufficient' standards. [...]"

Stakeholder responses

19. A number of stakeholders responded to the questions in respect of Core Reform 2, including SAS. SAS's response is enclosed with this pre-action letter, and its position was shared by a number of other key stakeholders: including: The Rivers Trust, Marine Conservation Society, Wildlife and Countryside LINK and Ilkley Clean River Group (among many other local campaign groups).[2]

20. Their core concern included that introducing a sufficiency criterion for designation would undermine the purpose of the Bathing Water Regulations. Even if not designated, bathers are likely to still use a popular bathing water area – also impacting public health. Moreover, introducing a barrier of 'feasibility' would likely mean that bathing areas which could and should be used for bathing will not be improved because of costs concerns. Thus, it would cut across the very purpose of the Bathing Water Regulations by reducing the number of areas designated for monitoring and improvement. This concern was heightened by the fact there was no detail provided as to how 'feasibility' or the costs and benefits would be assessed.

21. Even those who supported the proposal counselled caution, raising similar concerns to those raised by our client and others who opposed the proposal and/or made clear that they could not provide a full response without access to the necessary detail of the Government's proposal. This included in particular:

[2] See for example: Rivers Trust consultation response: 241223_Bathing-Water-Regulations-Consultation_The-Rivers-Trust-response-for-website.docx; Rivers Trust guidance on responding: Have your say on the Bathing Water Rules… | The Rivers Trust & Understanding the Bathing Water Rules Reform: Why… | The Rivers Trust

Marine Conservation Society guidance and response: Have your say on Bathing Waters in England and Wales | Marine Conservation Society

Wildlife and Countryside LINK which are a collective of environmental NGO's (which SAS are part of): WCL_Bathing_Water_Regs_Review_Response_Dec_2024.pdf

Ilkley Clean River Group - Our Response to Defra Consultation on Bathing Water Regulations – Ilkley Clean River Group

a. The Office for Environmental Protection (**"EOP"**) (bold emphasis in the original; underlined emphasis added):[3]

> "● The OEP response does identify concerns in some areas:
> The consultation does not acknowledge or link back to the Water Framework Directive (WFD) Regulations, which provide the wider system within which action to improve water bodies should be pursued. [...]
>
> ● There are opportunities to improve governance and transparency in some areas of the proposed changes. For example, some significant decisions under the current proposals could be determined without clear justification, through non-statutory rather than statutory guidance, or without reasonable appeal routes."
>
> "**Q11. To what extent do you agree or disagree that water quality, the feasibility to improve water quality to 'sufficient' standard, physical safety and environmental protections be considered before deciding whether to designate a site as a bathing water under the Bathing Water Regulations 2013 for England and Wales?**
>
> We agree with this proposal. Again, however, we have reservations about some aspects of how Defra proposes to give effect to this proposal.
>
> **Q12. Please give reasons for your answer.**
>
> We consider such an approach could form a useful element of a 'pre-identification' process, along the lines of that in Germany as discussed in our bathing water report (Section 4.3).
>
> We recognise that this is not intended to act as a barrier to designating new sites, as the consultation makes clear. The scheme will need to be designed and applied in a way that mitigates this risk. As part of this, Defra will need to consider how long the process will take, and over what period it is reasonable to assess the feasibility of a site achieving 'sufficient' for it to be selected for designation. Defra should also consider what information or advice is to be provided to recreational users of the site in the meantime.
>
> Such pre-identification assessments should include all relevant benefits for the water environment, including compliance with the WFD Regulations, rather than being a balance of the costs and benefits of achieving bathing water standards in isolation. For most water bodies, the environmental objectives under the WFD Regulations are to achieve 'Good Ecological Status' (or potential) by 2027.The consideration of the affordability and proportionality of achieving 'sufficient' bathing water quality should therefore be

[3] OEP response to Bathing Water Regs consultation | Office for Environmental Protection & 20241209_Defra_Bathing_Water_consultation_OEP_response (1).pdf. See also its previous November 2024 report: : Updating Bathing Water Regulations could better protect the public | Office for Environmental Protection.

based on the marginal costs of action beyond that needed to achieve the wider WFD Regulations' objectives.

We do not consider that it should be for proponents of new bathing waters to make the case on the feasibility of achieving 'sufficient' bathing water quality. They may not have the necessary information or expertise to undertake such an assessment. We agree that assessment should be undertaken by the EA. We suggest it should involve input from the proponents and other relevant stakeholders and include some form of public participation. The Secretary of State should make the final decision. The consultation suggests that details of how this assessment of feasibility will work. and what evidence will be considered, would be set out in non-statutory Defra guidance. Given the significance of this issue we suggest such guidance should be statutory and subject to consultation. [...]"

b. Paddle UK (emphasis added):[4]

"● Agree.

● Rationale: [Paddle UK] believes that it is reasonable for information related to safety, environmental considerations and the feasibility to reach a certain standard to be taken into account when assessing a new application, however we would need more detail on how these factors would be scored or balanced when making a decision whether to designate or not.

● Any decision would require:

● Any feasibility study should inform site management but not deter efforts to improve water quality for public health.

● [Paddle UK] would be concerned that complex feasibility processes will undoubtedly hinder voluntary community groups who have limited resources.

● [Paddle UK] would be concerned about decisions being taken related to safety, without the consultation with expert agencies, such as [Paddle UK], or other national governing bodies. Any guidance should be user friendly.

● If sites are not designated due to poor water quality, polluters should be held responsible for solutions rather than deterring public use through signage.

● [Paddle UK] would advocate for an appeal process for designation decisions, allowing new evidence to be considered, instead of relying solely on reapplication.

[4] file:///C:/Users/jmorrison/Downloads/Interim-response-to-Bathing-Waters-Consultation_nologo.pdf

The Government's Consultation Response

22. The "Consultation Response" was published on 12 March 2025. It is a materially deficient document. Despite the complexity of the issues raised by Core Reform 2, the Consultation Response provides only a very rudimentary, high-level, summary of the responses which does not in any way reflect opponents' views or aspects of the views raised by others known to SAS. It explained the essentially same background as quoted above, and then stated thus (emphasis added):

> "For these reasons, Defra and the Welsh Government have jointly consulted **on potential reform measures to improve the current Regulations and increase flexibility.** The decisions on whether legislation should be made to introduce reforms will be taken independently by relevant Ministers with respect to their own national jurisdictions. Regulations are currently shared, but the Environment Agency and NRW independently manage bathing waters within their own national jurisdiction.
>
> We have proposed 3 Core Reforms, 9 Technical Amendments and called for views for 2 Wider Reforms."

23. The only account of the consultation on Core Reform 2 was as follows (bold emphasis in the original; underlined emphasis added):

> "... All 3 Core Reforms consulted on had a majority of support from respondents. There was positive reception towards updating the bathing waters system, particularly for the proposed reforms on removing automatic de-designation and removing the fixed bathing season dates from the Regulations.
>
> **Core Reform 2**
>
> To introduce consideration of feasibility to improve to at least 'sufficient' water quality as well as considerations for physical safety and environmental protections in the designation process before a final designation is given.
>
> 56% of respondents either agreed or strongly agreed with this proposal.
>
> 32% of respondents either disagreed or strongly disagreed.
>
> The remaining respondents neither agreed nor disagreed or didn't know. Business and organisational respondents were 50% in favour of this reform, whilst 37% were against. The remaining neither agreed nor disagreed or didn't know.
>
> Health and safety was the most highly cited issue when responding to this proposed reform, <u>with concern about the feasibility assessment process being the second, specifically around transparency, communication and the resource required.</u>

> If a site was not designated, the respondents were most in favour of digital platforms and multi-channel communications being used to inform the public of the decision."[5]

24. The Consultation Response cautioned that the summary of responses was *"not an exhaustive list of all ideas provided by the respondents"* but then claimed that it *"summarises the most common concerns, opinions and relevant outliers."* It did not in respect of Core Reform 2. The concerns outlined above about the introduction of a feasibility requirement were simply not adequately reflected in the Consultation Response. Those concerns did not go only to issues of transparency, communication or resource issues, they also went to the fundamental incompatibility of introducing a feasibility element with the existing legal regime and its goals and the need for appropriate governance.

25. That insufficiency of summary of the responses particularly mattered if (which we envisage is likely to have been the case), it was only by reading a draft of that Responses document that the Secretary of State was able to consider what consultees had said.

26. Perhaps due to the above failure, the Secretary of State's response to the consultation, and decision to take Core Reform 2 forward, failed to engage at all with the concerns raised by respondents across the divide. The sole Secretary of State response to the consultation on Core Reform 2 under the heading *"UK government response and next steps"*:

> "Subject to parliamentary approval, Defra intends to proceed with planned regulatory reform for the 3 Core Reforms and 9 Technical Amendments outlined in this consultation."

27. That is it. No further explanation has been provided of why the Secretary of State decided that Core Reform 2 should be taken forward in the face of the concerns raised, and/or how those concerns were taken into account (if they were).

<u>Engagement between SAS and the Defendant since publication and the new Guidance</u>

28. On 24 April 2025, SAS representatives had a quarterly update meeting with the Defra Bathing Water Team. From that meeting, it is understood that the proposal is no longer to implement Core Reform 2 by way of amended legislation. Rather, the proposal is for it to be dealt with by way of guidance in force from 15 May 2025 (the start of the new bathing season), sidestepping Parliamentary approval. Thus, it appeared that the intention is to seek to effect legal change without legislative amendment. It has however been confirmed subsequently that this is not the case. Our client's representatives understood that the application guidance/process will be updated to include a new triage process owned by the Environment Agency, which would also be required to conduct a feasibility study. It was indicated that the guidance would be published on 15 May 2025.

29. SAS sought a meeting with the Minister to raise its concerns, but this was not possible. Consequently, on 13 May 2025 SAS emailed the Defendant outlining its concerns. In particular, SAS explained:

[5] See also Annex B for the relevant statistics.

> "Whilst we welcome the government's plans to update and amend the bathing regulations to better reflect how and who uses the water we are extremely concerned that Core Reform 2 goes against the aims of the Bathing Water Regulations which are designed to protect where a large number of people use the water.
>
> As we made clear during the consultation we believe that introducing a feasibility test for designation would undermine the purpose of the Bathing Water Regulations. Even if not designated, bathers are likely to still use a popular bathing water area – also impacting public health. Moreover, introducing a barrier of 'feasibility' would likely mean that bathing areas which could and should be used for bathing will not be improved because of costs concerns. Thus, it would cut across the very purpose of the Bathing Water Regulations by reducing the number of areas designated for monitoring and improvement....
>
> In our consultation response, we also made clear our concerns regarding the opaque feasibility process with no explanation of how the costs and benefits would be assessed in the decision-making process. We are not alone in these concerns with both The Office for Environmental Protection and Paddle UK also raising concerns about how the feasibility test would be implemented and what the decision-making process would be in their own responses to the consultation.
>
> However, judging from the Government's response to the consultation published on the 12th May, we believe that the government has not adequately considered these concerns. There is no answer to concerns about what the assessment of feasibility will involve – and whether cost will be allowed to outweigh the benefits of water improvement. There is simply no evidence of conscientious consideration of these important aspects of the consultation responses of those both for and against Core Reform 2...."

30. Thus, SAS urged the Defendant to pause the implementation of Core Reform 2 in order to properly consider the legality of its implementation and the implications for water use. The only response received to this to date was also sent on 13 May 2025, which explained only that: *"Core Reform 2 will not come into force on 15 May. The publication of guidance on 15 May will set out how the application process for Bathing Water status will function as we transition to new Regulations, including the available detail at this stage as it relates to Core Reform 2."*

31. The guidance was published on 15 May 2025[6] and states, insofar as material, that (underlined emphasis added):

> "**Triage process**
>
> Dependent on the planned reforms being implemented before the assessments for the 2026 designation decisions, the Environment Agency will assess your application using:
> - simple desk-based triage analysis
> - limited historic, existing or initial sampling data
>
> This aims to gauge its potential to achieve compliance with the bathing water 'sufficient' standard or higher, as set out in the regulations.

[6] Designate a bathing water: guidance on how to apply - GOV.UK

The triage process is being developed and will likely include an assessment of:

- access: including prohibitions on access and available facilities to support access
- physical safety concerns
- ecological sensitivity: locations will be screened for ecological high sensitivity that may be compromised by use as a designated bathing water
- potential sources of pollution and what can be done to address these

If the reforms are not implemented before this time, the designation decisions will be made on the basis of the criteria set out in the current Bathing Water Regulations 2013.

The triage process will allow sites with a high likelihood of meeting at least the 'sufficient' classification standard on the desk-based analysis to be recommended for designation ahead of the 2026 bathing water season. This is subject to any significant concerns arising from the triage process (for example, around public safety or ecological impact) or from the public consultation.

For remaining sites, the Environment Agency will need to complete further analysis to determine their potential to meet at least the 'sufficient' bathing water standard.

Feasibility and proportionality – cost-benefit analysis

After the triage process, if the Environment Agency needs further information as to whether your site would be likely to meet the 'sufficient' standard or higher, they will monitor it for one bathing water season.

Based on the sampling data, if your site meets at least the bathing water 'sufficient' standard, it will be considered for final designation. This is subject to any significant concerns from the 2027 public consultation.

If your site does not reach the minimum bathing water standard after being monitored for one season, the Environment Agency will carry out a 'feasibility assessment'.

This will include using the monitoring data to inform a cost-benefit assessment to determine whether it is feasible and not disproportionately expensive to bring a site up to the 'sufficient' standard.

If your site passes this feasibility assessment, Defra will include it in the 2027 public consultation. They will then recommend it for designation, subject to any significant concerns from the consultation.

If it does not pass this assessment, Defra will not recommend it for designation that year."[7]

32. There was no consultation on the above guidance or the process set out therein. More critically, the guidance does not provide any detail about how high / low risks

[7] To similar effect see the summary of the application stages.

are to be identified, or what the feasibility study will involve and consider. The significant deficiencies in the Consultation Response remain.

ii. Grounds of Challenge

33. SAS's first ground of challenge focuses on the Consultation Response (and thus the necessary conscientious consideration of responses to the consultation by the Secretary of State) and, in particular, the handling of the consultation on Core Reform 2. The concerns are that:

    a. A consultation must comply with common law duty of procedural fairness. That includes that the product of consultation must be conscientiously taken into account by the decision maker when the ultimate decision is taken.[8] As a consequence, a decision must be based on a reasonable or rational view of the evidence it is said to be based upon. It also must not be pre-determined.[9] A breach of this requirement also arises if the decision-maker fails to consider an aspect of the consultation responses which is material.[10]

    b. The Consultation Response document (which we understand to be the vehicle through which the decision-maker considered consultation responses) here simply failed to engage with or respond to legitimate concerns about the impact of Core Reform 2 on the goals of the Bathing Water Regulations, i.e. that by imposing a 'suitability' impediment to designation the Secretary of State will in fact disincentivise water improvement rather than encourage it. There is no answer to concerns about what the assessment of feasibility will involve – and whether cost will be allowed to outweigh the benefits of water improvement despite, *inter alia*, other obligations to improve water quality. There is simply no evidence of conscientious consideration of these importance aspects of the consultation responses of those both for and against Core Reform 2. There are equally no reasons given for the decision taken.

34. Our client is also concerned that the proposed implementation of Core Reform 2 by way of guidance as opposed to amended legislation (if that were indeed the proposal) would be unlawful. In summary:

    a. Article 3(1) of the Directive which defines its scope as follows (emphasis added):

    > "This Directive shall apply to any element of surface water **where the competent authority expects a large number of people to bathe and has not imposed a permanent bathing prohibition, or issued permanent advice against bathing (hereinafter bathing water).** It shall not apply to:

[8] *Gunning (1985) 84 L.G.R. 168* the Supreme Court affirmed these requirements in *R. (on the application of Moseley) v Haringey LBC* [2014] UKSC 56; [2014] 1 W.L.R. 3947 at [25];See also *R. (on the application of Flatley) v Hywel Dda University Local Health Board* [2014] EWHC 2258 (Admin) at [88]; *R. (on the application of United Company Rusal Plc) v London Metal Exchange* [2014] EWCA Civ 1271; [2015] 1 W.L.R. 1375 at [25]; *School and Nursery Milk Alliance Ltd v Scottish Ministers* [2022] CSOH 11; [2022] S.L.T. 262 at [43]; *R. (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52; [2021] 2 All E.R. 967.

[9] *R (British Academy of Songwriters, Composers and Authors) v Secretary of State for Business, Innovation and Skills* [2015] EWHC 1723 (admin); [168].

[10] *R(Kohler) v Mayor's Office for Policing and Crime* [2018] EWHC 1881 (admin) at [67]-[68]; *R (Morris) v Newport City Council* [2009] EWHC 3501 (Admin), [37]-[38].

(a) swimming pools and spa pools;

(b) confined waters subject to treatment or used for therapeutic purposes;

(c) artificially created confined waters separated from surface water and groundwater."

b. Regulation 3(1) of the Bathing Water Regulations therefore provided:

> "The Secretary of State must identify, and maintain a list of, the surface waters] in England, other than excluded pools and waters, at which the Secretary of State expects a large number of people to bathe, having regard in particular to past trends and any infrastructure or facilities provided, or other measures taken, to promote bathing at those waters."

c. In the Government's own words: *"Currently the Regulations do not allow for any consideration of existing water quality, physical safety to the public, environmental protections and the costs associated with improving water quality to bathing water 'sufficient' standard..."*

d. Core Reform 2 would involve a material change and departure from the legislative regime. Rather than recognise a surface water area as a potential bathing area, and then steps be taken to improve the water quality. The proposal turns this on its head and requires the feasibility of the using the water for bathing to be assessed first.

e. On the Secretary of State's own position, this would be a departure from the position under EU law. None of the public documents explain why the Secretary of State believes she could make this change under either the Retained EU Law (Revocation and Reform) Act 2023 and/or the European Union (Withdrawal Agreement) Act 2020. Please clarify the Secretary of State's position in this regard.

G. Action the Defendant is expected to take

35. The Defendant must now pause any further implementation of Core Reform 2 and provide a properly reasoned response to the Consultation. He must also confirm the legal basis upon which the Defendant believes it could make this change by way of Regulations.

36. This confirmation is required by 5 June 2025.

H. ADR proposals

37. The Claimant would welcome any opportunity to resolve this case without recourse to the courts.

I. Information / records

a) Documents/information requested

38. Please outline any relevant steps in the implementation of Core Reform 2, including any intention to conduct further consultation.

39. Please clearly state which Minister took the decision to proceed with Core Reform 2 on behalf of the Secretary of State, and when.

40. To allow us to complete our investigations, and in accordance with the pre-action protocol for judicial review, as well as your ongoing duty of candour, we request that you provide us with any documentation which is relevant to the Claimant's proposed judicial review claim.

41. We consider that this relevant documentation should include, but not be limited to, the following:

    a. The document(s) considered by the decision-maker (as noted above) for the purpose deciding to proceed with Core Reform 2.

    b. Any internal consideration / submission in respect of the consultation responses, beyond the published response including all documents considered by the decision-maker to as to inform themselves about responses to the consultation relating to Core Reform 2.

    c. Any submission before the Minister(s) in respect of Core Reform 2 prior to the Consultation Response being issued.

    d. Any submission and/or other documents relevant to the proposed implementation of Core Reform 2 as described above or otherwise.

    e. The documents evidencing the decision by the decision-maker to proceed with Core Reform 2 including any documents evidencing the decision-maker's communication of their views with their Private Office and any documents then conveying those views from the Private Office to others (a request informed by our recent experience of there being differences between the decision as expressed the decision-maker to the Private Office and the onward communication by the Private Office).

b) Duty of disclosure under Civil Procedure Rules

42. The information sought above is highly relevant to the Claimant understanding the reason behind the legal errors described above. This information is also essential for the Defendant to comply with its duty of candour. The Claimant must have as full a picture of the case as possible, in order to determine properly whether issuing proceedings is the best course of action.

43. We refer you to paragraph 13 of the Pre-Action Protocol for Judicial Review as outlined in the Civil Procedure Rules, which states:

> *"Requests for information and documents made at the pre-action stage should be proportionate and should be limited to what is properly necessary for the claimant to understand why the challenged decision has been taken and/or to present the claim in a manner that will properly identify the issues. The defendant should comply with any*

request which meets these requirements unless there is good reason for it not to do so. Where the court considers that a public body should have provided relevant documents and/or information, particularly where this failure is a breach of a statutory or common law requirement, it may impose costs sanctions."

44. We further remind you that you are under an ongoing duty of candour in these proceedings. The underlying principle concerning this duty is that a public authority's objective should not be to win at all costs, but instead should assist the court in its role of assessing the lawfulness of the decision under challenge, with a view to upholding the rule of law (*R v Lancashire County Council ex part Huddleston* [1986] 2 All ER 941.). We also draw your attention to the important guidance on the duty of candour to be found in *R (MA and KH) v SSHD* [2022] EWHC 2729 (Admin). This Divisional Court judgment emphasised, *inter alia*, the importance of compliance with the duty of candour at the pre-action stage.

45. Any failure to provide documents and disclosure by the Defendant will be a failure to comply with the duty of candour in the course of the pre-action phase of these proceedings.

J. Proposed reply date

46. With reference to the Pre-action Protocol for Judicial Review, we deem a reasonable response time is 14 days. Therefore, we should be grateful for a response by **5 June 2025** at the latest.

47. If we do not receive a satisfactory response to this pre-action letter by that date, we reserve the right to commence judicial review proceedings without further notice. If the proposed Guidance is published, implementing Core Reform 2, we put you on notice that our client will apply for an expedited hearing of this matter.

K. Address for reply and service of court documents:

48. Please serve your response to this letter by email to the email addresses above. Court documents may also be served by email in the same way.

Yours faithfully

Leigh Day.

LEIGH DAY