

Nutrient pollution and housing development: Nutrient neutrality

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'Green quango blocks housing developments across Britain' wrote *The Telegraph* back in April 2022. A snappy but unhelpful headline given that it concerned the consequences of nutrient pollution, which is in the news again with algal blooms being reported in Windermere and elsewhere. The 'quango' concerned, Natural England (NE), began issuing 'nutrient neutrality' guidance from 2019 to advise local authorities on how to deal with planning applications in areas affected by high levels of nutrient pollution. The number of authorities issued with such guidance has now risen to 74, impacting 14% of England's land area [according to the Chief Planner](#). In order to protect the environment, much of the housing development in the affected areas has been brought to a standstill.

Given the current climate crisis, the issue of nutrient pollution and the impact on housing development will almost certainly persist. However, the Department for Environment, Food and Rural Affairs (Defra) and NE have announced measures intended to enable stalled housing development to get going again. The Court of Appeal has also recently paved the way for local planning authorities to rely on NE guidance when granting consent for housing development in areas vulnerable to nutrient pollution. Developers whose projects have already been impacted by NE's nutrient neutrality guidance will be well-versed in the issues concerned, but more developments are likely to be affected in the future.

Why is nutrient pollution a problem for housing development?

Nutrient pollution is an excess of nutrients such as nitrogen and phosphorus in freshwater habitats and estuaries (see Defra's March 2022 Nutrient Pollution [Policy Paper](#) and NE's [Information Note](#) of 2 August 2022). It can cause eutrophication, which is the sped up growth of certain algae and aquatic plants resulting in, for example, algal blooms. This can impact oxygen levels in water bodies, with sometimes devastating effects. The source of such excess nutrients varies from site to site but, according to NE, common sources include livestock and arable farming, industrial processes and – as most relevant for housing developers due to the additional wastewater created by such development – sewage treatment works and septic tanks.

Defra and NE identify nutrient pollution in water courses as a 'significant cause of decline' in sites protected under the Conservations of Habitats and Species Regulations 2017 (known as the Habitats Regulations). Protected sites, also known as 'habitats sites' for national planning policy purposes, include special areas of conservation (SACs), special protection areas (SPAs) and sites of community importance (SCIs). The Habitats Regulations stem from European law, the Habitats Directive (92/43/EEC), which was retained following Brexit. Under this legislation, local planning authorities, being 'competent authorities', may only approve a plan or project (such as housing development) if they are certain that there will be no negative effect from the plan or project on the condition of the site.

NE's nutrient neutrality guidance and Habitats Regulations Assessments

Following a November 2018 decision of the European Court of Justice (*Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu V College van gedeputeerde staten van Limburg*) (the 'Dutch Nitrogen' case), in 2019 NE began issuing guidance to local authorities whose areas were affected by nutrient pollution. The guidance, known as 'nutrient neutrality' guidance, advised the individual authorities of protected sites in their area which were in 'unfavourable condition' or at risk of being so. As explained by the Chief Planner in March 2022, the effect of this was that to grant planning permission for developments in the relevant sites, planning authorities needed confidence that the development did:

... not require nutrient neutrality to be acceptable under the [Habitats Regulations] or that nutrient neutrality is secured, as part of the proposal.

To reach this conclusion, an HRA was required which showed the development either avoided harm to such protected sites or would have no adverse effect owing to the level of mitigation provided.

HRAs apply to developments pursuant to the Town and Country Planning Act 1990 as well as other development consent regimes. Wherever a project is likely to have a significant effect on a protected site which is not directly connected with or necessary to the management of that site an HRA must be carried out.

An HRA is a four-stage process:

1. 'Screening' considers whether the impacts of a development (alone or with other plans or projects) are likely to be significant.
2. 'Appropriate assessment' considers the impacts of the development and, where the impacts are adverse, considers potential mitigation measures.
3. If mitigation measures identified in the appropriate assessment will not avoid adverse effects, then the authority must consider whether there are 'alternative solutions' for achieving the project.
4. If no alternative solutions exist, and where there are still adverse impacts, any imperative reasons of overriding public interest (IROPI, Art 6(4) of the Habitats

Directive) must be assessed.

If an HRA demonstrates that a development will adversely affect a protected site, the local planning authority *cannot* grant consent for the development unless either there are 'imperative reasons of public interest' (IROPI) or there are alternative solutions which will address the adverse impact.

NE, Defra and the Department of Levelling Up, Housing and Communities (DLUHC) jointly published Nutrient Neutrality: A summary guide and frequently asked questions on 23 June 2022, which supplements the formal advice, guidance and tools issued by NE to local planning authorities. This guide is a helpful summary of the issue of nutrient pollution, the approach of nutrient neutrality, types of mitigation that might be available, and the respective roles of NE, government, planning authorities and developers.

Impact of mitigation measures

Refusal of housing development is not an inevitable consequence of the NE nutrient neutrality guidance. Nutrient neutrality can be achieved, so allowing planning permission to be granted, if mitigation measures to counter the nutrient load created through additional wastewater are secured in compliance with the Habitats Regulations. These mitigation measures are considered by the planning authority during the appropriate assessment stage in the HRA.

The June 2022 summary guide and FAQs set out some examples of mitigation measures which may contribute to nutrient neutrality and why. These include constructing wetlands, retrofitting Sustainable Urban Drainage Systems (SUDs) and making changes in land management. NE published a Technical Information Note in August 2022, 'Nutrient Neutrality Principles' (TIN186), setting out seven principles that nutrient neutrality mitigation measures must meet for the requirements of the Habitats Regulations to be met. These are that mitigation measures must:

- have 'scientific certainty', ie that the measures will deliver the required reduction in nutrients to achieve 'neutrality';
- have 'practical certainty', ie that they will be implemented and in place (secured and funded) at the 'relevant time', which may mean over the lifetime of the *effects* of the project;
- be 'preventative', addressing impacts over time ('temporarily') and according to their location ('spatially');
- not prejudice or make site restoration more difficult;
- not replace or double count existing measures;
- be 'carefully justified', ie not over or underestimated. Any upgrades to water treatment plants which are being taken into consideration must themselves be certain (ie agreed and funded); and
- ensure that existing land use at the site and any off-site mitigation land is not at risk of undermining 'the conservation objective to restore the site to a favourable condition'.

Whether or not proposed mitigation measures are sufficient to meet the requirements of the Habitats Regulations is a decision that the planning authority must take having followed the correct HRA process.

R (Wyatt) v Fareham BC [2021]

This High Court case concerned the grant of permission for housing development by a local planning authority which followed this process in reliance on the NE guidance, which was the subject of a challenge by an objector to the development.

The challenge took the form of an application for judicial review brought against the decision to grant planning permission for eight new four-to-five bedroom houses in the Solent region, despite it being a protected site. The High Court rejected the challenge and refused the application, saying that the grant of the permission by the local authority in accordance with the NE guidance was not in violation of the Habitats Regulations.

On 15 July 2022, the Court of Appeal upheld the High Court's decision in *R (Wyatt) v Fareham BC* [2022]. NE announced that the Court of Appeal's decision should 'give all those involved confidence in the approach and methodology' set out in NE's guidance, removing one level of potential uncertainty for developers.

Government intervention

Despite the potential for mitigation measures to open the door to housing development consents in affected areas, as *The Telegraph* reported in April, many local planning authorities have stopped granting permission while they 'work out what to do', threatening the government's 300,000 per year housing target and causing frustration for developers and councils alike.

As a consequence, in a Written Ministerial Statement (WMS) dated 20 July 2022, the Environment Secretary George Eustice announced a package of measures to help jump-start housing development in affected areas. This takes the form of a twin pronged approach: (i) tackling the problem of water pollution at source; and (ii) supporting mitigation schemes.

Tackling the source of water pollution

Nutrient neutrality aims to ensure that new development does not make pollution at protected sites worse. There is only so far that this can go. Action is also needed to positively improve water quality.

The government aims to achieve this by requiring that water and sewerage companies upgrade wastewater treatment works (WWTWs). They intend to do this by amending the Levelling Up and Regeneration Bill 2022-23 (LURB) which is currently at Committee Stage in the House of Commons. The amendment will place a new statutory duty on water and sewerage companies in England to upgrade WWTWs, so that they are at the 'highest technically achievable levels' by 2030 in the affected areas, focusing on the most polluting nutrients at protected sites. This will support wastewater upgrades already envisaged by the Environment Act 2021.

The intention is that these upgrades should be capable of being used by local planning authorities in their appropriate assessments. As the Chief Planner explained in her letter to Chief Planning Officers dated 21 July 2022, at the moment, the amount of mitigation

necessary for a development to achieve nutrient neutrality is very high and often not achievable. She explains that the Habitat Regulations 'require that mitigation be secured for the lifetime of the development', which is 80-120 years for Natural England's purposes. The idea is that the new statutory duty will mean that developments applying for permission now need only demonstrate that the necessary mitigation measures will be secured until 2030 when the new statutory duty will take effect, because after that date the pollution levels from WWTW should be 'much reduced'.

Supporting mitigation schemes

There are multiple reasons why mitigation measures struggle to satisfy HRA requirements presently. Developers may be asked to provide mitigation on-site (by incorporating measures into the scheme), off-site (often working with the local planning authority), or by purchasing 'nutrient credits' through private trading schemes which are being established in some areas where landowners are undertaking their own projects to reduce nutrient load. NE are aware that off-site mitigation measures and private trading schemes are outside developers' control and take time to put in place. Equally, on-site measures can push the boundaries of project viability.

Defra and NE's solution is that, in autumn 2022, NE will establish a statutory nutrient trading scheme. On 28 July 2022, the government issued a Direction to this effect under the Natural Environment and Rural Communities Act 2006. This provides that NE, working with local landowners, will prepare, facilitate and administer the operation of strategic mitigation schemes in areas where nutrient pollution is restricting development, with priority awarded to the areas where the schemes will have the most impact. These schemes will be funded by Defra and DLUHC. Developers will be able to purchase nutrient credits, if they wish, through the new Nutrient Mitigation Scheme.

The scheme will work by developers being issued with nutrient certificates, which will provide local planning authorities with the necessary certainty that nutrient credits that will be purchased by the developer before the development is occupied (as will be required by a planning condition) will mitigate the additional nutrients that will be created by the development. This will allow the planning authority to grant permission for the development having complied with the requirements of the Habitats Regulations.

The intention is that the statutory nutrient credit scheme will work alongside, rather than replace, existing private and local authority schemes that have been and are being established, which NE will in turn support. SME developers will be prioritised, although the scheme will be open to all developers. Income from credits will fund the cost of administering and maintaining the schemes, and of developing new schemes.

What next?

The intention is that the statutory nutrient credit scheme will be established by NE at some point in the autumn. There is a clear intention on the part of government, NE and PINS that this will go ahead. The WMS of 20 July 2022 notes that the scheme will be established with the support of Defra, DLUHC, the Environment Agency and Homes England, and that funding has been set aside from DLUHC.

There may be less confidence of success regarding the commitment to improve water

quality by tackling the sources of pollution. There is uncertainty surrounding the future of the LURB as a consequence of the Conservative Party leadership election. The LURB is a wide-ranging piece of legislation, covering levelling up commitments, fundamental reform of the planning system and various other measures. With Boris Johnson as Prime Minister and Michael Gove as Secretary of State for Levelling Up, Housing and Communities, the government was confident that the LURB would be pushed through Parliament by the end of this Parliamentary session. However, in hustings and interviews, both leadership candidates have been making various statements which could require changes to the current form of the draft legislation and impact the passage of the LURB.

It remains to be seen how quickly legislative changes which will impose the new statutory duty to improve WWTW onto water and sewerage companies can be brought forward. It also remains to be seen how effective the Environment Agency will be in monitoring compliance with the statutory duty by 2030. Local planning authorities may find it difficult to judge how certain they can be that developments need only prove that they can mitigate until 2030 rather than for the full 80 to 120 years of the lifetime of the project, which may in turn impact their confidence that they have complied with HRA requirements.

Finally, it is worth noting that pursuant to s113 of the Environment Act 2021, the government is also taking forward proposals to reform the HRA process, the intention being to simplify the system and merge different processes which currently apply to different protected sites (see PLJ May 2022, #397). While the general consensus is that this will be welcome, it will be another level of uncertainty for local planning authorities to deal with.

The problem of nutrient pollution urgently needs to be resolved. We must hope that the solutions proposed by Natural England and the government are successful in reducing the current blocks on housing development.

Cases Referenced

- Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu V College van gedeputeerde staten van Limburg [2018] C-293/17; C-294/17
- R (Wyatt) v Fareham BC [2021] EWHC 1434 (Admin); [2022] EWCA Civ 983

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