

Nutrient Neutrality – Detailed Notes

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1. KEY PRINCIPLES

Definition: "Nutrient Neutrality"

Nutrient neutrality is the outcome achieved when a specific land use or development within the catchment areas of vulnerable watercourses does not result in an increase in phosphate and nitrate levels in those watercourses beyond pre-development levels.

The Problem: Nutrient Pollution of Water

In freshwater habitats, estuaries and other water bodies, excess nutrients (mainly nitrates and phosphates) cause increased growth of plants and algae – a process known as 'eutrophication'. This removes oxygen from the water, which disrupts healthy ecosystems and impacts wildlife. Where this occurs, sites are said to have "unfavourable conservation status".¹ The sources of excess nutrients are site-specific, but the most significant are agricultural run-off (fertilisers and animal waste) and wastewater (e.g. from sewage treatment works and industrial processes).

Effect on Housing Development

Though a comparatively small source of harmful (excess) nutrients, wastewater from new housing developments inevitably increases the nutrient load in natural water courses. Recent developments in environment and planning law have established that any increase in overall nutrient pollution is intolerable in sites with important species or habitats. In such sites, it is now a prerequisite for planning permission that new developments are 'nutrient neutral'.

This can be achieved by designing developments alongside suitable mitigation measures; however these are often expensive and technically difficult. One effect of these requirements has been to dramatically inhibit residential developments.

Implications for Planning Authorities and Developers

By 16 March 2022, [Natural England had advised](#) 74 Local Planning Authorities (LPAs) that their catchments were affected by its advice on nutrient neutrality. Consequently, the Conservation of Habitats and Species Regulations 2017 (as amended) ("**Habitats Regulations**") require the LPAs to undertake "appropriate assessments" for development proposals in these areas.

The effect on housing developers is that they must calculate the nutrient burden of proposed developments in these areas and, if necessary, adopt appropriate mitigation measures.

2. JUDICIAL AND LEGISLATIVE FRAMEWORK

The Habitats Regulations

Many internationally important sites in England and Wales are protected under the Habitats Regulations. These are called "Habitats Sites" in the National Planning Policy Framework (NPPF).²

¹ Council Directive 92/43/EEC (conservation of natural habitats etc.) Article 1(e).

² The EU 'Habitats Directive' (Directive 92/43/EEC) requires EU Member States to prepare lists of important sites to be protected for species and habitats. These sites, designated 'Sites of Community Importance' or 'Special Areas of Conservation', were dubbed "European Sites" in Regulation 8 of the Habitats Regulations –

When "competent authorities" (planning decision makers, often LPAs or the Environment Agency) assess projects and planning applications, they are required to consider whether Habitats Sites will be significantly affected. If significant effects cannot be ruled out, the competent authority, in consultation with Natural England, performs a Habitats Regulations Assessment ("HRA") of likely damages and potential mitigation. If damages cannot be reduced or mitigated, planning permission will be refused.

The Dutch Nitrogen Case

In 2018, a landmark ruling of the European Court of Justice ("Dutch N")³ clarified its expectations regarding the assessment of proposed projects affecting protected sites in EU Member States.⁴

The ruling established that:

- national legislation can authorise developments on the basis of an "appropriate assessment" only if the assessment leaves no reasonable scientific doubt that the project will not adversely affect the conservation site; and
- such assessments must discount any proposed mitigation measures:
 - a. that do not form part of the project itself; and/or
 - b. the benefits of which are not certain at the time of assessment.

This set the precedent that any post-development (net) increase in nutrients at protected sites is unlawful; and that any necessary mitigation must be in place prior to the grant of planning permission. Effectively, it requires nutrient neutrality from potential developers of protected sites, as standard.

CG Fry & Son Limited v (1) Secretary of State for Levelling Up, Housing and Communities (2) Somerset Council

The issue in this case was whether an appropriate assessment is required at reserved matters stage when outline planning consent has already been obtained.

In short, an appropriate assessment will be required when LPA "*is making the final decision in a sequence authorising the development to proceed.*" This means that where outline permission is granted the appropriate assessment can be carried out at the reserved matters approval stage or discharge of conditions. There is no requirement for the LPA to consider only the subject matter of the conditions themselves when deciding whether or not an appropriate assessment is required. The impact and implications of the whole development must be considered not just the scope of the reserved matters or conditions in question. Further, there is nothing wrong in applying paragraph 181 of the National Planning Policy Framework (NPPF) to protect Ramsar sites as this is a legitimate policy goal. See further [here](#).

Natural England – Guidance

After the ruling, and in light of the amended Habitats Regulations, Natural England issued guidance to 32 LPA responsible for areas including Habitats Sites with an unfavourable conservation status. The guidance broadly mirrored the requirements of the Dutch N case, emphasising the risk of permitting changes in land use and developments in nutrient vulnerable areas, and advocating a nutrient neutral approach.

Where water catchments and protected sites were identified in Natural England's guidance, the relevant LPAs were advised that planning permission should only be granted for developments in

the UK statute that implemented the Habitats Directive. The term in common use, "Habitats Sites", comes from the NPPF, and includes these and other protected areas like Ramsar sites (internationally important wetlands).

³ *Mobilisation for the Environment UA v College van Gedeputeerde* (C-293/17) (ECJ).

⁴ Rulings of the ECJ are not binding on UK courts but are highly persuasive, and have broadly been followed.

these areas if an HRA demonstrated a neutral impact on nutrient levels in the catchment.⁵ If a development would increase nutrient levels, mitigation was required.

Updated Guidance

On 16 March 2022, Natural England updated its guidance, and extended it to a further 42 LPAs. The updated (and current) guidance aims to allow competent authorities and developers to identify the level of mitigation required to offset additional nutrient pollution expected from a particular project.

Developments affected by Natural England's Guidance

The guidance relates to all developments that would cause an increase in population served by a wastewater system or catchment area. The Planning Advisory Service clarifies that this relates particularly to developments that result in "additional overnight accommodation":

- Clear examples include new homes, student accommodation and care homes; most tourism infrastructure (which serves people from outside the catchment area); any developments connected to water mains; and off-grid treatment works that discharge into watercourses.
- Depending on the circumstances, HMOs may also be affected because they increase building occupancy, but replacement dwellings are generally excluded.
- Generally, the guidance applies to agricultural developments that intensify use, and therefore increase nutrient loads. However, due to the variation in nature and scale of agricultural infrastructure and industrial applications, these should be considered on a case-by-case basis.
- Commercial developments, offices, schools and retail are usually exempt because people are assumed to work and live in the same catchment area.
- Applications for other types of development will be considered on their individual merits, and should be discussed with Natural England to clarify whether an HRA is required.

Industry Response

Generally, Natural England's guidance was not well received in the house-building industry. In some regions it led to moratoriums on new housing developments and other overnight accommodation that would discharge into river catchments. The Home Builders Federation estimated that the development of up to 100,000 homes was delayed.⁶

A point to note however is that the Court of Appeal confirmed the legality of Natural England's guidance in *R (Wyatt) v Fareham Borough Council*. We discuss the case [here](#).

3. THE HOUSE BUILDING PROBLEM AND RECENT LEGISLATIVE REFORMS

Government guidance on the current status of nutrient neutrality (last updated 6 March 2024 before the new government came to power) [is available here](#).

Nutrient Credits

Since Natural England's initial guidance, developers have sometimes sought to maintain nutrient neutrality by striking deals with private landowners to take land out of agricultural production. The resulting reduction in fertiliser application and reduced nutrient run off creates an offset of nitrate and phosphate credits ("nutrient credits") that can be ascribed to their developments.

The government has confirmed that such arrangements can continue in effect, alongside a new Nutrient Mitigation Scheme, to ensure a competitive nutrient credit market place.

⁵ This also applied to post-permission approvals, e.g. reserved matters approvals or discharges of conditions.

⁶ Steve Turner, 'New report finds Natural England significantly overestimates the impact of new housing development on nutrient pollution' (*Home Builders Federation*, 31 May 2022).

For more on environmental credit schemes, see part 4, below.

The Nutrient Mitigation Scheme

In 2022, Defra provided funding to establish wetlands and woodlands that generate "Nutrient Mitigation Credits" (accredited by Natural England) that developers can purchase to offset nutrient pollution from housing development. The scheme was launched on 31 March 2023 in the Tees catchment, and (as of August 2023) has allowed 1,461 houses to be built.⁷

Upgrading Water Treatment Works – the Levelling-up and Regeneration Act 2023 (LURA)

Presently, water treatment works often cannot remove sufficient nutrients from wastewater. LURA requires water companies to upgrade wastewater treatment works to meet acceptable nutrient effluent limits (10mg/l for nitrogen, 0.25mg/l for phosphorus) by 01 April 2030.

When conducting a Habitats Regulations Assessment in relation to the grant of planning permission, in certain circumstances, local planning authorities will be required⁸ to assume that the particular treatment works will meet the new standards on and after the upgrade date.

Our back of an envelope calculations would indicate a reduced mitigation requirement of about 50%. Effectively, this would shift responsibility for nutrient neutrality from housing developers to water companies. Still, the timeframe will offer little comfort to developers who need to clear the nutrient neutrality hurdle now.

4. PRACTICAL IMPLICATIONS

Natural England and Defra have [published guidance](#) on using the nutrient neutrality calculators, which notes that developers must use nutrient budget calculations to show that their proposals will not bring about a net increase in nutrient pollution to specific habitats sites, and that some LPAs have their own nutrient neutrality calculators which can be used.

Calculating the Nutrient Burden of a Development

Each calculator has a cover page of instructions and 5 worksheets to complete:

1. Nutrients from wastewater
2. Nutrients from current land use
3. Nutrients from future land use
4. SuDS
5. Final nutrient budget (this is calculated automatically using the first four worksheets).

Mitigation Measures

Where mitigation measures are necessary to achieve nutrient neutrality, developers should consider whether on-site or off-site mitigation is more appropriate for the development.

On-site mitigation

Nutrient neutrality can be achieved on-site by creating large-scale wetlands, woodlands and fallow habitats; however, this requires significant open space provision within the development boundary.

Solutions need to be available and work in perpetuity, or for as long as the development is required, which is a heavy burden on developers.

Packaged private water treatment plants provide one solution, but these require material investment in front end infrastructure before other development can take place.

⁷ Built Environment Committee, 'Corrected oral evidence: The impact of environmental regulations on development' (*House of Lords*, 11 July 2023) 5.

⁸ See regulation 85A Habitats Regulations

Off-site mitigation (nutrient credits)

Off-site options are emerging as more a popular mitigation solution, and one approach is to purchase nutrient 'credits'. Third-party landowners are beginning to take agricultural land out of production and change the land use to woodland, heathland, saltmarsh, wetland, or conservation grassland to generate credits. For example, agricultural land used for poultry has a nitrogen leaching rate of 70.7 kgN/ha/yr, whereas woodland has a leaching rate of 5 kgN/ha/yr, creating a healthy nutrient deficit, which can be used to offset the effects of development.

Natural England advises that mitigation land is maintained for a minimum of 80-125 years. This significant obligation means that many developers may wish to buy credits from third-party landowners, in a one-time transaction, allowing the developers to move on without the need to maintain the habitat themselves.

Landowners are exploring the ability to benefit from several positive environmental outcomes on the same land. This may include the receipt of both public money, in the form of the new Environmental Land Management Scheme (ELMS), and private funds, such as those arising from nutrient neutrality. This "stacking" of environmental services on land is of obvious financial and environmental importance to landowners. This topic is explored in greater detail in the BNG notes.

Unlike the new mandatory biodiversity net gain requirement, Natural England has called for mitigation sites to be provided within the same local catchment area as the development. This greatly reduces the potential to find off-site land to deliver solutions at a viable cost.

LPAs are considering, or in some cases are already implementing, similar nutrient neutrality credit schemes of their own. For example, Havant Borough Council is the first LPA to develop its own nutrient neutrality scheme. Under this scheme, the proceeds of the credits go towards the creation of large-scale wetlands, woodlands and meadows to mitigate against the effect of development.

5. OUTLOOK

The new Labour Government has [committed to a rapid review](#) of the previous government's Environmental Improvement Plan (EIP) to be completed by the end of the year. This is intended to support delivery of the targets created by the Environment Act 2021 and includes cleaning up the UK's waterways.

In July 2024, Defra published the annual progress report on the EIP for 2023-2024, which refers to the LURA requirements for wastewater treatment works upgrades. It is available [here](#).

In its election manifesto, Labour set out its vision to 'Get Britain building again' simply noting that "We will implement solutions to unlock the building of homes affected by nutrient neutrality without weakening environmental protections." The 'New Homes Accelerator' was launched in August 2024 and the government has indicated that significant planning reforms are afoot. However, we are still awaiting the detail of these proposals. It is possible that the requirement to comply with the nutrient neutrality regime will shift from the pre planning permission stage to becoming a condition that has to be complied with before the houses are actually occupied.

FURTHER RECOMMENDED READING

- Natural England: [Nutrient Neutrality and Nutrient Mitigation](#)
- Planning Advisory Service: [Nutrient Neutrality and the Planning System](#)
- Planning Advisory Service: [Nutrient Neutrality FAQs](#)
- Defra: [Habitats Regulations Assessments: Protecting a European Site](#)

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