



**Planning,  
Environmental and  
Property Law  
One Day Conference  
London 2023**

Thursday 20 April 9am – 4:30pm

# Nutrient Neutrality – Past, Present and Future

20<sup>th</sup> April 2023

Ned Helme

# Nutrient Pollution

- *“Nutrient pollution is a major environmental issue for many of our most important places for nature in England. In freshwater habitats and estuaries, increased levels of nutrients (especially nitrogen and phosphorus) can speed up the growth of certain plants, disrupting natural processes and impacting wildlife. This process (called ‘eutrophication’) damages these water dependent sites and harms the plants and wildlife that are meant to be there. In technical terms it can put sites in ‘unfavourable condition’. The sources of excess nutrients are very site specific but include sewage treatment works, septic tanks, livestock, arable farming and industrial processes.”*

Natural England: Nutrient Neutrality and Mitigation Summary Guide  
(NE776)

# Nutrient Loading Impact Pathways

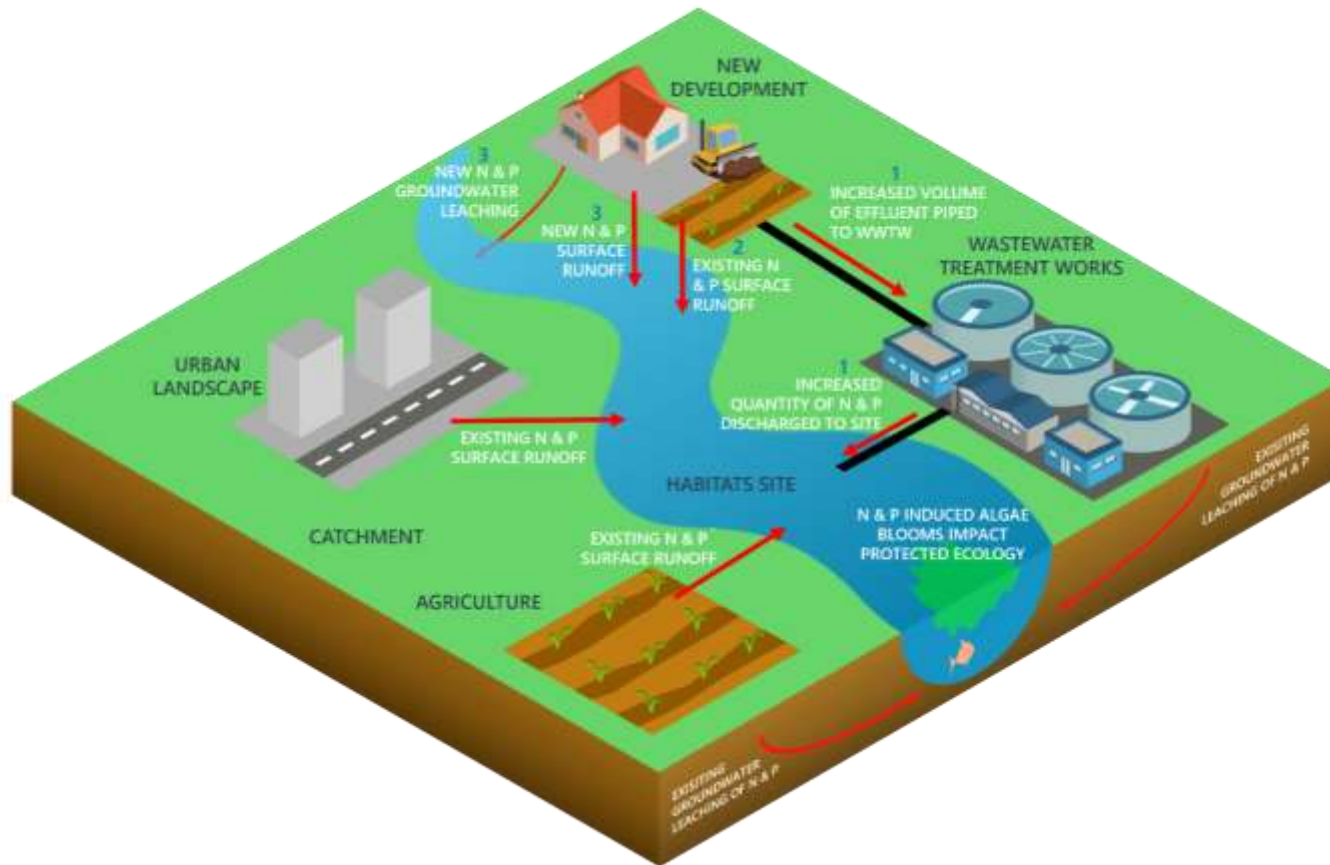


Image – Nutrient Neutrality Generic Methodology (Natural England Commissioned Report NECR459)

# Affected Areas

- 31 habitats sites (all in unfavourable condition due to excess nutrient pollution) spanning 27 catchments and a total of 74 local planning authorities (wholly or in part)

Image – Annex B to Natural England’s March 2022 Advice

Annex B: National Map of Catchments



European protected sites requiring nutrient neutrality strategic solutions

**Nutrient neutrality SSSI catchments**

■ SSSI subject to nutrient neutrality strategy

■ Nutrient neutrality SSSI catchment

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# Habitats Requirements

- Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (“the Habitats Directive”)
- Conservation of Habitats and Species Regulations 2017 (“the Habitats Regulations”)
- The preserving effect of the European Union (Withdrawal) Act 2018 (at least for now)

# The Nutrient Neutrality Concept

- *“Nutrient neutrality is a means of ensuring that a plan or project does not add to existing nutrient burdens so there is no net increase in nutrients as a result of the plan or project (i.e. it “consumes its own smoke”). Where nutrient neutrality is properly applied and the existing land use does not undermine the conservation objectives, Natural England considers that an adverse effect on integrity alone and in combination can be ruled out. ”*

Natural England: Nutrient Neutrality Principles (TIN186)

# Key Natural England Advice and Guidance

- Initial area/catchment specific guidance
- Water Quality and Nutrient Neutrality Advice (NE785) - 16 March 2022
- Nutrient Neutrality and Mitigation: A summary guide and frequently asked questions (NE776) – 23 June 2022 and updated 28 March 2023
- Nutrient Neutrality Principles (TIN186) – 2 August 2022
- Nutrient Neutrality Generic Methodology (NECR459) – 24 November 2022



# Key Case Law: The Wyatt Case

- *R (Wyatt) v Fareham BC* [2023] Env LR 14 (on appeal from [2022] Env LR 7)
- Challenge to outline permission for 8 detached houses with 4-5 bedrooms near the Solent
- Wide-ranging challenge to the LPA's appropriate assessment and the Natural England advice that underpinned it (“Advice on Achieving Nutrient Neutrality for New Development in the Solent Region” (Version 5—June 2020))
- Judicial review dismissed in the High Court, although Jay J recommended the Natural England advice be reviewed
- Appeal to the Court of Appeal dismissed

# Key Case Law: The Sahota Case

- *R (Sahota) v Herefordshire Council* [2022] EWCA Civ 1640
- Challenge to permission for the erection of a cattle shed and an extension to an existing agricultural building
- Site close to the River Wye SAC
- Court of Appeal found:
  - No error by the Judge in the High Court admitting ex post facto evidence from the Council ecologist
  - No public law error in the Council not having conducted an appropriate assessment
- Permission to appeal application filed at the Supreme Court

# Multi-stage consents (1)

- *R (Wingfield) v Canterbury CC* [2019] EWHC 1974 (Admin) at [67]-[77]
- *R (Swire) v Canterbury CC* [2022] EWHC 390 (Admin)
  - At [94]: *“In R (Wingfield) v Canterbury City Council [2019] EWHC 1974 (Admin) it was held at [72] – [77] that for the purposes of the Habitats Regulations, there is no decision authorising the implementation of the project in the case of a multi-stage consent until reserved matters are approved. Reserved matters approval is the “implementing decision”. Unlike the EIA Regulations, there is no legislative objective requiring HRA to be carried out at the earliest possible stage. Accordingly, HRA may lawfully be completed at the reserved matters stage, even if not carried out prior to the grant of outline permission.”*

# Multi-stage consents (2)

- 20<sup>th</sup> July 2022 Written Ministerial Statement and 21<sup>st</sup> July 2022 letter to Chief Planning Officers:
  - *“The Habitats Regulations Assessment provisions apply to any consent, permission, or other authorisation, this may include post-permission approvals; reserved matters or discharges of conditions. It may be that Habitats Regulation Assessment is required in situations including but not limited to:*
    - *where the environmental circumstances have materially changed as a matter of fact and degree (including where nutrient load or the conservation status of habitat site is now unfavourable) so that development that previously was lawfully screened out at the permission stage cannot now be screened out; or*
    - *development that previously was lawfully screened in but judged to pass an Appropriate Assessment cannot now do so because the mitigation (if any) secured is not adequate to enable the competent authority to be convinced of no adverse effect on integrity of the habitats site.”*

# Phase 3, Jurston Farm (1)

- Section 78 appeal (APP/W3330/W/22/3296248):
  - Outline permission for 650 houses had been granted in 2015
  - Reserved matters approvals had been granted for phases 1-2 and works were taking place on those phases
  - Reserved matters approval had been granted for phase 3 (comprising 190 dwellings) in June 2020
  - Council failed to determine application to discharge conditions of the phase 3 reserved matters approval in time and developer appealed
  - Main issue on appeal: *“Whether Appropriate Assessment pursuant to the Habitats Regulations is necessary in order to agree the Conditions attached to the Reserved Matters Approval and, if it is necessary, the scope of any such Appropriate Assessment.”*

## Phase 3, Jurston Farm (2)

- Inspector dismissed the appeal on 24<sup>th</sup> November 2022. Key findings:
  - It was legitimate to apply paragraph 181 of the NPPF, which confers the same level of regulatory scrutiny for Ramsar sites as European Sites would receive under the Habitats Regulations [20]-[28]
  - Requiring appropriate assessment would not reopen issues established by the outline permission and reserved matters approvals and they had not narrowed the issues for appropriate assessment [29]-[41]
  - The requirement for appropriate assessment in the Habitats Regulations applies to the discharge of conditions stage [42]-[51]
  - Approach was not practically affected as a consequence of EU withdrawal

## Phase 3, Jurston Farm (3)

- The Appellant has received permission to challenge the Jurston Farm decision under section 288 of the Town and Country Planning Act 1990. Issues in the challenge include:
  - Whether appropriate assessment is required under the Habitats Regulations at the discharge of conditions stage
  - If so, whether the scope of the appropriate assessment is limited to the scope of the conditions being discharged or whether it must cover the impact of the entire development
  - Whether the position is different in relation to Ramsar sites, which are not protected by law under the Habitats Regulations directly but which are the subject of policy under paragraph 181 of the NPPF

# Emerging Legislation

- The Retained EU Law (Revocation and Reform) Bill:
  - Proposes to revoke EU-derived subordinate legislation and retained direct EU legislation at the end of 2023 (with power to extend to 23 June 2026) unless restated, as well as removing the special features of EU law in the UK legal system.
- The Levelling-up and Regeneration Bill:
  - Clause 153 proposes amendments to the Water Industry Act 1991 to create a legal duty on water companies to upgrade wastewater treatment works. Clause 154 and Schedule 12 propose amendments to the Habitats Regulations so that when making an appropriate assessment, competent authorities should assume that the wastewater treatment works will meet the relevant pollution standards by the relevant upgrade date.



# The Environmental Improvement Plan

- Published on 31<sup>st</sup> January 2023
- First revision of the Government's 25 Year Environment Plan
- Goal 3 “Clean and plentiful water” (pages 97-125)



# The Spring Budget 2023

- Spring Budget 2023 (15<sup>th</sup> March 2023):
  - Paragraph 3.132 recognised that *“High levels of nutrient pollution in protected sites are stalling housing delivery across 74 Local Planning Authorities, reflecting a major barrier to the government’s ambition of delivering 300,000 homes per year”*.
  - Paragraph 4.134 promises that *“DLUHC will open a call for evidence from local authorities in England for locally led nutrient neutrality credit schemes. Where high quality proposals are identified, this government will provide funding to support clearer routes for housing developers to deliver ‘nutrient neutral’ sites, in line with their environmental obligations.”*
- Call for evidence running 12<sup>th</sup> April to 24<sup>th</sup> May 2023

# Natural England's Nutrient Mitigation Scheme

- Scheme launched 31<sup>st</sup> March 2023
- Applies only to housing development in the Tees catchment area, but more catchment areas will be added in the future
- Six steps:
  - (1) Calculate how many nutrient mitigation credits you need
  - (2) Apply for credits from Natural England
  - (3) Agree to buy your credits
  - (4) Continue your planning permission application with your LPA
  - (5) Pay for your credits
  - (6) Send your certificate to your LPA

# Defra Policy Paper on Nutrient Pollution

- Updated version published 31<sup>st</sup> March 2023
- Sets out 3 pillars to nutrient neutrality:
  - Pillar 1: accelerating the supply of mitigation
  - Pillar 2: reducing pollution and the mitigation burden on new housing
  - Pillar 3: providing certainty
- Also addresses action to restore protected sites to favourable condition, recognising that nutrient neutrality is only an interim solution while nutrient pollution is tackled at source

# Key Links (1)

- NE Advice on Achieving Nutrient Neutrality for New Development in the Solent Region (Version 5 – June 2020) - <https://www.push.gov.uk/wp-content/uploads/2020/06/Natural-England%E2%80%99s-latest-guidance-on-achieving-nutrient-neutrality-for-new-housing-development-June-2020.pdf>
- NE785 - <https://publications.naturalengland.org.uk/publication/4792131352002560>
- NE776 - <https://publications.naturalengland.org.uk/publication/6248597523005440>
- TIN186 - <https://publications.naturalengland.org.uk/publication/6687601766694912>
- NECR459 - <https://publications.naturalengland.org.uk/publication/5143927928913920>
- DEFRA Policy Paper (31 March 2023) - <https://www.gov.uk/government/publications/nutrient-pollution-reducing-the-impact-on-protected-sites/nutrient-pollution-reducing-the-impact-on-protected-sites>
- NE credits scheme - <https://www.gov.uk/government/publications/natural-englands-nutrient-mitigation-scheme-for-developers/how-to-apply-for-nutrient-mitigation-credits-from-natural-england>
- 20 July 2022 WMS - <https://questions-statements.parliament.uk/written-statements/detail/2022-07-20/hcws258>

# Key Links (2)

- 21 July 2022 letter to Chief Planning Officers - [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1093278/Chief Planner Letter with Nutrient Neutrality and HRA Update - July 2022.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1093278/Chief_Planner_Letter_with_Nutrient_Neutrality_and_HRA_Update_-_July_2022.pdf)
- Environmental Improvement Plan - <https://www.gov.uk/government/publications/environmental-improvement-plan>
- Spring Budget 2023 - <https://www.gov.uk/government/publications/spring-budget-2023>
- 12<sup>th</sup> April 2023 Call for Evidence - <https://www.gov.uk/government/consultations/local-nutrient-mitigation-fund-call-for-evidence-and-expression-of-interest>
- Levelling-up and Regeneration Bill - <https://bills.parliament.uk/bills/3155/publications>
- Retained EU Law (Revocation and Reform) Bill - <https://bills.parliament.uk/bills/3340/publications>
- Welsh Action Plan - <https://www.gov.wales/relieving-pressures-special-areas-conservation-sac-river-catchments-support-delivery-affordable>
- Local Government Lawyer article on Jurston Farm challenge - <https://www.localgovernmentlawyer.co.uk/environment/766-environmental-news/53240-high-court-agrees-to-hear-statutory-review-raising-key-issues-on-nutrient-neutrality-and-planning>