

Nutrient pollution: An alternative approach

Wildlife and Countryside Link policy proposal

In August 2023 the Government tabled an amendment to the Levelling Up and Regeneration Bill concerning nutrient pollution, the environmentally harmful accumulation of nitrates and phosphorus in rivers and estuaries. The amendment would have removed the Habitats Regulations requirement on planning authorities to require mitigation for additional nutrient pollution, before granting permission for new developments that would affect protected wildlife habitats. It would have exposed sensitive rivers to more pollution and shifted much of the cost of mitigation to the general public.

Although the amendment was defeated in the Lords¹, Ministers have indicated that the Government may reintroduce the proposals through a stand-alone bill, to be announced in the Kings Speech in November.²

The Government's plans would undermine the Habitats Regulations, the UK's most effective environmental protections, during a time of dangerous decline in species biodiversity.³ The Office for Environmental Protection said that *"the proposed changes would demonstrably reduce the level of environmental protection provided for in existing environmental law"*.⁴

Such wilful acceptance of environmental harm is all the more egregious as sustainable housing development can be achieved without the proposed regression in legal protections. The Habitats Regulations do not stop housing development, they simply require any negative effects on important wildlife sites to be mitigated.

There is already a growing market in mitigation measures that will enable tens of thousands of homes to be built in catchments covered by nutrient neutrality rules. In some catchments, where supply of mitigation credits is not yet readily available, the Government could speed up delivery with strategic mitigation schemes, without undermining environmental law.

This short paper sets out how this can be achieved.

¹ <https://www.bbc.co.uk/news/uk-politics-66804160>

² <https://www.endsreport.com/article/1838472/pm-absolutely-determined-scrap-nutrient-neutrality-rules-new-standalone-bill>

³ <https://stateofnature.org.uk/>

⁴ <https://www.theoep.org.uk/report/proposed-changes-laws-developments-will-weaken-environmental-protections-warns-oep>

Key principles for addressing nutrient pollution

Policies to address nutrient pollution should be built around three key principles:

1. **The polluter must pay:** Developers should not profit at the expense of the environment and the public. Weakening the Habitats Regulations would transfer costs from the polluter to the public, through the deterioration of natural spaces and biodiversity, as well as public expenditure to clean up pollution. Those profiting from actions that could increase pollution must assume full responsibility for the costs of mitigation.
2. **The integrity of the Habitats Regulations must be upheld:** The Habitats Regulations are the UK's most important nature conservation laws, giving important habitats and species the highest level of legal protection from harmful activities. The Regulations have been repeatedly reviewed and found to be effective, proportionate and good value for money.⁵ Their stringency is needed more than ever, as species dwindle and habitats degrade. 1 in 6 species are at risk of extinction in the UK.⁶ Any changes to the Regulations must preserve or enhance the level of protection they currently provide.
3. **Nutrient loads in sensitive habitats must not increase:** Nutrient neutrality rules apply to only the most sensitive areas, nutrient-stressed freshwater catchments where critical environmental thresholds have already been breached (referred to as nutrient stressed areas in the remainder of this briefing). Further pollution in these areas would tip these fragile habitats into complete ecological collapse and must be avoided at all costs. Mitigation should be up-front and prevent current nutrient levels across the catchment from increasing, rather than seeking to clean up after the pollution has occurred.

⁵<https://www.wcl.org.uk/docs/Link%20briefing%20on%20Habs%20Regs%20risks%20and%20opportunities%20Jan%202023.pdf>

⁶ <https://www.rspb.org.uk/whats-happening/news/state-of-nature-report>

The opportunity to streamline the system

Since 2019, a private market has emerged to provide developers seeking to build in nutrient-stressed areas with mitigation packages. As of September 2023, over 50,000 proposed new homes in areas affected by nutrient pollution rules now have appropriate mitigation in place as a result of this market, paving the way to construction.⁷

The market led system is starting to work. However, Government believes it is not working swiftly enough, given the urgent need for new housing in areas affected by nutrient pollution rules.

The best solution to this problem is making what we already have work faster, rather than resorting to damaging primary legislation. Any legislative changes would take months to progress and create huge uncertainty as all involved await an entirely new system.

A strategic mitigation approach

Under the Habitats Regulations, it is possible to speed up planning permission through a strategic mitigation approach.

At the moment, every applicant for planning permission in a nutrient stressed area must procure a nutrient mitigation credit for every new dwelling proposed, purchasing credits directly from the private market. Where the private market is already mature, this system is beginning to work well. Where there are fewer credits available, however, a strategic approach would speed up the system and help ensure certainty of supply.

A strategic approach would de-link individual planning permissions from individual mitigation projects. Instead, applicants would pay a fixed fee into a central pot in return for planning permission. The fee may vary in different years, according to market conditions and local circumstances. It would be calculated on the basis of average requirement per house across the catchment, providing a simple fixed fee for all developers in the same catchment at the same time. The pot may be administered by a responsible body such as Natural England or a Local Authority acting according to Natural England guidance. The responsible body would then use the funds for mitigation, monitoring and maintenance. This approach replaces a case-by-case approach with a more streamlined, strategic scheme.

There are a number of well-established schemes that operate in this way, including the Thames Basin Heaths scheme, the Solent Waders and Brent Geese mitigation scheme, and the national District Level Licensing scheme. These systems ensure that housing can proceed, with mitigation keeping pace with development.⁸

⁷ https://www.wcl.org.uk/docs/Levelling_Up_Bill_Briefing_nutrient_pollution_12.09.23.pdf

⁸ <https://www.surreyheath.gov.uk/planning-and-building-control/planning-policy/development-plan/supplementary-planning-documents/thames-basin-heaths-special-protection-area-avoidance-strategy-spd>



Such a scheme would have the advantage of faster permissions, greater certainty for mitigation project developers and more effective strategic mitigation schemes that can deliver enhanced environmental benefits.

Three Government interventions to streamline the system

The Government should issue a Direction to Natural England, focusing the agency's efforts on facilitating or implementing strategic mitigation programmes, beginning in catchments where there is a clear shortage of supply.

Working with eNGOs and with experts from the private market and planning authorities, Link has identified three actions the Government could swiftly take to further this focus on strategic solutions to streamline the current system.

1) Funding to enable strategic solutions

The Government should speedily resurrect and implement the Local Nutrient Mitigation Fund.

This fund was intended to support planning authorities in nutrient stressed areas to quickly put mitigation measures in place. Planning authorities were invited to submit expressions of interest to the Fund in Spring 2023.⁹ The Government's attempts to completely overhaul nutrient pollution rules in August stymied the progression of the fund, there has been no news on it since that time.

The fund is critically important, as it would provide a means of pump-priming strategic solutions to nutrient pollution. Strategic solutions allow for a range of mitigation measures, from new wetlands to reducing nutrient pollution from agriculture, to come together and take effect across an entire nutrient-stressed area. This means that rather than each development in that area needing to secure its own bespoke mitigation package, developers could simply make a financial contribution to the costs of a central package.

A swiftly progressed (and if necessary, expanded) Local Nutrient Mitigation Fund could provide the starting capital for responsible bodies in nutrient stressed areas to set up strategic solutions. Grants from this fund would come with the condition that the successful body should proactively lead on setting up a strategic solution; work with Natural England on the detail; co-operate with neighbouring authorities and oversee sustained management and monitoring measures to ensure the package remains effective. Planning authorities would work with private providers to source the range of measures necessary to make up the overall package and constitute a strategic solution.

⁹ <https://www.gov.uk/government/calls-for-evidence/local-nutrient-mitigation-fund-call-for-evidence-and-expression-of-interest#full-publication-update-history>

To aid the delivery of strategic solutions, the Government should also provide Natural England with a budget increase, ringfenced to fund a central team of specialists. This 'nutrients hit squad' should work with planning authorities to help get effective strategic solutions in place quickly. Natural England has recently proved effective at helping unlock strategic solutions in the Tees Valley¹⁰, further funding will cascade this impact out to other areas.

An element of public reimbursement should be built into the contribution developers make to strategic solutions, recouping the up-front taxpayer money used to provide the Local Nutrient Mitigation Fund and Natural England budget increase.

2) Planning process clarity to give developers more certainty

The Government should clarify exactly when in the planning process developers need to discharge their nutrient pollution mitigation responsibilities.

Under current practice, this usually has to happen before planning permission is granted. This causes problems for developers, whose business model typically relies on planning permission being achieved swiftly, to provide certainty to investors that the development will go ahead. It is also a problem for mitigation providers and landowners, who shoulder the risk that a project does not proceed. This has affected the development of a pipeline of mitigation projects.

The current sequencing is not set in stone. It emerged in the absence of clear guidance from Government. The Secretary of State for Levelling Up, Housing and Communities should issue a ministerial statement and instruct planning authorities that - provided a strategic mitigation plan is in place - they may grant planning permission. This should be contingent on developers accepting a Grampian condition that they will discharge any nutrient pollution mitigation responsibilities (such as paying into a strategic mitigation scheme) prior to impacts taking place. The discharge of responsibilities should be a pre-occupation planning condition, giving developers longer to make the necessary mitigation contribution.¹¹

If even more time is required, the discharge could be staggered. Contributions to mitigating the first tranche of houses on a development to be occupied could be made through investment in up-front nutrient load reductions within the strategic package for the area, such as compensating a farmer for switching to farming activities that will result in less pollution from that farm.¹² Contributions to measures that take a little longer, such as establishing a new wetland, could be tied to the last tranche of houses to be occupied on a development.

¹⁰ <https://www.gov.uk/government/news/further-housing-credits-for-nutrient-mitigation-scheme-announced>

¹¹ From an environmental point of view, this focus on occupation is appropriate. The main contribution housing stock makes to nutrient pollution is through sewage from residents, with nutrients from bathrooms and kitchen waste making their way through the sewage system into English rivers. See

https://www.wcl.org.uk/docs/Levelling_Up_Bill_Briefing_nutrient_pollution_12.09.23.pdf

¹² See for example: <http://biocoreagri.com/>



The planning guidance should also provide a way for the Government to again stress its commitment to strategic solutions to nutrient mitigation.

Problem catchment scheme

In a small number of areas, strategic mitigation schemes may not be fully operational before the occupation of a development is completed. In these specific circumstances, Natural England could support a 'problem catchment scheme', funding temporary mitigation measures (such as planting cover crops in strategic places in the catchment) to prevent any increase in overall nutrient pollution when new homes are occupied. These temporary upfront mitigation measures would be in place before occupation. This would allow development to go ahead where there is a shortage of normal mitigation credits, while ensuring that rivers do not suffer from increased pollution load.

This would only be a temporary stop-gap measure, until the strategic mitigation scheme is in place and permanent mitigation measures are delivered. Measures should be undertaken on an 'overshoot' basis (delivering more mitigation than the anticipated increase in pollution), to make absolutely sure that no increase in pollution takes place. The problem catchment scheme would provide assurance to developers that, if significant delays to strategic mitigation schemes occur, this will not delay occupation timelines.

Government should provide Natural England with funds to support targeted, temporary mitigation in problem catchments. Funds spent on the scheme would in time be recouped from developers as part of a standard levy.

To reiterate, the following principles must underpin the problem catchment scheme:

- Temporary mitigation must occur before occupation.
- Temporary mitigation must overshoot expected need.

3) Model agreements

To date, some delay has resulted from the time taken to agree mitigation measures and associated legal agreements on a case-by-case basis. Significant time could be saved by developing model or template agreements for Local Planning Authorities and for nutrient mitigation providers. This would also create greater confidence in the market, helping to stimulate supply.

In particular, Natural England should develop model or template agreements for:

- **Acceptable nutrient mitigation approaches:** setting out what a responsible authority may consider acceptable mitigation for the purposes of private market purchases or strategic mitigation, including standards for protecting and improving biodiversity.

- **Section 106 and Section 33 agreements:** standardising the contractual basis for nutrient mitigation purchases, including requirements for on-going maintenance and monitoring.
- **Accrediting mitigation schemes:** once companies providing mitigation are accredited as trusted operators, there will be less delay in approving individual measures that they bring forward.

The cumulative effect of the three interventions

This triple intervention of funding for strategic solutions, application sequencing changes and model agreements would streamline the planning process in nutrient stressed areas.

As a result of the changes, planning applications would proceed as they do in non-nutrient stressed areas. As part of achieving planning consent, developers would be required to agree a pre-occupation condition to pay funds to the local planning authority, as a contribution to a strategic mitigation solution. The time period for making this payment would be generous, lasting all the way through build-out. This will give enough time for strategic solutions to take effect, after being kick-started by the resurrected Local Nutrient Mitigation Fund, with gears being further greased by the Natural England budget increase and by greater use of model agreements.

Instead of removing legal controls and vital protections on nutrient pollution in rivers, as proposed by the Government, this alternative approach would equip the current private mitigation market to work faster. This would achieve the Government's stated objective of accelerating development whilst ensuring the polluter pays, upholding the Habitats Regulations and preventing increases in nutrient loads in sensitive freshwaters.

This is the approach that Natural England recommended during the debates on the Levelling Up & Regeneration Bill amendment. Writing to parliamentarians, Natural England stated that *"upfront, fixed rate contributions from developers could be faster and offer more certainty in enabling planning permissions to be granted and support emerging green finance markets."*¹³

This approach also has the advantage of speedy implementation. A Government Bill will take at least six months to come into law, meaning that uncertainty over the way forward on nutrient pollution mitigation will persist until summer 2024 at the earliest. The galvanising effect of the three interventions would be felt much sooner, boosted by vote of confidence in a private market system that is already in place and is ready to grow. If the Government is serious about unblocking new homes in nutrient stressed areas quickly, this is the way to do it.

Rather than the Government's damaging, slow, sledgehammer-to-crack-a-nut Bill, this alternative approach, backed by the leading experts in the field, would see the current system swiftly improved

¹³ <https://www.theguardian.com/environment/2023/sep/12/ministers-ignored-natural-england-advice-plans-rip-up-pollution-laws>



upon, allowing green markets to grow, new homes to come forward faster and environmental protections to be maintained.

Will these measures really make a difference? Yes.

The Local Nutrient Mitigation Fund was widely supported when announced in April 2023. If it hadn't been stalled, strategic solutions could have been underway across nutrient-stressed areas this autumn. The resurrection and possible expansion of the fund could deliver swift results, especially if bolstered by planning guidance instructing planning authorities in nutrient-stressed areas to take a leadership role in delivering strategic solutions.

Clear and sustained Government direction could also deliver transformative changes in planning process sequencing. Making the discharge of nutrient mitigation responsibilities a pre-occupation condition will provide greater certainty and assurance for developers (and their investors), as will the smoothing of these responsibilities into a simple financial contribution towards a strategic solution, paid to one provider. The new sequencing will give strategic solutions the time they need to take effect, before developers make their contributions.

Model agreements will offer further time savings, cutting out unnecessary duplication in the process.

The first of these non-legislative tools in the Government's toolkit has been gathering dust for months, the second and third have not been tried. The time has come to blow away the cobwebs and apply these tools to the nutrient mitigation challenge. This will bring benefits for nature, housing and the taxpayer in a way that works within the three principles for an effective nutrient neutrality scheme: the polluter pays; environmental law is maintained; and rivers and habitats will not be harmed.

[Wildlife and Countryside Link](#) (Link) is the largest nature coalition in England, bringing together 80 organisations to use their joint voice for the protection of the natural world.

For questions or further information please contact:

Matt Browne, Head of Policy & Advocacy, Wildlife and Countryside Link

E: matt@wcl.org.uk

24 October 2023