

## Levelling Up & Regeneration Bill Briefing: Nutrient pollution Opposing Government amendments 247YYA and 247YY

12.09.23 version

### Executive summary

- Government amendment 247YYA (expected for debate on 13<sup>th</sup> September) seeks to remove legal controls on nutrient pollution in rivers and to transfer the costs of attempted mitigation from polluters to the public. If passed it will regress environmental protections and undermine good administration.
- Wildlife & Countryside Link ([Link](#)) strongly urges peers to vote to reject the amendment.
- We also urge peers to vote against Government amendment 247YY, which gives Henry VIII powers to Ministers to further amend river pollution controls.
- Link also encourages peers to vote for a positive amendment for nature, amendment 282M to restore nature in National Parks and AONBs, which may also be debated on the 13<sup>th</sup>. The case for this amendment can be found [here](#).
- By voting against Government amendments 247YYA and 247YY on 13<sup>th</sup> September, peers will be voting to prevent environmental regression and to protect good administration.

### Preventing environmental regression

Urban runoff and sewage from new development contributes to the leaking of nitrates and phosphorus into rivers, lakes, streams and seas. An excess of these nutrients causes “eutrophication”—algal blooms which starve a river of light and oxygen, killing wildlife.<sup>1</sup> Under current Habitats Regulations rules, planning authorities have been required to closely consider the potential impacts of development on nutrient pollution levels in sensitive freshwater habitats.

Government amendment 247YYA inserts a new ‘section 85a’ into the Habitats Regulations to remove this requirement.<sup>2</sup> The new section 85a does this in a threefold manner – first by instructing planning authorities to assume no increase in pollution (paragraph 2), then by preventing planning authorities from requesting an assessment to investigate pollution impacts further or concluding potential impacts will be adverse (paragraph 3) and finally by instructing authorities to ignore any evidence of potential adverse impacts (paragraph 4).

The environmental watchdog set up by the Environment Act, the Office for Environmental Protection (OEP), has been very clear as to the impact these changes will have upon environmental protection. In

<sup>1</sup> <https://www.wildlifetrusts.org/news/new-report-reveals-pollution-biggest-threat-wildlife-our-waterways>

<sup>2</sup> <https://bills.parliament.uk/publications/52558/documents/3930>

its advice to the Secretaries of State for Levelling Up, Housing and Communities and the Environment, Food and Rural Affairs, OEP Chair Dame Glenys Stacey was clear that the amendment would:

*“Permit certain environmentally damaging activity to proceed without ‘appropriate assessment’ of certain nutrient impacts, thus risking substantial harm to protected wildlife sites. Planning authorities would also be required to disregard negative findings concerning such nutrient pollution in any appropriate assessments, and disregard representations from Natural England or others.*

*The proposed amendments would therefore remove legal controls on the addition of nutrient loads to sites that already suffer from these impacts. Legal certainty is replaced with policy interventions announced alongside the Bill amendments. These interventions do not unequivocally secure, for the long-term, the same level of environmental outcome as legal obligations in the Regulations do.”<sup>3</sup>*

As a result, the OEP concluded that:

*“The proposed changes would demonstrably reduce the level of environmental protection provided for in existing environmental law. They are a regression.”*

This regression breaks the multiple Ministerial promises, including those given only months ago during the passage of the Retained EU Law Act<sup>4</sup>, when Ministers stated categorically that environmental standards would not be weakened by this Government.<sup>5</sup> It will also make it harder to achieve the targets set under the Environment Act 2021, including the target to halt the decline in species abundance by 2030.

In a second letter to express the depth of its concern, the OEP advised the Government again that:

*“The proposed amendments would amount to regression in law. This is contrary to statements made in each House of Parliament on behalf of the Government under section 20 of the Environment Act 2021. Under that section, the Government has stated its view that the Bill “will not have the effect of reducing the level of protection provided for by existing environmental law”. Should the proposed amendments be adopted and form part of the Bill, this would no longer be accurate.”*

Government amendment 247YY creates a mechanism for further regression to be delivered in the future, using only secondary legislation. It gives the Secretary of State the power to amend by regulation any environmental, planning or development enactment (with the exception of Part 6 of the Habitats Regulations) with a bearing on nutrient pollution. No explanation, justification or details have been provided as to why these Henry VIII powers are required and no environmental safeguards have been proposed to accompany them. Amendment 247YY allows for further measures along the lines of

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<sup>3</sup> <https://www.theoep.org.uk/report/proposed-changes-laws-developments-will-weaken-environmental-protections-warns-oep>

<sup>4</sup> <https://www.thetimes.co.uk/article/michael-goves-u-turn-on-water-is-a-weaselly-move-9m6v3d7st>

<sup>5</sup> <https://www.wildlifetrusts.org/news/water-pollution-rules-expected-be-weakened-government-today>

247YYA, without meaningful parliamentary scrutiny this time. It amounts to a licence for Ministers to weaken pollution controls in perpetuity.

Amendment 247YY has been challenged by the Lords Delegated Powers and Regulatory Reform Committee, on the grounds that the Government has given inadequate justification for seeking an *“open-ended Henry VIII power to change how what is potentially a wide range of legislation (including primary legislation) operates in relation to the effect of nutrients in water that could adversely affect protected habitats sites.”* The Committee concludes: *“we consider that the delegation of power in new clause 159A that is inserted by Amendment 247YY is inappropriate and should not form part of the Bill.”*<sup>6</sup>

We urge peers to reject both amendments 247YY and 247YYA, to preserve the legal controls on the addition of nutrient loads to already vulnerable protected sites and prevent the most significant unwinding of environmental law for decades.<sup>7</sup>

### **Preserving good administration**

If passed, Government amendment 247YYA will have a polluting effect not only England’s rivers, but also on standards of public administration. It contravenes good law making and will embed irrationality into planning authority decision making.

The amendment amounts to huge environmental change, but it was announced without any consultation. It was introduced into the Levelling Up and Regeneration Bill without notice at the latest possible stage, giving parliamentarians barely any opportunity for scrutiny and debate, in contravention of both parliamentary convention and formal legislative guidance.<sup>8</sup>

Bad law-making in Parliament will lead to bad decision making at a local level. A legal opinion on the amendment from Alex Goodman KC of Landmark Chambers, commissioned by Rights Community Action, observes that:

*“[There is] a general principle of administrative law and of good public administration that those making administrative decisions should weigh up all the relevant factors when taking a decision. The new proposed regulation 85A introduces a concept at odds with that principle: it mandates that a competent authority must make assumptions which are contrary to the facts...If Councils and planning inspectors are required to make counterfactual assumptions, it will become difficult to make good administrative decisions.”*<sup>9</sup>

In this context, the new section 85a instructions on authorities not to assess pollution (paragraph 3), and to ignore any evidence of potential pollution brought to their attention (paragraph 4), amounts to

<sup>6</sup> <https://committees.parliament.uk/publications/41347/documents/203293/default/>

<sup>7</sup> [https://twitter.com/adamvaughan\\_uk/status/1701500050189234224](https://twitter.com/adamvaughan_uk/status/1701500050189234224)

<sup>8</sup> <https://greenallianceblog.org.uk/2023/08/30/scrapping-water-pollution-rules-shows-the-government-isnt-serious-about-our-environment/>

<sup>9</sup> <https://www.rightscommunityaction.co.uk/news/levelling-up-bill-government-amendments-such-reasoning-is-not-permitted-outside-wonderland>

active opposition to facts informing decision making. This profoundly undermines good administration, an established principle that underpins our democratic and judicial processes.<sup>10</sup>

Profound disrespect for parliamentary process and a centrally directed steer away from evidence-based decision making must be opposed, and as such we urge peers to reject Government amendment 247YYA.

The Duke of Wellington, with the support of Baroness Jones of Whitchurch, Baroness Parminter and Lord Randall of Uxbridge has tabled amendments **247YYAA, 247YYAB and 247YYAC**, which would ameliorate the worst impacts of amendment 247YYA. The Wellington amendments would delete the evidence-denying paragraphs 2, 3 and 4 from the proposed new section 85a of the Habitats Regulations, thereby upholding the high standards that underpin good public administration.

### **Mythbuster**

The Government has made a number of assertions in support of amendments 247YYA and 247YY. We address these assertions below.

Claim: Nutrient pollution from development is negligible

**Reality: Development impacts will tip struggling rivers into ecological collapse.**

The Government has claimed that development makes a negligible contribution to nutrient pollution, suggesting that all housing stock in England contributes under 5% to total nutrient pollution levels. It is unclear how this figure has been calculated; however, it significantly undercounts development impacts.

The main contribution housing stock makes to nutrient pollution is through sewage, with nutrients from bathrooms and kitchen waste making their way through the sewage system into English rivers. The latest figures suggest that overall 60-80% of phosphorus pollution<sup>11</sup> and 25-30% of nitrate pollution<sup>12</sup> comes from sewage. New homes mean more of these outputs and more pressure on creaking sewage infrastructure, resulting in an increased contribution to nutrient pollution from the sewage system.

In addition to the duties on water companies to upgrade their sewage plants (set out in clause 158 of the Bill), developers profiting from new development should play their part in addressing the significant increase in nutrient pollution from sewage which is a result of new housing.

Such increased pollution can cause a struggling freshwater ecosystem to collapse. Nutrient neutrality rules apply to only these sensitive areas, freshwater catchments where critical environmental thresholds

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<sup>10</sup> <https://www.ombudsman.org.uk/sites/default/files/page/0188-Principles-of-Good-Administration-bookletweb.pdf> (see p6 in particular)

<sup>11</sup> [https://consult.environment-agency.gov.uk/environment-and-business/challenges-and-choices/user\\_uploads/phosphorus-pressure-rbmp-2021.pdf](https://consult.environment-agency.gov.uk/environment-and-business/challenges-and-choices/user_uploads/phosphorus-pressure-rbmp-2021.pdf)

<sup>12</sup> [https://consult.environment-agency.gov.uk/++preview++/environment-and-business/challenges-and-choices/user\\_uploads/nitrates-pressure-rbmp-2021.pdf](https://consult.environment-agency.gov.uk/++preview++/environment-and-business/challenges-and-choices/user_uploads/nitrates-pressure-rbmp-2021.pdf)

have already been breached. Amendment 247YYA removes protections for these areas, adding new burdens to the health of freshwater habitats already at breaking point.

Examples of some of these struggling freshwaters can be found below, all precious nature sites including globally important chalk streams:

- Poole Harbour, where nutrient pollution has led to declines in wetland birds, including shelducks, curlews and lapwings.<sup>13</sup>
- The Somerset Levels, an SSSI and Ramsar site whose conservation status was downgraded to 'unfavourable declining' in 2021 due to nutrient pollution.<sup>14</sup>
- The River Wye, where nutrient pollution has led to catastrophic declines in salmon and white-clawed crayfish populations.<sup>15</sup>
- The Solent, where eutrophication has led to vast swathes of wetland being covered in algae.<sup>16</sup>
- The Avon and Itchen, where algal blooms are now occurring annually, causing invertebrate populations to decline<sup>17</sup> and putting salmon on the brink of extinction.<sup>18</sup>

Given the interconnection between freshwaters and marine habitats, this pollution will also negatively impact on marine species, and the human recreational and fishing activities dependent on healthy seas. We can expect these impacts, in both freshwater and marine environments, to worsen with further climate change – hot weather speeds the formation of algal blooms when nutrient pollution is present.

Claim: The current rules are blocking homes

**Reality: The current rules are now allowing new homes to come forward in polluted areas, without causing further damage to nature**

The stated justification for the amendment is the Government's updated claim that 100,000 homes will be delayed by nutrient pollution standards up to 2030. This claim was originally briefed by the Government as 140,000 homes delayed per year.<sup>19</sup> These figures were repeatedly challenged<sup>20 21</sup>, and the 140,000 homes per year claim now appears to have been withdrawn.

In an explanatory note published on 11.09.23, the Government confirmed that the lower 100,000 homes up to 2030 figure has been estimated from the number of homes delivered in nutrient pollution affected

<sup>13</sup> <https://www.rspb.org.uk/globalassets/downloads/our-work/poole-harbour.pdf>

<sup>14</sup> <https://westcountryvoices.co.uk/somerset-levels-and-moors-rhetoric-vs-reality-in-the-nature-emergency/>

<sup>15</sup> <https://naturalengland.blog.gov.uk/2023/05/30/assessing-the-health-of-the-river-wye-and-its-catchment/>

<sup>16</sup> <https://www.push.gov.uk/wp-content/uploads/2023/04/Overview-of-Solent-Eutrophication-and-Recovery-January-2023.pdf>

<sup>17</sup> <https://wildfish.org/wp-content/uploads/2022/06/Avon-Commentary.pdf>

<sup>18</sup> <https://ifm.org.uk/wp-content/uploads/2023/02/IFM-statement-on-salmon-conservation-February-2023-1.pdf>

<sup>19</sup> <https://www.dailymail.co.uk/news/article-12454681/Controversial-eco-red-tape-blocking-140-000-new-homes-built-axed-Michael-Gove-seeks-free-Britain-housing-paralysis-caused-EU-bureaucracy.html>

<sup>20</sup> <https://www.endsreport.com/article/1832842/nutrient-neutrality-housing-logjam-statistics-from>

<sup>21</sup> <https://www.wcl.org.uk/docs/Letter%20to%20Michael%20Gove%20and%20Therese%20Coffey%20on%20nutrient%20neutrality.pdf>



areas between 2015/16 and 2017/18, the peak of recent housebuilding before the current nutrient pollution rules and the Covid-19 pandemic.<sup>22</sup> As such it represents an estimate of the theoretical maximum of homes that could be delivered over seven years, rather than actual permissions that have been blocked.

Critically the number appears to assume that the current system would fail to mitigate any of these homes. This is simply not credible. Over 50,000 proposed new homes in areas affected by nutrient pollution rules now have identified appropriate mitigation in place, including developer-funded mitigation schemes agreed by local authorities under the current Habitat Regulations rules, paving the way to construction.<sup>23</sup> These developer-funded schemes are now working well in many places, allowing homes to be built without causing further harm to nature.<sup>24</sup> Environmental organisations and mitigation companies have proposals which could make these schemes work in a faster way, without the need to amend the Habitats Regulations and regress environmental protection, or to call on public funds (see more on page 7).

It is also important to remember that the homes that have been affected by the current rules are only those located close to our most valuable sites for conservation, in areas particularly badly affected by nutrient pollution.<sup>25</sup> Significant additional new homes will not be unblocked by amendment 247YYA; it is simply that the cost of unblocking will be shifted from developers' profit margins to the public purse, whilst damage to the environment increases.

Claim: New mitigation measures will address the pollution

**Reality: Taxpayers are being asked to bear the financial burden of pollution, in a manner that will fail to address the environmental damage**

In place of the current mandatory duty on development companies to pay for pollution they cause in sensitive freshwater sites, the Government has announced a new general mitigation fund, to be paid for by public money, with an unspecified 'contribution' to the overall cost from developers.<sup>26</sup>

The proposed fund is insufficient to mitigate nutrient pollution impacts, running only to 2030 and failing to cover the long-term maintenance costs essential to effective ecological mitigation. The current developer-funded system covers in-perpetuity maintenance costs, the new fund paid for by taxpayers will not. There is a high risk that underlying pollution loads from sewage and farming will not have been

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<sup>22</sup> <https://www.gov.uk/guidance/nutrient-neutrality-announcement-explainer>

<sup>23</sup> <https://greenshank-environmental.com/nutrient-letter-to-the-pm#:~:text=We%20request%20the%20Government's%20support,the%20significant%20progress%20already%20made.>

<sup>24</sup> A range of examples of existing schemes working well, from around the country, can be found here; [https://www.wcl.org.uk/docs/delivery\\_of\\_nutrient\\_mitigation\\_schemes\\_TWT\\_Link\\_briefing\\_04.09.24.pdf](https://www.wcl.org.uk/docs/delivery_of_nutrient_mitigation_schemes_TWT_Link_briefing_04.09.24.pdf)

<sup>25</sup> A map of affected areas can be found on p11 here:

<https://publications.naturalengland.org.uk/publication/4792131352002560>

<sup>26</sup> <https://www.gov.uk/guidance/nutrient-neutrality-announcement-explainer>

resolved by 2030, meaning that nutrient mitigation would still be required beyond this. There also a risk that a future Government could simply end the fund before 2030, ending mitigation with it.

Overall, the new mitigation funding model makes a switch from ‘polluter pays’ to an arrangement whereby the public partially pay for the partial mitigation of the pollution of their own rivers, inflicted by private development companies. Development company stock prices rose considerably on the day the amendments were announced, in anticipation of increased profits from this shift from polluter to public liability.<sup>27</sup>

Claim: The amendment does not set a precedent

**Reality: The Government is already trying to give itself more powers to amend environmental protections, through amendment 247YY**

The Government’s intervention to weaken the Habitats Regulations, the strongest and most critical form of environmental protection applying in the UK, sets a worrying precedent. Verbal assurances from the Secretary of State for Levelling Up, Communities and Housing that this is a one-time intervention fail to hold water, as the Government has already proposed amendment 247YY, allowing it to make further changes to the rules around nutrient pollution through secondary legislation.

We urge peers to outright reject amendment 247YY, to prevent Ministers making further sweeping changes to river pollution controls through secondary legislation.

Claim: There is no alternative

**Reality: The Government’s own environmental body has made clear that housebuilding could be enabled in nutrient polluted areas without amendment 247YYA and 247YY.**

Natural England have advised parliamentarians that the current system of mitigation under the Habitats Regulations is working well – and 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.*” These measures, including moving the mitigation stage to earlier in the planning system and offering a fixed rate of mitigations (rather than treating developments on a case-by-case basis), would make the current system work faster without requiring legislation.

The Government could swiftly instigate these non-legislative reforms to speed up housing delivery without increasing pollution, rather than relying on their sledgehammer-to-crack-a-nut amendments to the Levelling Up and Regeneration Bill.

These options would have become clear to Government had it consulted properly rather than introduce defective proposals in the final stages of the Levelling Up Bill, proposals which came as an unpleasant surprise to even their own environmental advisers. In expressing concern at the abrupt announcement of the changes, whistleblowers at Natural England have highlighted how the sudden u-turn will

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<sup>27</sup> [https://twitter.com/horton\\_official/status/1696503555354509632](https://twitter.com/horton_official/status/1696503555354509632)

undermine natural capital markets that had been growing: *'Basically we instigated a developing green market, a pioneering green market. And now it's put the brakes on that'*<sup>28</sup>

**Amendment 247YYDA** tabled by Baroness Hayman (a new clause entitled Nutrient Neutrality: Further Legislation) would ensure that a full range of options are fully considered through consultation and further parliamentary debate, before any changes to nutrient pollution rules are made. This would introduce the key policy making safeguards that should have applied first time around.

The current system can be improved upon, rather than being ripped up, allowing green markets to grow, new homes to come forward faster and environmental protections to be maintained. Amendments 247YYA and 247YY must be voted down, to keep this win-win scenario viable.

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[Wildlife and Countryside Link](#) (Link) is the largest nature coalition in England, bringing together 78 organisations to use their joint voice for the protection of the natural world.

For questions or further information please contact:

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<sup>28</sup> <https://www.endsreport.com/article/1836797/slap-face-natural-england-reeling-nutrient-neutrality-bombshell-insiders-reveal>