

## **Nutrient Neutrality Frequently Asked Questions**

### **What is Nutrient Neutrality?**

In March 2022, Natural England issued advice to all Council's in Norfolk about the impact of phosphorus and nitrogen on water quality within the wider catchment of the River Wensum and The Broads. This advice impacts a large area of Norfolk including areas within Breckland, Broads Authority, Broadland and South Norfolk, Great Yarmouth, North Norfolk and Norwich.

### **What water bodies are affected?**

Across Norfolk, catchments of the River Wensum Special Area of Conservation (SAC) and The Broads SAC are impacted by the advice.

### **What does the Natural England advice mean?**

Unless it can be demonstrated that certain development proposals will not add to the phosphorus and nitrogen issue, planning permission for a range of development types, including for additional overnight accommodation, should not be granted according to Natural England. This advice affects existing planning proposals already submitted and prevents many decisions from being issued at this time. The advice also impacts on future plans or projects within the wider catchment area.

### **How do I know if a specific site is impacted by Nutrient Neutrality?**

Maps were provided by Natural England in March but these were provided at a scale that made it challenging to identify specific sites in detail. Each Local Planning Authority now has maps on their website showing the catchment in more detail which will enable identification of specific sites. Unfortunately, we are unable to share those maps however, if you are unsure please contact your Case Officer or Natural England directly.

### **What Applications are Affected?**

Whilst the advice covers all types of overnight accommodation including new homes, student accommodation, care homes, tourism attractions and tourist accommodation and permitted development (which gives rise to new overnight accommodation) it also affects any development not involving overnight accommodation, but which may have non-sewerage water quality implications which includes various commercial or agricultural related schemes.

### **My site is not in the catchment – does that mean it is not affected by Nutrient Neutrality?**

In most cases, if you are well outside of the catchment then the Nutrient Neutrality advice from Natural England will not likely apply. However, where schemes are in closer proximity to the catchment boundary it will be important to understand if foul flows from additional overnight accommodation will be processed at Wastewater Recycling Centres which discharge into the affected catchments. In those circumstances, the Local Planning Authority will require further information, from an accredited source, to demonstrate where a specific site drains.

### **Where can I find Information about where foul flows drain to from my site?**

Where development drains into Anglian Water's network, this information can be obtained directly from Anglian Water via their [digdat](#) service. There is a cost for this service. Anglian Water cannot provide advice where you are intending to drain into a private network or sewage treatment plant nor can they provide advice with regards to NN or mitigation.

### **Why is all mapping data relating to Nutrient Neutrality not in the public domain and accessible free of charge?**

Each Council has maps on their website showing the affected catchments in more detail which will enable identification of specific sites. However, in relation to foul flows, Norfolk Council's do not currently have catchment maps for Wastewater Recycling Centres that can be placed in the public domain due to map licencing issues.

### **What are the Conservation of Species and Habitats Regulations 2017 and why do they matter?**

The Conservation of Species and Habitats Regulations 2017 (Habitats Regs) require local planning authorities to ensure that new development does not cause adverse impacts to the integrity of protected habitats. These protected habitats would include Special Areas of Conservation such as the River Wensum and The Broads.

The Local Planning Authority is the competent authority under the Habitats Regulations and will need to assess the implications of nutrient enrichment for relevant plans and projects within its area. Where the Local Planning Authority cannot lawfully conclude that development within the catchment of the River Wensum or the Broads Special Area of Conservation and Ramsar site will not have an adverse effect, permission would have to be refused. However, where there is sufficient evidence to rule out likely significant effects, permission can be granted.

### **What is the Natural Environment and Rural Communities Act and why does it matter?**

Section 40 of the Natural Environment and Rural Communities Act 2006 (as amended) places a duty on local authorities to conserve and enhance biodiversity including when exercising its functions as a Local Planning Authority. Councils are under increasing pressure to ensure that development does not result in net loss of biodiversity.

### **What impact does phosphorus and nitrogen have on water quality and the condition of Special Areas of Conservation?**

In freshwater habitats and estuaries, poor water quality due to nutrient enrichment from elevated nitrogen and phosphorus levels is one of the primary reasons for habitats sites being in unfavourable condition. Excessive levels of nutrients can cause the rapid growth of certain plants through the process of eutrophication. The effects of this look different depending on the habitat, however in each case, there is a loss of biodiversity, leading to sites being in 'unfavourable condition'.

### **What do Local Planning Authorities need to do?**

Each Local Planning Authority (LPA) is the competent authority required to fully consider the nutrients implications on affected sites when determining affected planning applications.

The LPA will need to carry out a Habitats Regulation Assessment (HRA) (to assist it is suggested that if your development is affected then you provide a shadow HRA) and then carry out, based on the scientific evidence provided, an Appropriate Assessment (AA), to establish whether or not the proposal will have a significant effect (either alone or in combination) on a protected site.

The competent authority should only grant permission if they have made certain at the time of Appropriate Assessment that the plan or project will not adversely affect the integrity of a habitats site i.e. where no reasonable scientific doubt remains as to the absence of effects.

The Natural England advice states that LPAs need to apply a "precautionary approach".

### **Why can't you just ignore the Natural England advice and grant planning permission for affected schemes?**

Whilst Local Planning Authorities are the competent authority under the Habitats Regulations and so could in theory disregard the advice of Natural England, in most cases it would likely be considered unlawful to grant planning permission where it could not be demonstrated beyond reasonable scientific doubt that a plan or project would not cause adverse impacts to the integrity of protected habitats. Planning permissions issued without proper regard to the Habitats Regulations (or other legal duties) may be subject to legal challenge and, if a challenge is successful, could lead to planning permission being quashed.

### **What does mitigation look like?**

Mitigating the impact of phosphorus and nitrogen on water quality within the wider catchment of the River Wensum and The Broads is complex. Ideally each development should seek to

achieve nutrient neutrality. Achieving nutrient neutrality often requires mitigation as part of development, either in the form of on-site treatment of wastewater and surface water runoff, or by offsetting any increase in nutrient loading by converting land on or off-site with woodlands or wetlands or through other means of mitigation designed to reduce phosphorus and nitrogen entering into the river. Work is ongoing to establish a range of mitigation options for the short, medium and long-term.

### **Can I just pay a tariff and have my permission approved?**

It is very likely that, as the range of mitigation options are identified and ways to deliver mitigation secured, tariff schemes may be created enabling developers to pay a tariff to be used towards off-site mitigation. At the moment, given that mitigation has not been identified nor has any delivery of mitigation been costed, identifying or setting an appropriate tariff rate is not currently possible. Until such time as the mitigation measures required are clear, a tariff based solution is unlikely to satisfy the requirements of the Habitats Regs.

### **How long is this going to take to resolve?**

Experience from elsewhere across the country suggests that identifying appropriate mitigation solutions can take some time both in terms of understanding the type of mitigation required and securing that mitigation for 80-125 years to be delivered as part of any tariff based solution. In this case the impact of both phosphorus and nitrogen on water quality within the wider catchment of the River Wensum and The Broads requires mitigation and that adds to complexity.

All affected Norfolk Authorities are working together to find a solution alongside relevant partners. Finding a solution is a high priority given the impact Natural England's advice has on the delivery of housing and employment growth across Norfolk.

### **Why did Natural England not raise nutrient pollution concerns sooner as part of wider growth plans across the County?**

Local Planning Authorities were surprised to receive the advice from Natural England when it did and without prior-warning. However, the advice is now in the public domain and, unless it is subsequently withdrawn, the issues raised within the advice must be taken into consideration by each competent authority as part of assessment under the Habitats Regulations.

### **Will Natural England be providing advice and support to Local Planning Authorities?**

Natural England have provided in their advice the methodology and calculator tools and are working with Local Planning Authorities.

Natural England have indicated that it is for the competent authority (i.e. the Local Planning Authority) to make an assessment as to whether a plan or project will result in adverse impacts to the integrity of protected habitats. It will be the competent authority who completes the Habitats Regulations Assessment (HRA) and Appropriate Assessment (AA). Natural England will in most cases be consulted when an HRA/AA is produced but they may not necessarily provide detailed advice. Norfolk Authorities are working with Natural England to ensure that all necessary support and guidance is in place to enable smooth processing of applications, particularly once mitigation solutions are understood.

### **Will Natural England be providing advice and support to Applicants / Agents on Nutrient Neutrality?**

Whilst applicants and agents are free to contact Natural England, early indications suggest that they will not comment in detail on specific cases and will likely refer an applicant or agent back to the Local Planning Authority as they are the competent authority under the Habitats Regulations. Norfolk Authorities are working with Natural England to ensure that all necessary support and guidance is in place to enable smooth processing of applications, particularly once mitigation solutions are understood.

### **Can drainage and other pre-commencement conditions be discharged?**

The Written Ministerial Statement made 20<sup>th</sup> July 2022 – Statement on improving water quality and tackling nutrient pollution (George Eustice Secretary of State for Environment, Food and Rural Affairs) and the Chief Planners letter clarify whether the Habitats Regulations apply to discharge of conditions:

*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.*

WMS: <https://questions-statements.parliament.uk/written-statements/detail/2022-07-20/hcws258>

Chief Planners letter:

[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)

Applications to discharge conditions which go to the heart of a planning permission are considered an 'implementing consent' and therefore are subject to regulation 63 of the Habitats Regulations.

In carrying out its duties as Competent Authority the Local Planning Authority will therefore seek to establish through your submission and a review of the application and consent, whether the relevant condition goes to the heart of the planning permission and therefore whether the Habitats Regulations apply.

It is not possible to provide generic advice on when a condition will be a pre-commencement condition going to the heart of the permission. Because in substance the test is a rationality one i.e. would it be rational for the Council to conclude that a breach of the given condition means that a development has taken place without planning permission (as opposed simply to being in breach of condition), a case specific consideration of the importance of a condition to *the particular permitted development* will always be required.

However in general terms, determining whether or not the condition goes to the heart of the permission requires:

- Examining the wording of the condition; and
- Examining its effects in the wider context of the permission

If it is concluded that the condition goes to the heart of the permission, implementation of the permission without having discharged this would be unlawful and it is therefore considered to be an implementing consent for the purposes of the Habitats Regulations. Where the

condition does not go to the heart of the permission the LPA in principle will be able to proceed to determine your application without applying the Habitats Regulations.

You are advised to speak directly to the planning team to discuss your individual cases and we will also encourage you to demonstrate to the Council with your submission whether the condition is an implementing consent.