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Quarterly Environmental Law Update

19 March 2024

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The bridge to nowhere ... and beyond

Project splitting and related issues in EIA



Ned Westaway

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Key statutory provisions

Town and Country Planning (Environmental Impact Assessment) Regulations 2017

Reg.3: "The [authority] ... must not grant planning permission or subsequent consent for EIA development unless an EIA has been carried out in respect of that development"

When 'screening' development under Reg.5, must have regard among other things to "cumulation with other existing development and/or approved development" (Sch.3 paras.1(b) and 3(g))

When preparing an environmental statement of impacts, the description must cover "direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the development" (Sch.4 para.5)

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Questions arising

Leads to three (sometimes related) questions:

1. What is the scope of the development or the project under question (has there been unlawful 'project splitting')?
2. What is the extent of indirect impacts that must be considered?
3. What is the extent of cumulative impacts that must be considered?

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R (Ashchurch Rural Parish Council) v Tewkesbury BC [2023] EWCA Civ 101; [2023] PTSR 1377

EIA screened out against bridge as stand-alone “project”



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Ashchurch (cont.)

Court of Appeal:

The identity of the “project” is not necessarily circumscribed by the planning permission under consideration (para.78)

“The question “is this application part of a larger project?” can still be answered even if planning permission has not yet been sought for the larger project or the details of the larger project have not been finalised” (para.88)

Here, LPA had simply failed to ask the question of whether the bridge was part of a larger project – considering the factors set out in Wingfield

Functional link was particularly strong – bridge served no purpose without the housing development it was intended to unlock

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Ashchurch (cont.)

NB para.93:

“The fact that the Planning Practice Guidance addresses the potential relevance of “other existing or approved developments” and tells local planning authorities that they should always have regard to the possible cumulative effects arising from any existing or approved development, should not be taken as restricting consideration of the impact of larger projects to “existing or approved” developments.”

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Subsequent reliance on Ashchurch

1. Matter addressed

R (Llandaff North Residents' Association) v Cardiff CC [2023] EWHC 1731 (Admin); [2023] Env LR 31

Functional relationship but no functional interdependence

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Subsequent reliance on Ashchurch (cont.)

2. Remoteness

Re No Gas Caverns Ltd's Application for Judicial Review [2023] NIKB 84

No significant risk identified with future decommissioning, and lawful to defer detailed assessment



Subsequent reliance on Ashchurch (cont.)

3. Clearly separate projects

Frack Free Balcombe Residents Association v SSLUHC [2023] EWHC 2548 (Admin)

Application for exploration and assessment which may or may not lead to a subsequent application for production – “conceptually different” to Ashchurch

Reference to Preston New Road Action Group



Subsequent reliance on Ashchurch (cont.)

4. Procedural/policy reasons

R (Together Against Sizewell C Ltd) v SSESNZ [2023] EWCA Civ 1517

Issue of sustainable potable water supply to nuclear power station

Not settled at the stage of DCO determination

ExA: unable to rule out likely significant effects on habitats

SoS: water company (Northumbrian Water Ltd) is developing supply options which are "potentially viable", as is applicant's fall back desalination plant; the WRMP process is separate/stand-alone



Court of Appeal:

Para.72: Ashchurch "turned very much on its own peculiar facts"

Para.83: C's argument would produce "sclerosis in the planning system"

"It would seem to imply that, as a general rule, the infrastructure that might later be used by a utility company to supply water, electricity, gas or sewerage to a major development would fall to be considered as part of the development itself, with the potential consequence that decision-making on that development would have to await the utility company's own choice of its preferred means of supply"



Subsequent reliance on Ashchurch (cont.)

5. Clear-cut cases remain

R (BW Farms Ltd) v SSLUHC [2024] EWHC 217 (Admin)

Screening decision that spreading, with odour and ammonia impacts, part of the development

Follows Squire

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Reflections (1)

Artificiality of “project” arguments – the better analysis may be cumulative effects or indirect effects

Cf. Pearce v SSBEIS [2021] EWHC 326 (Admin); [2022] Env LR 4; see also R (Substation Action Save East Suffolk Ltd) v SSESNZ [2024] EWCA Civ 12

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Reflections (1)

Artificiality of “project” arguments – the better analysis may be cumulative effects or indirect effects

Cf. Pearce v SSBEIS [2021] EWHC 326 (Admin); [2022] Env LR 4; see also R (Substation Action Save East Suffolk Ltd) v SSESNZ [2024] EWCA Civ 12

Tension is where there is lack of information available

Logically, if significant effects are likely, should be assessed even if it means deferring assessment to ensure that more information is obtained

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Reflections (2)

For those assessing projects, always sensible to consider all facets of potential impacts in both screening and assessment

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Reflections (3)

Cumulative and indirect impacts in the context of climate change are a hot topic

R (Finch) v Surrey CC [2022] EWCA Civ 187 – downstream (indirect) impacts

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Reflections (3)

Cumulative and indirect impacts in the context of climate change are a hot topic

R (Finch) v Surrey CC [2022] EWCA Civ 187 – downstream (indirect) impacts

R (Boswell) v SST [2023] EWHC 1710 (Admin) – carbon emissions a *sui generis* type of cumulative impact

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Reflections (4)

Issues unlikely to disappear with environmental outcomes reports
 LURA s.154(8) defines "consent" as any consent or approval (etc.)
 "required, or otherwise provided for, by or under any enactment in relation
 to a project"

And s.153(4) defines EOR as a report which assesses impacts of proposed
 relevant consents



Water Neutrality



Horatio Waller



Water neutrality – what is the issue?

- The abstraction of groundwater to supply water to homes or other development can harm biodiversity reliant upon that groundwater.
- The threat has been highlighted by Natural England in relation to the Arun Valley.
- Led to a slowdown in the delivery of housing across North Sussex.



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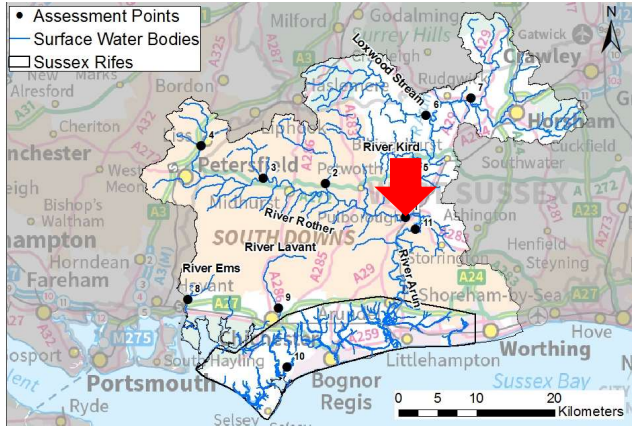
Natural England Position Statement

- 14 September 2021 - Natural England send a position statement advising of the negative impact caused to the Arun Valley wildlife sites through water abstraction, and advising that any development must not add to that impact ("the PS").
- The Arun Valley falls within the Sussex North Water Resources Zone ("SNWRZ"), supplied by Southern Water.
- An addendum document dated November 2022 clarified that the PS applies to new developments where water abstraction is required specifically from the aquifer at Hardham, near Pulborough.

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The catchment of the Arun and Western Streams



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The Protected sites

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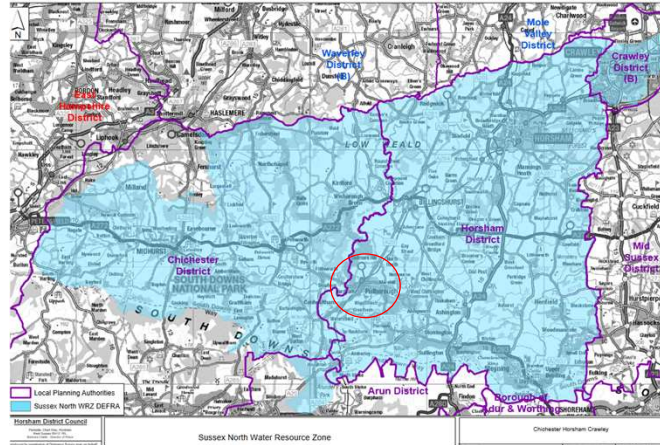


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The local authorities affected

- Horsham DC
- Crawley BC
- Chichester DC
- The South Downs NPA.



Copyright – Horsham DC

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Demonstrating water neutrality

- Natural England's February 2022 position statement - guidance to developers on how to demonstrate water neutrality.
- 1: reduce water usage to the greatest extent possible, i.e. water efficient taps, sanitary infrastructure etc.
- 2: demonstrate methods for providing alternative sources of water to meet the expected needs of their proposals, to remove / reduce the need to rely upon water abstraction from the Hardham aquifer.
- 3: commit to fund and deliver efficiencies in the water usage of other sites reliant upon the Hardham aquifer to offset any residual increase in water usage that their proposals would create.

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Case Studies

- Land at Brook Hill, Cowfold.
 - Permission granted for 35 dwellings in Horsham (Ref DC/22/1815).
 - Delivery committed for a private borehole, sunk into a 'secondary aquifer', that would not impact water levels in the aquifer serving Hardham.
- Land at Sandygate Lane, Lower Beeding.
 - Permission granted for 22 dwellings in Horsham (Ref DC/22/0708).
 - Demand for water, met by the Hardham aquifer, offset against savings delivered through a rainfall harvesting system delivered at a local farm.
 - Harvesting system secured by s106.

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Interim strategic solution?

- LPAs can develop agreements with housing associations to enable developers in return for "water credits" to fund the installation of new water efficient infrastructure in social housing, offsetting the impacts of their schemes.
- An emerging scheme involving housing authorities across North Sussex, such as Saxon Weald, called the 'Sussex North Water Offsetting Scheme (SNOWS)'.
- Set out in the Sussex North Water Neutrality Study: Part C- Mitigation Strategy
- No strategic solution finalised yet.

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When can development come forward?

- No strategic offsetting schemes have been developed yet. But it is possible for developers to apply for permission now and provide s106 agreements offering a financial contribution towards the offsetting scheme when developed.
- An Inspector was recently prepared to grant permission subject to a condition and s106 preventing development until an offsetting scheme is in place and a contribution is made; Land West of Ravenscroft, Storrington (dated 6.10.23, 3308455).



Long term strategic solution

- For Southern Water to deliver new supplies of water, to increase the supply of water from existing sources (without harming protected sites) and to create efficiencies.
- One proposal under consideration is a desalination plant on the tidal stretch of the River Avun.
- Further reading: Water Supply Options for 2025 to 2030.
<https://www.southernwater.co.uk/media/1361/25-30.pdf>



Climate Change



Flora Curtis

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Introduction

1. ClientEarth v Financial Conduct Authority [2023] EWHC 3301 (Admin)
2. ClientEarth v Shell Plc [2023] EWHC 1137 (Ch)
3. Michael John Smith v Fonterra Co-Operative Group Limited [2024] NZSC 5

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ClientEarth v Financial Conduct Authority [2023] EWHC 3301 (Admin)

The Claim

- The claim challenged the FCA's decision to approve Ithaca Energy Plc's prospectus.
- CE argued that Ithaca's prospectus did not adequately describe the climate risks associated with the company's activities.
- CE argued that the FCA's decision was unlawful as the prospectus breached Articles 6 and 16 of the Prospectus Regulation.



The Prospectus Regulation

Article 6: Requires a prospectus to set out the necessary information which is material to an investor for making an informed assessment of the assets and liabilities, profits and losses, financial position, and prospects of the issuer.

Article 16: Requires investors to set out certain risk factors that are specific to the issuer and material for making an informed investment decision. Investors must adequately describe each risk factor.

Section 87A Financial Services and Markets Act 2000: FCA may not approve a prospectus unless it is satisfied that the prospectus contains "*the information required by Article 6(1) of the prospectus regulation*" and "*all the other requirements imposed by...the prospectus regulation...have been complied with*".



ClientEarth v Financial Conduct Authority [2023] EWHC 3301 (Admin)

Grounds 1 and 2: Article 16 of the Prospectus Regulation

- CE argued that (1) the FCA erroneously assumed that the Art.16 obligations had been complied with, and (2) the FCA had erred by concluding that the prospectus adequately disclosed or described the specificity of the climate-related risks associated with Ithaca's securities.
- The court refused permission on both grounds.
- Essentially: the compliance of the prospectus with the Prospectus Regulation was a matter of judgment for the FCA.



ClientEarth v Financial Conduct Authority [2023] EWHC 3301 (Admin)

Ground 3: Article 6 of the Prospectus Regulations

- CE argued that the FCA's conclusion that the prospectus met the Prospectus Regulations was irrational.
- Court disagreed: no evidence of irrationality in this case.



ClientEarth v Financial Conduct Authority [2023] EWHC 3301 (Admin)

Implications

- CE sought to establish that companies should be including more information on climate-related risks in their prospectuses.
- Court's decision: no legal requirement to do so.
- Deference given to the FCA as an expert regulator.
- Aarhus decision will make future challenges costly.



ClientEarth v Shell [2023] EWHC 1137 (Ch)

The Claim

- Derivative claim under s.260 of the Companies Act 2006.
- Application for permission to bring the derivative claim.
- Shell's directors had failed to manage the material and foreseeable risk presented to shell by climate change, in breach of their duties under the Companies Act 2006.





ClientEarth v Shell [2023] EWHC 1137 (Ch)

The Relevant Tests

- CE had to demonstrate a **prima facie** case to obtain permission.
- **Section 172 CA 2006:** duty to promote the success of the company.
- **Section 174 CA 2006:** duty to exercise reasonable care, skill and diligence.
- Derivative claims are *"an exception to one of the most basic principles of company law: that it is a matter for a company...not any one or more of its shareholders, to determine whether or not to pursue a cause of action that may be available to it"*.



ClientEarth v Shell [2023] EWHC 1137 (Ch)

The Decision

- No prima facie case that the directors' approach was manifestly unreasonable.
- Limited weight could be given to CE's witness evidence, which was not expert evidence.
- Lack of any universally accepted methodology for achieving reduction targets.
- Directors had to weigh multiple competing considerations when deciding their approach.
- CE was not acting in good faith in bringing the claim.



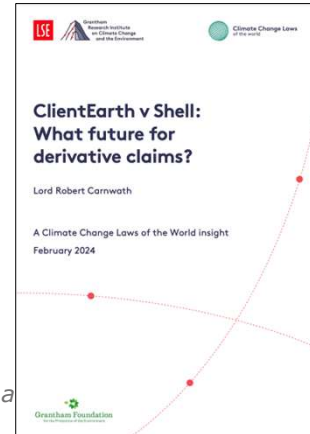
ClientEarth v Shell [2023] EWHC 1137 (Ch)

Lord Carnwath's Critique

"With respect to the judge, I find his reasons for dismissing this case at the preliminary stage unpersuasive on all these points.

[...]

I find it surprising that the judge held that ClientEarth had failed to disclose even a prima facie case, and unfortunate that the application for permission to appeal was dismissed by a single Lord Justice without any form of hearing. It was a missed opportunity."



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ClientEarth v Financial Conduct Authority [2023] EWHC 3301 (Admin)

Implications

- Possible glimmer of hope for future claimants as a result of Lord Carnwath's essay.
- **BUT** potentially very high risk to bring a similar claim due to potential costs implications.

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Smith v Fonterra [2024] NZSC 5

The Claim

- Tort claim brought by Michael Smith, a Maori person, against high-emitting companies.
- C argued that Ds had materially contributed to climate change, and this impacted land that was of cultural, historical, spiritual and customary significance to him.
- Three causes of action: (1) public nuisance, (2) negligence, (3) new climate tort.



Smith v Fonterra [2024] NZSC 5

New Zealand statutory response to climate change

- Ds argued that Parliament had put a statutory scheme in place which should not be cut across by a parallel common law regime.
- NZ has the Climate Change Response Act 2002 and the Resource Management Act 1991.
- Court disagreed: no express/implied removal of the entirety of tort law in the realm of GHG emissions and climate change.



Smith v Fonterra [2024] NZSC 5

Public Nuisance

- Court disagreed with the High Court and Court of Appeal: public nuisance claim disclosed a reasonable cause of action against Ds.
- Common law is capable of adapting to challenges such as climate change.
- Two interesting points:
 - (1) **Causation**: court accepted an aggregate/cumulative test
 - (2) **Special damage**: court accepted that C had standing at this stage

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Smith v Fonterra [2024] NZSC 5

Implications

- This was a strike-out application, so the threshold for the Claimant was not high.
- Decision means that the claim will proceed to a full trial.
- Fuller consideration will be given to interesting questions concerning the relationship between emissions, climate change, environmental harm, and tort law.
- Possibly helpful for other types of claim which rely on harm to individuals from climate change, e.g. human rights.

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Concluding Points

- 1) The courts and the legal profession are starting to grapple with the ways in which climate change and environmental damage permeate all areas of the law.
- 2) The outcomes of the English claims are unfortunate from the perspective of strategic litigants, particularly from a costs perspective.



Nutrient Neutrality and Housing

A tale of two letters?



Stephanie Bruce-Smith



Contents

1. How we got here: Natural England to LURA 2023
2. Wild Justice's pre-action letter & update
3. Nutrient neutrality & appropriate assessment pre-LURA
4. Nutrient neutrality & appropriate assessment post-LURA
5. Implications of Brexit



1. Where we are: from the Natural England letter to LURA



Natural England Letter

16 March 2022

Letter:

- Outlining Natural England's advice for development proposals that have the potential to affect water quality in such a way that adverse nutrient impacts on designated habitats sites cannot be ruled out.
- Providing an update to LPAs whose areas include catchments where NE already advised on how to assess nutrient impacts of new development and mitigate any adverse effects, including **through the application of the nutrient neutrality methodology.**

Date: 16 March 2022



To: LPA Chief Executives & Heads of Planning,
County Council Chief Executives and Heads of Planning,
EA Area and National Team Directors,
Planning Inspectorate,
Natural Resources Wales (Cross border sites only) &
Secretary of State for Department for Levelling Up Housing & Communities
(DLUHC)

BY EMAIL ONLY

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Crown Business Park
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Chesham
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T 0300 960 3900

Dear Sir / Madam

Advice for development proposals with the potential to affect water quality resulting in adverse nutrient impacts on habitats sites.

1.0 Summary

This letter sets out Natural England's advice for development proposals that have the potential to affect water quality in such a way that adverse nutrient impacts on designated habitats sites* cannot be ruled out.

It also provides an update to those Local Planning Authorities (LPAs) whose areas include catchments where Natural England has already advised on how to assess the nutrient impacts of new development and mitigate any adverse effects, including through application of the nutrient neutrality methodology. It includes:

- Supporting information (Annex A) which summarises the key tools and guidance documents available and how to take account of certain issues in any Habitats Regulations Assessment (HRA)
- a national map showing the affected catchments (Annex B)
- a list of habitats sites in unfavourable condition due to nutrients, where new development may have

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Government seeks to amend LURB

29 August 2023

Proposed inserting new Regulation 85(A) into Habitats Regulations:

- (2) *When making the relevant decision, the competent authority **must assume that nutrients in urban waste water from the potential development will not adversely affect the relevant site.***
- (3) *Accordingly, a potentially adverse effect on a relevant site caused by nutrients in urban waste water [...] is not a ground for the competent authority to determine that—*
 - (a) *an appropriate assessment is required [...]* or
 - (b) *the potential development will adversely affect the integrity of the relevant site [...]*

News story

100,000 more homes to be built via reform of defective EU laws

Government announces plan that will unblock housebuilding to deliver homes for local communities while protecting the environment.

From: [Department for Levelling Up, Housing and Communities](#), [Department for Environment, Food & Rural Affairs](#), [The Rt Hon Michael Gove MP](#), and [The Rt Hon Thérèse Coffey MP](#)

Published 29 August 2023

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Amendment defeated in the House of Lords

13 September 2023



UK Parliament

Votes in Parliament

UK Parliament > Business > Votes in Parliament > House of Lords votes > Division 5

Levelling-up and Regeneration Bill

Division 5: held on 13 September 2023

161 Contents

192 Not Contents

*The amendment was disagreed
Government defeat*

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Levelling-up and Regeneration Act 2023 receives royal assent

26 October 2023

Includes sections (also present in Bill published in December 2022):

- Amending WIA 1991 to require sewage undertakers in areas with protected habitats sites in unfavourable condition (i.e. in **designated "sensitive catchment areas"**) to secure plant will be able to meet pollution standards by 2030 (new s96B of WIA 1991)
- Amending Habitats Regs to require **CAs to assume that the treatment plants responsible for processing wastewater from proposed development will be upgraded by 2030** (new Reg 85A of Habitats Directive)



Levelling-up and Regeneration Act 2023

2023 CHAPTER 55

An Act to make provision for the setting of levelling-up missions and reporting on progress in delivering them; about local democracy; about town and country planning; about Community Infrastructure Levy; about the imposition of Infrastructure Levy; about environmental outcome reports for certain consents and plans; about nutrient pollution standards; about regeneration; about the compulsory purchase of land; about information and records relating to land, the environment or heritage; about the registration of short-term rental properties; for the provision for pavement licences to be permanent; about governance of the Royal Institution of Chartered Surveyors; about the charging of fees in connection with marine licences; for a body to replace the Health and Safety Executive as the building safety regulator; about the transfer of land for Academy schools; about the review of maps of open country and registered common land; about the regulation of childminding; about qualifying leases under the Building Safety Act 2022; about road user charging schemes in London; about National Parks, areas of outstanding natural beauty and the Broads; and for connected purposes.

[26th October 2023]

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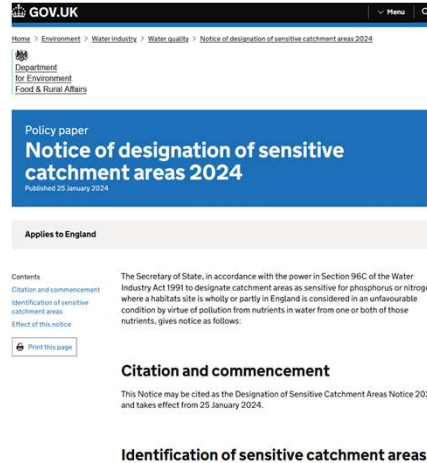


Notice of designation of sensitive catchment areas 2024 (1)

25 January 2024

[Policy paper](#) published designating sensitive catchment areas for phosphorus and nitrogen:

- Includes nearly all of the sites identified by Natural England in its letter of 16 March 2022
- Includes section titled "Effect of this notice"



GOV.UK

Home > Environment > Water industry > Water quality > Notice of designation of sensitive catchment areas 2024

Department for Environment, Food & Rural Affairs

Policy paper

Notice of designation of sensitive catchment areas 2024

Published 25 January 2024

Applies to England

Contents

- Citation and commencement
- Identification of sensitive catchment areas
- Effect of this notice

[Print this page](#)

The Secretary of State, in accordance with the power in Section 96C of the Water Industry Act 1991 to designate catchment areas as sensitive for phosphorus or nitrogen where a habitats site is wholly or partly in England is considered in an unfavourable condition by virtue of pollution from nutrients in water from one or both of those nutrients, gives notice as follows:

Citation and commencement

This Notice may be cited as the Designation of Sensitive Catchment Areas Notice 2024 and takes effect from 25 January 2024.

Identification of sensitive catchment areas

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Notice of designation of sensitive catchment areas 2024 (2)

"Effect of this notice"

"In designated catchments, water companies have a duty to ensure wastewater treatment works serving a population equivalent over 2,000 meet specified nutrient removal standards by 1 April 2030. Competent authorities (including local planning authorities) considering planning proposals for development draining via a sewer to a wastewater treatment works subject to the upgrade duty are **required to consider that the nutrient pollution standard will be met by the upgrade date for the purposes of Habitats Regulations Assessments.**

A limited exemption process will be completed by 1 April 2024, when wastewater treatment works exemptions will be confirmed, **which may affect the levels of nutrient mitigation that development must secure for specific wastewater treatment works** in some catchments. **It is important that planning decisions continue to be taken based on material planning considerations."**

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Taking stock

Three points to note:

- Repetition of the 'assumption' in Regulation 85A of Habitats Regulations
- "Limited" exemption process "which **may** affect the levels of nutrient mitigation that development must secure for specific wastewater treatment works in some catchments"
 - "Will" affect?
 - How "limited"?
 - What impact will this have on appropriate assessments in those areas?
- "It is important that planning decisions continue to be taken based on material planning considerations"
 - i.e. "it is important that planning decisions are lawful"?

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2. Wild Justice and the unissued claim

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Wild Justice issue pre-action letter

1 February 2024

Pre-action letter sent to DEFRA challenging the publication of the "Notice of Designation of sensitive catchment areas 2024."



- Refers to the proposed Government amendment defeated in the HL
- Argues that Notice is unlawful as would require LPAs to ignore potential impacts to sensitive catchment areas in situations where the relevant pollution standard has not been met, even though LURA requires it to be.
- Argues that if complied with, the Notice would have the same effect as some of the LURB amendments that were defeated in the HoL: DEFRA *"trying to achieve with guidance some of what could not be passed as primary legislation"*

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Wild Justice decides not to proceed to issue claim

16 February 2024

Provides update on [website](#) explaining why no longer seeking to challenge Notice:

"UPDATE (16:30 16 February): we received a response from Defra yesterday and having spoken to our legal team today we have decided there is no prospect of winning this challenge. We got this one wrong. But what Defra is doing is shockingly bad and if we were still in the EU we would be considering challenging this policy. As it is, we can't see a legal route forward. However there is work to be done by us and others to ensure that the promised upgrades are produced and that the relevant regulators do their jobs properly. Watch this space for more thoughts."

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Taking stock

Three points to note:

- Suggests LURA amendment to Habitats Regulations (new Regulation 85A) has gone unnoticed until now
- Clear statement that considers would be unlawful if we were still in the EU (presumably challenge would be to the new regulation 85A rather than the policy)
- Omission of any reference to new Regulation 85A of the Habitats Regulations, which introduces this assumption (only references the policy).

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3. Nutrient neutrality & appropriate assessment

The position pre-LURA 2023

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Natural England flowchart (extract)

- If cannot conclude no likely significant effect, must undertake an AA.
- If conclude that there is no certain mitigation that will ensure no hydrological connectivity AND that there is no certain mitigation that would make the plan / project insignificant must consider the following:


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    graph LR
      A[Is there a strategic plan which creates capacity for the plan or project that is certain or enables a conclusion of no adverse effect for the lifetime of the development's effects?] --> B[If certain strategic plan but delay, is there additional certain mitigation which will bridge the gap until the benefits of the strategic plan measures are felt at the site or conditions which could be applied?]
      A --> C[If not, is there certain mitigation or conditions that would make the plan / project nutrient neutral for the lifetime of the development's effects?]
      B --> D[If not, is there any other evidence which provides certainty that the plan or project will not have an adverse effect on site integrity?]
      C --> D
  
```

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4. Nutrient neutrality & appropriate assessment

The position post-LURA 2023

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Recall: Levelling Up and Regeneration Act 2023

Schedule 15:

New Regulation 85A:

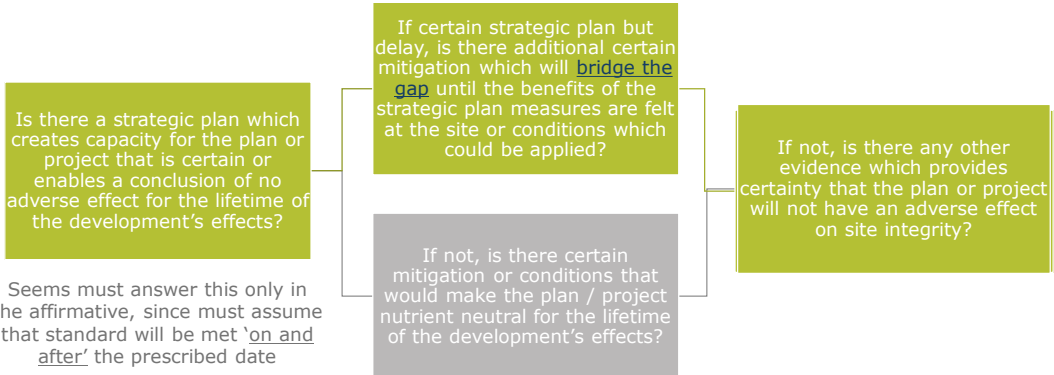
- Requires competent authority to assume when making a relevant assessment, that a nitrogen / phosphorus nutrient significant plant will meet the nitrogen / phosphorus nutrient pollution standard on and after the applicable date (where it is a catchment permitting area plant) or on and after the upgrade date (where it is a non-catchment permitting area plant).

New Regulation 85C:

- Disapplies assumptions in 85A and 85C if Secretary of State so directs.
- In context of non-catchment permitting area plants, SoS can only make such a direction where satisfied that plant will not be able to meet the upgrade date.



Natural England flowchart (extract)



Seems must answer this only in the affirmative, since must assume that standard will be met 'on and after' the prescribed date

Means plan/project will always have 'nil' effect on protected site – since will meet it regardless?



5. Implications of Brexit

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Wild Justice: "if we were still in the EU we would be considering challenging this policy. As it is, we can't see a legal route forward"

Raises Two Questions:

1. Would new Regulation 85A of the Habitats Regulations be unlawful under EU law?
2. In any event, would any decision under it be 'unchallengeable' because of Brexit?

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Compliance with Habitats Directive?

Key points:

- Depends on whether 'assumption' requires competent authority to ignore relevant information in undertaking appropriate assessment
- If Regulation 85A merely sets out a starting point, might be possible to read compatibly...
 - Yet, Regulation 85C seems to prevent that interpretation. Regulation 85C also seems to transfer decision as to whether will or will not meet pollution standard from appropriate authority to Secretary of State.
- **Query:** what happens when CA *must* know that development highly likely make the situation worse, but no designation from SoS?



Example:

- LPA required to assume sewage undertaker Thanglian Water will meet pollution standard by 2030 and afterwards. Thanglian Water discharges treated effluent into the River Myne SAC, a designated sensitive catchment area in the notice dated January 2024.
- The River Myne SAC suffered widespread nitrogen pollution since 2015, as Thanglian Water's sewage treatment works have insufficient capacity to treat the wastewater from the catchment area.
- It is July 2028. Upgrades to Thanglian Water are underway and should be completed in 2032. These would have allowed Thanglian Water to meet the pollution standard, but due to significant recent development in the area, it is highly likely that the pollution standard will be exceeded, even after these upgrades are completed. Further upgrades will therefore be necessary but there are currently no plans for any further upgrades within the next 5 years.
- Harvey Homes has submitted an application to build 2,000 new homes within the catchment area for the River Myne SAC. All of the above information in relation to Thanglian Water is before the LPA. However, the assumption has not yet been disapplied by the SoS.
- The LPA approves the scheme, and in carrying out its AA, it assumes that the pollution standard will be met by 2030 and afterwards.
 - **Would such a decision be lawful?**



Lawfulness of decision in Example:

Remains unclear:

- Post-Brexit, public law principles still likely to provide some form of safeguard: might making the AA without reference to these clearly material considerations be irrational / illegal?
- Principle of legality: requires clear statutory words to oust basic common-law norms
- Context in which LURA passed likely to be important to any future interpretation by courts:
 - Might be difficult for D to argue that 'intention of Parliament' = new 85A to have same effect as amendment rejected by HL (i.e. that it requires LPA to assume that nutrients in urban wastewater from the potential development will not adversely affect the relevant site)
- **NB:** *CG Fry & Son v SSLUHC in Court of Appeal today, in which court considering the scope and application following the UK's withdrawal from the EU of the Habitats Regulations 2017 and the Habitats Directive on which it was based.*



Environmental Corporate Social Responsibility in Action: The Advertising Standards Authority bans a Toyota SUV advert for not being prepared with a sense of social responsibility



Claire Nevin



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What do the following sentences evoke for you?

- "One of nature's true spectacles"
- "The great migration"
- "Born to Roam"

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