Legal briefing on the implications of the Habitats Regulations for local authority decision making in the context of nutrient neutrality

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This briefing note has been commissioned by the Planning Advisory Service for the benefit of local planning authorities, in the context of Natural England's advice on nutrient neutrality. The aim of the briefing note is to set out the established legal framework in this complex area of law in order to enable decision-makers to make lawful decisions and avoid legal challenge.

Summary

1. We are instructed by the Planning Advisory Service ("PAS") to provide a briefing note on the legal basis for decision-making in areas subject to Natural England's ("NE") nutrient neutrality advice. The key points are as follows:
    i) It is well established in law that decision-makers must adopt a strictly precautionary approach where protected habitats sites might be affected;
    ii) Development can only be consented where the decision-maker is sure, meaning there is no reasonable scientific doubt, that it will not affect the integrity of the site;
    iii) Binding EU case law makes clear that where a proposal could affect the ecological status of a protected site that is already in unfavourable condition, there will only be a limited possibility of consenting to it;
    iv) According to NE, the evidence now shows that many more proposals risk affecting protected sites that are in unfavourable condition due to nutrient overload, so mitigation must be secured before consents can be issued;
    v) Local authorities are the ultimate decision-makers but they are required by law to consult NE as part of the habitats assessment process, to give NE's advice considerable weight, and to provide cogent reasons if they depart from it.

Background

2. On 16th March 2022 NE wrote to a number of local planning authorities ("LPA")s regarding certain river catchments protected under habitats law that are considered to be in unfavourable[1] condition due to exceeded nutrient thresholds.
3. NE stated that it had reviewed the evidence regarding the impact of development on these sites in light of ongoing harm being caused to plants and wildlife due to excess nitrogen and phosphorus in the water.
4. NE is now advising affected LPAs that:
    i) more development, including all new housing development, risks having significant effects on these sites by adding further nutrients;
    ii) assessments will be required for a wide range of new proposals (particularly those generating overnight stays) to establish the possible impacts;
    iii) new proposals should only be approved where they will not cause additional pollution (in other words, they will have a neutral impact on nutrient levels); and
    iv) such proposals are likely to require measures to mitigate nutrient outputs.
5. The result of NE's advice is that housing development consents are being held up in large areas, a significant problem for LPAs, developers, and people in need of housing in the context of a national housing crisis. This briefing note sets out the legal underpinnings of NE's advice in the three-part format: part 1 sets out the general legal framework; part two considers relevant provisions in the recently enacted Levelling Up and Regeneration Act 2023 ("LURA") in more detail; and part three summarises the implications for LPAs.

Part One: The Habitats Regulations Legal Framework

6. The legal regime underpinning this area of law was established by the Habitats Regulations.[2] The Habitats Regulations transpose the land and marine aspects of the EU-derived Habitats Directive and certain elements of the EU-derived Wild Birds Directive. The Habitats Regulations are domestic law and remain in place post-Brexit, unless and until the Government chooses to repeal or amend them. Due to the EU-derived origin of this domestic law the Habitats Regulations must still be interpreted in line with pre-Brexit EU case law.[3]

[1] "Unfavourable" and "favourable" status are technical terms derived from Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Flora and Fauna ("the Habitats Directive"), essentially meaning whether the habitat's structure, species, and range are stable or increasing (article 1).
[2] The Conservation of Habitats and Species Regulations 2017.
[3] Unless the Supreme Court or Court of Appeal overrule those judgments, see European Union (Withdrawal) Act 2018 ("EUWA") sections 2, 6(3) and 5(2).

7. For present purposes, other than regulation 63 which is addressed further below, the key Habitats Regulations provisions are as follows:

   i) Regulation 8 defines protected sites. These are known individually as either Special Areas of Conservation ("SAC") or Special Protection Areas ("SPA"). Government policy also gives equivalent protection to Ramsar sites, proposed SAC, potential SPA, and sites compensating for damage to SAC/SPA.[4] Together these will be referred to as "Habitats Sites".

   ii) Regulation 9(1) requires the Secretary of State, the Welsh Ministers, NE, and the Natural Resources Body for Wales ("NRW") secure compliance with the requirements of the relevant Directives when exercising their nature conservation functions. Regulation 9(3) requires other competent authorities to "have regard" to the requirements of the Directives when exercising any of their functions. Competent authorities are defined in reg. 7 and include LPAs, the Secretary of State, the Planning Inspectorate, and statutory undertakers such as water companies: reg. 7(1)(a). What this means in practical terms is that these decision-makers are under a mandatory duty to take account of what the Directives require so far as they may be affected by the exercise of those functions.

   This is not a duty to achieve a certain result, nor a duty to secure compliance with the Directives in its own right[5] (such duties can be found elsewhere in the legislation), nor does it require that competent authorities ignore countervailing factors. The weight to be given to any countervailing factor is a matter for the competent authority, unless the assessment by the competent authority is irrational, or leads to a breach of one of the competent authority's duties, whether under the Habitats Regulations or under public law more generally, in which case the courts would intervene. It is important to note in Harris v Environment Agency Johnson J. held that reg. 9(3) meant that where they had a responsibility elsewhere under the Directives the competent authority had to discharge those requirements or be in a position to justify departure from them.[6] Obviously, the duty is on the competent

[4] See NPPF, paras 181-182; DEFRA's Guidance, 'Habitats regulations assessments: protecting a European site' (February 2021).

[5] Harris v Environment Agency [2022] EWHC 2264 (Admin) at §75 and §78.

[6] Harris v Environment Agency [2022] EWHC 2264 (Admin) at §87: …"[t]he duty on the [competent authority] to have regard to the requirements of the Habitats Directive means that the [competent authority] must take those requirements into account, and, insofar as it is (in a particular context) the relevant public body with responsibility for fulfilling those requirements, then it must discharge those requirements. In other words, the scope for departure that is ordinarily inherent in the words 'have regard to' is considerably narrowed."

authority alone (thus, if a third party is contracted to carry out relevant work, the competent authority must maintain proper supervision to ensure it complies with its reg. 9(3) duty). It is good practice for competent authorities to keep an adequate record showing that they had properly taken account of their duties under the Habitats Regulations.

8. As Johnson J. said Harris v Environment Agency[7] the natural and conventional approach to the "have regard" duty is that it means that the competent authority is obliged to take account of the requirements of the Habitats Directive, but may depart from its requirements if there is good reason to do so. It is, however, relevant when considering a departure from the requirements of the Habitats Directive to note that the object of the "have regard" duty under reg. 9(3) is any "requirement" rather than advice or guidance. Advice or guidance is not, ordinarily, mandatory. A requirement, on the other hand, is usually mandatory. This led Johnson J. to confirm[8] in this context the duty on the competent authority to have regard to the requirements of the Habitats Directive means they must take those requirements into account, and, insofar as it is the relevant public body responsible for fulfilling those requirements, then it must discharge those requirements. In other words, in such circumstances the scope for departure that is ordinarily inherent in the words "have regard to" is considerably narrowed.
9. The Regulations also establish management objectives for the national protected site network. These are called the network objectives. The UK Government and devolved administrations are to cooperate to manage, and where necessary, adapt the network to contribute towards meeting the network objectives. The appropriate authorities may publish guidance relating to these requirements to maintain or, where appropriate, restore habitats and species listed in Annexes I and II of the Habitats Directive to a favourable conservation status.
10. While this legal advice is written for LPAs in the particular context of residential planning decisions, several things follow from the fact that LPAs are not the only competent authorities with responsibilities to deal with nutrient pollution under the Habitats Regulations. Similar considerations apply, for example, to the Environment Agency and statutory undertakers when granting environmental permits and consents. As noted earlier, this includes water companies, who are told under the Water Industry Strategic

[7] Harris at §§82-83.
[8] Harris at §87.

Environmental Requirements technical document ("WISER") that, in order to comply with their obligations under the Habitats Regulations, they must take account of predicted growth in housing development in their business plans and maintain and upgrade their wastewater systems in that light.

11. WISER also tells water companies if they expect that predicted levels of housing growth will result in deterioration against the relevant water quality standards downstream of their discharges, they must inform the Environment Agency and apply for a permit variation. It will then be up to the Environment Agency to decide whether to adjust the relevant permit limits.
12. The key statutory provision for the purposes of this advice to LPAs is reg. 63, which requires competent authorities follow a number of prescribed steps when making development control decisions.
13. Reg. 63 requires those competent authorities to do the following when dealing with planning applications that could impact a Habitats Site (including by way of nutrient pollution):
    i) **Screening**: establish whether the plan or project[9] is likely to have a significant effect on the Site, either alone or in combination with other plans or projects, in view of that Site's conservation objectives: reg. 63(1);
    ii) **Assessment**: where the proposal is likely to have a significant effect, to make an "appropriate assessment" of its implications in view of the Site's conservation objectives: reg. 63(1);
    iii) **Consultation**: for the purposes of the appropriate assessment, to consult the appropriate nature conservation body and have regard to any representations made by that body: reg 63(3);
    iv) **Integrity test**: only to agree to the proposal after having ascertained that it will not adversely affect the integrity of the Site: reg. 63(5)[10].
14. This means that proposals should only be granted consent without an appropriate assessment where they are not likely to have a significant effect on the Site. The High Court has held that the reg. 63 steps set out above are not confined to decisions about whether to

[9] "Plan or project" has a broad meaning, covering most proposals that might have an impact, including development plan documents, development proposals, and licensing, permitting or regulating an activity

[10] Subject to the provisions about derogation in reg. 64 in cases of overriding public interest, not generally relevant for housing proposals or similar.

grant planning or outline planning permission and apply also to decisions as to whether to discharge conditions in a planning permission, if no such assessment has yet taken place.[11]

Relevant Legal Principles

15. There is a significant body of domestic and EU case law that provides more clarity on how LPAs must interpret the requirements of the Habitats Regulations. In the context of NE's advice to LPAs, we consider that a number of areas of established case law are particularly important:

    i) The precautionary approach and certainty;

    ii) Adverse effects and mitigation;

    iii) Consultation; and

    iv) Judgment in decision-making.

Precautionary Approach

16. The first important legal principle that LPAs need to be aware of is that case law tells decision-makers that they need to apply a precautionary approach at each stage of the habitats assessment process.[12] This precautionary approach underlies NE's advice.

17. The first stage is **screening**, the initial check as to whether a proposal is likely to have a significant effect. Applying the precautionary approach, the courts have made clear that there will be a likely significant effect, such that an appropriate assessment is required, wherever there is a risk of such an effect. A risk exists if it cannot be excluded on the basis of objective information. In cases of doubt, the proposal cannot lawfully be given consent without an assessment.[13]

18. The practical impact is that an appropriate assessment will be required wherever there is a mere possibility that the proposal will have a significant effect on a protected site by undermining its conservation objectives.[14] In the words of the European Court's Advocate General, the question to be addressed by the competent authority is "*should we bother to check?*".[15] Where the evidence is unavailable or uncertain at the screening stage, an appropriate assessment will be required.

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[11] C G Fry v SSCLG [2023] EWHC 1622 (Admin), at §§56 and 64. This decision is subject to an application for permission to appeal.

[12] Commission v Poland, C-441/17 at §118; Waddenzee, C-127/02 at §58.

[13] Waddenzee at §44; Wealden DC v Secretary of State for Communities and Local Government [2017] EWHC 351 (Admin) at §44.

[14] Joined Cases C-293/17 and C-294/17 Coöperatie Mobilisation for the Environment UA v College van gedeputeerde staten van Limburg (the Dutch Nitrogen cases) at §82, §93. For the conservation objectives relevant to a specific Habitats Site, see NE's website.

[15] Opinion of Advocate General Sharpston 22 November 2012 Case C-258/11 Sweetman v An Bord Pleanala at §50.

19. The case law is also clear that the precautionary approach applies at **appropriate assessment stage**. What this means is that the assessment must be particularly robust to a high standard of investigation, based on the best up-to-date scientific knowledge and not based on the bare assertion of an expert.[16] Any scientific uncertainty should be addressed by applying precautionary rates to variables.[17] In all, the assessment can have no gaps, and must contain complete, precise and definitive conclusions "*capable of removing all reasonable scientific doubt*" as to the effects of the proposal on the site.[18]
20. In sum, to give to consent to a proposal following an appropriate assessment, the case law is clear that an LPA must be able to rule out all reasonable scientific doubt that the proposal would have an adverse effect on the integrity of the site. This doubt must be ruled out at the date of the decision authorising the project, not based on something that might or should happen later.[19]
21. In an important EU case (known as the Dutch Nitrogen case) the CJEU said the application of a precautionary approach constrains decision-maker's options in terms of consenting to a proposal where that proposal could affect the ecological status of a Habitats Site which is already in unfavourable condition. In such situations, the binding decision of the Court was that the possibility of authorising activities which may affect the ecological situation of such Sites is "*necessarily limited*".[20]

Mitigation

22. The second area of case law authorities need to be aware of concerns mitigation, being measures taken to prevent adverse impacts of proposals on Habitats Sites (e.g. by preventing pollution from entering the catchment). Mitigation can take place onsite or alternatively offsite, in the latter case by reducing nutrients from external sources that affect the catchment.
23. Critically, a different approach must be applied at screening and appropriate assessment stages. At **screening** stage, an LPA deciding whether there is a risk of a significant effect cannot take any proposed mitigation measures into account.[21] However, mitigation

[16] Holohan v An Bord Pleanála Case C-461/17 at §33; Wyatt v Fareham BC [2021] EWHC 1434 (Admin) at §30. Note Wyatt has been upheld by the Court of Appeal [2022] EWCA Civ 983).
[17] Wyatt High Court at §45.
[18] Dutch Nitrogen at §98; Wealden at §44.
[19] Commission v Poland §120.
[20] Dutch Nitrogen §103.
[21] Gladman Developments Limited v S of S for Housing, Communities and Local Government [2019] EWHC 2001 (Admin); Case C-323/17 People Over Wind & Peter Sweetman v Coillte Teoranta.

measures can be considered at **appropriate assessment** stage when determining whether the proposal will have an adverse effect on the integrity of the Habitats Site.

24. Even at appropriate assessment stage, the only measures that can be taken into account are mitigation measures that are protective or preventive, meaning that they avoid direct damage in the first place. What cannot be taken into account are what the courts call "compensatory" measures, which offset or compensate for damage that will be caused (such as by providing replacement habitats in a different area).[22] Compensation measures trigger a different legal framework than mitigation measures, and have generally been considered to be measures separate from the proposal itself whereas mitigation measures are an integral part of the proposal. The key distinction is whether harm will be caused to the Habitats Site.
25. This means that any mitigation measures must be effective **before** the proposal adds additional nutrients to the catchment (i.e. before houses are occupied). If a measure simply compensates once damage has been done, it cannot be considered true mitigation.
26. Applying the precautionary approach, mitigation can also only be considered as part of the appropriate assessment when it is sufficiently certain that the proposed measures will be effective in avoiding harm.[23] Mitigation measures might not be sufficiently certain if, for example, available scientific knowledge does not allow the benefits to quantified with the requisite degree of certainty at the time of assessment.[24] In all, the LPA must be able to guarantee beyond all reasonable scientific doubt that the mitigation will mean that the project will not adversely affect the integrity of the Site.[25] This represents a particularly high bar. Relevant considerations will include how the measures will be implemented and monitored, and how any enforcement will take place.
27. One option for mitigation that the courts have approved is NE's suggested approach of "nutrient neutrality".[26] A development will achieve nutrient neutrality when there is no net increase in the nutrient load that would result from the development within the catchment(s) of the affected Habitats Site. This is likely to be achieved by reducing existing sources of nutrient pollution to mitigate the nutrients generated by new development upstream of the Habitats Site.

[22] Grace and Sweetman v An Bord Pleanála C-164/17 §50.
[23] Dutch Nitrogen §126.
[24] Dutch Nitrogen §130.
[25] Grace and Sweetman, C-164/17 §51.
[26] Wyatt High Court at §§41-44 and Court of Appeal at §55.

28. The Dutch Nitrogen case confirmed that a programmatic approach, including strategic mitigation, to nutrient neutrality is appropriate provided a thorough and in-depth examination of the scientific soundness of that assessment makes it possible to ensure that there is no reasonable scientific doubt as to the absence of adverse effects of each plan or project (i.e. each development) on the integrity of the Site concerned. This means the outcome of strategic mitigation measures must provide sufficient certainty that preventive measures such as nutrient neutrality will make an effective contribution to avoiding harm to the integrity of the Site concerned, by guaranteeing beyond all reasonable doubt that the plan or project at issue will not adversely affect the integrity of that Site. Where this is the case such a measure may be taken into consideration in the appropriate assessment as mitigation preventing any harm from arising.
29. The appropriate assessment of the implications of a plan or project on a Habitats Site may not take into account the future benefits of such mitigation measures if those benefits are uncertain, *inter alia* because the procedures needed to accomplish them have not yet been carried out or because the level of scientific knowledge does not allow them to be identified or quantified with certainty.
30. Timing is occasionally in issue, in that an application for development is submitted for determination before a nutrient neutrality scheme can be identified or secured. This is increasingly the case as more and more development requires nutrient offset land, rendering what is appropriate and immediately available scarcer. The solution to this timing issue is an appropriately worded Grampian condition precluding the event known to give rise to the risk of harm (i.e. for residential development, this will be occupation of the dwellings) until a nutrient neutrality scheme is submitted to and approved by the LPA. An example of such a condition is as follows:

> "The development hereby permitted shall not be occupied until:
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> - A water efficiency calculation in accordance with the Government's National Calculation Methodology for assessing water efficiency in new dwellings has been undertaken which demonstrates that no more than 110 litres of water per person per day shall be consumed within the development, and this calculation has been submitted to, and approved in writing by, the local planning authority; all measures necessary to meet the agreed waste water efficiency calculation must be installed before first occupation and retained thereafter;
> - A mitigation package addressing the additional nutrient input arising from the development has been submitted to, and approved in writing by, the local planning authority. Such mitigation package shall address all of the additional nutrient load imposed on protected European Sites by the development when

fully occupied and shall allow the local planning authority to ascertain on the basis of the best available scientific evidence that such additional nutrient loading will not have an adverse effect on the integrity of the protected European Sites, having regard to the conservation objectives for those sites; and

- The mitigation package shall include a timetable for implementation and measures for retention and maintenance of that mitigation package.

The mitigation package shall thereafter be implemented, maintained and retained in accordance with the approved timetable."[27]

31. The Habitats Regulations require that mitigation be secured for the lifetime of the development. NE's position is that this is 80-120 years.
32. The Court of Appeal has endorsed NE's approach as a "*rational methodology recommended by the appropriate nature conservation body*".[28] However, as the CJEU confirmed in Dutch Nitrogen, there is room for other approaches to mitigation – provided of course that they satisfy the requirements of the precautionary principle.
33. It should be noted the Chief Planner has also confirmed that nutrient neutrality can only be an interim solution. To remove the requirement for nutrient neutrality, site restoration will be required. The Chief Planner sees this role as being addressed by Nutrient Management Plans (Protected Site Strategies, or Diffuse Water Pollution Plans) which will secure the actions required for site restoration.
34. In the future, when NE's credit scheme is up and running the option of purchasing credits from the scheme would also provide sufficient certainty for a Grampian condition to be used, thereby enabling planning applications to be approved. The advice in the PPG on Grampians only precludes their use where there are "*no prospects at all of the action in question being performed within the time-limit imposed by the permission*."[29]
35. Recently legislated mandatory upgrades to certain wastewater treatment works are addressed in the section below on the LURA.
36. There is wider national action on diffuse pollution from agriculture to bear in mind. Regulation 9(1) requires that the Secretary of State ensures compliance with the Habitats Directive, and under the Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018 action has been taken in the form of the 2018 farming rules for water (as updated), the Environment Agency's commitment to increase farm

[27] Appeal Decision APP/B1740/W/20/3265937.
[28] *Fareham*, at §138.
[29] Paragraph: 009 Reference ID: 21a-009-20140306.

inspections to at least 4,000 inspections a year by 2023, and the launch of future farming schemes to reward farmers and land managers for action to reduce run-off, such as introducing cover crops and buffering rivers. If farmers require consent for their activities from the Environment Agency, as a competent authority under reg. 7, where there is a risk of an adverse effect on a Habitats Site the Environment Agency is likely to require an appropriate assessment and appropriate mitigation where necessary.

37. Overall, when considering measures that seek to achieve nutrient neutrality, LPAs must keep in mind the precautionary approach set out above: there will need to be reasonable scientific certainty that the measures will make the project nutrient neutral over the lifetime of the development; and they need to be preventative rather than compensatory, such that they avoid any effect at source. Assessments cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the plans or the projects proposed on the Habitats Site concerned.

Consulting the Statutory Nature Conservation Body

38. The third key area of case law LPAs need to be aware of in light of NE's advice concerns consultation. As set out above, the Habitats Regulations expressly require competent authorities consult the appropriate statutory nature conservation body ("SNCB") for the purpose of appropriate assessments and have regard to any representations made.
39. As to what this means in practice, the courts have held that LPAs must give "condign", "significant" or "considerable" weight to NE's expert advice.[30] However, that does not mean the advice is binding. The LPA as ultimate decision-maker can depart from the advice or give it reduced weight, but only if it has cogent evidence-based reasons for doing so.[31]
40. LPAs will recall that pursuant to reg. 9 of the Habitats Regulations, SNCBs are under a duty when carrying out their functions to secure compliance with the requirements of the Habitats Directive. In light of this, while LPAs must consult NE at the assessment stage, they are entitled to seek their advice at any stage in the habitats process.

LPA Judgment

41. LPAs cannot consent to development if there remains reasonable scientific doubt that it will not adversely affect the integrity of a Habitats Site. For catchments that have

[30] Wyatt Court of Appeal at §9(4) and §141; Wealden at §44; R (Mynnyd y Gwynt Ltd) v Secretary of State for Business Energy and Industrial Strategy [2018] EWCA Civ 231 at §8.
[31] Ibid.

"unfavourable status" due to high nutrient loads, the possibility of authorising development that will result in further nutrient pollution is limited.

42. However, while the legal test is demanding one, it also requires LPAs make evaluative judgments, having regard to many varied factors and considerations.[32] Even applying a strict precautionary approach, absolute certainty is neither possible nor proportionate. The competent authority's final finding is, of necessity, subjective in nature.[33]
43. Similarly, it is up to the LPA to judge what mitigation it considers acceptable, in light of the need for practical certainty. While LPAs must have regard to the SNCB's advice, as the decision-maker they will also need to determine whether they agree with that advice.
44. In terms of the level of certainty required for these decisions, the Court of Appeal has held that the question the competent authority must ask itself is whether it is convinced by the information before it that, taking into account all material considerations and exercising an evaluative judgment, the proposal generates no real risk to the integrity of the Site, considered in light of its conservation objectives. [34]

Part Two: Levelling Up and Regeneration Act 2023

45. LURA makes a number of significant amendments to the legal regime applicable to Habitats Sites subject to the nutrient neutrality requirement. LURA received Royal Assent on 26 October 2023. The relevant provisions of LURA enter into force on Boxing Day, 26 December 2023 (see s.255(6)).
46. Under LURA's Part 7 the Water Industry Act 1991 ("WIA") is amended so as to require sewerage undertakers secure specific nitrogen and phosphorus pollution standards by the "upgrade date" of 2030 (for designations made in the intial period). These insert a new s.96B into the WIA requiring both "nitrogen significant plant" and "phosphorus significant plant" meet a specified nitrogen or phosphorus nutrient pollution standard (as the case may be) by the upgrade date. The duty to achieve this result is enforceable principally by the Secretary of State, but also by the Environment Agency.
47. A nitrogen or phosphorus significant plant is one which is (1) not exempt and (2) discharges the relevant nutrient into a designated nitrogen- and/or phosphorus-sensitive catchment. The designation is made by the Secretary of State under the newly inserted s.96C WIA.
48. Exempt plants are defined by the new s.96D WIA: they either (1) serve a capacity of less than 2,000 people (or the equivalent to a population of 2,000 people) when the designation

[32] Wealden at §51.
[33] Wyatt Court of Appeal at §9(7) and §124.
[34] Mynnyd y Gwynt at §§8-9.

of the associated catchment area takes effect; (2) are designated as exempt by the Secretary of State; or (3) are deemed exempt under regulations yet to be published by the Secretary of State under s.96D(8) WIA.

49. Finally, the upgrade date is 1 April 2030 if the catchment is designated during the initial three-month period from 26 October 2023 to 26 January 2024, or, in specific circumstances depending on the dates of various relevant events, the date as specified in the Secretary of State's designation order.

50. Significantly, the LURA tells competent authorities, thus including LPAs, how they are to treat this strategic solution for habitats assessment purposes. Schedule 15 amends the Habitats Regulations by inserting a new reg. 85A (also entering into force on 26 December 2023) which requires competent authorities to assume that a wastewater plant will meet the relevant nitrogen or phosphorous pollution standard by the relevant date. The Secretary of State would be able to direct that the assumption does not apply in particular cases at their discretion, but only after having consulted specified stakeholders such as the Environment Agency and NE. The result is that the discretion on whether or not a designated plant will meet the relevant standard by the relevant date does not lie with LPAs, who are given a legal direction under the Habitats Regulations, and is instead a matter for the Secretary of State's discretion to disapply the assumption (under reg. 85C).

51. In these respects the LURA is relatively rare, in that it provides for a particular strategic solution and directs LPAs to rely on that solution being brought forward for Habitats Regulations assessment purposes. As the Chief Planner has stated, the upshot of the LURA is that LPAs need only insist on mitigation in relation to higher pollution levels until 2030, with mitigation being required in respect of lower levels thereafter. The LURA enables LPAs to treat as certain the lower levels of pollution after 2030.

52. One additional regime established under LURA worth noting is the new "catchment permitting" regime under s.96G(1) WIA. This enables the Secretary of State to designate a sensitive catchment area as a "catchment permitting area", thereby mandating a review of all permits in the area relating to nutrient significant plants and any such other plants as are considered appropriate by the Environment Agency. It appears the intention is to limit this review only to plants which discharge treated effluent into the catchment permitting area. The Environment Agency is then empowered to impose revised nutrient conditions on the reviewed permits in accordance with the purpose specified in s.96G(4) (essentially, to improve the condition of the affected Habitats Site).

53. As will be seen, the LURA establishes a highly complicated regime which depends on a series of dates, designations and circumstances, each of which will in turn depend on the facts applicable to the particular wastewater treatment works, the catchment, and the affected Habitats Site(s).
54. To assist LPAs, water companies and developers to understand what applies where and when, the Secretary of State is obliged to publish an online map showing all designated nitrogen and phosphorus sensitive areas, as well as a document online listing all designated catchment permitting areas, all nitrogen and phosphorus significant plants (including the relevant upgrade date for each plant), as well as whether the plant has become or ceased to be an exempt plant, and the relevant date of either event. All of this information is to be kept up to date by the Secretary of State.
55. A final change to note is that LURA directly contemplates what will happen if upgrades fail to materialise by the relevant upgrade date. Section 170 of LURA amends the Environmental Damage (Prevention and Remediation) (England) Regulations 2015 ("the EDR"). In such cases, all nutrient input in the treated effluent above the relevant nutrient pollution standard is treated as "damage" to the related Habitats Site for the purposes of the EDR.
56. Three points follow from the foregoing. The first is that the LURA does not render mitigation unnecessary, even after the upgrade or applicable date (as the case may be). Mitigation would still be required, albeit in respect of lower pollution levels. Second, the question of mitigation is unaffected until the upgrades take place. Third, and perhaps most obviously, the LURA still sits alongside the Habitats Regulations, and so LPAs will still need to satisfy themselves that adequate mitigation is in place overall in order to ensure no adverse effect on the integrity of the Habitats Site.
57. In practical terms, the mandatory waste water treatment work upgrade in the LURA can be taken account of insofar as it will change the baseline circumstances for the purposes of any HRA. In practice this would mean the LPA would have to identify a "bridge" of more extensive mitigation from the date of occupation of the development until the effective WWTW upgrade date in 2030 to offset a higher level of nutrients, then the LPA would have to secure long-term in-perpetuity mitigation to offset the lower level of pollution.
58. Additionally, other existing mitigation solutions have been approved by NE under the Habitats Regulations e.g., to offset harm arising from recreational disturbance through SANGS. These could serve as models for a more strategic risk management approach alongside LURA.

59. It is also worth noting other initiatives concerning precise legal targets enshrined in existing law, but where, unlike LURA, the pathway to meeting those targets is yet to be defined or the pathway defined but the target not yet achieved. Thus, the Environment Act 2021 ("EA 2021") allows the Secretary of State to set long-term targets in respect of the natural environment including in priority areas such as water. To that end, the Environmental Targets (Water) (England) Regulations 2023 set targets for wastewater and agricultural water discharge. The wastewater target requires phosphorus load from treated wastewater from the sewerage systems of undertakers at sewerage disposal works to be 80% lower in 2038 than the 2020 baseline (see reg. 10). But the legislation leaves the issue of how to achieve those targets at large, with various policy and guidance documents then fleshing out the plan for doing so. OFWAT has produced the Water Industry National Environment Programme ("WINEP"), whose primary role is to "*provide information to water companies on the actions they need to take to meet the environmental legislative requirements that apply to water companies in England*" including the legally binding water targets under the EA 2021 (para. 2.3). Similarly, DEFRA's Plan for Water (April 2023) notes the EA 2021's phosphorous wastewater target and refers to "*an interim target to achieve a 50% reduction by 2028*" in the Environmental Improvement Plan 2023 (para. 2.2). Analysis of the potential impact of each available strategic solution is necessarily beyond the scope of this briefing note because the outcome of any appropriate assessment will ultimately depend entirely on the facts of the particular development proposal being put forward.
60. With respect to LURA, it is also worth noting that section 164(2) establishes that secondary Regulations made by the Secretary of State in relation to Environmental Outcome Reports ("EORs") can make provision for treating anything done in relation to an EOR as satisfying a requirement under the Habitats Regulations, as well as for disapplying or modifying any part of the Habitats Regulations where preparation of an EOR is required. Thus, the Secretary of State now has to the power to make regulations that allow an EOR to also stand as the Habitats Regulation Assessment for a project. As there are no draft regulations yet, it remains to early to tell whether this will have a significant impact on the HRA process.

Part Three: Decision-Making

61. So what does this mean for LPA decision-making? In short, in making planning decisions LPAs need to be aware of and follow the above legal principles, including the rules on mitigation measures, binding legal authority that there will be limited possibilities for

consenting proposals that might affect sites already in an unfavourable condition, and the importance of NE as statutory consultee.

62. NE has written to LPAs regarding Sites that are already in unfavourable condition due to elevated nutrient levels. NE's advice is that the evidence shows that for those Sites, all proposals that generate new overnight stays (so result in net increases in wastewater) risk a significant effect. NE advises that such proposals are likely to require significant mitigation, if LPAs are to achieve the requisite scientific certainty that there will be no adverse effect on the Site's integrity. NE advises that other proposals need to be assessed on a case by case basis.
63. In many areas, following this advice will mean housing and tourism development is put on hold until effective mitigation strategies can be put in place. However, if in a given case the LPA, as final decision-maker, considers that there is reasonable scientific certainty that a particular proposal together with any suggested mitigation will not adversely affect the integrity of the Site, then consent can still be granted. To avoid being found unlawful, such consents should be carefully justified, based on the objective evidence available.
64. In addition, the case law is clear that for mitigation to be lawful, it must be preventative – so it must stop any net gain in nutrients entering the water. This means it needs to be in place before any occupancy of homes, and the LPA needs to have practical certainty on the effectiveness of the measures when it grants consent.
65. The stringent case law requirements for practical certainty also mean that LPAs for the time being will not be able to rely on the nutrient reduction plans and strategies from the water industry and agricultural sector as mitigation for individual development projects. These plans, the fulfilment of which is not within either the applicant's or LPA's control, are unlikely to provide the requisite certainty which eliminates reasonable scientific doubt that there might be harm to Site integrity. What they are likely to do, over time, and if successful, is to affect the baseline condition such that Habitats Sites are no longer subject to a nutrient overload. When that is achieved, it will no longer be the case that <u>any</u> nutrient input will lead to significant harm and decisions will be determined on a case by case basis (as traditionally has been the case everywhere). The scale of nutrient overload in many catchments, however, means that any such effect is likely to take years.
66. Finally, we note that NE's advice is provided to LPAs as an aid to interpreting existing Habitats Regulations requirements. It is not a change to the law, but advice on how to apply the law. As such, it applies as soon as it is issued – including to proposals already within the planning system. Undoubtedly, this will cause significant difficulties to affected LPAs.

However, LPAs that depart from NE's advice without cogent, evidence-based reasons for doing so risk legal challenge in light of the established legal framework.

Conclusion

67. NE's advice undoubtedly presents a significant challenge for affected LPAs. However, in light of all the legal principles set out above, LPAs will need to give it appropriate weight and only depart where there are cogent reasons for doing so, taking into account the relevant regulations and case law. Consents should only be issued where there is objective evidence to show there will be no impact on the integrity of a Habitats Site, to the standard of reasonable scientific certainty.

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