

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

Executive summary

- Government amendment 247YYA seeks to remove legal controls on nutrient pollution in rivers and to transfer the costs of attempted mitigation from polluters to the public. If passed it will regress environmental protections and undermine good administration.
- Environmental organisations strongly urge peers to vote to reject the amendment.
- Amendments to amendment 247YYA tabled by the Duke of Wellington and others (amendments 247YYAA, 247YYAB and 247YYAC) would ameliorate the worst impacts of the Government proposals and as such should be supported.
- We also urge peers to vote against Government amendment 247YY, which gives Henry VIII powers to Ministers to further amend river pollution controls.
- In voting against Government amendments 247YYA and 247YY, peers can support England's rivers in the face of a grave threat.

Background

On 29th August, the Government tabled amendment 247YYA ahead of the final debates on Lords report stage of the Levelling Up Regeneration Bill.¹ The amendment seeks to amend the Habitat Regulations to instruct planning authorities to assume that new development will not increase nutrient pollution in protected sites.

The Duke of Wellington, with the support of Baroness Jones of Whitchurch, Baroness Parminter and Lord Randall of Uxbridge has tabled amendments 247YYAA, 247YYAB and 247YYAC to improve Government amendment 247YYA, by removing the instruction to planning authorities to assume no increase in pollution.

The Government has also tabled amendment 247YY, which gives Ministers sweeping powers to issue regulations amending nutrient pollution enactments.

These amendments are due to be debated in the House of Lords on Wednesday 13th September. This briefing sets out why both Government amendments should be voted down by peers, to prevent environmental regression and to protect good administration.

¹ <https://bills.parliament.uk/publications/52441/documents/3891>

Preventing environmental regression

Urban runoff and sewage from new development contributes to the leaking of nitrates and phosphorus into rivers, lakes, streams and seas. An excess of these nutrients causes “eutrophication”—algal blooms which starve a river of light and oxygen, killing wildlife.² Under current Habitats Regulations rules, planning authorities have been required to closely consider the potential impacts of development on nutrient pollution levels in sensitive freshwater habitats.

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

The environmental watchdog set up by the Environment Act, the Office for Environmental Protection (OEP), has been very clear as to the impact these changes will have upon environmental protection. In its advice to the Secretaries of State for Levelling Up, Housing and Communities and the Environment, Food and Rural Affairs, OEP Chair Dame Glenys Stacey was clear that the amendment would:

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

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

As a result, the OEP concluded that:

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

This regression breaks the multiple Ministerial promises, including those given only months ago during the passage of the Retained EU Law Act⁴, when Ministers stated categorically that environmental

² <https://www.wildlifetrusts.org/news/new-report-reveals-pollution-biggest-threat-wildlife-our-waterways>

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

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

standards would not be weakened by this Government.⁵ It will also make it harder to achieve the targets set under the Environment Act 2021, including the target to halt the decline in species abundance by 2030.

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

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

Government amendment 247YY creates a mechanism for further regression to be delivered in the future, using only secondary legislation. It gives the Secretary of State the power to amend by regulation any environmental, planning or development enactment (with the exception of Part 6 of the Habitats Regulations) with a bearing on nutrient pollution. No explanation, justification or details have been provided as to why these Henry VIII powers are required and no environmental safeguards have been proposed to accompany them. Amendment 247YY allows for further measures along the lines of 247YYA, without meaningful parliamentary scrutiny this time. It amounts to a licence for Ministers to weaken pollution controls in perpetuity.

We urge peers to reject both amendments 247YY and 247YYA, to preserve the legal controls on the addition of nutrient loads to already vulnerable protected sites.

The Duke of Wellington’s amendments would help prevent the environmental regression proposed by amendment 247YYA, by deleting the egregious paragraphs 2, 3 and 4 from the proposed new section 85a of the Habitats Regulations.

Preserving good administration

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

The amendment amounts to huge environmental change, but it was announced without any consultation. It was introduced into the Levelling Up and Regeneration Bill without notice at the latest possible stage, giving parliamentarians barely any opportunity for scrutiny and debate, in contravention of both parliamentary convention and formal legislative guidance.⁶

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

⁶ <https://greenallianceblog.org.uk/2023/08/30/scrapping-water-pollution-rules-shows-the-government-isnt-serious-about-our-environment/>

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

*"[There is] a general principle of administrative law and of good public administration that those making administrative decisions should weigh up all the relevant factors when taking a decision. The new proposed regulation 85A introduces a concept at odds with that principle: it mandates that a competent authority must make assumptions which are contrary to the facts...If Councils and planning inspectors are required to make counterfactual assumptions, it will become difficult to make good administrative decisions."*⁷

In this context, the new section 85a instructions on authorities not to assess pollution (paragraph 3), and to ignore any evidence of potential pollution brought to their attention (paragraph 4), amounts to active opposition to facts informing decision making. This profoundly undermines good administration, an established principle that underpins our democratic and judicial processes.⁸

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

By deleting the offending paragraphs of the proposed new section 85a (and plan and development orders equivalents), the Duke of Wellington's amendment would help to uphold the high standards that underpin good public administration.

Mythbuster

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

Claim: Nutrient pollution from development is negligible

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

The Government has claimed that development makes a negligible contribution to nutrient pollution, suggesting that all housing stock in England contributes under 5% to total nutrient pollution levels. This figure appears to only count pollution from urban runoff, and as such significantly undercounts development impacts.

The main contribution housing stock makes to nutrient pollution is through sewage, with nutrients from bathrooms and kitchen waste making their way through the sewage system into English rivers. The

⁷ <https://www.rightscommunityaction.co.uk/news/levelling-up-bill-government-amendments-such-reasoning-is-not-permitted-outside-wonderland>

⁸ <https://www.ombudsman.org.uk/sites/default/files/page/0188-Principles-of-Good-Administration-bookletweb.pdf> (see p6 in particular)

latest figures suggest that overall 60-80% of phosphorus pollution⁹ and 25-30% of nitrate pollution¹⁰ comes from sewage. New homes mean more of these outputs, and an increased contribution to nutrient pollution from the sewage system.

Even if it was only a small additional impact, such increase pressure can cause a struggling freshwater ecosystem to collapse. Nutrient neutrality rules apply to only these sensitive areas, freshwater catchments where critical environmental thresholds have already been breached. Amendment 247YYA removes protections for these areas, adding new burdens to the health of freshwater habitats already at breaking point.

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

- Poole Harbour, where nutrient pollution has led to declines in wetland birds, including shelducks, curlews and lapwings.¹¹
- The Somerset Levels, an SSSI and Ramsar site whose conservation status was downgraded to 'unfavourable declining' in 2021 due to nutrient pollution.¹²
- The River Wye, where nutrient pollution has led to catastrophic declines in salmon and white-clawed crayfish populations.¹³
- The Solent, where eutrophication has led to vast swathes of wetland being covered in algae.¹⁴
- The Avon and Itchen, where algal blooms are now occurring annually, causing invertebrate populations to decline¹⁵ and putting salmon on the brink of extinction.¹⁶

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

Claim: The current rules are blocking homes

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

⁹ https://consult.environment-agency.gov.uk/environment-and-business/challenges-and-choices/user_uploads/phosphorus-pressure-rbmp-2021.pdf

¹⁰ https://consult.environment-agency.gov.uk/++preview++/environment-and-business/challenges-and-choices/user_uploads/nitrates-pressure-rbmp-2021.pdf

¹¹ <https://www.rspb.org.uk/globalassets/downloads/our-work/poole-harbour.pdf>

¹² <https://westcountryvoices.co.uk/somerset-levels-and-moors-rhetoric-vs-reality-in-the-nature-emergency/>

¹³ <https://naturalengland.blog.gov.uk/2023/05/30/assessing-the-health-of-the-river-wye-and-its-catchment/>

¹⁴ <https://www.push.gov.uk/wp-content/uploads/2023/04/Overview-of-Solent-Eutrophication-and-Recovery-January-2023.pdf>

¹⁵ <https://wildfish.org/wp-content/uploads/2022/06/Avon-Commentary.pdf>

¹⁶ <https://ifm.org.uk/wp-content/uploads/2023/02/IFM-statement-on-salmon-conservation-February-2023-1.pdf>

The stated justification for the amendment is the Government's claim that 100,000 homes have been delayed by nutrient pollution standards. This number, drawn from calculations by the Home Builders Federation as the representative body for development companies, have been repeatedly challenged.¹⁷

It appears to include development plan allocations and outline permissions, representing an estimate of the theoretical maximum of homes that could be delivered over seven years, rather than actual permissions that have been blocked. Environmental organisations have requested that the Government justifies the use of this doubtful statistic.¹⁸

Critically the number appears to assume that the current system would fail to mitigate any of these homes. This is simply not credible. 70% of the proposed new homes affected by nutrient pollution rules now have identified appropriate mitigation in place, including developer-funded mitigation schemes agreed by local authorities under the current Habitat Regulations rules, paving the way to construction.¹⁹ These developer-funded schemes are now working well in many places, allowing homes to be built without causing further harm to nature.²⁰ Environmental organisations and mitigation companies have proposals which could make these schemes work in a faster way, without the need to amend the Habitats Regulations and regress environmental protection, or to call on public funds.

It is also important to remember that the homes that have been affected by the current rules are only those located close to our most valuable sites for conservation, in areas particularly badly affected by nutrient pollution.²¹ Significant additional new homes will not be unblocked by amendment 247YYA; it is simply that the cost of unblocking will be shifted from developers' profit margins to the public purse, whilst damage to the environment increases.

Claim: New mitigation measures will address the pollution

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

In place of the current mandatory duty on development companies to pay for pollution they cause in sensitive freshwater sites, the Government has announced a new general mitigation fund, to be paid for by public money. The proposed fund is insufficient to mitigate nutrient pollution impacts, running only to 2030 and failing to cover the long-term maintenance costs essential to effective ecological mitigation. The current developer-funded system covers in-perpetuity maintenance costs, the new fund paid for by taxpayers will not. There is a high risk that underlying pollution loads from sewage and farming will not

¹⁷ <https://www.endsreport.com/article/1832842/nutrient-neutrality-housing-logjam-statistics-from>

¹⁸ <https://www.wcl.org.uk/docs/Letter%20to%20Michael%20Gove%20and%20Therese%20Coffey%20on%20nutrient%20neutrality.pdf>

¹⁹ <https://greenshank-environmental.com/nutrient-letter-to-the-pm#:~:text=We%20request%20the%20Government's%20support,the%20significant%20progress%20already%20made.>

²⁰ https://www.wcl.org.uk/docs/delivery_of_nutrient_mitigation_schemes_TWT_Link_briefing_04.09.24.pdf

²¹ A map of affected areas can be found on p11 here:

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

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

Overall, the new mitigation funding model makes a switch from 'polluter pays' to an arrangement whereby the public pay for the partial mitigation of the pollution of their own rivers, inflicted by private development companies. Development company stock prices rose considerably on the day the amendments were announced, in anticipation of increased profits from this shift from polluter to public liability.²²

Claim: The amendment does not set a precedent

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

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

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

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

A Link briefing covering other Levelling Up & Regeneration Bill amendments of note for nature can be found [here](#).

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²² https://twitter.com/horton_official/status/1696503555354509632