

House of Lords Built Environment Committee

Submission by the Home Builders Federation (HBF) and the Land Promoters and Developers Federation (LPDF)

Summary

The environmental duties of house builders are many and varied. Although compliance remains challenging, the industry has broadly been able to adapt to accommodate most current statutory environmental requirements. Challenges remain, but these are not insuperable. We do not consider they represent a major barrier to housebuilding.

The same cannot be said for the new requirements imposed on house building following Natural England's advice to local authorities from June 2019 onwards in respect to nutrient and water neutrality and recreational impact zones. The European Court of Justice ruling has changed the way the Habitat Regulations are interpreted in the UK, with the government requiring mitigation to be provided and operational before homes can be approved, built and occupied. Local authorities can no longer rely, as they had in the past, on broad programmes of mitigation, that aimed to achieve desired environmental outcomes in the future: each housing application must now demonstrate that it is causing no harm to a designated habitat - or has a means of mitigating that harm - before homes can be occupied. This is the case even though the contribution of the occupants of new housing to the three issues in question - nutrients, water, recreation - is very small.

The new way that the Habitats Regulations is being interpreted and applied represents a serious obstacle to building homes in the UK. Natural England's restrictions apply to at least 82 local authorities in England – a quarter of all local authorities in England – delaying an estimated 150,000 homes at various stages in the planning process. So long as the issues remain unresolved, the restrictions could result in up to 45,000 fewer homes completed each year. It is feasible that the restrictions could spread to other parts of the country if other designated habitats are judged to be in an adverse condition.

These restrictions have been imposed without warning. Even schemes with planning permission have stalled. The restrictions have been in place for nearly four years in some areas, with resolution unlikely for several more years yet owing to the non-availability and/or expense of nature-based solutions – the means by which the government expects mitigation to be achieved.

Engagement by Natural England to assist local authorities and house builders has been poor to date. Communication is improving but an effective resolution to the issue is still many years away.

The government's plan to improve the performance of wastewater treatment works will assist, but the benefits are uncertain, and the water industry is opposed. Nor will the planned improvements assist SME house builders as they will come into effect only in 2030.

Of chief concern is the breakdown in the government's regulatory model whereby responsibility for overseeing compliance with environmental legislation is outsourced to various non-departmental public bodies. The Environment Agency (10,600 staff) appears to have failed to communicate via Ofwat to sewerage companies their statutory duties under section 94 of the Water Industry Act 1991, not least when it comes to a sewerage company's statutory obligations relating to wastewater treatment and subsequent effluent quality. These statutory duties have been re-affirmed as 'absolute' in Supreme Court decisions but clearly ignored by Natural England. This failure to enforce has allowed Natural England (2,000 staff) to impose restrictions on house building despite the Environment Agency's statutory responsibilities in relation to established environmental legislation, especially in the context of treated effluent quality, and compliance with approved permit levels for wastewater treatment (nutrients) or abstraction levels (water supply).

**Home Builders Federation
Land Promoters and Developers Federation**

31 March 2023

Question 1. What environmental regulations need to be considered when undertaking development? When during the development process are they most likely to be encountered?

The Committee asked for a note on the full range of environmental legislation and regulation relevant to house building.

There are several separate strands of legislation that have a direct bearing on the three areas the Committee is seeking evidence. We summarise below some of the environmental regulations (and quasi-statutory guidance) directly affecting the provision of new homes. These effectively define what needs to be considered at the outset.

Legislation

1. Environmental Protection Act 1990

The remediation of contaminated land is captured by this legislation. As part of the ground investigation/remediation works for any residential development on a brownfield/contaminated site, prevailing groundwater levels and groundwater quality must be taken into consideration. Likewise, the potential impact of any surface water infiltration into the ground in terms of the potential mobilisation of relict contaminants. This legislation also deals with how we classify waste from excavations and how house builders deal with its disposal. This remains an important consideration when above ground sustainable drainage systems (SuDS) infrastructure is being advocated, i.e., attenuation ponds and swales and the classification of the excavation arisings, i.e., inert, non-hazardous, hazardous. This classification defines disposal location and cost. It is an important link to Schedule 3 of the Flood & Water Management Act 2010, and which seeks to mandate the provision of SuDS on almost all new development.

2. Water Resources Act 1991

Legislation that deals with the control of pollution of water resources, flood defence and the role of the statutory bodies concerned with these matters. This has links to River Basin Management Plans which set the framework for how house builders deal with development and flood risk.

3. Countryside and Rights of Way Act 2000

This Act gives the public right of access to land mapped as “open country” (mountain, moor, heath and down) or registered common land. Residential schemes will need to have regard to these rights of way.

4. Flood & Water Management Act 2010

This subsequent Act refined the requirement of the Water Resources Act 1991 to:

- Define the competent bodies with responsibility for dealing with flood risk, i.e., Environment Agency (EA) (main river) and/or the Lead Local Flood Authority (LLFA) (minor watercourses).
- The need for local planning authorities (LPAs) to prepare and have in place Strategic Flood Risk Assessments (level 1 – more generic); (level 2 – detailed site/catchment specific). The qualitative and quantitative content of many Strategic Flood Risk Assessments (SFRAs) is poor with housebuilders and/or their consultants having to undertake more detailed assessment work as part of a site-specific Flood Risk Assessment (FRA). This is challenging for housebuilders. It speaks to the extent of the

failure of the government's regulatory arrangements to the extent that housebuilders are unable to rely on the assessments that are undertaken by its agencies. As an aside, the Environment Agency changes its flood risk assessment guidance frequently but without notifying the developer community when and how these changes are to be applied. (It is perhaps noteworthy that flood risk considerations have been a material planning consideration since planning circulars were introduced by Government several decades ago, i.e., Department of Environment Planning Circular 30/92) and that developers first introduced above ground SuDS on a major scale in the late 1970s in Stockport, Greater Manchester).

- LPAs to produce surface water management plans. Whilst non-statutory these plans can have a direct bearing on the surface water drainage strategy for a site.
- As part of any FRA, the surface water drainage strategy must be considered, i.e., credible options for sustainable surface water drainage.

5. Water Industry Act 1991

This defines the statutory duties imposed on all water and sewerage companies (ref s37 (water infrastructure provision) and s94 (sewerage infrastructure). In addition, it confirms the absolute right to connect to the public sewerage system (ref s106).

6. Land Drainage Act 1991 (as amended)

Defines responsibility for the maintenance of all watercourses and what is or is not permitted in terms of specific works. It also set in place a statutory approval mechanism for discharges to existing watercourses and potential penalties for non-compliance. Established legal precedent in the UK has defined that actual surface water discharge into a watercourse/water body must have the Riparian Owners consent and for this consent to endure in perpetuity – see Appeal Court decision Manchester Ship Canal Company (Peel) v United Utilities (February 2013).

7. Environment Act 1995

This legislation created/introduced the Environment Agency (EA) and defined its powers and remit. It also covered issues relating to waste and its disposal, drainage, and air quality.

8. Water Act 2014

Changed parts but not the whole of the Water Industry Act 1991. This legislation included provisions relating to:

- The adoption of water and sewerage infrastructure – Water UK/Ofwat introduced statutory codes dealing with adoption. Part of the latter included a redefinition of what constitutes a 'sewer' so that sewerage companies could henceforth formally adopt most non-piped, above ground surface water/SuDS infrastructure under s104 of the Water Industry Act 1991. Current proposals for schedule 3 will now make this obsolete and the occupants of new homes will have to pay for SuDS infrastructure to be maintained by a SuDS Approval Body and part of the surface water drainage infrastructure maintained by the sewerage company and highway authority.
- The introduction of 'New Appointments and Variations' (NAVs), i.e., the establishment of alternative licenced organisations that can compete against water and sewerage companies to provide water and sewerage infrastructure for new development.

- Regulation of the Water Industry.
- The introduction of new charging rules and charging arrangements for the provision of water and sewerage infrastructure – responsibility handed to Ofwat but accompanied by statutory guidance from Defra in Jan 2016.
- Regulation of the Water Environment.
- Flood Insurance.

9. Environment Act 2021

This Act sets out the legal framework for significant reforms to local authority waste and recycling services, as well as creating new statutory duties for local authorities on nature recovery.

The Act established the Office for Environmental Protection, whilst again reiterating the need for waste and resource efficiency, in addition to the following:

- Local air quality management framework.
- Reporting on storm overflow performance.
- Regulation of water and sewerage companies.
- Water quality.
- Land drainage.
- Nature & Biodiversity, whilst reinforcing the underlying importance of meeting the requirements of the Habitats Regulations.

The legislation introduced the requirement for biodiversity net gain on every residential scheme – to come into practical effect in November 2023.

10. Environment Agency Position Statements (Various)

These position statements cover a range of construction activities. They have a very important part to play when it comes to regulation and intervention by the Environment Agency (EA). Take for example, groundwater considerations if piling (all types) or ground source heat pumps are being considered in sensitive groundwater locations – see EA publication - *The Environment Agency's Approach to Groundwater Protection February 2018 Version 1.2*. In many respects this statement defines how the Environment Agency carries out government policy for groundwater and adopts a risk-based approach where legislation allows. Non-compliance with the position statement will invite statutory EA intervention. The current position statement states the following and perhaps should be considered alongside the current proposals to create wetlands as a means of achieving nutrient neutrality:

“Sewage and trade effluent: For treated sewage effluent discharges, the Environment Agency encourages the use of shallow infiltration systems, which maximise attenuation within the drainage blanket and the underlying unsaturated zone. British Standard 6297:2007+A1:2008 (or latest version) provides guidance on the design and installation of drainage fields for use in wastewater treatment and should be used to determine if a shallow infiltration system is a feasible option.”

There are other statements i.e., G13 of the same position statement that relate to SuDS and infiltration of surface water into the ground. Typically, where infiltration SuDS are proposed for anything other than clean roof drainage (see G12) in a Groundwater Source Protection Zone 1, a hydrogeological risk assessment should be undertaken, to ensure that the system does not pose an unacceptable risk to the source of supply.

This prompts the question of whether Natural England was aware of the compliance requirements of the Environment Agency's position statements and if these were considered by Natural England before it issued its guidance on nutrient and water neutrality to the local planning authorities. We discuss this further in our response to question 7.

11. Section 7 of Levelling Up and Regeneration Bill

Section 7 is dedicated to establishing new nutrient pollution standards and seeks to amend further sections of the Water Industry Act 1991, in particular s 96A relating to pollution standards that are to apply to certain wastewater treatment works (WWTW), but certain WWTW – those serving settlements with a population equivalent of fewer than 2,000 will be exempt (unless improvement is directed by the Secretary of State). Upgrades are to be in place by 1 April 2030 and set to meet the following treated effluent standards:

- Nutrient Pollution Standards – not to exceed 10mg/litre
- Phosphorous Pollution Standard – 0.25mg/litre
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This is a statutory duty on water companies. This could be a very beneficial intervention by the government to enable housebuilders to achieve nutrient neutrality as the volume of land that needs to be purchased after 2030 to provide mitigation through nature-based solutions could reduce significantly. However, it is uncertain what the situation will be if these improvements are not completed. We also note that Ofwat, through its Price Review 24 consultation response, has stated that improvements at WWTW cannot count towards effective nutrient mitigation – a position that conflicts directly with statements by government. We have been surprised that Ofwat, which is an agency of the government, is allowed to adopt a position contrary to that of the government.

Statutory Instruments

The following may also be relevant to the determination of a residential planning application, but this will depend on what is involved in the application:

Brownfield Land Register Regulations 2017 (Consolidated)

This places a duty on each local planning authority responsible for determining applications for housing development to prepare, maintain and register of previously developed land.

Environmental Impact Assessment Regulations 2017 (Consolidated)

These Regulations set out the procedure for identifying those projects, which should be subject to an Environmental Impact Assessment (EIA).

In a recent Post-Implementation Review (PIR) of its own Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (TCPA 2017), the DLUHC noted that its attempt to reduce administrative burdens relating to environmental regulation had had the opposite effect. The TCPA 2017 regulations were introduced with the objective of streamlining the increasing administrative burdens on developers, councils and other stakeholders involved in carrying out EIA. EIA had grown

over time and gained increased prominence, forming an important part of the development management system in England.

The TCPA 2017 regulations modified the EIA production process in a way designed to reduce burdens while maintaining environmental safeguards. As part of the changes, the Government introduced a new requirement for the EIA to be produced by a 'competent expert'. The local planning authority (LPA) also has a duty to ensure it has sufficient expertise. In a review published on 17 March 2023, DLUHC acknowledged that the regulations were contributing to 'the high costs and administrative burden associated with EIA in the town and country planning system', stating:

'Contrary to the intentions of the regulations, there is still evidence of high costs and significant administrative burden associated with conducting an environmental assessment under the TCPA EIA regime, with a resulting impact on businesses.'^[1]

The Government's PIR of the regulations cited research showing that:

'An average environmental statement for a 500-home development cost £150,000-£250,000; took 8-18 months; and ran to 4,350 pages.'^[2]

The research found that the cost of EIAs on a Contracts Finder database ranged from £150,000 to £1 million. The coordination of EIAs is estimated to require between 0.2-3 full-time-equivalent (FTE) workers plus 6-10 technical specialists and take 'almost 55 days of effort on average'.^[3] While these estimates are based on a typical 500 home site, the costs of providing EIAs on smaller sites will be proportionately similar on a per unit basis and perhaps even greater. All of these pre-permission costs are incurred at the company's own risk. For those reliant on project-based finance this will be prior to securing development finance on the scheme.

The Government PIR stated that the regulations had resulted in:

'Extended time periods for preparing EIA applications, increased costs and delays in the processing of EIA applications by authorities as they procure external support, all adding to the administrative burden of EIAs to business. An example from the Contracts Finder database shows £2.5m allocated for a 3-year EIA review contract by a London planning authority.'^[4]

The fear of legal challenge was deemed by the research to be the predominant reason for the expansion of materials produced through EIAs.

The Government plans to replace the current EIA process with a new process as part of proposals in the Levelling Up and Regeneration legislation first introduced to parliament in May 2022. It is not yet known when this will be implemented and how it will change the landscape for housebuilders and LPAs.

[1] Post-Implementation Review: Town and Country Planning Act (Environmental Impact Assessment) Regulations 2017, 17 March 2023

[2] *Ibid*

[3] *Digitising the Environmental Impact Assessment Process* (March 2020), Digital EIA Project Partners, page 28

[4] Post-Implementation Review: TCP Act Regulations 2017

The Conservation of Habitats and Species Regulations 2017 (together with other specific habitat regulations)

These Regulations ensure that appropriate steps are taken to preserve, maintain and re-establish habitat that is large and varied enough for wild birds to support their population in the long term and avoid the pollution and deterioration of those areas.

A European Site (listed below in 4.2) is protected by the Conservation of Habitats and Species Regulations 2017 as amended (“Habitats Regulations”).

Where a site is situated within or near any of the following:

- Special Area of Conservation;
- Special Protection Area;
- Proposed Special Area of Conservation;
- Potential Special Protection Area;
- Ramsar Site; and
- Areas secured as sites compensating for damage to a European Site

it is likely that a development proposal will require an Appropriate Assessment under the Habitats Regulations. A precautionary approach is adopted towards potential impacts. This is contained in EU and domestic case law and referenced in the government’s national planning practice guidance (NPPG).

If the development proposal could affect a European Site, then the Appropriate Assessment should:

- Assess the likely significant effects of a proposal on the integrity of the site and its conservation objectives;
- Consider ways to avoid or reduce (mitigate) any potential for an “adverse effect on the integrity of the site” which can include the imposition of conditions.

A proposal will satisfy the test if the appropriate assessment demonstrates that there is no reasonable scientific doubt that the proposal will not have an adverse effect on the integrity of the site. If, however, the proposal fails the integrity test, because one cannot rule out an adverse effect on the site integrity, planning permission will not be granted. There are some exceptions to this which are:

- where there are no feasible alternative solutions that would be less damaging or avoid damage to the site; and
- the proposal needs to be carried out for imperative reasons of overriding public interest; and
- the necessary compensatory measures can be secured.

The proposal must satisfy all three of these tests to go ahead under a HRA derogation.

Tree Preservation Regulations 2012 (Consolidated)

These regulations introduce a single set of procedures for all trees covered by tree preservation order.

Conclusion

This list is not exhaustive, but one can understand that as we progress and changes in both legislation and guidance are made in isolation, what is left behind in terms of legislative provisions and accompanying guidance, and what may still be relevant and therefore requires careful consideration as part of the development process, becomes increasingly difficult to ascertain. Consolidation would not go amiss; indeed, it would be an exercise in leadership and effective regulation.

As explained at the Select Committee hearing, save in respect of the Habitat Regulations and the requirement for nutrient and water neutrality and recreational impact zones, and the emerging requirement for biodiversity net gain (under the Environment Act 2021), we do not consider there to be any major issues associated with current legislation that cause major barriers to housebuilding.

We will explain the specific challenges in relation to Natural England's various restrictions on house building introduced in the last four years, and biodiversity net gain, in our response to question 2.

Planning for Economic Failure: the number of homes that could be at risk. HBF and LPDF's estimate of how many homes may be at risk owing to the government's planning reforms

We drew the attention of the Committee to research completed recently by the planning consultancy Lichfields, on behalf of HBF and LPDF, that examines the possible effect on future housing supply of the government's reforms to the planning system. In addition, the research considers the possible effect on housing supply of the government's requirements for nutrient and water neutrality, and recreational impact zones, so long as these issues remain unresolved.

The Committee asked for more detail on how these figures were calculated.

The calculations have two components:

1. the effect of the government's planning reforms; and
2. the effect of Natural England's restrictions on housebuilding.

1. Effect of the government's planning reforms

The Government's proposed changes to national policy will not change the government's calculation for the number of homes needed each year – this remains a target of 300k net additional homes a year – but it will change the planning rules. The report concludes that changes to planning policy, in combination with nutrient and water neutrality restrictions and recreational impact zones could result in 122,000 fewer homes each year. Owing to:

- Proposed changes to the NPPF – 77,000 homes a year
- Nutrient neutrality requirements – 37,000 to 41,000 homes a year
- Water neutrality – 1,500 to 1,900 homes a year
- Recreational Impact Zones – 1,200 to 2,100 homes a year

The method for calculating the figures is as follows:

London's housing need

Following the standard method (the government's favoured method that local authorities should follow when calculating future housing need), London has a need for 86,000 homes per annum. The adopted

London Plan sets a target of 52,000 based on evidence that the supply of land is limited in the capital. The recent average for housing delivery in London is 37.4k. The proposed changes to the NPPF introduce obstacles to building at densities significantly out of character with the existing area. This will limit many forms of development that might have been able to accommodate higher housing numbers. Supply, consequently, is unlikely to exceed the recent average, let alone increase to meet the London Plan target of 52,000, with little prospect of meeting the need for 86,000 homes.

Large urban centres 35% uplift

Under current planning policy, the 19 other large urban cities of England are required to add an additional 35% to the number of homes they are required to deliver. All these proposed homes must be accommodated within the city itself, e.g. Manchester City must provide all these homes within its administrative boundary: it cannot export some of the requirement to an adjacent local authority, like Bury, Trafford or Salford. It has become evident in the last two years that these 19 cities do not have sufficient brownfield capacity, many are surrounded by green belt or administratively tightly bounded, and the NPPF proposals on character will – as in London – limit the ability to densify, particularly in suburbs. Many have been building out existing housing allocations (including on previous green belt releases) that are now unlikely to be replaced. The report concludes that these areas will undershoot their housing need by 19.6k.

Green belt, landscape and environmental constraints

There are 108 local authority areas where the potential development of land is restricted because of designations defined in policy and legislation, such as green belt and national parks. The green belt is the most significant of these. Since 2012, some local authorities have reviewed the green belt to see if some could be released for housing development. They have only done so after exhausting options such as optimising density on previously developed sites and exploring the possibility of accommodating some of the homes needed on land in adjacent local authorities. All three of these options – green belt release, densification, cooperation with neighbours - will be removed or weakened by the proposed changes to planning policy. This means there is little realistic prospect that the number of homes that these local authorities will need can be delivered in full; in fact, rates of housebuilding are likely to reduce as readily deliverable brownfield capacity is exhausted, densities are lowered for character reasons, and green belt releases are built out and not replaced. The report concludes these 108 areas will under-shoot their housing need by 30.4k.

Past 'over-delivery' to be discounted

Some areas have built more homes than their adopted housing targets. This is sometimes referred to as 'over-delivery'. Although the current NPPF says that the standard method is a 'minimum number', the government is now proposing that 'over-delivery' may be deducted from the provision required in the plan. It is unclear how this will apply in practice, but it is likely to have effect in those areas that have been successful in building homes, usually areas with fewer policy constraints like the green belt, or environmental constraints like the national parks. The report calculates conservatively that these areas will under-shoot their housing need by 3.6k. This clause also means that areas that complete more homes than required by the target in the plan will be able to offset it against future need.

Weakening the five-year housing land supply and Housing Delivery Test

The five-year housing land supply is a device that each local authority must adopt to ensure an adequate supply of land for housing on deliverable sites for the next five years.

The government intends to weaken this discipline. Local authorities with local plans in preparation will only be required to demonstrate supply for the next four years and those with an adopted plan will not need to maintain a five-year land supply at all until the plan falls out of date.

The Housing Delivery Test is a mechanism that reviews past delivery of homes and requires the local authority to take remedial action in various ways if delivery has faltered. The government proposes to do-away with the remedial actions if the local authority can demonstrate that there are 'sufficient' deliverable permissions to meet the housing requirement set out in its local plan.

The combined effect on housing supply of these changes is uncertain, but it is the view of HBF and LPDF that this will reduce significantly the number of homes completed as the circumstances whereby permissions for housing are granted in order to compensate for existing or future shortfalls in housing land supply will be far fewer. Unchecked, it is more likely that local authorities will assess future land supply far more optimistically than house builders.

The report concludes a reduction in housing supply of circa 38k a year to reflect a reduction in the housing granted at appeal, plus less pressure on councils to grant applications in order to protect their land supply position, and increased optimism bias in five-year land supply calculations.

Some of the intended reforms will have a much greater impact on future housing supply than others but overall, the effect of these changes in combination is illustrated below. Although the standard method may still total-up to 300,000 homes a year, the cumulative effect of the planning reforms will see delivery fall below the most recent level of completions achieved - 233,000. There could be 77,000 fewer housing completions in the future compared to the 233,000 achieved in 2021/22.



2. Effect of Natural England's restrictions

HBF and LPDF have undertaken a companion analysis of the possible fall in housing completions owing to the various restrictions on housebuilding introduced by Natural England since 2019.

These figures have been calculated by taking the average of the number of homes delivered over three years in each local authority area affected by one of the restrictions prior to the first of these being introduced in 2019. We have then assumed that 80% of the administrative area is subject to a restriction on housebuilding. Not all areas of a local authority will be affected – housebuilding can continue in some areas - although many of the local authorities where the greatest number of homes are delayed are wholly affected.

We have calculated the effect of the following restrictions:

- Nutrient neutrality requirements – 37,000 to 41,000 fewer homes a year
- Water neutrality – 1,500 to 1,900 fewer homes a year
- Recreational Impact Zones – 1,200 to 2,100 fewer homes a year

Nutrient neutrality

The 74 authorities affected deliver an average of 51,000 new homes every year. Using an assumption that development in these areas will drop by 80%, based on an assessment of the area covered by the neutrality rules, the current approach will see an average of 41,000 fewer homes built annually.

Water neutrality

The affected catchments deliver an annual average of 2,100 new homes. On top of the 3,000 homes currently held up in the planning system, we estimate that the water neutrality restrictions will see a further drop of up to 1,900 homes per annum.

Recreational impact zones

The affected local authorities provide over 21,000 homes a year. While the delays to development as a result of the recreational impact zones are less severe than other interventions, the ongoing restrictions still have the potential to further cut housing supply by 10%, around 2,100 homes a year.

Summary

In combination it is possible that housing completions could fall to 116,000 to 111,000 homes a year.

	Low impact	High impact
2021/22 Net Supply	233,000	
Government planning policy changes impact	-77,000	-77,000
Nutrient neutrality annual impact	-37,000	-41,000
Water neutrality annual impact	-1,500	-1,900
Recreational Impact Zones annual impact	-1,200	-2,100
Total estimated reduction	-116,700	-122,000
Potential annual Net Housing Supply outturn	116,300	111,000

Question 2. What is the single biggest challenge for developers and promoters in fulfilling environmental requirements?

As explained above, the chief challenges confronting the house building industry are those restrictions introduced by Natural England from June 2019 onwards in the wake of the European Court of Justice (ECJ) Dutch-N judgement. Natural England's advice to local authorities to impose an embargo on new housebuilding on the grounds of nutrient, water and recreational pressures on protected habitats has delayed house building in at least 83 local authorities – a quarter of all local authorities in England. For some local authorities, the delays have been in place for nearly four years.

Where designated habitats are judged to be in an adverse condition, a local planning authority cannot grant planning permission for any project that might result in further deterioration to that habitat, unless the project is able to provide mitigation that will demonstrate that the impact of the project will be at least neutral. This requires that mitigation will need to be provided by housebuilders in advance of planning permission being granted.

A second challenge is the new statutory requirement for developments to provide biodiversity net gain introduced by the Environment Act 2021 which will be required on all developments from November 2022.

We will describe the challenges below.

Nutrient neutrality

In November 2018, the European Court of Justice (ECJ) made a decision relating to the application of the Habitats Directive that has effect across the member states of the European Union and the UK. This judgement requires decision-makers - including local planning authorities – to take necessary steps to prevent any further deterioration in the condition of protected wetland areas from pollution. One of these pollutants is nutrients – nitrogen or phosphorus – from the effluent or surface water run-off associated with new housing developments as well as from other sources. Once this enters into

the sewerage system and into watercourses, this causes environmental damage to designated conservation sites further downstream.

Nitrogen and phosphorous from farming and from the wastewater of the built environment is causing, in some cases, damage to the health and biodiversity of wetland areas. This has become a growing problem because these nutrients are not always removed at wastewater treatment works before they enter the watercourses. Many of the large wastewater treatment works remove relatively high loads, but smaller wastewater treatment works, located typically in more rural areas, do not.

The ruling from the ECJ in 2018 prompted Natural England in 2019 to revise its guidance to local authorities, advising local authorities that they should now apply the 'precautionary principle', whereby it was necessary for all new development of any kind involving overnight stays (e.g. housing and hotels) should be nutrient neutral; i.e. no amount of nutrient could be allowed to enter the watercourse through wastewater, and that new developments would have to demonstrate how these nutrients would be captured and contained through various 'mitigation' interventions. Mitigation measures were required to avoid harm to protected sites and had to be certain in their benefits and needed to apply directly to the protected site affected, rather than provide any wider environmental benefit elsewhere. Mitigation solutions would also need to be effective for a period of 80-125 years.

The difference with the ECJ Dutch-N judgement compared to how government bodies and the development industry had previously addressed environmental issues, is that those proposing development (e.g. a house builder) or those planning for development (e.g. the local authority as plan-maker) can no longer depend on a broad programme of mitigation that would take effect and deliver beneficial outcomes over a period of time into the future. Mitigation would have to be linked directly to a project, established, operational and effective before the project could proceed. In other words, mitigation solutions have to be procured and established prior to planning permission being granted.

The advice by Natural England resulted in an immediate cessation in house building activity in the 74 local authorities covering the 27 catchments affected owing to the non-availability of mitigation solutions. The embargo on housebuilding cannot be lifted until these mitigation solutions have been created. Equivalent restrictions have been introduced in Wales by Natural Resources Wales.

The issue affected first local authorities in the Solent catchment in June 2019, before spreading to elsewhere in England and Wales. A total of 74 local authorities in England and nine in Wales now face restrictions on housebuilding.

Availability of mitigation solutions

The non-availability of options for mitigation is a grave concern to the industry. Schemes providing nature-based solutions that could serve all housing developments located within specific river catchments are sparse. The Government has determined that mitigation through nature-based projects is the proper solution to the problem, but aside from the Solent area, where seven schemes have been established offering credits, schemes are unavailable elsewhere and, in some cases, are unlikely to become available for several years yet. This is the issue that must be impressed upon Government. If Government is wedded to the idea of nature-based projects, then it must realise that housing delivery will remain in paralysis for months in some place and years in others.

At present, schemes providing mitigation are only available in the Solent area to any substantial extent to deal with the nitrate problem experienced there (seven schemes providing nitrate credits to varying degrees are available in 13 of the local authority areas affected although provision to the west in the Avon Valley and Poole area is sparse). They are also available to a more limited extent in Wiltshire. Elsewhere, discussions with local authority officers and consideration of reports and statements

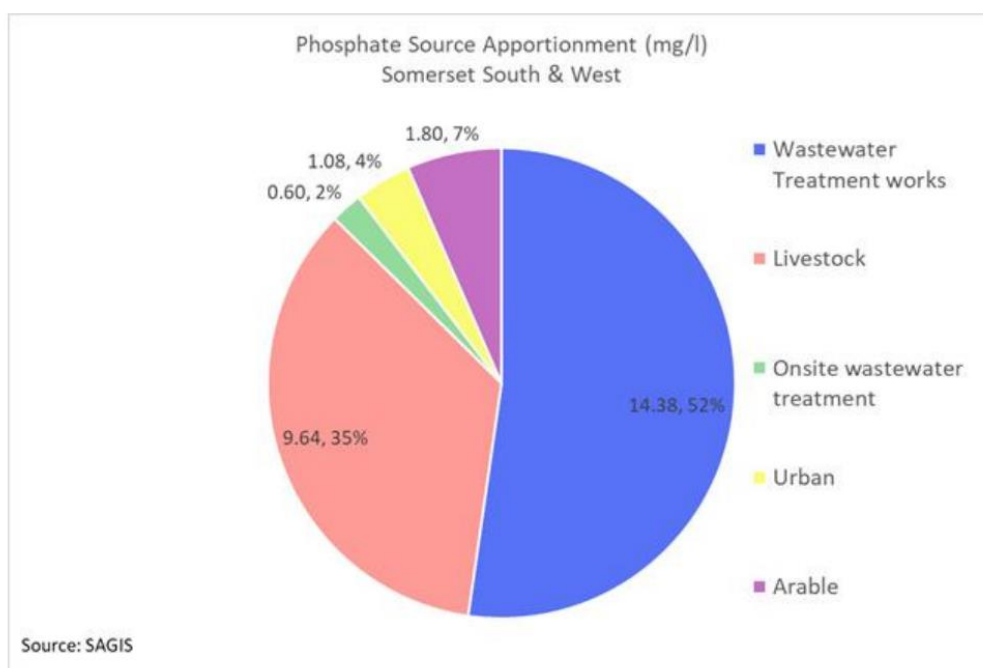
prepared by them, indicate that catchment schemes will not become operational for several months to years yet although Somerset West and Taunton is developing a scheme of mitigation that could unlock 700-1,350 homes from 2022 onwards¹ and Herefordshire may have a scheme providing some relief from next year, subject to discussions with Natural England.

Natural England is on the cusp of launching a scheme to sell credits in nature-based solutions to housebuilders in the Teesmouth and Cleveland Coast catchment. This may launch in the spring 2023. Natural England estimates that the scheme will provide credits in four rounds sufficient to release only 1,600 homes out of the 21,000 homes delayed in this catchment. Clearly the number is insufficient to resolve the problem.

The contribution of new housing development to the nutrients issue

While the home building industry is supportive of the need to protect water habitats, developers are being disproportionately impacted by the mitigation measures introduced by Natural England. This is despite acceptance from Government that nutrients from the urban environment contribute around just 4% of the problem, with the vast majority of nutrients in the rivers coming from agriculture or failings of the water companies. It remains unclear the reason why Natural England has targeted housebuilding for the restrictions when the chief sources of pollution are from agriculture and the existing built environment.

The diagram below, produced by the Somerset local authorities in 2021, shows the phosphorous generated by various sources / activities. As can be seen, the contribution from the urban environment, of which new housebuilding is a sub-set, is marginal when compared to the phosphates generated through farming (livestock and arable) and wastewater treatment works.



¹ Paragraph 4.7 of report titled *Somerset Levels and Moors Phosphate Mitigation: Somerset West and Taunton - proposed programme of interim measures*. Report by Somerset West & Taunton officers to Full Council, 5 October 2021.

The impact of new housing on water quality derives from the occupancy of these dwellings by people and very little from the process of construction. Calculating the extent to which new housing contributes to a decline in the water quality of protected habitats should be based on the number of additional residents moving to live in a catchment for the first time. Natural England's current approach overestimates significantly the likely *additional* population that would result from the development of new housing – it is based on an assumption that each new home will increase the population in the catchment by 2.4 additional people.

Research commissioned by the HBF in 2021, which considered the first 32 local authorities subject to the requirement to demonstrate nutrient neutrality, found that Natural England's 2.4 person per dwelling assumption would point to an increase in the household population that would be much higher than the official population and household projections – that is c.73,500 persons per annum compared to 35,250 person per annum. The critical reason for this is that calculators fail to acknowledge that most new housing caters for people already living in a catchment, not new people moving into the area. Consequently, the amount of mitigation required by each new development is overestimated and unnecessary.

Furthermore, home builders pay hundreds of millions of pounds worth of contributions to water companies each year. Since sector privatisation in 1989, and up to April 2018, house builders had already paid to water and sewerage companies a conservatively estimated £2.8 billion in infrastructure charges. These charges were split equally between water and sewerage infrastructure.

Moreover, Section 94 Water Industry Act 1991 imposes a duty on all sewerage companies to effectually drain their area and to provide 'effectual' wastewater treatment, including compliant treated effluent quality standards meeting EU Directive and domestic legislation. The failure of the Government's regulatory arrangements for the water industry does not justify the Government, through its agency Natural England, intervention to halt housebuilding in the areas affected, and nor is it fair or acceptable to expect housebuilders to subsidise the water industry further to rectify its own shortcomings. Housebuilding should not be subsidising via mitigation the failure of the water industry to invest.

The exemption for farming

The Environment Agency has recognised that agriculture and rural land management has now overtaken water industry wastewater treatment works as the most common cause of water bodies not achieving good status for nutrients.

The Environment Agency Summary Document, *Phosphorus and Freshwater Eutrophication Pressure Narrative* (October 2019) has noted that "this is a significant change from second cycle of the river basin management plans when water industry sewage works were the most common cause." In the light of the continued reductions in nutrients that are planned by the water industry by 2027, the document anticipated that the contribution of agriculture will be increasingly significant. As the document observes:

"Our latest analysis suggests that, without further agricultural P load reductions, the agricultural contribution to national river P loadings will increase from around 25-30% at present to over 50% by 2027." (Page 4).

The House of Commons Environmental Audit Committee report on water quality in rivers (January 2022) noted that:

1. Reduction in fertiliser use over the past 30 years has helped to reduce phosphorus loadings from agricultural sources but there remains an annual phosphorus surplus in UK agriculture with greater inputs of phosphates (in fertilisers and manures) than that removed via crop and

fodder production. This has resulted in a continued accumulation in soils. The resultant build-up of “legacy phosphate” within catchment soils means that even if agricultural activities were to cease, the discharge of nutrients into protected watercourses would continue for a considerable period of time.

2. “Intensive livestock and poultry farming appears to be putting enormous pressure on particular catchments... The potential impact of intensive agricultural practices on river water quality must be fully acknowledged and the risks mitigated.” (paragraph 106).

The report recommended that “planning authorities in England establish a presumption against granting planning permission for new intensive poultry or other intensive livestock units in catchments where the proposed development would exceed the catchment’s nutrient budget, unless evidence is presented of robust mitigation plans in place...” (paragraph 108). However, this was rejected by the Government which responded by stating that “the Government does not agree that planning authorities should adopt a broad policy against farming infrastructure.”

It is apparent from this that mitigation measures by housebuilders, therefore, will make no appreciable difference in improving water quality. The solution lies with improvements in wastewater treatment and changes in agricultural practice. Given the degrees of contribution by various sectors to the issue of nutrient-related pollution to wetland habitats, the government’s decision to exempt farming while imposing a ban on housebuilding is irrational and unfair.

Number of homes delayed

The requirement for house builders to demonstrate nutrient neutrality is delaying a total of 120,000 homes at various stages in the planning process (from allocations in plans to sites with planning permission). So long as the issue remains unresolved, the HBF has calculated that there may be between 37,000 and 41,000 fewer homes completed each year in England compared to past levels of completions. We have explained in more detail above on page 11 how this figure has been calculated.

Water neutrality

In a related move, Natural England has imposed a halt on housebuilding in three local authorities in north Sussex in September 2021 (Chichester, Crawley and Horsham district councils).

The issue emanates from the Sussex North water supply zone and, according to Natural England, the continued abstraction of water from the nearby rivers Rother and Arun, has the potential to threaten a European protected species of snail inhabiting this area. As a result, Natural England have advised the local authorities affected that unless water neutrality can be achieved through new planning permissions, then under the Habitats Regulation Assessment (HRA) they would be unable to consent any new development further drawing on the abstraction of water in this area. Natural England’s intervention is delaying the delivering of 4,000 homes and could result in between 1,500 to 1,900 fewer housing completions each year so long as the issue remains unresolved.

HBF has challenged the intervention on the basis of the validity of Southern Water’s Water Resource Management Plan 19 (WRMP 19), the seeming ineffectiveness of the Environment Agency as the ultimate approver of Southern Water’s abstraction licence, and also the fact that no concern had been raised by Natural England as a statutory consultee to Southern Water’s WRMP 19. This abstraction licence was also approved by Defra. We have had no response from the government to these arguments.

Recreational impact zones

In March 2022 Natural England wrote to Buckinghamshire Council (formerly Aylesbury Vale and Chiltern Districts) Central Bedfordshire Council, Dacorum Borough Council, Three Rivers and St Albans City and District Council informing them that the councils would not be able to approve applications for residential development that fell within 12.6km of the Beechwoods Special Area of Conservation (SAC). Permission could not be granted until proposed developments could demonstrate either no adverse effects associated with increased footfall in the SAC from new residents living in the new developments or provide mitigation. There is also a 'zone of exclusion' of a radius of 500m around the SAC where new development will be prohibited. What might constitute effective mitigation has yet to be agreed.

A survey of HBF and LPDF members revealed that a total of 19,452 homes have been delayed across the five local authorities affected.

Natural England's justification for the restrictions on house building and its requirement for mitigation is that the Habitats Regulations require that appropriate mitigation measures are in place to ensure that a proposed development (either alone or in combination with other plans or projects) will not have an adverse effect on the integrity of internationally designated sites. Mitigation is provided in the form of provision of suitable alternative natural green space (SANGS), measures to discourage people visiting these areas, as well as payments for monitoring.

This follows other restrictions introduced elsewhere by Natural England, including the New Forest, Chichester & Langstone Harbours SPA / Portsmouth Harbour SPA / Solent & Southampton Water SPA, Epping Forest SAC, and Burnham Beeches SAC.

HBF has calculated that the restrictions could result in between 1,200 to 2,100 fewer housing completions each year.

Biodiversity net gain

Biodiversity net gain is a requirement to develop land and contribute to the recovery of nature. It is a way of making sure the habitat for wildlife is in a better state than it was before development. Developers are required to avoid a loss of habitat – and improve that habitat (hence biodiversity net gain) – on any land that they would wish to develop. If the developer cannot enhance the habitat on site, s/he can do so off-site.

All development is required to provide BNG except for permitted development; urgent crown development; development on sites of 25 metres squared or lower or 5m for linear habitats such as hedgerows; householder applications; and biodiversity gain sites (where habitats are being enhanced for wildlife).

The government has ruled that all development sites must achieve a minimum improvement of 10% of the biodiversity of the site. Local authorities may set higher targets. Some local authorities have done so already in advance of the mandatory introduction of BNG in November 2023. For example, Lichfield and Guildford have set a requirement for a 20% improvement.

Although, the government has provided tools to enable applicants to assess biodiversity net gain on sites, this is a highly specialised and complicated area. It requires a skilled ecologist to make the calculation, and these skilled professionals are likely to be in high demand but short supply. It also requires professional judgement and experience to input the necessary data relating to categorising habitats and applying the metric. This includes an assessment of qualitative factors such as the

condition, distinctiveness and connectivity of the habitat. This can result in major differences in the baseline score when run by different ecologists.

Assessing net gain (i.e. the impact of the proposed development and mitigation where required) is also subject to qualitative factors including: how long it will take for habitats to reach the target condition; and the difficulty of habitat creation.

The view that it is easier for large greenfield strategic sites to secure a 10% improvement in biodiversity is too simplistic. This is because the trading rules in the calculator do not allow the replacement of a higher distinctive habitat with one of lower distinctiveness. Consequently, the ability to achieve BNG will depend very much on the baseline condition of each site, the design solution adopted, the net gain assessment, and the ability to secure some of the BNG required off-site where this cannot be achieved on-site.

As with the Natural England imposed restrictions, the lack of available credits to enable BNG to be achieved off-site (including a national credit scheme) because schemes supplying the market with solutions are in their infancy, means that the mandatory requirement could be hard to achieve in November. Also the weighting in the mitigation hierarchy which favours mitigation on-site will tend to militate against the establishment of new habitats off-site even though this may prove to be a far more effective way of improving biodiversity.

How could this be resolved?

In terms of those restrictions introduced by Natural England, it is clear that the government's expectation that new markets would emerge quickly providing mitigation in the form of nature-based solutions has proved unfounded. Even where these catchment-wide solutions are available, they are unable to supply housebuilders with sufficient credits to enable them to discharge their obligations. For example, Natural England's national Nutrient Credit Scheme will operate in only one of the 27 catchments affected - the Teesmouth & Cleveland Coast catchment - yet it will unlock only 1,600 homes out of the total 21,000 delayed. The Solent catchment does have schemes, but only sufficient credits to sustain housebuilding for the next five years. Wessex Water's pilot scheme serving South Somerset District Council may unlock only 700 homes in its first market round, despite being years in development.

It is the view of HBF and LPDF that the government must lift the moratorium on housebuilding imposed by Natural England. The degree to which new homes contributes to the issue is negligible and is outweighed vastly by run-off of nutrients from farming and the discharge of sewerage into rivers by the water industry. The moratorium on housebuilding is disproportionate, unfair and it will be ineffective. Stopping housebuilding will make no difference to water quality. It will cause great hardship to those in housing need. The government has chosen not to introduce tighter nutrient restrictions on farming for understandable socio-economic reasons. It should do the same for housing especially during a growing housing emergency.

The arguments are similar in respect to water quality and recreational impact zones. The consumption of water by new residents is negligible compared to that consumed by society as a whole. The restriction on small number of new homes because of their proximity to popular areas of recreation and the risk that the new residents may visit these places ignores the fact that many of the residents of these new homes will already be living in the locality and visiting these places. It is also inequitable, in the sense that Natural England imposes no restriction on existing residents enjoying these places. It is also perverse, given that one of the aims of the planning system was to safeguard wildlife areas for public recreation.

Biodiversity net gain (BNG)

In terms of supporting the delivery of BNG, the government could assist more by adopting policies that would allow BNG to be secured off-site. Training and support for local authorities and the industry is essential. This should include support for an accreditation scheme for ecological specialists to help them identify habitat and mitigation solutions.

Local authorities should be encouraged and supported to establish BNG mitigation schemes and for these to support the preparation of local plans. Ideally, these schemes should set out in detail the scheme and price per unit to provide certainty to local communities and to developers about the cost of complying with BNG where it is not possible to provide the 10% requirement on site. Related to this, development plans should align with Nature Recovery Strategies –currently these both operate under separate legislation. The government could amend national planning policy to require these to align.

Lastly, the government could assist if it allowed housebuilders the flexibility to decide when the BNG requirement is delivered on a scheme, particularly schemes with multiple phases. Currently, the government favours the requirement being delivered in its entirety within the first phase. There is a risk that local authorities will require this also when it may be more practical for the house builder to deliver the BNG requirement in the last phase.

Question 3. Are changes in environmental regulations governing development clearly communicated? Is sufficient support available to help developers and promoters fulfil their responsibilities?

Housebuilders and land promoters are aggrieved that the restrictions on house building were imposed by Natural England without warning and without regard for the social-economic consequences. The reasons why the restrictions were imposed without warning has never been adequately explained by Natural England or by government.

Very little support has been provided by Natural England to assist house builders. It has been reluctant to engage with the house building industry on this matter, directing questions towards the local authorities affected who were ill equipped to assist. At most, Natural England has helped by providing a model nutrient-load calculator. Support elsewhere is lacking entirely. For example, it did not establish a website providing basic information or assistance, such as maps showing the geographic extent of the restrictions to assist house builders. Despite the size of the organisation, the support provided has been negligible.

Nearly four years on from the first restrictions being introduced, the house building industry is still struggling to find solutions. As described above, the number of schemes that have been established supplying housebuilders with nature-based solutions – which is the government's favoured solution – is still extremely limited. A few schemes are emerging after years of delay but even these will unlock very few homes.

Question 4. What are the costs of meeting environmental regulations for developers? How does this vary for types of developer or promoter and in different locations?

As described in the first part of this response, prior to new problems created in the wake of the ECJ Dutch-N judgement – i.e. nutrient and water neutrality and recreational impact zones – most existing environmental regulations have been absorbed and accommodated by house builders and do not represent a major challenge to the viability of development. The cost of complying with these statutory duties is reflected in the land value (the price negotiated with landowners for the purchase of land for

development). That is not to say that it does not come without cost: the number of affordable homes provided on a development will tend to be adjusted downwards to absorb these environmental costs while still providing a competitive price to entice a landowner to sell.

Biodiversity gain also represents a new cost. This will become mandatory in November 2023. So will compliance with the new sustainable urban drainage regime.

Nutrient and water neutrality and recreational impact zones will represent new costs. However, the obstacle is not simply one of cost; it is the availability of nature-based solutions to the extent needed to provide mitigation. If farmers and landowners are unwilling or disinterested in selling or using their land to create these nature schemes in sufficient number within the catchments affected, then the cost is merely a theoretical barrier.

Nevertheless, to try and answer directly the Committee's question, we can provide some general indications of the cost of providing mitigation for nutrient neutrality, recreational impact zones and biodiversity net gain. However, it is impossible to be definitive about these costs, as every site is unique with its different soil conditions, challenges, baseline habitat etc.

Nutrients: cost of mitigation / cost of credits

HBF / LPDF undertook a survey of members during the summer of 2021 to understand the extent of the nutrients issue, the availability of solutions, and the cost of achieving mitigation.

The results show a very broad range of costs and land requirements reflecting the many variables at play. Each site has its specific features. The chief variables are the permit levels of wastewater treatment works to which developments connect; the nature of the existing land use; and the availability or not of nature-based solutions in a locality; and the market cost of providing a solution, and very importantly, whether you are addressing nitrogen or phosphorous, or both.

Based on the case studies provided that have been able to assess the possible cost of mitigation, we established the following range of costs:

Cheapest: £153 per dwelling (this is in Wiltshire where there is already a long-established developer contribution scheme)

Most expensive: £12,581 per dwelling

Average: £5,091 per dwelling.

We also undertook a separate analysis of the cost of providing mitigation in South Somerset, where the issue is one of phosphates, which is acknowledged as being more expensive to deal with compared to nitrates, and where the permit levels of wastewater treatment works are much higher (i.e. meaning the wastewater treatment works allow for more phosphorous to be released).

Detailed modelling for the 3,811 homes delayed in South Somerset using the nutrient load calculator prepared by the Somerset local authorities which incorporates the permitted levels for phosphates at wastewater treatment works, provides a range of costs depending on the location of the scheme. The calculations are based on the estimated cost of purchasing a credit of £25,000 to offset one kilogram (kg) of phosphate. This is based on EnTrade's (a commercial subsidiary of Wessex Water) emerging catchment market scheme. Costs could be lower or higher depending on market demand for credits (number of suppliers versus number of purchasers). Costs could also be higher in the other three Somerset authorities because the permit levels at wastewater treatment works (WWTW) are higher meaning more phosphate must be mitigated. Therefore, a permit level of 5.0 (where 5 milligrams of

total phosphorus is allowed per litre of wastewater) means more mitigation is required than where a WWTW has a permit level of 0.5.

Although these are notional calculations, we consider they provide a reasonable reflection of the potential range of costs. These estimates based upon EnTrade's original indication that the cost of one credit to offset one kg of phosphate would be £25,000. The estimate was the initial budget figure tabled by EnTrade during the preparation of its Catchment Market Scheme. This figure has not been tested so the true cost will remain unknown until the initial rounds of the catchment market are run. However, given the current level of demand and relatively small quantities of mitigation being bought to the market this could be considerably higher.

Lowest £ 2,484 per home

Middle £ 5,049 per home

Highest £15,094 per home

The Solent catchment (encompassing fourteen local authorities) has an established strategic mitigation scheme, where the local authorities have come together with the Hampshire Wildlife and Wetland Trust and purchased and decommissioned seven farms to provide nature-based projects. We understand, based on conversations with the Strategic Environmental Planning Manager for the Partnership for South Hampshire, that the cost mitigation per dwelling in that catchment is about £3,250. One kg/TN in mitigation for nitrogen will cost generally about £3,250 with some variation between schemes. For the majority of development in the Solent one dwelling equates to one kg/TN in mitigation. However, in some areas it can be as much as three kg/TN per dwelling (i.e. £3,250 x 3).

These costs are not insubstantial and the cost of providing mitigation represents a significant diversion of planning gain away from other public policy goals, not least the supply of affordable homes through S106 agreements. The cost of delivering nutrient neutrality and the loss of planning gain to support other policy objectives is a common concern among the local authorities affected.

Recreational impact zones

There are several of these schemes in operation, or about to be introduced, to enable housebuilders to pay a levy so development can be allowed. Contributions towards mitigation measures are required for every net addition to the residential accommodation stock. New Forest District Council Park has published an example on its website as a guide for applicants.

The example assumes a development of four dwellings consisting of:

2 x two-bedroom dwellings

2 x three-bedroom dwellings

The calculations using the current contribution figures would be as follows.

Two-bedroom dwellings: $2 \times (£3,770 + £589 = £4,359) = £8,718$

Three-bedroom dwellings: $2 \times (£5,597 + £813 = £6,410) = £12,820$

Air Quality Monitoring: $4 \times £91 = £364$

Sub-total: £21,902

Average: £5,475 per dwelling.

See here for more details:

<https://www.newforest.gov.uk/article/1185/Development-in-European-nature-conservation-areas#h23>

For the Chiltern Beechwoods SAC recreational impact zone housebuilders are required to pay towards Strategic Access Management and Monitoring (SAMM) and Suitable Alternative Natural Green Space (SANG). An indication of the costs of mitigation is provided by Dacorum Council which requires £913.80 per dwelling for SAMM and £4,251.71 per dwelling for SANGS (if the applicant is unable to provide SANGS itself).

Central Bedfordshire Council has identified SANG cost of around £4,000 per dwelling.

Biodiversity net gain (BNG)

It is harder to provide an indication of the costs for complying with BNG because the requirement will only become mandatory in November 2023, so data is limited. Some local authorities, however, have made it a policy requirement in advance of this date so some early indications are available.

One of the challenges with BNG, as we have described above, is the challenge of accommodating the BNG requirement in full on site. The greater the area set aside to accommodate habitat creation the less area is available for homes. Critical infrastructure like access roads and policy requirements like public open space and SuDS etc are non-negotiable and must be accommodated. Consequently, if the applicant is unable to accommodate the BNG requirement in full on-site s/he will need to procure an off-site solution.

One example given by a developer is a scheme for 1,500 homes. This required 352 units of BNG to comply with the council's policy requirement for a 10% net gain in biodiversity. Only 231 units of BNG could be accommodated on-site so the applicant needed to procure a further 121 units of BNG off-site. The cost of procuring those units off-site was £20,000 each or a total of £2.45 million.

Defra has indicated that a BNG unit for habitat creation would cost around £11k each (see *Biodiversity net gain and local nature recovery strategies: Impact Assessment*, Defra, 2019, page 40).

However, we have had feedback from members indicating that Leeds and Stevenage councils are currently charging £20,000/BNG Unit (index linked), whilst Warwickshire and other councils are charging up to £50,000/BNG unit.

It is difficult to say if these costs will be typical. The cost of procuring off-site solutions for BNG could reduce once a market in providing land for habitat creation (as well as nutrient and recreation mitigation) has been established. Equally, the cost may rise in line with greater levels of demand for BNG credits and limited supplies of land providing credits.

Question 5. Is there sufficient coherence between different environmental regulations? How could regulations be administered in a more systematic and coherent way?

Question 6. What impact do Government bodies such as the Environment Agency and Natural England have on planning and development decisions? How effectively do these bodies work together? How does the Environment Agency interact with development as both regulator and owner of land and other assets?

We will answer questions 5 and 6 together.

General overview

The two agencies exercise a considerable influence over plan-making and decision-taking.

Both agencies should be consulted early in the 'plan-making' stage and take a strategic approach to development. This will inform plan-making – i.e., the policies contained in local plans relating to decisions on allocations as well as more specific policies relating to matters like water consumption, water run-off rates etc. that are applicants will need to comply with.

However, they are also statutory consultees on individual planning applications.

Local authorities are not obliged to accept or act on the recommendations of both agencies in response to specific planning consultations. Local authorities can choose to ignore, fully accept or partially accept their findings. More often than not, councils will choose to act on the findings of the two agencies, and this will inevitably deny, defer or delay an application from progressing through the planning system. Local councils will also consult with other landscape and biodiversity officers – either employed within the council or as external consultants. The views of these will tend to be in line with those of the EA and NE thereby consolidating the local council position on planning applications.

More specific observations about both agencies:

Environment Agency

The Environment Agency (EA) holds information that is vital for undertaking Flood Risk Assessments (FRA) – see the link below, especially the section titled *What Information You Require* from the EA:

<https://www.gov.uk/guidance/flood-risk-assessment-for-planning-applications>

This information can be quite dated and/or contain errors which will require dialogue with the EA to clarify. Once the FRA is completed and submitted as part of the planning application, even when dealing with ordinary watercourses, the lead local flood authority (LLFA) – usually the county council or unitary authority – can default to the EA for assessment and guidance. If the EA does not agree with the content of the FRA, then a new assessment will need to be done. This is not uncommon.

The EA is also required to work collaboratively with all risk management authorities, for example in the preparation of strategic flood risk assessments (SFRA). The lack of effective engagement between these bodies can result in SFRA's that are qualitatively and quantitatively poor, leaving the house builder to undertake additional work, leading to potential delay.

Even if a site is in a zone 1 flood risk area if the catchment is one defined as a critical drainage area, then the FRA becomes a matter for the EA to determine/deal with as the statutory consultee and not the LLFA.

In addition, the EA is responsible for the approval of all surface water outfall structures to receiving watercourses, both main river and ordinary watercourses. Likewise, when possible, culverting of a watercourse is involved – the latter approval can be a very lengthy process. (The EA position is to limit culverting wherever possible).

Of greater concern is the EA's constant re-examination of the approach to flood risk and the input parameters that feed into the way house builders undertake watercourse hydraulic modelling. The EA frequently issue revised guidance covering this and other flood risk issues without informing the wider development community. The EA has a statutory duty to develop, maintain, apply, and monitor a national Flood and Coastal Erosion Risk Management (FCERM) Strategy but it rarely advises if

transitional arrangements apply. It is not unusual therefore for the EA and LLFA to apply new guidance retrospectively. This requires the flood risk assessment process to recommence.

In the context of the remediation of contaminated land the EA is a key and influential player both in terms of the proposed remediation strategy and the verification of any remediation works undertaken. Local authorities can often default to the EA for guidance/advice. Likewise, when it comes to the definition of construction waste and the possibilities for re-use, for example, the re-use of excavated material.

If piling is involved in groundwater sensitive areas, then an appropriate environmental permit is required from the EA under the Environmental Permitting Regime. This would also apply when ground source heat pumps are being contemplated – something that will become more common as the industry moves towards net zero homes. Failure to do so could result in enforcement proceedings.

Natural England

Natural England (NE) is a statutory consultee. Few LPAs are likely to go against its advice.

NE can be involved in the approval of nutrient neutrality proposals. Likewise, issues relating to ecology and biodiversity. On both counts house builders have experienced considerable delays accompanied by the imposition of subjective assessment criteria. For this reason, HBF has argued for the development by Defra and Natural England of independent standards for mitigation solutions to enable local authorities and project providers to act with greater confidence without having to refer these solutions to NE for approval.

In terms of ecology and biodiversity we must consider not just the nature of the species that may be present on a site (e.g., newts, bats etc) but the designated period in the natural lifecycle when any assessment can be undertaken. Likewise, the time and resource(s) required and available to complete any study in a detailed, informative way. This not always compatible with the planning process either when seeking outline planning consent or reserved matters/detailed planning approval. Similarly, the timing of any mitigation/enhancement measures that may result, are not always compatible with an intended start on site and can lead to unfounded accusations of developer land hoarding.

In summary, these and other bodies (such as Ofwat) do not work effectively together. We have illustrated this with reference to the issue of water neutrality (see question 7). There are many instances these organisations acting in isolation and recommendations and/or guidance that fails to appreciate the impact on other strands of legislation.

Question 7. What role does Natural England play in monitoring and implementing these regulations? How does Natural England's involvement affect the delivery of new development?

Natural England's advice to local authorities to impose a moratorium on new housebuilding on the grounds of nutrient, water and recreational pressures on protected habitats has delayed house building in at least 83 local authorities – nearly a quarter of all local authorities in England. For some local authorities, the restrictions have been in place for nearly four years. These delays will continue in most areas as solutions have taken time to develop owing to a lack of effective support and guidance from Natural England. Only a few local authorities have schemes available that allow house builders to purchase nature-based solutions to achieve nutrient neutrality.

The question of regulatory failure

There must also be a role for government to review the competency of its regulatory bodies. The issue of nutrient neutrality and the immediate embargo this imposed on new housebuilding is not one that should have been introduced without warning. As we have explained above, the Environment Agency has been aware of the issue of nutrients since it issued a specific publication in 2019 relating to the problems with nutrients in water in general – this was the *River Basin Management Plan 2021* issued in October 2019 as part of a related consultation process. Natural England and the Environment Agency ought to have been aware of the statutory requirements for the removal of nutrients and instructed Ofwat and the water companies accordingly. The Environment Agency has a duty to inform Ofwat of these requirements in order to inform the various price review investment programmes. This forms part of the water companies' section 94 statutory duty under the Water Industry Act 1991.

The most compelling evidence can be found in the statement made by Ofwat in its publication *Ofwat: Final Methodology for Price Review (PR)24 (published 13 December 2022)*, in particular on page 23 of Appendix 9, and specific to the matter of nutrient neutrality. Ofwat states:

"Companies are subject to statutory requirements in relation to the removal of nutrients. Ahead of every price control period, a programme of works to reduce nutrients is agreed with the Environment Agency, Natural England, and Natural Resources Wales to ensure wastewater treatment works (WWTWs) comply with the permitted level of nutrients in their discharge permits. We engage on the optioneering process and assess the cost efficiency of the agreed schemes."

The relevance of this paragraph begs the question, namely, if this is an engagement process involving recognised competent bodies (as defined by both Directive and UK statutes) and undertaken even before Price Review 24 (PR24), (and previous PR considerations) then why did Natural England not advise Ofwat of what was required as part of a sewerage company's section 94 statutory duty, especially as a direct response to the progressive changes in environmental legislation that have had a material impact on the functionality of WWTWs, in particular the progressive changes required to address effluent quality standards?

The fact that has not occurred is concerning. It would appear that Natural England, the Environment Agency, Ofwat and the water companies have ignored the growing problem of nutrients.

Similarly, with the issue of water neutrality, why has Natural England been allowed by Defra to impose a halt on housebuilding when the Environment Agency - as the 'competent authority' for the water resources regime and in particular the issuing of water abstraction licences – has not raised an issue? Either the Environment Agency is at fault, or Natural England is. Both cannot be right. If the licenced abstraction of water is at a level which is in accordance with those duties (i.e., a significant effect on habitats can be excluded), the very premise of the advice in Natural England's Position Statement issued in September 2021 calling a halt to housebuilding is unfounded. If, on the other hand, significant effect on the condition of habitats from the licenced abstraction cannot be excluded, then the Environment Agency is under a continuing duty to review or revoke the licence. It may be that on current scientific knowledge, compliance with the Habitats Regulations means no (or no further) abstraction should occur at the impugned source, but that is a decision for the regulating authority, which is the Environment Agency, not Natural England and still less the district councils.

It is unclear why informed competent, statutory bodies have not co-operated effectively on such an important issue, taking account of the existing legislation and the statutory duties imposed on all sewerage companies. These are well resourced agencies. The Environment Agency employs 10,600 people. Natural England employs 2,171.

House building that is vital to the life of communities has been stopped for four years already and will be for a further indefinite period as a consequence of Natural England's interventions. Its actions have been allowed to override plans prepared by local authorities based on decisions by the Environment Agency and Defra.

The lack of 'market rules' produced by Natural England for delivering nature-based solutions also hampers a speedier resolution to the problem of nutrient neutrality. Without standards for nature-based projects and the accreditation of these, landowners are more wary about bringing forward solutions.

Question 8. To what extent are the information needs of the planning system proportionate?

Question 9. How far do the key actors in implementing environmental regulations have sufficient resources to carry out their responsibilities?

We will answer questions 8 and 9 together.

Under the Habitat Regulations, the local authority is defined as the 'competent authority'. It is the ultimate decision-maker in terms of approving mitigation solutions and devising a strategy for addressing the issue in the longer term.

However, the local authority can only decide what needs to be done, and do so with confidence, if it has the requisite knowledge and expertise. The issue of nutrient neutrality was an entirely new duty that was imposed on local authorities, without warning. Those local authorities had neither the knowledge nor resources to know how to deal with this issue. Dealing with both requires retaining the services of an expert ecologist, but without any 'market rules' relating to how to deliver nutrient neutrality, time and resource can be expended in devising solutions that may not satisfy Natural England or the Environment Agency. Assistance from Natural England has been extremely limited.

Question 10. Are there further significant changes which would improve this system?

The need for a different approach

HBF and LPDF welcomed the measures announced by the Government on 20 July 2022, but they will take time to implement and to yield the outcomes desired. First, the effectiveness of the measures announced cannot be entirely guaranteed. For example, the statutory requirement placed on water companies to upgrade wastewater treatment works will require the Levelling up and Regeneration Bill to gain assent, and this may be delayed. It is also unclear how significant these improvements will be on reducing the amount of residual mitigation that needs to be provided through nature-based solutions by developers, and the cost of this. Second, the scope and effectiveness of Natural England's Nutrient Mitigation Scheme will be limited providing credits in only one out of the 27 catchments affected. Also, it will unlock few homes initially – only 1,600 out of the 20,000 delayed across the Tees Valley. Although the scheme is supposed to roll-out to a further five catchments, it is unclear how many homes the scheme will release from the current impasse and when this might be.

Addressing nutrient-related pollution at the level of individual housebuilding schemes is also an ineffective way to address this problem. As we have argued above, because new housebuilding makes such a marginal contribution to nutrient-related pollution of our waterways trying to resolve this at the level of individual housebuilding applications dissipates effort and resources. Trying to improve the condition of rivers and wetlands at the level of dispersed housing schemes is unlikely to achieve the result desired by Government when the chief sources of pollution is the existing built environment and farming.

The housebuilding industry is prepared to play its part in improving water quality, but the issue needs to be addressed collectively by society through a national programme of action towards which all those responsible – new development of all types involving toilets and washing facilities, farming, the water industry – can make a proportionate contribution.

We need reform of the Habitats Regulations to enable better environmental outcomes to be delivered over the longer term.

Agreeing on a national programme to address the problem in the medium to longer term and decoupling this from planning permission makes sense to most people we have spoken to. A national strategy of habitat improvement to which the water industry and farming as well as housebuilding could contribute could deliver actual and much better environmental outcomes over the course of the next decade than the current, uncertain, fragmented and unfair approach with its focus solely on new housebuilding and hotel accommodation. At the same time this would allow vitally important housebuilding to resume, and new homes occupied with immediate effect. This should be the goal.

To achieve that would require reform of the Habitats Directive and Regulations and repurposing these to support a set of redefined public policy goals for the UK. Reform focusing on redefining the Habitats Regulations would enable the current restrictions on housebuilding to be lifted. We note that the Government has announced its intention to review and repeal EU-derived legislation in UK law, through the proposed Retained EU Law (Revocation and Reform) Bill. We consider that this is the opportunity for the Government to redesign environmental legislation in this country to lift the restrictions imposed on housebuilding and important development projects introduced in the wake of the Dutch-N judgment by the European Court. Reforming the Habitat Regulations will help to support growth and provide for the future wellbeing of UK residents by devising a new system of environmental objectives that will provide protection and enhancement for the environment.

Removing the Dutch-N legal obstacle through reform to the Habitat Regulations should be treated as an imperative – a matter that is of overriding public interest to the people of the UK.

There are various broad ways in which the Habitats Regulations may be reformed, appreciating that a balance will need to be struck between quite often the competing objectives of environmental protection and the delivery of needed homes on the other. Quite often these objectives are appropriately aligned, but in the instance of nutrient neutrality, this has been less so.

One of the main implications of the nutrient neutrality requirements – and indeed following publication of the guidance by Natural England that affects a particular local planning authority – is that within that local authority there is a guillotine effect. Overnight, issue of planning permissions and indeed decisions at subsequent consent stages (reserved matters and condition discharges) ceased completely. Such permissions cannot be released until such time as nutrient neutrality is demonstrated, in situations where mitigation may take years to come forward – if at all.

The situation is particularly acute for those developers who have already purchased sites with the benefit of outline or full planning permissions – or indeed are looking to make relatively modest changes to those permissions. In such circumstances, those schemes may no longer be delivered unless mitigation is provided which was not factored at acquisition stage, and when timescales are unknown. For SMEs, this is disastrous and many across the Country are, or will be, in financial difficulty. The consequences of the inevitable reduction in SMEs in terms of market choice and accelerating housing delivery could be felt for years to come.

At one end of the scale, relatively simple changes to the Habitats Regulations could be made to introduce, for example, a ‘grace period’ whereby sites that secure planning permission by a particular

date in the future, need not have to demonstrate 'nutrient neutrality' for a period of time once catchment areas are confirmed, by Natural England or alternative appropriate body, to be in an adverse condition. This enables housebuilding to continue in the short term, while Natural England through its Accelerator Unit and other legislative reforms, such as increasing the duties on water authorities, begin to take effect. This seems to strike an appropriate balance, and is a similar approach taken with other legislative reforms such as biodiversity net gain and building regulation reforms where the industry has a chance to act, consider and plan.

Of course, a stepped approach to neutrality may also be considered. This could operate whereby, for a period of time, developers within affected areas, are not required to demonstrate neutrality but increasing thresholds of improvement as time goes on – so that ultimately there is a requirement to achieve neutrality by say 2030, but in the meantime the industry needs to work on a stepped basis to achieve that. Again, this is about reducing the burden on housebuilding in the short term.

Proper engagement by Natural England and the Environment Agency

Consultation is also important. The challenge faced by the industry is the inability to plan. As noted above, guidance is released from Natural England without warning or consultation, which overnight stops the issue of planning decisions and, in turn, construction of homes. A requirement for Natural England to consult upon draft guidance, before that 'comes into effect' would minimise such risks – and avoid situations such as the one in Dover where housebuilding was forced to cease for a significant period of time, only for it to be established subsequently - and accepted - that there was no adverse impact from housebuilding on nutrient loading owing to a lack of connectivity. Such delay would have been avoided through forewarning and consultation. We understand that the reason the guillotine has fallen so suddenly, without warning, is because of a particular legal obligation on the government and its agencies through the Habitats Directive, that measures must be taken to avoid any potential adverse impact, even if the scale of the contribution from new housebuilding could be non-existent or very small. This is the danger with the precautionary principle. The example of Dover shows that the embargo was unjustified, and there should be an opportunity for the local authorities affected to review the evidence given the potentially severe socio-economic consequences that will follow from an embargo on housebuilding.

How changes to Natural England's nutrient load calculator could assist

If the government is not minded to pursue legislative solutions, then changes in the way that Natural England advises local authorities could help to provide relief for the house building industry.

The HBF published a report on March considering how the changes to Natural England's approach to calculating the nutrient load of a development could help more residential schemes to progress. If the recommended changes are made it could help many of the estimated 120,000 homes that have been delayed by the nutrients issue to achieve neutrality through nature-based solutions. As explained above, mitigation through nature-based solutions is the Government's preferred route to meeting the requirements of the Habitats Regulations. The changes, if adopted, would help not only some housebuilding to resume but it would also reduce the amount of farmland that would otherwise need to be taken out of food-production to make way for nature-based solutions. Based on Natural England's current calculator, the land-take requirements associated with achieving nutrient neutrality through nature-based solutions is considerable. As the report shows, on current calculations, a scheme in Kent for 500 homes would require 43 hectares of wetland to be constructed to achieve nutrient neutrality – the least land intensive mitigation option. This falls to 16 hectares if the changes we advise in the report are adopted.

The two most important changes proposed are:

a) Adjusting Natural England's calculator to reflect the net additional population that will result from the delivery of new housing – rather than a continued focus on the gross population of the new dwellings – based on an application of the net additional average household size; and

b) assessing the number of dwellings that are to be delivered before 2030 rather than a requirement to mitigate a development in its entirety, regardless of when the houses will be delivered. This would enable larger schemes with longer build-out timetables to benefit from the planned statutory improvements to wastewater treatment works which it is hoped will take effect in 2030.

If adopted, the changes would make it more feasible for some medium and larger sized housing developments to achieve nutrient neutrality before 2030. After 2030 the Government's proposed measure to improve the performance of wastewater treatment works will come into effect, making it easier still to achieve nutrient neutrality.

Even so, irrespective of this proposed programme of improvements, the Government will still need to consider a targeted package of measures to assist SMEs who do not have the cash reserves to procure expensive nature-based solutions.

The water industry and improvements to wastewater treatment works

As discussed above, HBF and LPDF welcomed the government's decision to place a statutory duty on water companies to improve the performance of wastewater treatment works (WWTW) via the Levelling up and Regeneration Bill. These improvements are scheduled to be completed by 31 March 2030, with local authorities and housebuilders being able to assume that they have been done when calculating the nutrient load of a development from this date on. This is an important measure – which if enacted – could help to reduce the amount of nutrient-related pollution that housebuilders will need to mitigate since more of these pollutants will be captured at the WWTW.

Nevertheless, welcome as this intervention is, it will not assist many SME housebuilders who would have expected to build-out sites well before 2030 and consequently, will not benefit from the lower amount of mitigation to be provided after 2030. Furthermore, the legislation will exempt small WWTW from being upgraded – that is those WWTW serving a population equivalent of fewer than 2,000. These smaller WWTW are typical in rural areas (serving villages), so it is possible that many small housing schemes will still be at a disadvantage. The government will need to consider a targeted package of measures to assist SME housebuilders.

**Home Builders Federation
Land Promoters and Developers Federation
March 2023**

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