

SOMERSET COUNCIL

PHOSPHATES IN THE SOMERSET LEVELS AND MOORS SPA AND RAMSAR SITE

NOTE OF ADVICE

Introduction

1. I have been asked to provide a note which summarises the advice which I gave in conference on 26 January 2024, concerning the extent to which it is legally possible for Somerset Council (“Somerset”) to treat past improvements to waste water treatment works (“WWTWs”) by Wessex Water as mitigation for future housing development within the water catchment area of the Somerset Levels and Moors SPA and Ramsar Site (“the SLM Site”).
2. In particular, my instructions for that conference included details of the approach taken by Cornwall Council (“Cornwall”) to an application for permission for residential development on land at Castle Street, Bodmin, which lies within the catchment area of the River Camel Special Area of Conservation. Despite the fact that the site had been allocated for development in the Local Plan, Natural England (“NE”) had objected to the grant of permission on the grounds that the interest features of the SAC were unfavourable or at risk, and that all new housing within the catchment area was likely to add phosphate to the SAC via the wastewater treatment effluent, thus contributing to the unfavourable condition and further preventing the SAC from achieving its conservation objectives. Consequently, NE had advised that the scope for permitting further development was “necessarily limited unless

mitigation measures designed to avoid an adverse impact” formed part of the proposal.

3. That objection was dismissed by Cornwall. The Habitats Regulations Assessment adopted in relation to the application reasoned that upgrades which had already been made to the WWTWs pursuant to a 2014 Site Improvement Plan had been intended to address the proposed housing growth in the Local Plan. Noting that, when these measures had first been proposed, NE had accepted that they would constitute mitigation, the HRA disagreed with NE’s revised view (following the *Dutch Nitrogen* case) that these works should now be regarded as conservation measures. Instead, the HRA concluded that:

“it is reasonable for the Council to continue treating the WWTW upgrades as mitigation measures to accommodate housing growth, as Natural England did, in connection with the Local Plan and Site Allocations DPD.”

Since the efficacy of the upgrade works in stripping phosphate from the effluent was not in doubt, the HRA concluded that, with this mitigation in place, there would be no likely significant effects on the SAC.

4. In conference, I was asked to advise on the extent to which Somerset Council could adopt similar reasoning in relation to proposed housing development within its own area. In particular, my attention was drawn to the fact that, on the basis of information provided by Wessex Water, it was clear that past improvements to WWTWs in the catchment area had gone beyond what was required to meet Wessex Water’s obligations under the “fair share” arrangements which were in place at the time, and specifically included investment to secure additional phosphorous removal which was intended to address the impact of new development within the Local Plan areas which fed in to the SLM Site.

Summary of Advice

5. The advice which I gave on this issue can be divided into two parts:
 - a. Whether the approach adopted by Cornwall was legally permissible;

- b. If the answer to (a) was “yes”, whether the factual situation in Somerset was sufficiently analogous to allow the same reasoning to be deployed.

I address these in turn, below.

A. *Was the Cornwall reasoning legally permissible?*

6. In conference, I noted that this was a matter on which I had previously provided advice to one of Somerset Council’s predecessors. In particular, in January 2023 I had advised Somerset West and Taunton Council that:
 - a. In circumstances where the status of a protected site was “unfavourable”, it was obvious that any new development which undermined existing measures which had been put in place in order to return the site to “favourable” status was likely to have an adverse effect on the integrity of the site, even though (when taken together with those other efforts) it did not actively make the status even more unfavourable than it currently was. In particular, if new development was allowed to take the benefit of removals which were intended to improve the status of the site, the overall effect may be that the situation did not get any worse, but the ability to restore the site to favourable condition would necessarily be compromised. Simply retaining the status at an unfavourable level, when it would otherwise be improving, was an adverse effect.
 - b. In that context, it would clearly be inappropriate to rely on phosphates which have been removed by Wessex Water under AMP6 or AMP7 pursuant to the “fair share” principle as mitigation for the impact of new residential

development. If the purpose of those removals had been to improve the existing, unfavourable situation, that improvement would not occur if the phosphates which had been removed were immediately replaced by new housing in the catchment area, which would amount to an adverse effect.

- c. However, if new development was able to mitigate that impact through the removal of phosphates which had not been part of a wider programme designed to improve the status of a protected site, the competent authority was entitled to take that mitigation into account when deciding whether the development was “phosphate neutral”.
 - d. In this regard, the *Dutch Nitrogen* case generally required mitigation to be in place before the development which it was intended to mitigate goes ahead. It would therefore be perverse to conclude that something could not be mitigation, merely because it had already taken place.
 - e. Although there had to be some causal connection between a proposed development and a programme of phosphate removal before the former could claim the latter as “mitigation”, there was nothing in either European or domestic law which required either (i) that the mitigation was authorised under the same development consent as the development itself, or (ii) that the mitigation was funded or put in place by the same developer. In principle, and as long as the competent authority was satisfied that it had been (or would be) provided and was (or would be) effective, that authority was entitled to take into account mitigation which was provided by a third party.
 - f. Whether measures were part of a suite of measures designed to improve the conservation status of a protected site, or were sufficiently connected to proposed development to qualify as mitigation was a question of fact for the competent authority.
7. In conference, I noted that this advice was effectively the approach which had been taken by Cornwall. Provided Somerset was satisfied that improvements had been undertaken in order to accommodate future growth, rather than to restore the status of

the SLM Site, it was entitled to treat them as mitigation. As the Cornwall HRA had observed:

“the issue is not ... about the efficacy of phosphate stripping secured through the WWTW upgrades, but the purpose for which those upgrades were authorised.”

8. In short, I concluded that the approach taken by Cornwall was legally correct. The real issue was whether the factual situation in Somerset was sufficiently similar to allow the same reasoning to be applied.

B. Does the factual situation in Somerset support the use of the Cornwall reasoning to allow the grant of permission for further residential development?

9. On this issue, my advice was that:
 - a. There was clear evidence to support the conclusion that the purpose for which Wessex Water had upgraded its WWTWs was not limited to improving the existing unfavourable status of the SLM Site pursuant to “fair share” principles, and that there had been significant additional investment which was specifically intended to mitigate the impacts of future development in the area. In principle, therefore, the situation was analogous to that in Cornwall. However, Somerset Council could only take advantage of this to the extent that any additional growth within the catchment area remained below the levels of growth for which Wessex Water had planned.
 - b. In this regard, on the basis of the information I was given in conference, there was an important distinction between the situation in Somerset and that in Cornwall. In particular, I was advised that, in the period since Wessex Water had made the improvements, Somerset’s predecessor authorities had already granted permission for at least as many new houses as Wessex Water had anticipated, and that headroom was frequently utilised by transporting in effluent from the wider catchment area. Thus Somerset was unable to rely on these measures providing the necessary certainty that additional nutrient

loading on the Ramsar sites will not occur. To the extent that Wessex Water had made improvements which could legally be regarded as “mitigation”, the benefits of that mitigation could not be relied upon beyond reasonable scientific doubt.

- c. This conclusion was unaffected by the advice from Wessex Water that, as a result of the improvements it had made, it still had “many years of headroom in the flow part of [its] permit and outperforms the concentration part of the permit”. Meeting a limit on the amount of phosphate which is found in every litre of water discharged does not alter the fact that additional housing will increase the amount of water discharged, and therefore the amount of phosphate in local rivers. Moreover, the question was not the efficacy of the phosphate stripping, but the purpose for which those improvements were made. Without clear evidence that any “headroom” which existed had been created specifically to accommodate future growth, there was no basis on which the Somerset could safely conclude that this was “mitigation”.
- d. This conclusion was reinforced by the basic architecture of the Habitats Regulations, under which Somerset, as the competent authority, required a high degree of confidence that there would be no adverse effect on the integrity of the SLM Site. If there was any doubt as to whether additional mitigation was required, the precautionary principle dictated that permission should be refused unless it was clear that such mitigation would be provided.

Conclusions and Supplementary Matters

- 10. In conclusion, my advice was (and is) that, although the reasoning adopted by Cornwall is legally correct, on the basis of the factual information available to me I do not consider it is an approach which could safely be adopted by Somerset.

11. If there are any questions arising from the above, those instructing should not hesitate to contact me.

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