

## Decision Report - Executive Decision

Forward Plan Reference: FP/24/05/12

Decision Date - 5 June 2024

Key Decision - Yes



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### Recommendations from Scrutiny Committee - Climate and Place meeting on 26 April 2024 regarding water quality in Somerset

Executive Member(s): Cllr Ros Wyke - Lead Member for Economic Development, Planning & Assets

Local Member(s) and Division: All

Lead Officer: Mickey Green - Executive Director - Climate and Place

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#### Summary

1. The Climate and Place Scrutiny Committee held a dedicated water quality meeting on 26<sup>th</sup> April 2024. The purpose of this session was to share with the committee the research that is currently underway, to understand the nutrient pollutions sources on the Somerset Levels and Moors and to consider the actions key organisations are taking to reduce nutrient pollution. The Committee was informed that the session was not to revisit Nutrient Neutrality advice.
2. The committee was advised that **Somerset Council does not have a statutory responsibility for water quality** but is working closely with partners. Longer term the recycling of the £9.6m Local Nutrient Mitigation Funding, the Council has been awarded, is to be made available to assist with the restoration of the Somerset Levels and Moors Special Protection Area.
3. The committee concluded the session with a number of recommendations for the Executive to consider and these are explained in further detail below and accompanied by officer advice.

## Recommendations

4. The Executive considers and responds to the recommendations from the Scrutiny Committee Climate and Place meeting on 26<sup>th</sup> April 2024 with the benefit of officer advice set out in this report.

## Reasons for recommendations

5. The Scrutiny Committee made a number of recommendations for the Executive to consider and these are outlined below. Each recommendation is accompanied by officer advice explaining the Council's current position on the recommendations. The officer recommendation against each scrutiny committee recommendation is summarised in the following table, with further detail set out in paragraphs 6-36.

<b>Scrutiny recommendation</b>	<b>Officer recommendation to Executive</b>
Immediately remove the 20% buffer included in the Somerset Phosphate Calculator.	On the basis that this is a national position, the legal advice received and the lack of robust evidence to underpin a different approach, the officer recommendation is that Somerset Council should not remove the 20% buffer.
Conduct a speedy review of the huge inconsistency between what Dr Clegg said, echoed by Wessex Water and what the calculator says with how much of the river borne phosphorus enters the Somerset Levels and Moors, as that calculator is what informs developments as to how much phosphate we are requiring them to offset.	On the basis that the body with statutory responsibility in this area (Natural England) has already reviewed the additional research provided and deemed that it does not provide sufficient certainty the officer recommendation is that a further review is unnecessary, and that even if such a review were to be undertaken Somerset Council is not the appropriate body to undertake it.
Conduct an urgent review of the entire nutrient neutrality policy in light of the legal advice we have received, which makes it clear that headroom existing and that it could	The officer recommendation to Executive is that a review of nutrient neutrality policy in light of legal advice received should not be undertaken as this reflects a

<p>be used in the mitigation of new housing development.</p>	<p>misinterpretation of both the legal advice, the evidence that underpins it and a lack of understanding of the Council's role when it relates to nutrient neutrality.</p>
<p>The Climate and Place to set up a Task and Finish Group which will report back to the Committee on a tight timescale to set out the options available to the Council once it is in possession of the correct data.</p>	<p>Given the lack of clarity on the purpose of the task and finish group, the opportunity cost of committing resources to this, the duplication this may create it is not recommended that officer resources be committed to any such task and finish group at this time. Officers recommend alternatively that we should seek to work with Scrutiny in due course to establish a task and finish group to focus on the restoration of the Somerset Levels and Moors Ramsar site, and that an all member briefing is scheduled ahead of the Interim Phosphate Mitigation Delivery Strategy being provided to the Strategic Planning Committee in September 2024.</p>
<p>The Council looks to work on a Land Use Strategy as part of the Local Plan</p>	<p>A Land Use Strategy for Somerset could be a useful tool in ensuring that our vision for the future of Somerset is realised and that competing interests are balanced, noting that the Council does not have statutory powers to control many of these land uses. Timing and resource considerations are important and therefore the officer recommendation is that consideration of a land use framework or strategy for Somerset should be reconsidered if and when government guidance is published, noting that this will still be subject to resource constraints.</p>

6. **Scrutiny Committee Recommendation 1:** Immediately remove the 20% buffer included in the Somerset Phosphate Calculator.
  
7. The **20% buffer included in the Somerset Phosphate Calculator is included in all the national nutrient load calculators** utilised by each of the Local Planning Authorities affected by nutrient neutrality requirements. This buffer is **based on Natural England advice as the Statutory Nature Conservation Body**, responsible for the Special Protection Areas (SPA) and Special Areas of Conservation (SAC). The buffer is built into the national calculators to ensure the mitigation measures, to achieve nutrient neutrality, satisfy the precautionary approach legally required by the Habitat Regulations. This is explained in detail in the legal advice provided to the Local Government Association and attached in Appendix A ie 'there will need to be reasonable scientific certainty that the measures will make the project nutrient neutral over the lifetime of the development' (Appendix A para 37). The legal advice is clear that:

'Local Planning Authorities will need to give [Natural England's advice] appropriate weight [as the statutory consultee] and only depart where there are cogent reasons for doing so, taking into account the relevant regulations and case law. Consents should only be issued where there is objective evidence to show there will be no impact on the integrity of a Habitats Site, to the standard of reasonable scientific certainty.' (Appendix A para 67)

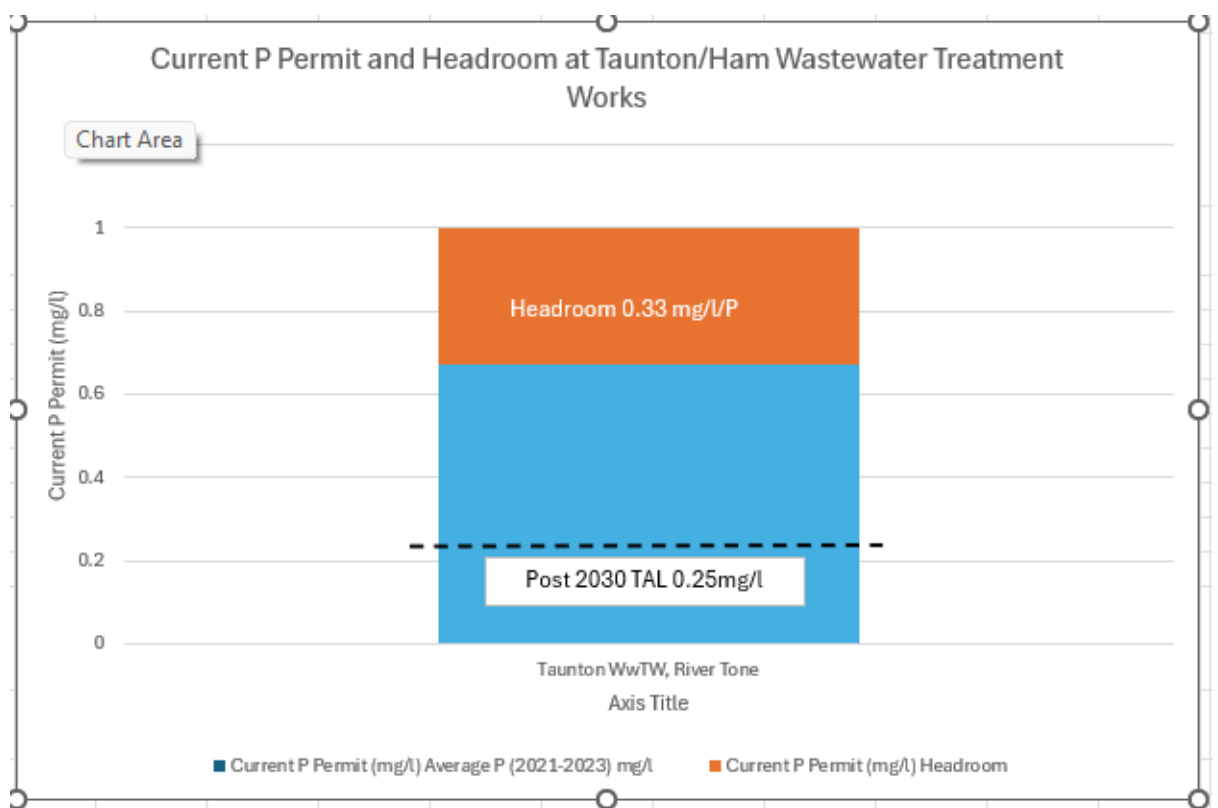
8. During the Scrutiny session Dr Andrew Clegg reported his research findings from a citizen science project he has undertaken with spot water sampling at specific locations of the River Parrett. The presentation and Scrutiny recording can be accessed here :  
<https://democracy.somerset.gov.uk/ieListDocuments.aspx?CIId=202&MIId=7253&Ver=4>
  
9. Natural England has reviewed Dr Clegg's work and highlighted a number of areas where the research cannot be relied upon by the Somerset Planning Authority to justify a reduction in phosphate mitigation for impacted developments. Natural England's comments on Dr Clegg's research are available in Appendix C.
  
10. Dr Clegg acknowledges that his research was not intended to provide a comprehensive understanding of the nutrient pollution issues impacting the Somerset Levels and Moors and that further research is required.

11. The Council would need robust evidence to underpin a different approach. Given the limited nature of Dr Clegg's research (which only covers a section of the River Parrett) and Natural England's advice (Appendix C), this research does not provide the necessary scientific certainty. On the basis that this is a national position, the legal advice received and based on the lack of robust evidence to underpin a different approach, the officer recommendation is that Somerset Council should not remove the 20% buffer. The consequences of removing the 20% buffer increases the risk of legal challenge and financial costs to the Council.
12. **Scrutiny Committee Recommendation 2:** Conduct a speedy review of the huge inconsistency between what Dr Clegg said, echoed by Wessex Water and what the calculator says with how much of the river borne phosphorus enters the Somerset Levels and Moors, as that calculator is what informs developments as to how much phosphate we are requiring them to offset.
13. On the basis of Natural England's advice and review of Dr Clegg's research (Appendix C) the Council is unable to rely on Dr Clegg's research to support taking a different approach. This is underpinned by the legal advice (Appendix A and B) and explained above in paragraphs 7-11. Furthermore the Rivers Trust have published a report ([Mind the evidence gap \(arcgis.com\)](http://arcgis.com)) which highlights 'evidence from published studies have shown that spot sampling can underestimate phosphorus pollutions loads by 60% and that up to 80% of phosphorus pollution load can enter rivers in just 2 or 3 rainfall runoff events.'
14. Dr Clegg acknowledges that his research was not intended to provide a comprehensive understanding of the nutrient pollution issues impacting the Somerset Levels and Moors and that further research is required. This Scrutiny recommendation will require extensive research if the Council was to consider changing the Somerset Calculator. Local Government does not have statutory responsibility for water quality. Councils impacted by nutrient neutrality do not have the expertise internally nor the financial resources to undertake scientific research projects of this scale and complexity.
15. Somerset Council has been awarded £9.6m to increase the supply of phosphate mitigation measures to unlock impacted developments. This will help deliver the scale of mitigation required, it reduces the risk of legal challenge and has the potential to provide additional environmental benefits for Somerset. At the current time it is critical that the limited staff resource is

prioritised on delivering phosphate mitigation schemes to help unlock impacted developments, rather than seeking to amend the phosphate calculator which is dependent on robust evidence that currently does not exist.

16. On the basis that the body with statutory responsibility in this area (Natural England) have already reviewed the additional research provided and deemed that it does not provide sufficient certainty, the officer recommendation is that a further review is unnecessary, and that even if such a review were to be undertaken Somerset Council is not the appropriate body to undertake it. The consequences of undertaking such a review would be to delay activity on implementation of measures to increase the supply of phosphate mitigation measures.
17. **Scrutiny Committee Recommendation 3:** Conduct an urgent review of the entire nutrient neutrality policy in light of the legal advice we have received, which makes it clear that headroom existing and that it could be used in the mitigation of new housing development.
18. The Officer view of the Council's legal advice is not reflected in the Scrutiny recommendation, which reflects a view of the legal position that officers do not endorse, as set out in the legal advice appended to this report (Appendix A and B). Furthermore Nutrient Neutrality is not a Somerset Council policy but rather advice from Natural England as the statutory body responsible for nature conservation. This advice is supported by case law. There are approximately 70 Local Planning Authorities impacted by Natural England's Nutrient Neutrality advice and they are all (including Cornwall Council) following the legal requirements and nutrient neutrality advice from Natural England.
19. The case law is clear that for mitigation to be lawful, it must be preventative i.e. it must stop any net gain in nutrients entering the river catchments (para 64 PAS Legal Advice Appendix A). Para 9(c) of the Council's legal advice (Appendix B) states 'without clear evidence that any "headroom" which existed had been created specifically to accommodate future growth, there was no basis on which Somerset could safely conclude that this was "mitigation". Wessex Water have clearly stated that the headroom is in the flow part and concentration part of its permit. The legal advice states that '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.'

20. For example the bar chart below demonstrates the current permit limit operating at the Taunton/Ham wastewater treatment works (WwTW). The permit limit is currently 1mg/l/P. This means that for every litre of treated effluent discharged to the river it should not exceed 1mg of phosphorus. The bar chart outlines what the current average discharge level is operating at the Taunton/Ham wastewater treatment works (ie 0.67mg/l/P) and this means that there is headroom of approximately 0.33mg/l/P. Whilst headroom exists this is to ensure the WwTW can continue to operate within the regulated permit limit (ie 1mg/l/P) and not to achieve nutrient neutrality ie additional housing will increase the amount of water discharged and therefore the amount of phosphates.



21. Furthermore this permit limit does not take account of the untreated sewage that can be discharged from combined sewer overflows (CSOs) before reaching the WwTWs. The Rivers Trust Sewage Map shows where the sewerage network discharges overflows of untreated sewage and storm water into rivers in England and Wales in 2023. The data in the Sewage Map is collected from Event Duration Monitoring (EDM) data collected using water level sensors. The EDM data is released by the Environment Agency. Source: <https://theriverstrust.org/sewage-map>

22. Case law requirements for practical certainty mean that Local Planning Authorities will not be able to rely on nutrient reduction plans and strategies from water industry as they do not provide the requisite certainty to eliminate reasonable scientific doubt (Appendix A Para 65 PAS Legal Advice).
23. Whilst the Council fully accepts that Wessex Water Asset Management Plan programmes have removed several tonnes of phosphorus in several river catchments impacted by Nutrient Neutrality advice (eg Somerset Levels and Moors and River Avon), these Asset Management Plan programmes do not ensure additional housing growth will be mitigated. The case law is clear that for mitigation to be lawful, it must be preventative – so it must stop any net gain in nutrients entering the water.
24. The officer recommendation to Executive is that a review of nutrient neutrality policy in light of legal advice received, should not be undertaken as this reflects a misinterpretation of the legal advice and the evidence that underpins it and a lack of understanding of the Council's role when it relates to nutrient neutrality and the evidence that underpins this national advice.
25. **Scrutiny Committee Recommendation 4:** The Climate and Place to set up a Task and Finish Group which will report back to the Committee on a tight timescale to set out the options available to the Council once it is in possession of the correct data.
26. At the current time it is unclear what Recommendation 4 is seeking to achieve by the establishment of a Task and Finish Group and what the tasks of this group would include. Somerset Council does not have a statutory responsibility for water quality or the restoration of the Somerset Levels and Moors. At this time our limited resources are focused on the statutory roles our teams must fulfil and on delivering increased phosphate mitigation to unlock impacted developments, utilising the £9.6m time-limited Local Nutrient Mitigation grant funding.
27. The longer-term requirements for the grant funding is to recover and recycle the funding until there is sufficient phosphate mitigation schemes in place to unlock all the affected developments in the catchment area. When this has been achieved the recycled funding can be repurposed to enhance the condition of the Somerset Levels and Moors. The Council will then be in a position to support the establishment of a Task and Finish Group when the funding is available for the restoration of the Somerset Levels and Moors Ramsar sites.



28. As a Council we are active in partnerships such as The Somerset Catchment Partnership which comprises a range of organisations, authorities and groups dedicated to working together to improve the water environment and provide wider benefits for people and nature at a catchment scale. The water environment includes all rivers, streams and wetlands that drain within the catchment landscape.

29. Natural England are working to establish a Technical Working Group for the Somerset Levels and Moors that will sit as a subgroup of the Somerset Catchment Partnership.

30. A task and finish group will likely duplicate current efforts from within the council to engage such groups who are already working to better the SLMs.

31. Given the lack of clarity on the purpose of the task and finish group, the opportunity cost of committing resources to this, the duplication this may create it is not recommended that officer resources be committed to any such task and finish group at this time. Officers recommend alternatively that we should seek to work with Scrutiny in due course to establish a task and finish group to focus on the restoration of the Somerset Levels and Moors Ramsar site, and that an all member briefing is scheduled ahead of the Interim Phosphate Mitigation Delivery Strategy being provided to the Strategic Planning Committee in September 2024.

**32. Scrutiny Recommendation 5:** The Council looks to work on a Land Use Strategy as part of the Local Plan

33. A Land Use Strategy for Somerset could cover land uses including land for carbon sequestration, food production and food security, tree planting and forestry, nature recovery, energy and infrastructure needs, minerals and waste requirements, future development needs and public open space. In principle and subject to sufficient resources, it could be a useful tool in ensuring that our vision for the future of Somerset is realised and that competing interests are balanced, noting that the Council does not have statutory powers to control many of these land uses.

34. Such a land use strategy could take many forms and is likely to be a significant piece of partnership work. The UK Government previously committed to publishing its plans for a Land Use Framework for England by the end of 2023. As yet this has not been published and the status remains

unclear, although media reports indicate that the Framework will provide guidance.

35. At the current time the Council's limited staff resource is focused on delivering statutory services. The Council, in its role as statutory planning authority, is responsible for preparing a new Local Plan for Somerset. The new Local Plan will focus on setting out a vision, planning policies and proposals to meet the future development needs for Somerset in line with the Council's strategic policy framework.
36. The Officer recommendation is that consideration of a land use framework or strategy for Somerset should be reconsidered if and when government guidance is published, noting that this will still be subject to resource constraints.

### **Next Steps**

37. The Council has been awarded £9.6m from the Government's Local Nutrient Mitigation Fund. The Strategic Planning Committee approved the Council's Interim Phosphate Mitigation Delivery Strategy on 21<sup>st</sup> March. This outlines the key projects the Council is focusing on to deliver the required phosphate mitigation.
38. To date the Council has undertaken extensive work to provide guidance and assistance to impacted developments. This work has also facilitated the Third Party Environmental Credit market in Somerset which will deliver additional environmental benefits. To date this work has unlocked over 600 dwellings and other large scale developments have delivered their own nature-based solutions to deliver phosphate mitigation. There are now credits available to unlock approximately 4,500 dwellings in the Somerset Levels and Moors catchment.
39. The Council launched a call for sites on Monday 20<sup>th</sup> May to seek additional environmental schemes both for nutrient and biodiversity net gain credits. Where possible we will seek to deliver additional public benefits such as natural flood management and public access. Further information on the call for sites is available here <https://www.somerset.gov.uk/planning-buildings-and-land/environmental-call-for-sites/>
40. The Strategic Planning Committee is responsible for overseeing the delivery of the Interim Phosphate Mitigation Delivery Strategy. An update report will be

provided to the Strategic Planning Committee in September 2024 and an all-member briefing will be scheduled.

### **Other options considered**

41. Other options considered have been set out in the main body of the report as part of setting out the rationale for the officer recommendation on each scrutiny recommendation. Overall the consequences of disregarding the legal advice received and the advice from the statutory body increases the risk of legal challenge significantly.

### **Links to Council Plan and Medium-Term Financial Plan**

42. The Council Plan 2023 to 2027 sets out the Key Priorities of the Council and is available on the Council website at <https://www.somerset.gov.uk/council-and-democracy/somerset-council-council-plan-2023-2027/>

43. This report has links to various corporate priorities, including:

- Greener, More Sustainable Somerset
- A Flourishing and Resilient Somerset

44. To implement the scrutiny recommendations would require additional funding which would need to be sought through the MTFP process and/or expose the Council to significant financial risk through the high risk of challenge to any planning decisions taken on a position which would be contrary to our legal advice (and the position adopted nationally).

### **Financial and Risk Implications**

45. As advised in paragraph 15 above, Somerset Council has been awarded £9.6m to increase the supply of phosphate mitigation measures to unlock impacted developments. The acceptance of the Local Nutrient Mitigation Fund grant has financial implications for the Council. As a commitment, the fund has been added to the capital programme.

46. The Interim Delivery Strategy associated with this funding was considered and agreed by the Strategic Planning Committee in March 2024 <https://democracy.somerset.gov.uk/ieListDocuments.aspx?CIId=204&MIId=2530&Ver=4> The risks have been recorded on the Council Corporate risk register / risk management software (JCAD). As explained in paragraph 26 above, there is an increased risk of diverting limited staff resource away from

delivering phosphate mitigation schemes to help unlock impacted developments. This in turn increases the risk of non-delivery and the Council having to return unspent Local Nutrient Mitigation Fund grant money to central government.

## **Legal Implications**

47. The legal and policy background to the 'phosphates issue' have been set out in the body of previous reports, briefing notes, and presentations to Members of this Council and former Councils of Somerset. The legal advice and evidence does not support an alternative approach. Furthermore, if Councils do not follow legal advice, then there is a risk of legal challenge.

48. With regard to Scrutiny Committee Recommendation 1: within this report paragraphs 6-11 above draw attention to the legal advice provided to the Local Government Association and to Somerset Council (enclosed as Appendix A and B respectively). The Local Planning Authorities will need to give [Natural England's advice] appropriate weight [as the statutory consultee] and only depart where there are cogent reasons for doing so, taking into account the relevant regulations and case law. With regard to Scrutiny Committee Recommendation 3 (see paragraphs 17-24 above), the case law is also clear. For mitigation to be lawful, it must be preventative i.e. it must stop any net gain in nutrients entering the river catchments (para 64 PAS Legal Advice Appendix A). Para 9(c) of the Council's legal advice (Appendix B). . Furthermore, across England, there are approximately 70 Local Planning Authorities impacted by Natural England's Nutrient Neutrality advice and they are all (including Cornwall Council) following the legal requirements and nutrient neutrality advice from Natural England.

## **HR Implications**

49. None related directly to this report.

## **Other Implications:**

## **Equalities Implications**

50. The Public Sector Equality Duty has the following aims which the authority must have due regard to

- a. Eliminate discrimination, harassment, victimisation.

- b. Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.
- c. Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

None of the above relate directly to this report.

### **Community Safety Implications**

51. This can include:

- Possible impact upon local crime rates
- Likely impact upon reoffending rates
- Ability for services to help prevent crime and disorder
- Overall impact upon quality of life and wellbeing
- Increase or reduce fear of crime
- Impact on social isolation or exclusion

None of the above relate directly to this report.

52. This report does not have an impact upon any existing projects/services that other community safety partners may have.

### **Climate Change and Sustainability Implications**

53. Somerset Council have declared both a Climate and Ecological Emergency.

Through that, the Council has committed to working towards making the whole county, including our own estate and operations, 'Carbon Neutral' by 2030 and to take positive action to reverse the damage on our natural habitats by man-made activity. We have also pledged to ensure that Somerset is resilient to, and prepared for, the effects of Climate Change.

54. The climate and sustainability implications of development proposals is a material planning consideration which will be assessed for each planning application.

55. Where members take decisions on planning applications they must do so in accordance with the development plan unless material considerations indicate otherwise. The Local plans and other documents that form part of the Local Development Framework can be accessed on our website here:

<https://www.somerset.gov.uk/planning-buildings-and-land/adopted-local-plans/>

56. In light of NE letter of August 2020, concerning the unacceptable levels of phosphates present in the SL&M Ramsar site, the legal requirement for nutrient neutral development does not make the situation any worse, but neither does it help to improve the situation.

### **Health and Safety Implications**

57. None related to this report.

### **Health and Wellbeing Implications**

58. None related to this report.

### **Social Value**

59. None related to this report.

### **Scrutiny comments / recommendations:**

60. This report sets out the recommendations made by the Climate and Place Scrutiny Committee at its meeting on 26 April for the Executive to consider. It is intended that the decision made by the Executive on 5 June are reported back to the Climate and Place Scrutiny Committee verbally on 6 June - an approach agreed with the Chair of Scrutiny.

### **Background**

61. On 17 August 2020, all the planning authorities in Somerset Council (at that time the four District Councils and the County Council), as well as Dorset Council received an advice note from Natural England (NE) concerning the unacceptable levels of phosphates in the Somerset Levels and Moors Ramsar site (SL&M). As a result, since then a large proportion of new development (particularly housing development) in the impacted area needs to demonstrate nutrient neutrality.

62. The Council's Strategic Planning Committee receives regular updates on work undertaken across the Authority area, to achieve nutrient neutral development whilst also supporting housing growth. These updates also contain information on recent Government announcements, changes to legislation in relation to nutrient neutrality and changes to the Councils phosphate web pages.

63. In March 2024, the Council's Strategic Planning Committee considers matters relating to the Nutrient Mitigation Fund. The Government's announcement in December 2023 confirmed that the Council has been awarded up to £9.6m for capital projects via the Local Nutrient Mitigation Fund. The conditions of the grant are that it must be replenished to deliver more phosphate mitigation projects in the catchment and continue to help support, where possible, the delivery of development in the affected river catchments (i.e. The Tone, Parrett, and Brue).

64. This funding will help pump-prime nutrient neutrality interventions within the river catchment area of the SL&M Ramsar site and ultimately secure the release of homes in Somerset and Dorset (within the environs of Sherborne), which are held up by the phosphates issue.

65. The Climate and Place Scrutiny Committee held a dedicated water quality meeting on 26th April 2024. The purpose of this session was to share with the committee the research that is currently underway to understand the nutrient pollution sources on the Somerset Levels and Moors and to outline the actions key organisations are taking to reduce nutrient pollution. **The Committee was informed that the session was not to revisit Nutrient Neutrality advice.**

66. Somerset Council does not have a statutory responsibility for water quality but is working closely with partners. Scrutiny Committee on the 26 April 2024 concluded the session with a number of recommendations for the Executive to consider and these are explained in detail with accompanying officer advice.

## **Background Papers**

67. Please see appendices attached.

## **Appendices**

- **Appendix A:** Legal Advice – PAS
- **Appendix B:** Legal Advice – Paul Brown KC
- **Appendix C:** Natural England's comments on Dr Clegg's research
- **Appendix D:** Member briefing note on nutrient neutrality
- **Appendix E:** List of Member Committees and Briefing Sessions covering nutrient neutrality

## Assurance checklist

	Officer Name	Date Completed
Legal & Governance Implications	David Clark	28/5/24
Communications	Peter Elliott	28/5/24
Finance & Procurement	Nicola Hix	24/5/24
Workforce	Alyn Jones	24/5/24
Asset Management	Oliver Woodhams	
Executive Director / Senior Manager	Mickey Green	
Strategy & Performance	Alyn Jones	24/5/24
Executive Lead Member	Cllr Ros Wyke	28/5/24
<b>Consulted:</b>	Councillor Name	
Local Division Members		
Opposition Spokesperson	Cllr Mark Healey	Sent 28/5/24
Scrutiny Chair	Cllr Martin Dimmery	Sent 28/5/24