

Planning to support the release of phosphate credits within the Somerset Levels and Moors Ramsar catchment to unlock stalled housing developments

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Purpose of the Report

1. The purpose of the report is to provide an update on work that has been undertaken with En Trade (a commercial trading arm of Wessex Water) to enable a credit market to be offered to developers within the River Parrett catchment within the Somerset Levels and Moors (SLAM) Ramsar catchment and to set out a recommendation that will allow the first “Market Round” for phosphate credits to be opened to third party developers.
2. For clarity, whilst South Somerset District Council (the Council) is impacted by two nutrient neutrality catchments, the SLAM as well as the River Axe, this report only relates to proposals impacting the SLAM catchment. Work in relation to the River Axe has not advanced to the same extent at this time.

Forward Plan

3. This report has appeared on the District Executive Forward Plan however, it has been delayed by reason of the need to review and agree a suite of legal agreements to provide the contractual commitments between the various parties involved. The various legal structures and draft agreements have been the subject of detailed engagement with the Council and Natural England (NE) who are both respectively happy that the approach proposed can release reliable credits for sale to the market.

Public Interest

4. The Council is responsible for determining development applications under the provisions of The Town & Country Planning Act 1990 (As amended).
5. As the Local Planning Authority, the Council is responsible for preparing and delivering a Local Plan that meets the assessed housing needs of the district. In this case the housing requirement was originally set out within the South Somerset Local Plan. (2006 – 2028) (The Development Plan).
6. Over the past 18 months the Council has received 2 appeal decisions which deal with the impact of phosphates upon housing supply.

7. As a matter of public interest, the ability to be able to release residential consents with a process that allows for landowners to sell land use change Phosphate (P) credits allows the planning authority to demonstrate a pathway back towards the delivery of a 5-year housing supply position thereby improving its ability to manage its planning decision making processes in the interests of the wider South Somerset community.

Recommendations

8. The District Executive agrees:
 - a. the structure of the En Trade Somerset Catchment Model comprises an appropriate mechanism to facilitate:
 - the co-ordination of land use management projects that result in phosphate use reduction or phosphate removal,
 - the methodology for agreeing the level of P credits derived from each land use project,
 - the mechanisms for the marketing of credits, including the retention of any buffer, and;
 - the mechanisms and funding arrangements to ensure ongoing project monitoring and compliance over the “in perpetuity” term and the management arrangements for selling credits to developers.
 - b. To delegate to lead officers (Director of Service Delivery and Lead Specialist Built Environment) to write to En Trade to confirm:
 - (i) The Council’s agreement to the project described by this report and
 - (ii) That securing a solution to phosphate mitigation alone, where the consequences of any such credit acquisition will result in the applicant seeking to re-visit issues of viability, or otherwise seek to diverge away from the other obligations normally sought by way of S.106 based upon the policies set out within the Development Plan will require the Council to assess (or re-assess) whether, the application proposal remains one that delivers a sustainable form of development, when considered against the provisions of the Development Plan as a whole.

Executive Summary

Following advice received from Natural England in August 2020, new development likely to increase phosphate levels within much of South Somerset are required to demonstrate “nutrient neutrality”.

To a large extent nutrient neutrality will be achieved through land use changes that either reduce the levels of phosphates applied to land, or remove phosphates already within the environment. Solutions are required to deliver nutrient neutral benefits “in perpetuity”. In practice this means for at least 80 years.



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South Somerset is not able to deliver the land use change requirements and are therefore dependent upon third party landowners promoting commercial solutions to generate phosphate credits that enable development proposals to progress.

It is important that where land use changes are brought forward, the costs to manage and monitor their effectiveness are secured as part of the projects initial costing and does not become a resource burden upon the Council.

This report recommends the Council enters into agreement with a third-party credit enabler to allow phosphate credits to be marketed with obligations upon the enabler and landowner to meet any ongoing costs for project management that may fall to the Council in the future.

Background

9. The Council is “the Competent Authority” for undertaking Habitat Regulations Assessments for new development that may give rise to “Likely Significant Effects” upon the SLAM Ramsar site (as well as the River Axe Special Area of Conservation) under the provisions of The Conservation of Habitats and Species Regulations 2017 (The Habitats Regulations).
10. As a result of a court judgment known as Dutch-N, the Council were advised by NE in August 2020 that it must not permit new residential development, infrastructure that supports agricultural intensification, anaerobic digesters, some tourism development, and development that provides overnight accommodation unless it ‘can be certain beyond a reasonable doubt’ that it would not give rise to additional phosphates within the hydrological catchment of the Somerset Levels and Moors Ramsar Site.
11. The Dutch-N case has informed the way in which Regulation 63 of the Habitats Regulation 2017 should apply to pollution related incidents. This has resulted greater scrutiny of proposed developments that are likely to increase nutrient loads to internationally important sites where a reason for unfavourable condition is an excess of a specific pollutant.
12. The impacts of the NE letter has been to reduce certainty over housing delivery, resulting in a supply of less than 5 years being evidenced, re-engaging the “tilted balance” in favour of sustainable development as set out in the National Planning Policy Framework. (The NPPF).
13. There are more than 360 planning applications relating to 5,000 dwellings that cannot be progressed to a decision including large scale outline applications where the relevant committee(s) have approved development in principle but S.106 Legal Agreements were outstanding as well as several Reserved Matters applications where the principle of development has previously been approved until it can be proven that the proposed developments will be ‘phosphate neutral’ in perpetuity.
14. Over the past 2 years, the Council has been able to make progress with a limited number of planning applications where applicants have been able to demonstrate nutrient neutrality on a project-by-project basis. These types of solution include:



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- Retro-fitting water efficiency measures to retained housing stock in a single ownership to release credits to allow the same operation to demonstrate nutrient neutrality over the existing and proposed stock. In practice this is limited to Housing Associations and larger Care Operators where water appliance fittings are managed by a single property management body.
 - Fallow land strategies where land within the control of the applicant is set aside from established agricultural practices to “unlock” development, usually of an early phase of development.
 - Replacing inefficient septic tanks or Package Treatment Plants (PTP’s) with more efficient models to release additional capacity to manage water release with a lesser phosphate output. This approach can be combined with woodland planting at the drainage field to enhance efficiency.
 - Small scale PTP solutions that fall below the Environment Agencies permit levels of 2 m³ water / day.
15. Additionally, within the SLAM catchment (but not the River Axe Special Area of Conservation catchment) development proposals brought forward using “Prior Approval” under the Town & Country Planning (General Permitted Development) Order 2105 (GPDO) are excluded from the types of development that are required to provide nutrient neutrality mitigation.
16. The above measures have released some development since receipt of the August 2020 NE letter; however, they are not delivering long term, strategic solutions. Retrofitting water efficiency measures is limited by the scale of existing stock and the owner’s commitment. Fallowing land is not an efficient use of agricultural land and does not represent a good long-term use of land whilst the smaller PTP solutions and use of Prior Approvals are respectively limited to more rural sites away from mains foul sewerage or limited by reason of site size and existing use criteria set out in the GPDO.

Interim Opportunities under Local Authority control

17. Following publication of the August 2020 letter, the Somerset Councils resolved to work jointly on developing approaches to deliver a phosphate mitigation strategy. This included commissioning the Royal Haskoning calculator a revised version of which currently informs all residential phosphate mitigation needs calculations within the catchment.
18. A further Solutions Report was published in March 2022 which set out the most likely land use management opportunities that could deliver efficient mitigation opportunities.
19. Whilst these documents were being prepared, officers reviewed the Councils property holdings to determine whether SSDC had access to land that may deliver nutrient neutrality mitigation. Generally, by reason of the Councils existing commitments to land use management measures including woodland planting and wetland development we were not able to transfer the phosphate benefits as the projects had been previously “badged” to a differing objective so were not primarily nutrient neutrality projects.



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20. Additionally, we do not have the opportunity to retrofit existing housing with water efficient measures or to upgrade inefficient treatment works, particularly prevalent in more rural areas to offer a Council solution.
21. Where authorities have been able to deliver land use change including wetland creation as well as taking large scale / intensive farming operations out of existing uses initial feedback indicates credits costing between £5,000 and £10,000 per dwelling where Councils are leading on the projects.
22. The work done to date on unlocking phosphates credits has confirmed our initial views that nature-based solutions can only be part of a package of measures to unlock all the impacted development. In partnership with the other Somerset authorities, we are continuing to raise the challenges delivering phosphate neutral development with Government officials in Department for Environment, Food and Rural Affairs (DEFRA) and Department for Levelling Up, Housing and Communities (DLUHC).

The South Somerset Solution

23. In the absence of any in house assets that would allow the Council to deliver its own credit market, the Council opted to work with En Trade to develop a catchment market based upon the River Parrett.
24. En Trade is a commercial business controlled by Wessex Water, initially established to deliver nitrate offsetting proposals for the Poole Catchment in Dorset.
25. Its role is to act as enabler bringing together landowners with an interest in developing nature recovery and nutrient neutrality land management projects which can be presented to businesses and developers seeking to acquire access to biodiversity enhancement, carbon credits, improved flood management or nutrient neutrality.
26. En Trade is currently running three projects, comprising:
 - The Bristol Avon Catchment Market in association with landowners and the Wildlife Trusts for Avon and Wiltshire,
 - The Solent Catchment Market Pilot, an online nutrient trading service engaging landowners in long term land use changes to reduce nitrogen levels and deliver nutrient neutrality within the River Test & Itchen catchments, and
 - The Somerset Catchment Market Pilot working with landowners, NE, and Planning Authorities to deliver nutrient neutrality and Biodiversity Net Gain opportunities for developers to acquire.
27. The Somerset Catchment Market Pilot is focused upon the River Parrett catchment. It is a requirement that nutrient neutrality mitigation proposals are delivered within the same catchment as the development they are seeking to mitigate. Land use management solutions delivered within the River Parrett catchment can only be offset against development within the same catchment. As such, the mitigation proposals initially being



South Somerset District Council

brought forward by En Trade will deliver mitigation opportunities that predominantly service applications with this Council's administrative area.

28. The Somerset Catchment Market Pilot is the result of ongoing engagement between the Council (from a development management, planning policy and legal perspective), Natural England as the relevant body to advise upon the suitability of mitigation proposals as well as agreeing their levels of nutrient credit, and En Trade as the project enabler. NE's support for the project is confirmed by their letter attached at Appendix A.

29. For the Council key principles are:

- Ensuring that Natural England accepts both the process adopted to bring forward groups of projects to generate credits and will advise upon the phosphate credits generated by each project and round, and
- Securing sufficient resources through the various agreements to ensure that the body charged with ongoing monitoring and compliance work has access to the resources necessary to undertake that work.

30. The structure to the Catchment Market contains four distinct steps, illustrated at Figure 1 below:

The Catchment Market

Market Process

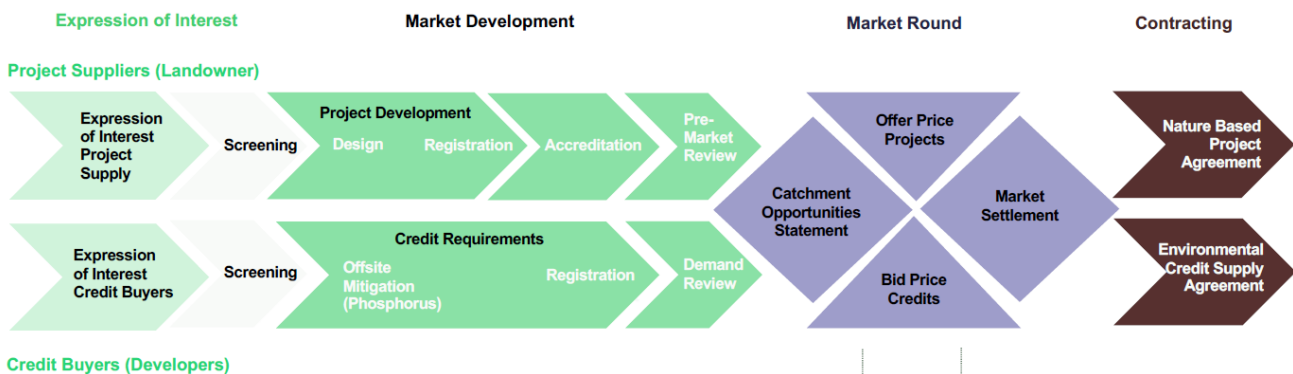


Figure 1: Catchment Market Design

31. The four steps are:

- I. Expressions of interest – seeking interest from landowners looking to promote their land for in perpetuity land use changes as well as developers seeking to acquire P credits.



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- II. Market Development- Working through the likely land use projects that are most appropriate to each parcel of land being promoted to deliver P credits, seeking NE agreement to the levels of P credit deriving from each project within that market round. And confirming the level of credits being sought by developers accurately reflect their application's needs.
- III. Market Round comprising the auction of the various projects and the process to match up the landowners' expectations with the developers offer.
- IV. Contracting – the process of concluding the relevant agreements set out below.

32. The key elements of the Market are:

- To ensure that each land use mitigation project is designed using a specification for works that has been agreed beforehand by NE.
- To ensure that NE and the Council can review the detail of each land use project that is being presented for an upcoming Market and as a part of this process NE and the Council are able to agree both individual and overall P credits to include any precautionary buffer. This step would comprise the Habitat Regulation Assessment stage of the plan or project. (In this case the plan or project would comprise the release to market of a series of individual land use change projects)
- Confirmation that each applicant's bid for P credits is based upon a calculation agreed by the Council.
- To ensure the Council can access a clear and up to date record of the credits that have been made available in each Market, and the identity of the applicant / application reference for successful bidders to ensure the credit is only acquired once.
- That the enabling body (En Trade) retain a register of projects that have been implemented but not directly sold (Comprising the credit buffer if there is project failure in the future.
- To ensure the project costs include a fund to cover the cost of future monitoring and compliance work that reflects the differing frequency and complexity of compliance work required to ensure the projects continue to deliver "in perpetuity" and that this fund is available to the Council if monitoring, and compliance responsibility is transferred from En Trade to the Council.
- To confirm the triggers for each credit acquisition relative to any development's start on site and first occupation.

The Agreements

33. The range of agreements required to regulate the Catchment Market are set out at Figure 2 below and explained in more detail at paragraphs 35-39.

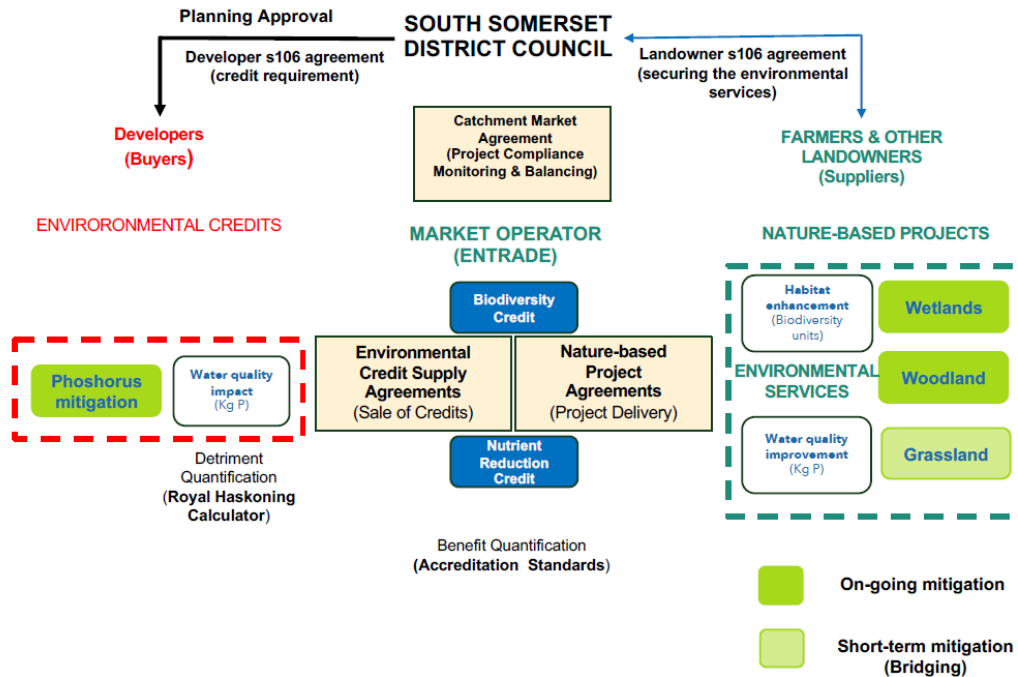


Figure 2: Catchment Market Agreements.

34. The Catchment Market will be controlled by two sets of agreements. Firstly, the agreements between the Council and respectively the mitigation project provider, the applicant looking to acquire credits and En Trade as project enabler, and secondly the contracts between En Trade and respectively the mitigation project provider and the applicant looking to acquire credits.

The Council and Mitigation Project Provider.

35. It is intended to use S.106 as the agreement type between the mitigation provider and the Council. This would enable the steps required of each party to firstly deliver the project to an approved specification and secondly to maintain the project again in line with a monitoring and compliance regime also agreed with NE to be set out in an agreement with recourse to planning enforcement powers. The Agreement would also set out the steps to be pursued in the event of project failure. The Agreement would be registered as a land charge against the mitigation land.

The Council and applicant seeking to acquire mitigation

36. Prior to bidding for a credit, the applicant is required to confirm they are bidding for an accurate credit requirement. Once an applicant is successful in bidding for a credit, if there are no other obligations, they can submit a S.106 Undertaking (The Council will issue a template S.106 Undertaking before the first market round is undertaken.) if the application is for a major type of development the applicant will have to choose between issuing a stand-alone Phosphate Undertaking or including the provision in the overarching S.106. The Undertaking will comprise a land charge on the planning application site.

37. The triggers for acquiring a credit within the En Trade model will be:

- (i) To acquire the capital cost element prior to a commencement on site, and



(ii) To acquire the ongoing maintenance credit prior to first occupation.

38. The undertaking will confirm that once the applicant / developer has acquired the relevant credit, their obligations are discharged insofar as phosphate mitigation is concerned.

The Council and En Trade

39. The agreement between the Council and En Trade would comprise a contract rather than S.106 agreement as the agreement will relate to the way the market is operated rather than being specific to a particular site. The contract will define the following:

- The projects comprising each Market Round
- The establishment of a project registry
- The nature of separate agreements between En Trade and landowners and developers
- Compliance monitoring undertaken by En Trade
- The management of a “credit reserve”
- Market monitoring and balancing fees
- The process for the Council to step in and require works to any failed nature-based project
- The process for En Trade to hand over residual monitoring and compliance obligations as well as funding to undertake such activities.

Separate En Trade Agreements

40. As En Trade will be acting as a broker / enabler, they will also require contracts with each of the landowner’s providing mitigation as well as the parties seeking to acquire mitigation to ensure the credits are accepted by the Council and to ensure that all specifications are agreed by the Council, advised by Natural England as comprising mitigation secured through a process that has successfully passed a Habitat Regulations Assessment.

41. Whereas from a planning perspective the triggers for credit purchase will relate to the delivery of housing projects, from the mitigation landowner’s perspective the acquisition of the credit must also align with the timetable for the delivery of the mitigation project.

Allocation of Credits and Credit price

42. Where Councils have managed their own land to release credits, they are able to also establish application blind criteria to develop a hierarchy of credit bidders. This may focus upon small to medium-sized enterprise (SME) developments, developments capable of being implemented in the short term and policy compliant developments.



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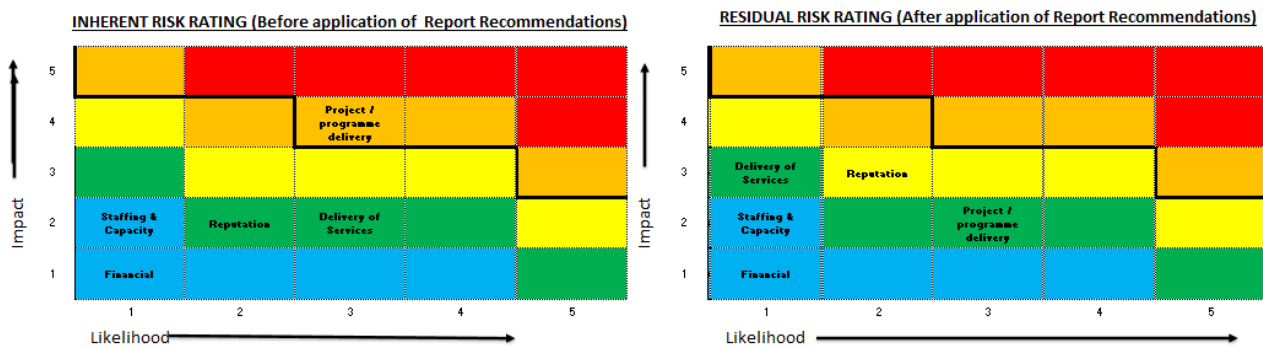
43. This type of prioritisation rationale would apply equally within this Council, particularly the high number of SME developers and the desire to see credits being put to use as soon as possible in order to unlock development now, rather than being banked as part of a nutrient neutrality solution acquired for a large site requiring many years to deliver. However, as the Council does not own the credits, we do not have the power to define a market priority that a third party will have to adopt in their market sales.
44. As such, we could not for instance prevent credits being acquired by the promoters of applications which may not, ultimately be supported for other reasons because the applicant will have an interest in dealing with the issue at appeal.
45. Additionally, as the Council does not own the market, we cannot dictate the price that may be offered to acquire P. Whereas we are seeing typical P credits having a value of £55,000 / kg, the value of an En Trade credit could vary depending upon the aspirations of individual landowners within each Market Round.
46. That said, given that the cost to a developer of acquiring a P credit will be directly influenced by the efficiency of the relevant sewerage treatment works the issue of P credit values and development costs will vary site by site an any event.
47. From the perspective of the Council, all housing schemes within the minor category are excluded from seeking S.106 obligations therefore, for many SME projects the decision about the price to bid at will be a commercial decision for the developer but will not impact upon our requirement for affordable housing and social infrastructure.
48. Where larger applications are seeking to acquire P credits before being presented to committee, any argument that the cost of the P credit must be offset against other social infrastructure will be a standard viability assessment which would include and understanding of legitimate land value expectations. Equally, those applications caught after a favourable committee resolution but prior to completion of the S.106 could require re-determination if the agreed heads of terms for the S.106 originally presented for approval are being varied.
49. As such, and in line with the second recommendation at Paragraph 11 above, the Council should make clear to En Trade (and therefore parties bidding for credits) that securing a phosphate solution is only one part of the assessment that a development represents sustainable development when considered against the provisions of the Local Plan when read as a whole and as such, paying too high a price for securing P credits at the expense of other social infrastructure including affordable housing can still lead to an applications refusal.

Legal implications (if any) and details of Statutory Powers

50. The relevant legislation comprises The Town and Country Planning Act 1990 (As amended) together with The Conservation of Habitats and Species Regulations 2017.
51. The key duty within the process set out above is the undertaking of a project wide Habitat Regulations Assessment of each Market Round as the individual land use management projects are secured and brought forward.

52. The process behind the structure of the market involves ongoing engagement with NE to ensure the design and specification for each individual project is agreed, the cumulative value of P credits within any Market Round is agreed between the Council as competent authority and Natural England before any sales take place, the appropriate precautionary buffers are built into each project assessment as well as the overall Market Round and there is an appropriate post implementation monitoring and compliance capacity which is funded by the Market Round itself.

Risk Matrix



Risk Re	Risk Category	Inherent Risk Rating	Residual Risk Rating
1	Project / programme delivery	13	9
2	Financial	1	1
3	Delivery of Services	9	6
4	Staffing & Capacity	2	2
5	Reputation	8	13
6	Health & Safety	0	0
7	Governance & Legal	9	2

Risk Description	Mediation / Controls
Failure to agree phosphate mitigation solutions will worsen the Council's housing supply position.	There is scope to review the value of each Market Round therefore approval for the mechanism to commence does not
There is no financial obligation upon the Council arising from this project.	N/A
Not enabling the approval of housing project will increase the level of complaints about inactivity and	Opportunity to review value and beneficial impact will remain available to the Council for future rounds, however this would
The use of the En Trade model reflects the Council's need to draw upon 3rd party solutions, lacking in	Staffing capacity is unlikely to change in the medium term
Being able to release development held up by phosphates is a significant factor in current	We will need to have template Agreements and HRA's available to ensure smooth progress
N/A	N/A
The project requires good drafting of the various agreements to ensure no challenge to SSDC	Capacity to review mechanisms before entering into further rounds

Council Plan Implications

53. The Corporate Plan vision for South Somerset is for a naturally beautiful and sustainable environment which also allows for businesses to flourish and good homes to be delivered. The lack of a phosphate solution has largely housing delivery from taking place since August 2020.

54. There is scope for land management solutions to contribute positively to Priority 1 Environment which includes enhancing the natural environment.

55. Enabling the release of planning permissions for new housing will contribute towards our local SME developer sector assisting businesses and supporting growth within South Somerset within Priority 3.

Carbon Emissions and Climate Change Implications

56. Phosphorus has no direct effects on climate, but mitigation measures do have indirect effects, such as increasing carbon sinks by fertilizing plants. There may be wider benefits flowing from this project such as carbon sequestration, improved and enriched flora and fauna and so help deliver carbon reduction targets. The inclusion of projects such as



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wetland creation could lead to biodiversity enhancements and accord with proposals and initiatives to address the climate emergency and biodiversity net gain. The sustainability credentials will be assessed through the project Habitats Regulation Assessment which will be agreed with NE.

Equality and Diversity Implications

<i>An Equality Impact Relevance Check Form has been completed in respect of the Proposal?</i>	Yes
<i>The Impact Relevance Check indicated that a full EIA was required?</i>	No
<i>If an EIA was not required, please attach the Impact Relevance Check Form as an Appendix to this report and provide a summary of its findings in the comments box below.</i>	
<i>If an EIA was required, please attach the completed EIA form as an Appendix to this report and provide a summary of the result of your Equality Impact Assessment in the comment box below.</i>	
Additional Comments	
<p>The Public Sector Equality Duty has the following aims which the authority must have due regard to:</p> <ul style="list-style-type: none"> • Eliminate discrimination, harassment, victimisation. • Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it. • Foster good relations between persons who share a relevant protected characteristic and persons who do not share it. <p>None of the above relate directly to this report which relates to land use management and is at this scale tenure and end user blind.</p>	

Privacy Impact Assessment

57. There are no privacy issues raised by this report.

Background Papers

- Appendix A – NE letter
- Appendix B – Equality Impact Assessment Check Form