

Appendix C: Background and further details

Introduction

1. When considering this background note it is important to remember that the Council can be a developer and a partner in delivering Council projects (e.g. Firepool and Council housing redevelopment proposals such as in North Taunton). The Council also has other wider duties such as:
 - Facilitating sustainable development.
 - Protecting and enhancing the natural environment.
 - Have a key role in driving economic recovery, minimising adverse impacts on small and medium-sized enterprises and the local economy.
 - The requirement to maintain a 5-year housing land supply and our wider housing duties as set out in The National Planning Policy Framework (2021).
2. The quality of the natural environment in Somerset is of a particularly high standard. Parts of the District fall within the Somerset Levels and Moors. Within this area various locations are of national and international significance for wildlife. The Somerset Levels and Moors are designated as a Special Protection Area (SPA) under the Habitat Regulations 2017 and listed as a Ramsar Site under the Ramsar Convention.

Natural England Advice Note (August 2020)

3. On 17 August 2020, all the planning authorities in Somerset received an advice note from Natural England concerning the unacceptable levels of phosphates in the Somerset Levels and Moors Ramsar site. Phosphates are a salt containing the element phosphorus. They occur naturally through the weathering and erosion of rocks, or in agriculture and food production, through the use of fertilisers and food additives, and in animal and human waste. A high level of nutrients in rivers and lakes affects water quality. Increased nutrient loads causes an excess growth of algae in the water, which in turn deteriorates water quality and depletes the oxygen, which plants and animals need to survive. This process is known as eutrophication. For the Somerset Levels and Moors Ramsar sites, the Pie Charts in Appendix D show the relative contribution from each activity.
4. In light of a court Judgment (known as Dutch N), (Joined Cases C-293/17 and C-294/17 Coöperatie Mobilisation for the Environment UA and Others v College van gedeputeerde staten van Limburg and Others) Natural England have advised that, in light of the unfavourable condition of the Somerset Levels and Moors Ramsar Site, before determining a planning application that may give rise to additional phosphates within the catchment, competent authorities should undertake a Habitats Regulations Assessment (HRA).
5. The types of development include:

- New residential units - including tourist accommodation, gypsy sites /pitches.
 - Commercial developments - where overnight accommodation is provided.
 - Agricultural Development - additional barns, slurry stores etc. where it is likely to lead to an increase in herd size.
 - Prior Notifications of agricultural development where, as a result of the development, the herd size may increase. Also, prior notifications for change of use of office to dwellings and agricultural buildings to dwellings.
 - Anaerobic Digesters.
 - Possibly some tourism attractions.
6. Since receipt of Natural England's letter the four Somerset districts councils and Somerset County Council have been working hard to minimise delay and uncertainty around planning applications following recent guidance over unacceptable amounts of phosphates in the Somerset Levels and Moors. This work includes a county-wide nutrient strategy to identify both short term solutions to help clear the current backlog of planning permissions and longer-term solutions to address the existing and future growth commitments.
7. Before determining a planning application that may give rise to additional phosphates within the catchment an Appropriate Assessment (AA) is required. The AA needs to demonstrate how the proposed development will achieve phosphate neutrality - to prove beyond reasonable scientific doubt that no likely significant effects on the integrity of protected sites would occur. Thus the ecologists use 'AA' to test whether proposals meet the requirements in the Habitats Regulations. It is unlawful for the Council to grant planning permission unless these assessments can achieve nutrient neutrality.
8. The Natural England advice note, the geographical area of risk, the types of development affected, a summary of our legal advice, presentations to stakeholders, the phosphate calculator and further detailed information about the phosphate issue are available on SWT website at:
<https://www.somersetwestandtaunton.gov.uk/planning/phosphates-on-the-somerset-levels-and-moors/>

Responding to the Issue: Somerset wide

9. In response to the receipt of Natural England's advice note as Local Planning Authorities (LPA's) the four Somerset districts councils and Somerset County Council have been working together to minimise delay and uncertainty around planning applications following recent guidance over unacceptable amounts of phosphates in the Somerset Levels and Moors. Key activities to date include:
- **The Phosphate Calculator**
10. The publication of the phosphate calculator in February 2021 which has been approved by Natural England enables developers to calculate their phosphate load and helps inform possible nature-based solutions required to unlock their development. Several developers are actively seeking their own solutions to unlock their own sites. As a general observation, phosphate mitigation is

easier to implement on larger green sites such as those associated with the new garden communities in Taunton (e.g. through following existing farmland in the developers control as at Comeytrowe), than on small brownfield sites within the existing urban areas.

- **Development Management:**

11. In line with other LPA's with a phosphate and/or nitrate issue, SWT have advised affected applicants of the need to undertake appropriate assessments for full planning applications, outline planning applications, reserved matters applications and applications to discharge implementing planning conditions
12. Since the receipt of Natural England's advice note, the four Somerset districts councils and Somerset County Council have been working hard to minimise delay and uncertainty around planning applications. In addition to the phosphate calculator there are various activities aimed at helping to clear the current backlog of residential applications. For example, within existing budgets, SWT are in the process of recruiting a nutrient officer to assist on the processing HRA's and the implementation of mitigation proposals that will deliver phosphate credits.

- **Strategic solutions/Somerset wide Nutrient Strategy**

13. The Somerset LPA's have also been working on progressing medium to long term strategic solutions for the 4 river catchment areas which feed into the Somerset Levels and Moors.
14. On behalf of the Somerset LPA's, in the spring of 2021 SWT commissioned and appointed consultants Royal Haskoning DHV. One of the initial findings is that constructed wetlands down stream of Waste Water Treatment Works (WWTW's) represents an important part of the medium to long term solution in Somerset.
15. What is clear is the number of homes unlocked depends upon the performance of the Waste Water Treatment works (WWTW's). More housing can be unlocked in locations where the WWTW is good performing. For the River Tone catchment area, at a threshold of 2mg/l initial assessments indicate that such wetlands could potentially unlock circa 1,800 homes.
16. Stakeholder briefings on draft solutions with developers, landowners and technical experts occurred during August 2021:
17. This "Strategy" work is scheduled to be completed in Autumn 2021. This 'Strategy' will be agreed with Natural England and will then give us a Somerset wide framework to work within. The Strategy and draft Supplementary Planning Document due in autumn 2021 affords an opportunity to review the interim solutions being proposed.

- **Discussions with Wessex Water and EnTrade:**

18. Under their approved Assessment Management Plan (AMP 7), Wessex Water have until 2024 to implement and put in place their phosphate reduction plans for the period up to the end of 2024. By 2027 they aim to remove 303 tons per annum of phosphorus and invest £150m (See Appendix E – Wessex Water slide)
19. Wessex Water are also developing a pilot trading platform for trading phosphate credits for the River Tone and Parrett catchment areas which offers interim solutions (EnTrade). For more information please visit Wessex Water website at : <https://www.entrade.co.uk/>
20. The overall rules, resources and financial costs associated with EnTrade are not yet clear. To date the services of EnTrade are commissioned through auctions run with farmers / landowners to find suitable land for mitigation measures, and some small wetland projects are being progressed as a result of this. Discussions are currently on-going with officers from the Somerset Local Planning Authorities (LPA's). The current position with EnTrade is that they are not willing to sell all credits to us as the Planning Authority. This position could change.
21. What is clear is the amount of homes unlocked by a single phosphate credit depends upon which Waste Water Treatment works (WWTW's) the proposed development feeds into. More housing is unlocked in locations such as Taunton where the waste water from the development feeds into a higher performing WWTW's (ie more bangs per buck). Initial discussions with Wessex Water and from consultants Royal Haskoning indicate that the EnTrade pilot has the initial potential to unlock between 700 and 1,200 homes.
22. SWT officers have sought legal advice from Shape Mendip on various matters associated with the determination of planning applications, such as management agreements with owners and occupiers of land used for phosphate mitigation. Our legal advice is to employ the use of Section 106 obligation to control when a housing developer with EnTrade credits can commence and then occupy their development (probably using a template Unilateral Undertaking (UU) .

A more difficult question is the LPA's relationship with the landowner/farmer providing the mitigation project on their land. EnTrade will have a Nature Based Project Agreement with the landowner/farmer and will be responsible for monitoring the project and making annual payments. EnTrade have proposed that the LPA should also enter into a parallel Section 39 Agreement with the landowner/farmers. The enforceability of a Section 39 Agreement is unclear– in particular should the LPA secure 'step-in' rights in the event a project fails and EnTrade take no action? Who would fund the remedial work? By this point in time the developer will have paid for their credits, built out their development. As the final form of these arrangements have yet to be settled, within the main report, Recommendation "i" covers such matters

- **Partnership working**

23. Working with Cllr's; stakeholders and interested parties, SWT officers have held numerous briefing sessions and lobbied central government for funding and changes to legislation. We continue to "flag up" the need for a national response to address water quality given that the number of local authority areas experiencing similar problems is increasing. At present this issue undermines the Government's ability to deliver against its national ambition of 300,000 new homes per annum target. The lack of action by Government and lack of enforcement by Environment Agency to address key polluters has also been raised in the media. In England, spending on monitoring protected sites, including freshwater, fell from about £2m in 2010 to £700,000 in 2019. See:

<https://www.theguardian.com/environment/2021/sep/15/pollution-is-damaging-uk-rivers-more-than-public-thinks-report-says>

<https://www.theguardian.com/environment/2021/sep/13/government-failing-to-stop-sewage-discharge-into-english-rivers-says-charity>

24. The Somerset authorities wrote to the Secretary of State in December 2020 raising issues and concerns:

(<https://www.somersetwestandtaunton.gov.uk/media/2535/letter-to-the-secretary-of-state-from-all-somerset-authorities.pdf>)

25. Following on from this, SWT officers are having:

- Regular meetings with the Ministry of Housing, Communities and Local Government (MHCLG – now known as the Department of Levelling Up, Housing and Communities and Department for Environment, Food and Rural Affairs (DEFRA) officials.
- Meetings with other local authorities who are also dealing with the Nitrates issue (e.g. Dorset and Hampshire) and a phosphates issue (e.g. Ashford, Kent and Wiltshire) to share understanding and mitigation strategies. The latter involved discussion about the EnTrade model and also Wiltshire's appointment of an ecology officer.
- Regular meetings with local house builders and representatives of the development industry. (Phosphate collaboration meetings).

26. SWT now have a current list of all the authorities with a Phosphates issue provided by Homes England – see Table 2 below. The aim is to coordinate a lobbying group through the Planning Advisory Service (PAS) on water quality and via the Local Government Association (LGA). To date PAS have held two webinars (20 and 29 July 2021) which officers from SWT, other LPA's and

officials from MHCLG, DEFRA, the Environment Agency and Natural England presented at. All of the slide packs from these events are now available to download on the PAS [website](#)

27. These partnership working activities have informed the contents of further SWT / Somerset LPA letter to the Secretary of State on the 23 July 2021 (<https://www.somersetwestandtaunton.gov.uk/planning/phosphates-on-the-somerset-levels-and-moors/>) At the time of writing this report, SWT had not received a reply.
28. Given the overall amounts that existing households and agriculture land uses are contributing to the phosphate problem (see Appendix D), the letter restates our view that there should be a national solution including the potential for water authorities to charge a precept to deal with the issue.

Table 2: Authorities with a Phosphates issue

Poole Harbour	Dorset Council Bournemouth, Christchurch and Poole Council
Hampshire Avon	Wiltshire New Forest District New Forest NPA Dorset Council Bournemouth, Christchurch and Poole Council
Stodmarsh	Canterbury City Ashford Borough Folkstone and Hythe District Dover District Maidstone Borough
River Wye	Herefordshire County Council
River Camel	Cornwall Council

29. In terms of learning lessons, there are relatively few solutions on phosphates in England. SWT officers visited Cromhall Wetland Site, Gloucester on the 23rd of August 2021. A short video below showing the benefits of constructed wetlands downstream of a WwTWs is available at [Cromhall Wetland Bioblitz - YouTube](#). Accordingly Officers have also been looking at the nitrates issues to learn lessons.

Disruption in the determination of Planning Applications

30. In line with other LPA's with a phosphate and/or nitrate issue, SWT have advised affected applicants of the need to undertake appropriate assessments for full planning applications, outline planning applications, reserved matters applications and applications to discharge implementing planning conditions.
31. This has resulted in the build-up of a significant number of planning applications awaiting determination at SWT – an up to date list is being

prepared and will be put on the Council's website. At the time of drafting the report, our records indicate:

- 100 planning applications held in abeyance equating to approximately 2,000 dwellings.
- That currently 13 application sites are on hold as the LPA is unable to discharge pre-commencement conditions which are considered to be implementing decision, this impacts on approximately 450 dwellings.

32. This equates to significant disruption to the determination of applications for new homes and affected developments within the River Tone catchment area. Representatives from the development industry have drawn our attention to a substantial effect on SME housebuilders and developers, as well as supply-chain businesses that employ local people. We have conveyed such concerns in both of our letters to ministers (available on the SWT web site at.

<https://www.somersetwestandtaunton.gov.uk/media/2535/letter-to-the-secretary-of-state-from-all-somerset-authorities.pdf>) and

[\(https://www.somersetwestandtaunton.gov.uk/planning/phosphates-on-the-somerset-levels-and-moors/\)](https://www.somersetwestandtaunton.gov.uk/planning/phosphates-on-the-somerset-levels-and-moors/).

Options Assessment

33. This section provides a summary of the main options available to SWT as the LPA, which has informed the recommendations of this report. There are two potential options available to the Council. These are:

No intervention.

34. Intervention with interim programme of measures (Recommended course of action).

35. Local Authorities have no statutory duty to provide mitigation for affected future development. However, they do have a legal requirement to consider the availability of mitigation in compliance with the Habitat Regulations, as a competent authority, when plan making or planning decision making. We also have various other duties, as set out in Appendix C paragraph 1 above.

36. At present for the River Tone catchment area there is no phosphate mitigation market to supply the immediate need for development awaiting planning decisions. Evidence suggests that further mitigation sites will become available through the EnTrade pilot trading platform. As set out in Appendix C paragraph 19 to 22 above, the scale of the phosphate's credits generated is unclear, as is the number of homes that this unlocks.

37. Based upon the planning applications that SWT have determined, evidence to date suggests that immediate and short-term needs are likely to be met, mainly from privately owned commercial mitigation schemes associated with

large greenfield sites (e.g. Comeytrowe). Thus the emerging open market system may have a disproportionate impact on minor development and the speed at which planning applications can be determined may be limited due to the complex legal frameworks required. There are also concerns about how the cost of phosphate mitigation will affect site viability, the delivery of infrastructure requirements and affordable and social housing.

38. It is anticipated that a do-nothing scenario would also have a detrimental impact on the Council's ability to meet the housing delivery test, and 5-year housing land supply, an adverse impact on SME's and the local economy, whilst also having a detrimental impact on place making and SWT corporate objectives as shown in section 5 of this report.
39. Accordingly, on balance, the recommended course of action is to intervene with a proposed programme of interim measures.