

Member Briefing Paper:

Phosphates and the Somerset Levels and Moors Ramsar Site

Purpose of the Note

1. This briefing has been prepared to update members on the approach taken by Somerset Council to address the issues raised since the receipt of the Natural England advice in 2020. The briefing note focuses on the issue of nutrient neutrality and the approach taken to this matter in the Local Planning Authorities of Cornwall and Wiltshire.
2. In the light of comments received the Council has sought further legal advice on our approach and whether an alternative approach such as that adopted by Cornwall should be taken and specifically whether it is legally possible for Somerset Council to treat past improvements to Waste Water Treatment Works by Wessex Water as mitigation for future housing. This advice will be circulated to members but in the meantime the legal advice provided to the Local Government Association is provided and key paragraphs relating to this matter have been extracted for ease of reference below.

Background

3. Natural England's (NE) wrote to the Council on 17 August 2020 (enclosed as Appendix A), advising the need for nutrient neutrality for affected development. This has held up the determination of planning applications (and in particular housing) across Somerset. The letter advised that the Somerset Levels & Moors Ramsar site is in an 'unfavourable condition' as a result of excessive phosphates.
4. Since receipt of NE's letter as the Local Planning Authority (LPA), Somerset Council (and prior to 1 April 2023, the County and former District Councils) have sought advice on the legal requirements for decision-making in areas subject to the NE nutrient neutrality advice and has proceeded on the basis of that advice in requiring mitigation to be provided to ensure that developments are nutrient neutral. This is consistent with the advice which has been made publicly available on the Planning

Advisory Service website <https://www.local.gov.uk/pas/topics/environment/nutrient-neutrality-and-planning-system/habitats-regulations-advice-lpas>).

5. However it has been argued that the Council's position is incorrect, and that the Council should treat past improvements to Waste Water Treatment Works ("WWTWs") by Wessex Water as the mitigation for future housing development within the water catchment area of the Somerset Levels and Moors Ramsar site. The rationale is that in planning and implementing upgrades to WWTW's, Wessex Water has taken into account population growth and thus new development is nutrient neutral.
6. In particular it has been suggested that the Council should move towards an approach taken by Cornwall Council to an application for permission for residential development on land at Castle Street Bodmin, for approximately 170 dwellings. This involved Cornwall Council disagreeing with Natural England's revised advice on WWTW upgrades as conservation measures rather than mitigation. 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 allocations in the Local Plan.
7. The Council have explored the potential for taking a similar approach and at the end of December 2023, Wessex Water provided further information on population equivalent growth data to Somerset Council which was reviewed and analysed. It demonstrated headroom within their currently approved permit levels as part of the improvements they have made to specific WWTW's, under their previous Asset Management Plan programmes.

Legal advice

8. On this basis the Council sought further advice on the extent to which it is legally possible for Somerset Council to treat past improvements to WWTWs" by Wessex Water as mitigation for future housing. We are currently awaiting the final legal advice and will circulate this to members in due course.
9. In the meantime and to assist members to understand this complex matter, we have outlined below key paragraphs from the LGA published legal advice on nutrient neutrality. This advice provides the current legal position on this matter (i.e. whether upgrades to waste water treatment works can count as mitigation).

10. The full legal advice can be viewed [Habitats Regulations advice for LPAs | Local Government Association](#):

Key paragraphs (notably para 65 below) have been extracted from the LGA Legal Advice on Nutrient Neutrality and whether upgrades to waste water treatment works can count as mitigation:

Para 26. Applying the precautionary approach, mitigation can also only be considered as part of the appropriate assessment when it is sufficiently certain that the proposed measures will be effective in avoiding harm. Mitigation measures might not be sufficiently certain if, for example, available scientific knowledge does not allow the benefits to be quantified with the requisite degree of certainty at the time of assessment. In all, the LPA must be able to guarantee beyond all reasonable scientific doubt that the mitigation will mean that the project will not adversely affect the integrity of the Site. This represents a particularly high bar. Relevant considerations will include how the measures will be implemented and monitored, and how any enforcement will take place.

Para 27. One option for mitigation that the courts have approved is NE's suggested approach of "nutrient neutrality". A development will achieve nutrient neutrality when there is no net increase in the nutrient load that would result from the development within the catchment(s) of the affected Habitats Site. This is likely to be achieved by reducing existing sources of nutrient pollution to mitigate the nutrients generated by new development upstream of the Habitats Site.

Para 61. So what does this mean for LPA decision-making? In short, in making planning decisions LPAs need to be aware of and follow the above legal principles, including the rules on mitigation measures, binding legal authority that there will be limited possibilities for consenting proposals that might affect sites already in an unfavourable condition, and the importance of NE as statutory consultee.

Para 65. The stringent case law requirements for practical certainty also mean that LPAs for the time being will not be able to rely on the nutrient reduction plans and strategies from the water industry and agricultural sector as mitigation for individual development projects. These plans, the fulfilment of which is not within either the applicant's or LPA's control, are unlikely to provide the requisite certainty which eliminates reasonable scientific doubt that there might be harm to Site integrity. What they are likely to do, over time, and if successful, is to affect the baseline condition such that Habitats Sites are no longer subject to a nutrient overload. When that is achieved, it will no longer be the case that any nutrient input will lead to significant harm and decisions will be determined on a case by case basis (as traditionally has

been the case everywhere). The scale of nutrient overload in many catchments, however, means that any such effect is likely to take years.

Para 67. NE's advice undoubtedly presents a significant challenge for affected LPAs. However, in light of all the legal principles set out above, LPAs will need to give it appropriate weight 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. Case law is clear that for mitigation to be lawful, it must be preventative – i.e. no net gain in nutrients entering the water.

11. Furthermore, the Council's approach has been verified via appeals and case law to date (e.g. Jurston Farm, Wellington and other planning applications).

Approach taken by Wiltshire Council

12. Officers have also looked at the approach taken by Wiltshire Council as this has also been cited. Until the report to their Cabinet Committee on 6 February 2024, their interim scheme was focused upon unlocking plan led housing development to March 2026 (approx. 6,200 dwellings) with mitigation measures being funded by the Council from Community Infrastructure Levy (CIL) money (£850k).
13. The report to the Wiltshire Council Cabinet Committee of 6 February 2024, has signalled a change in approach which mirrors the approach already being taken by Somerset. It is now proposing mitigation projects funded by developer contributions via planning obligations; and template agreements are being progressed to make the system as streamlined as possible. Wiltshire is also working with partners to help increase the availability of private mitigation solutions in the catchment to supplement the council-led delivery. The committee report advises that the original council-led scheme in Wiltshire will only be available in parts of the catchment where there is a sufficient supply of mitigation projects. Fees and charges related to their revised interim scheme are being considered as part of the annual budget setting process and will be subject to approval by Wiltshire Council on 20 February 2024. (The Wiltshire Cabinet Report is available at https://cms.wiltshire.gov.uk/documents/s223131/Revised%20Nutrient%20Neutrality%20Strategy6Feb2024_003.pdf)

Comparing Catchment Areas

14. Overall, comparing river catchments areas and different local authority approaches to nutrient neutrality is difficult and from the evidence above there is no single solution to resolving this complex issue.
15. The current position in Cornwall is that a P credit scheme for the River Camel is being set up in 2024. This clearly demonstrates that phosphate mitigation is still required to unlock development in Cornwall. [River Camel phosphates mitigation strategy and policy - Cornwall Council](#) .
16. Prior to the above changes it is clear that the Wiltshire interim scheme did not lead to a 5 year housing land supply (4.6 years). It also directed CIL funding away from the provision of other growth-related infrastructure requirements and did not include unplanned growth. Furthermore if strategic mitigation was not forthcoming, the financial risk of non-delivery of a pipeline of mitigation measures lay with the Council.

Nutrient Mitigation Fund

17. Somerset Council have been successful in an award of £9.6m from the Nutrient Mitigation Fund and £522k revenue funding which collectively will enable the Council to bring forward mitigation through innovative schemes and to provide P Credits which will ultimately secure the release of all the housing (some 16,000 homes) held up by the phosphates issue. A report outlining a delivery strategy will go to the Strategic Planning Committee on the 21 March 2024.
18. Somerset is one of only eight authorities awarded funding through this programme. Cornwall have been awarded £2m for the River Camel and Wiltshire £9.8m, which indicates a continuing need for mitigation measures to be delivered in these localities as well. Further information is available at

<https://www.gov.uk/government/publications/letter-from-minister-for-housing-planning-and-building-safety-on-nutrient-neutrality-december-2023/letter-from-minister-for-housing-planning-and-building-safety-on-nutrient-neutrality-december-2023#nutrient-neutrality-and-local-nutrient-mitigation-fund-update>

Other recent updates from Government

19. On the 25 January 2024 the Secretary of State designated the Somerset Levels and Moors Ramsar Site as one of the catchment areas sensitive for phosphorus where a habitats site is wholly or partly in an unfavourable condition. [Notice of designation of sensitive catchment areas 2024 - GOV.UK \(www.gov.uk\)](#)

Current Workstreams

20. Following the Government award of funding, officers are in the process of developing an Interim Nutrient Mitigation Delivery Strategy. This Interim Strategy will outline the programme of work for 2024-2026 and accompanying report will be considered by the Strategic Planning Committee on 21 March 2024.
21. The Climate and Place Scrutiny Committee is scheduling a special meeting in March (date to be confirmed) to consider water quality issues.

End

Appendices (Links in SharePoint)

a) Natural England Letter August 20

<https://somesetcc.sharepoint.com/sites/SCCPublic/Planning%20and%20Land/Forms/AllItems.aspx?id=%2Fsites%2FSCCPublic%2FPlanning%20and%20Land%2FSW%26T%20Natural%20England%20Advice%20to%20LPAs%20on%20Nutrients%20in%20the%20Somerset%20Levels%20and%20Moors%20%2817%20Aug%202020%29%2Epdf&parent=%2Fsites%2FSCCPublic%2FPlanning%20and%20Land&p=true&ga=1>

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