

## **Position Statement - Development in the River Lugg Catchment Area March 2020**

### **Background**

Herefordshire is an area rich in its natural features of special value; its landscape, wildlife, recreation and health benefits, as well as its local economy. The River Wye and its tributaries are recognised as being of international importance for their unique character and wildlife, requiring the highest level of protection, management, enhancement and where appropriate; restoration.

### **Habitat Regulations Assessment**

Herefordshire Council as the 'competent authority' under the Habitats Regulations, (The Conservation of Habitats and Species Regulations 2017) is legally required to assess the potential impacts of projects and plans, on internationally important sites which include the River Wye SAC (Special Area of Conservation).

In its role as competent authority, the council must carry out a 'Habitat Regulations Assessment' on any relevant planning application that falls within the red and purple areas shown on the plan. Where there is a 'Likely Significant Effect', the council must carry out an 'Appropriate Assessment' in order to determine, with scientific certainty, that there would be no 'Adverse Effect on Integrity' on the designated site from the plan or project, either alone or in combination with other plans and projects. The council takes this into account when considering whether planning permission can be granted. If it cannot be proven that there would not be an adverse effect on integrity, then planning permission cannot be granted without further stringent consideration under the Habitats Regulations.

Natural England (NE) is a statutory consultee on appropriate assessments and provides advice to competent authorities in relation to sites designated as SACs. Local Planning Authorities must have regard to the advice given by NE when making planning decisions (for both individual developments and local plans). NE's advice should be given considerable weight, but competent authorities are entitled to depart from it where they can give cogent reasons for doing so.

### **The Nutrient Management Plan**

The NMP is a partnership plan developed to reduce phosphate levels in the River Wye SAC to below the set limit by 2027 - in line with the final date for achieving good ecological status set by the Water Framework Directive. The NMP is managed by the Nutrient Management Board (NMB), comprising; Herefordshire Council, Powys Council, Natural England, Natural Resources Wales, the Environment Agency, Dwr Cymru Welsh Water, Wye and Usk Foundation, National Farmers' Union, Farm Herefordshire and the County Land and Business Association.

The work that went into producing the NMP established that target phosphate levels were achievable, including when considering growth plans across the catchment. The NMP established that a combination of discharge reductions from waste water treatment works, land use change and changes to agricultural practice would be required to meet the target. Improvements to waste water treatment works were to be included in Welsh Water's work plans, whilst land use changes and changes to agricultural practice were to be progressed on a voluntary basis with support from schemes such as Catchment Sensitive Farming. At the time, this was adequate to allow the council to adopt its Core Strategy and to allow development proposals to proceed, however this is no longer the case.

## Approach to proposals in the River Lugg catchment

The River Lugg is a tributary of the River Wye SAC, and forms part of the SAC from Hope under Dinmore. The River Lugg catchment covers predominantly the north of the Herefordshire administrative area (refer to plan). The River Lugg is currently exceeding its limits for phosphates, as a result of water pollution from both 'point' source (in particular sewage outlets) and 'diffuse' source (in particular agricultural run-off).

The approach taken by Herefordshire Council to date has been to permit development in the River Lugg catchment even when it would add to the existing phosphate levels in the river, because they were in the context of an agreed plan (the NMP) to reduce phosphate levels down to target. However, recent European case law means that this approach can no longer be taken. *For further information: on the Nutrient Management Plan; The Wye and Lugg Monitoring Dashboard web:*

[https://www.herefordshire.gov.uk/directory\\_record/2097/nutrient\\_management\\_plan](https://www.herefordshire.gov.uk/directory_record/2097/nutrient_management_plan)

## Recent developments

Following the judgment in the case of *Cooperatie Mobilisatie* handed down in November 2018 by the Court of Justice of the European Union (Joined Cases C-293/17 and C-294/17) (known as the Dutch Case), the approach to allowing proposals that would increase phosphate levels in the Lugg catchment has been reviewed.

Natural England provided initial advice to Herefordshire Council on 22nd July 2019 and further advice on 30<sup>th</sup> August 2019. Subsequent to this, Herefordshire Council has sought its own legal advice on the issue.

In the light of the Dutch judgment, where a site is failing its water quality objectives and is therefore classed as being in unfavourable condition, there is limited scope for the approval of planning applications that give rise to additional damaging effects. Furthermore, the future benefit of mitigation measures cannot be relied upon in an appropriate assessment, where those benefits are uncertain at the time of the assessment.

Natural England has advised that for any plans or projects in the River Lugg catchment which require an appropriate assessment, the effects are currently uncertain. This is because there is reasonable scientific doubt as to whether the NMP provides adequate mitigation and can be relied upon to underpin a conclusion of no adverse effects on integrity.

Herefordshire Council has sought its own legal advice on how to proceed and is liaising with Natural England and other partners to find an effective solution as soon as possible. This includes discussions with the NMB. It is likely that the NMP will need to be reviewed, in order to provide an increased level of certainty and allow it to be relied upon as mitigation in an appropriate assessment again.

## **An interim approach**

There remains potential for a positive appropriate assessment to enable development to proceed, on Natural England's advice, where it can be demonstrated that development is **nutrient neutral** (where avoidance / mitigation measures included in the plan or project counterbalance any phosphate increase from the plan or project) or would lead to '**betterment**'. Proposals will need to provide appropriate evidence of this.

In relation to discharges to drainage fields in the red zone, Natural England have indicated that if the following criteria are in place then phosphates would be unlikely to reach the river as there is therefore no pathway for impacts. With no pathway for impacts there is no need for further Habitat Regulations Assessment:

- The drainage field is more than 50m from the designated site boundary or sensitive interest feature **and**;
- The drainage field is more than 50m from any surface water feature e.g. ditch, drain, watercourse, **and**;
- The drainage field is in an area with a slope no greater than 15%, **and**;
- The drainage field is in an area where the high water table groundwater depth is at least 2m below the surface at all times **and**;
- There are no other hydrological pathways which would expedite the transport of phosphorous e.g. fissured geology, flooding or shallow soil.