

Advice concerning the obligations imposed by the Habitats Directive on the drawing up of the Herefordshire Core Strategy in relation to the phosphate pollution of the River Wye SAC

1. The Habitats Directive

1.1 The Habitats Directive¹ is the most important law promoting the conservation of nature and maintenance of biodiversity across Europe.

1.2 The European Commission notes that while the Directive makes a contribution to the general objective of sustainable development, its main aim is to ensure the conservation of a wide range of rare, threatened or endemic species, including around 450 animals and 500 plants. Some 200 rare and characteristic habitat types are also targeted for conservation in their own right.

1.3 Specifically, Article 3(1) of the Directive provides that:

“a coherent European ecological network of special areas of conservation (SACs) shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species’ habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range”.

1.4 Importantly for these SACs, the Directive provides a high level of safeguards against potentially damaging developments, both inside and outside the SAC itself. This would include an increase in housing leading to increased phosphate pollution of a riverine SAC such as the River Wye.

1.5 The River Wye SAC is part of the Natura 2000 network². As such the River Wye SAC needs to contribute significantly to the maintenance or restoration at a favourable conservation status of the natural habitat type in Annex I and species in Annex II of the Directive for which it is designated, as well as contributing significantly to the coherence of Natura 2000 and to the maintenance of biological diversity within the Europe.

¹ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora

² <http://jncc.defra.gov.uk/protectedsites/sacselection/sac.asp?EUCode=UK0012642>

1.6 The designation of sites under the Directive should not therefore be regarded as an administrative difficulty to be overcome, but as strict legal protection applied to the minimum network necessary to protect biodiversity across Europe. As such, damage to integrity of a single SAC may in itself threaten the coherence of the Natura 2000 network and compromise the achievement of the overall aim of the Directive, and so must be avoided.

1.7 Specifically, the process of drawing up the Core Strategy for Herefordshire (CS)³ must comply with Article 6 of the Directive, which places obligations upon Member States, including the UK:

6(1) - For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

(2) - Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

(3) - Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

(4) - If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted. Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those

³ Herefordshire Local Plan – Core Strategy 2011-2031 Pre-Submission Publication Version Spring 2014

relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest"

1.8 Importantly, the CS is a 'plan or project' caught by Article 6(3). The reversal of the usual burden of proof, as under Article 6(3), such that it must be beyond reasonable scientific doubt that a plan such as the CS **will not** adversely affect the integrity of the site concerned, before it can be approved, reflects the importance that the European Union - and the Member States, including the UK - has placed on the conservation of the Natura 2000 network.

1.9 The Herefordshire Council, as a statutory body charged with ensuring compliance with the Directive, is obliged to ensure that the pre-submission CS is in compliance with the Directive, particularly in relation to the phosphate pollution of the River Wye SAC and the consequent threat to its conservation status and integrity.

2. Phosphates in the Wye SAC

2.1 As the Environment Agency (EA) and Natural England (NE) acknowledge⁴, the main issue of concern relating to water quality in the River Wye SAC is that of phosphate. Raised phosphate levels in rivers, such as the River Wye SAC, cause freshwater eutrophication and subsequent impacts, not only on wildlife and conservation, but also on drinking water abstraction and treatment and recreation.

2.2 The main source of phosphates to rivers nationally is thought to be from sewage effluent (estimated between 60% and 80% of the total phosphate in rivers in England and 48% in Wales. In the River Wye SAC, the EA and NE report that it is thought that point source discharges, such as industrial and wastewater treatment works discharges are responsible for a large portion of the phosphate loading to the rivers. The main diffuse source of phosphate is thought to be from agricultural sources via land run-off.

2.3 Importantly for the process of drawing up the CS, although the River Wye SAC needs to achieve the conservation target levels for phosphate required to protect the site's integrity, the site currently includes reaches where the levels of phosphate *already exceed* the target level in those conservation objectives.

⁴ Environment Agency and Natural England (2014) River Wye SAC Nutrient Management Plan - Evidence base and options appraisal – 14th May 2014 ('the NMP')

2.4 In this context, it is important not to overlook Article 2(2) of the Directive requires that:

“measures taken pursuant to the Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest”. [emphasis added]

2.5 Although the upper River Wye, upstream of Hay-on-Wye is currently meeting its conservation target and is not considered to be at risk from the current permitted discharges, the River Wye between Hay-on-Wye and the River Lugg confluence is currently meeting the phosphate target and therefore fulfilling the conservation objectives set out by NE, but it is nearing the target and so there is a risk to future compliance that needs addressing. Importantly, the River Lugg section of the SAC is currently exceeding the phosphate target set out for the site’s favourable conditions tables and is considered by NE to be failing its conservation objectives, and not therefore making a full contribution to achieving favourable conservation status of each of the qualifying features of the SAC.

2.6 The EA and NE also acknowledge that:

“growth plans within Herefordshire indicate a rise in population between 2013 and 2027 that would lead to an additional phosphate loading from the wastewater treatment operations within the catchment. Currently, further development that would increase phosphate loads to the River Wye SAC, or would lead to future failures, would not be in compliance with the Habitats Regulations”⁵.

3. The obligations under Article 6(3)

3.1 The growth plans for Herefordshire, contained within the CS, will directly affect the River Wye SAC. As such, they must be assessed as against the requirements of the Directive, particularly those in Article 6(3).

3.2 Article 6(3) has been widely and universally interpreted as establishing a two-stage procedure to be applied by a competent authority when considering a plan or project, such as the CS. Advice to Herefordshire Council⁶ correctly notes that the Directive, as transposed into domestic regulations⁷, requires a two-stage process. Firstly, a ‘significance test’ must be applied, followed, if

⁵ EA and NE (2014) NMP at page 14/149

⁶ David Tyldesley Associates (2013) 1833 Advice to Herefordshire Council on aligning HRA of CS with SOI 18 February 2013 (‘the DTA Report’)

⁷ The Conservation of Habitats and Species Regulations 2010

necessary, by an appropriate assessment which will inform the outcome of the second or 'integrity test'.

3.3 The judgement given by the European Court of Justice (ECJ) in the leading case of *Waddenzee*⁸ expanded upon the interpretation of Article 6(3) of the Directive.

3.4 In relation to the first test, the case clarified what "*likely to have a significant effect*" means. The ECJ ruled that a plan or project should undergo an appropriate assessment "*if it cannot be excluded on the basis of objective information, that it will have a significant effect on the site*". Therefore, "likely" has to be interpreted strictly. This means that unless a significant effect can be objectively ruled-out **with certainty**, then it is 'likely'.

3.5 Once a public body such as the Herefordshire Council has concluded that a plan or project, such as the CS, has a likely significant effect ('the significance test'), the plan or project must be subject to appropriate assessment.

3.6 Only if it can be ascertained that there will be no adverse effect on site integrity, can a plan or project proceed. This reflects the degree to which the precautionary principle is written into law in the Habitats Directive. A conclusion of no adverse effect on the integrity of the affected SAC can only be reached where an appropriate assessment concludes there is no reasonable scientific doubt remains as to the absence of such effects. If there is doubt, the plan or project cannot pass the 'integrity test'.

3.7 Unless the plan or project it benefits from the rare exception allowed for under Article 6(4) of the Directive - where a plan or project can lawfully proceed for "imperative reasons of overriding public interest" - any decision to proceed with a plan or project which failed the 'integrity test', would be unlawful and open to legal challenge by way of judicial review.

3.8 Likewise, any plan or project which had not been made subject to appropriate assessment and the 'integrity test', where it was likely to have a significant effect, would be unlawful and subject to challenge by way of judicial review.

⁸ Judgment of the Court (Grand Chamber) of 7 September 2004. Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij. Case C-127/02.

4. Herefordshire Core Strategy

- 4.1 The CS is designed to shape future development and sets the overall strategic planning framework for the county of Herefordshire. At the same time it must ensure that this development does not cause irreversible harm to important resources and features, including the River Wye SAC. Although the CS does not allocate land directly, it proposes broad strategic directions for growth in selected locations. In short, development is expected to bring with it pressure for sewerage services and so implies increased phosphate discharges to the River Wye SAC.
- 4.2 The key CS Policies at issue are Policies SS3 and SD4, which both refer to phosphate issue, although this issue also gets subsidiary mentions in area Policies LO1, RA6, and in paras 4.8.21 and 4.8.31, supporting Policies RA2 and RA3 respectively.
- 4.3 Importantly, while Policies SS3 and SD4 recognise the threat to the integrity of the River Wye SAC, the degree of conditionality, required to protect the integrity of the River Wye SAC, appears weak and the wording is ambiguous – i.e. the use of ‘may’, ‘should’, ‘might’, but not ‘must’.
- 4.4 In relation to the phosphate issue, Policy SS3, dealing with housing, states that: *“the release of specific sites [for residential development] may be phased or delayed to ensure that necessary infrastructure is in place to support the new development or in order to safeguard the integrity of the River Wye SAC from significant adverse effects”*. There is further explanation in paragraph 3.44, page 34.
- 4.5 Policy SD4 deals specifically with wastewater treatment and river water quality and again, inter alia, recognises that: *“development should not undermine the achievement of water quality targets for rivers”*.
- 4.6 Policy SD4 goes on to state that *“where this option [development using existing infrastructure] would result in nutrient levels exceeding conservation objectives targets, in particular additional phosphate loading within a SAC designated river, then proposals will need to fully mitigate the adverse effects of wastewater discharges into rivers caused by the development”* and that *“this may involve... in the case of development which might lead to nutrient levels exceeding the limits for the target conservation objectives within a SAC river, planning permission will only be granted where it can be demonstrated that there will be no adverse effect on the integrity of the SAC...”* and that *“this may involve....where the nutrient levels set for conservation objectives are already exceeded, new development should not compromise the ability to reduce levels to those which are defined as favourable for the site”*.

4.7 In relation to development requiring new sewerage infrastructure, Policy SD4 also sets out that proposals should be accompanied by the following:
“information to demonstrate there will be no likely significant effect on the water quality, in particular of designated national or European sites, especially the River Wye SAC and the River Clun SAC; Or where there will be a likely significant effect upon a SAC river, information to enable the Council in its role as a competent authority, to ascertain that the development will have no adverse effect on the integrity of the SAC; in relation to water courses with national or European nature conservation designations, the inclusion of measures achieving the highest standard of water quality discharge to the natural drainage system including provision for monitoring”.

4.8 Again, paragraphs 5.3.58 to 5.3.70 of Policy SD4 contain more detail.

4.9 Importantly, the CS relies extremely heavily upon the NMP to be drawn up by EA and NE, to try to ensure those Policies which imply increased phosphate loading of the River Wye SAC, are compliant with the Habitats Directive.

5. The Nutrient Management Plan (NMP)

5.1 The NMP was proposed following the Review of Consents process carried out for the River Wye SAC in 2010. That process was required to ensure that existing permits and licences were not threatening the integrity of the River Wye SAC. One of the outcomes of that process was that a plan was needed for the River Wye SAC in order to reduce current phosphate concentrations in the river to comply with conservation objectives.

5.2 In 2013, the EA and NE issued a joint Statement of Intent to prepare the NMP for the River Wye SAC, to address both the existing phosphate ‘failures’ and, importantly for the CS, also to address predicted growth within the catchment. As the NMP options appraisal stated *“the proposals will also inform Herefordshire Council’s Core Strategy and other relevant development plans”.*

5.3 Growth plans within Herefordshire indicate a rise in population between 2013 and 2027 that would lead to an additional phosphate loading from the wastewater treatment operations within the catchment. The EA and NE state clearly that further development that would increase phosphate loads to the River Wye SAC, or would lead to future failures, would not be in compliance with the Habitats Regulations.

5.4 The NMP is full of assumptions and uncertainty as to both whether phosphate levels can be reduced sufficiently and, if so, how this can be achieved.

5.5 There is great detail in the NMP Evidence Base and Options Appraisal but the Conclusions and Recommendations note, inter alia, that:

5.6 For point source discharges (such as sewage works) - *“the assessment shows that in the absence of mitigation measures, the additional population is likely to push the upper River Wye into non-compliance with the Natural England conservation targets, and will exacerbate the existing situation of non-compliance in the River Lugg”*.

5.7 In relation to meeting the required phosphate standards on the upper River Wye SAC – *“this would require technology to be utilised that is **currently only theoretical** (“future technology”); a phosphate concentration discharge of 0.1 mg/L would be required, which is a factor of 10 lower than the levels achievable with the current Best Available Technology (1 mg/L). Therefore there is **an element of uncertainty** that needs to be considered in this situation”* and for the River Lugg sub-catchment, *“similarly to the situation on the upper River Wye, this solution **relies on future technology** delivering discharges with phosphate concentrations to the predicted 0.1 mg/L level”*.

5.8 For agricultural sources, the NMP reports similar uncertainty as to the likely effect of phosphate reduction efforts envisaged - *“It should be emphasised that these percentages are likely to be upper end estimates as the reductions rely on all farms implementing the required changes to the highest specification over a long period of time; it also assumes that the measures can be applied to all farms, when in fact they may not be applicable in some cases. The optimiser max scenario, although providing a theoretical maximum for reference, is **therefore potentially not feasible**. Furthermore, there is **significant uncertainty** over the actual outcomes of implementing these measures as any evidence of water quality improvements can easily be lost when catchment processes are combined”* [emphases added].

5.9 Paragraph 13.2.1 of the NMP options appraisal - *“Confidence in outcome”* - further illustrates that the success or not of the NMP in reducing phosphate in the River Wye SAC over the lifetime of the plan is subject to considerable uncertainty. Despite this, the CS relies very heavily upon the NMP and the hoped-for success of the NMP in delivering phosphate reduction to ‘make room’ for new housing development in the Wye and Lugg catchments.

5.10 The DTA Report makes it clear that *“the NMP can...be regarded as **the** vehicle through which the conservation objectives for the SAC in relation to phosphate levels, will be delivered”* [emphasis added].

5.11 The NMP Action Plan published in November 2014 preserves the uncertainties in the NMP Evidence Base and Options Appraisal.

6. The Habitats Regulations Assessment of the CS

6.1 As required by the Habitats Regulations, the Council has commissioned a Habitats Regulation Assessment Report (HRA) of the CS⁹.

6.2 This HRA is supported by advice to Herefordshire Council produced by DTA aimed at “*aligning the Habitats Regulations Assessment of the Core Strategy with the statement of intent and Nutrient Management Plan for the River Wye SAC*”.

6.3 The results of applying the ‘significance test’ and, if applicable, the ‘integrity test’, dealing with the phosphate issue, are found in paragraphs 2.85 to 2.91 of the HRA. The text box at pages 26-28 in the HRA shows how the HRA has drawn upon the DTA Report in reaching its conclusions.

6.4 In some parts of the Wye catchments, the conclusion is that development can be accommodated within existing sewage treatment works permits. Paragraph 2.87 concludes that “*there is sufficient existing permitted headroom in the STWs serving Hereford, Bromyard, Kington, and Ross-on-Wye to continue to treat water from the amount of new housing provided for in the Core Strategy throughout the plan period, although under the current water quality levels in the River Wye SAC this does not mean that there would not be a likely significant effect if all the available headroom were used*”. In short, there may be a likely significant effect.

6.5 Note here that the footnote 28 on page 25 of the HRA describes that “*headroom in a permit can be generated through a difference between current and permitted effluent quality or a difference between current and permitted effluent flow rate*”. Both ‘options’ result in more phosphate being discharged to the River Wye SAC which, due to the behaviour of phosphate in rivers and sediments, could be expected to result in a higher in-river concentrations of phosphate, with associated damage to the SAC. Further, although the permits within which this ‘headroom’ is to be found were all subject to a Review of Consents by the EA in 2010, as required by the Habitats Regulations, the EA acknowledges that that Review of Consents failed to achieve overall compliance with relevant phosphate targets in the River Wye SAC. As such, this ‘headroom’, when viewed against the Review of Consents assessment of the SAC, may in fact be illusory.

⁹ Pre-Submission Publication of the Herefordshire Local Plan - Core Strategy Habitats Regulations Assessment Report - Final Report - Prepared by LUC - May 2014

6.6 Despite the finding of 'likely significant effect' in paragraph 2.87, paragraph 2.88 qualifies this by concluding that "*preparation of the draft Nutrient Management Plan (NMP) for the River Wye SAC should ensure that development within Herefordshire which can be accommodated within existing water discharge permits would not be likely to have a significant effect upon the River Wye SAC*". In other words, the HRA concludes that, given the NMP, provision for new housing that uses 'headroom' in existing sewage works permits is not likely to have a significant effect on the River Wye SAC.

6.7 In other parts of the Wye catchment, there is no such 'headroom' at STWs. Paragraph 2.89 notes that "*there is not sufficient existing permitted headroom in the STWs serving Leominster and parts of rural Herefordshire to continue to treat water from all of the new housing provided for in the Core Strategy without affecting water quality in the River Wye SAC*" but again, the HRA relies upon the NMP (paragraph 2.91) to allow it conclude that "*even where development is proposed at or around Leominster and in the rural areas, there would be no likely significant effect on the River Wye SAC*".

6.8 The final conclusion of the HRA is that none of the Pre-Submission CS Policies were likely to have a significant effect on any European sites in and around Herefordshire. This would include by way of increased phosphate pollution of the River Wye SAC.

7. Problems with the HRA – how 'low' is the test and at what stage should mitigation should be considered?

7.1 At paragraph 2.36, the HRA notes that "*the extent to which mitigation may be achieved through other policies within the Core Strategy was considered during the screening stage and has influenced the screening conclusions of the HRA*".

7.2 In applying the 'significance test' - whether or not an effect can be excluded on the basis of objective information that the CS will not have a significant effect on a site designated under the Habitats Directive – the HRA has taken into account proposed mitigation measures in the CS. In relation to the phosphate issue in the River Wye SAC, the NMP provides that mitigation.

7.3 For example, the HRA at paragraph 2.91 states that "*the evidence base for the NMP identifies measures that would enable such development to proceed*" and as such the HRA then concludes that "*even where development is proposed at or around Leominster and in the rural areas, there would be no likely significant effect on the River Wye SAC*".

7.4 Policies in the CS otherwise likely to have a significant effect on the River Wye SAC have been screened out on the basis of future mitigation, under the NMP, and have not therefore been subject to appropriate assessment or the 'integrity test'.

7.5 However, contrary to the approach adopted in the HRA, mitigation **should not** be considered at the stage of the 'significance test'.

7.6 Methodological Guidance on the provisions of Article 6(3) and 6(4) of the Habitats Directive, produced by the European Commission¹⁰ states that *"it is important to recognise that the screening assessment should be carried out **in the absence of any consideration of mitigation measures** that form part of a project or plan and are designed to avoid or reduce the impact of a project or plan on a Natura 2000 site"*.

Further, *"to ensure the assessment is as objective as possible, the competent authority **must first consider the project or plan in the absence of mitigation measures** that are designed into a project. Effective mitigation of adverse effects on Natura 2000 sites can only take place once those effects have been fully recognised, assessed and reported"*.

Indeed, the Methodological Guidance indicates that only after it is not possible *"on the basis of the precautionary principle [to conclude] that the integrity of the site will not be affected by the project or plan"* should the plan or project be amended to *"design appropriate mitigation measures that will cancel or minimise the adverse impacts"*¹¹. In other words, consideration of mitigation should occur within the appropriate assessment of a plan or project¹².

7.7 This is supported by the recent Opinion of the Advocate General in *Briels*¹³, at para 32, that *"measures which form part of a plan or project and which effectively minimise its impact may be taken into account when assessing, in accordance with Article 6(3), whether that plan or project adversely affects the integrity of a site"*. That is, at the 'integrity test' stage and not at the stage of the 'significance test'.

7.8 The key Policies within the CS should have been subject to the 'significance test' without any consideration of mitigation, such as the NMP. Given the

¹⁰ European Commission (2001) Assessment of plans and projects significantly affecting Natura 2000 sites Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC

¹¹ Methodological Guidance, page 25

¹² Methodological Guidance, para 3.2.5

¹³ Opinion of Advocate General Sharpston, delivered 27 February 2014, Case C-521/12 T C Briels and Others v Minister van Infrastructuur en Milieu

current phosphate issues in the River Wye SAC, which may be exacerbated by the provision of new housing and associated demands for sewerage, those CS Policies relevant to the phosphate issue should have been found to have likely significant effects and should then have been subject to appropriate assessment and the 'integrity test'.

7.9 The Advocate-General has also drawn attention to the very low test represented by the 'significance test'¹⁴:

"I would pause here to note that, although the words 'likely to have [an] effect' used in the English-language version of the text (18) may immediately bring to mind the need to establish a degree of probability – that is to say that they may appear to require an immediate, and quite possibly detailed, determination of the impact that the plan or project in question might have on the site – the expression used in other language versions is weaker. Thus, for example, in the French version, the expression is 'susceptible d'affecter', the German version uses the phrase 'beeinträchtigen könnte', the Dutch refers to a plan or project which 'gevolgen kan heben', while the Spanish uses the expression 'pueda afectar'. Each of those versions suggests that the test is set at a lower level and that the question is simply whether the plan or project concerned is capable of having an effect. It is in that sense that the English 'likely to' should be understood....It follows that the possibility of there being a significant effect on the site will generate the need for an appropriate assessment for the purposes of Article 6(3).

The requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry out an appropriate assessment. There is no need to establish such an effect; it is....merely necessary to determine that there may be such an effect".

7.10 The Advocate-General could not be clearer, at para 50, where he characterises the 'significance test' as "*should we bother to check?*". In the context of the phosphate issue on the River Wye SAC, that question must be answered in the affirmative.

7.11 For any Policy in the CS that could increase phosphate discharges to the River Wye SAC, the Advocate-General's low test would seem to be satisfied – patently, there is a possibility of an effect. If there were no such possibility, the EA and NE would not be bothering to draw up the NMP.

¹⁴ Opinion of Advocate General Sharpston, delivered 22 November 2012, Case C-258/11 Peter Sweetman Ireland etc.

7.12 Both the Advocate-General's Opinions and the Commission's Guidance suggests that the HRA has erred in applying the 'significance test' to the CS, both in reaching a conclusion of no significance, and in including the possible impact of mitigation measures such as the NMP in its deliberations.

7.13 The conclusion of the HRA - that CS is not likely to have a significant effect on any European sites in and around Herefordshire - is therefore unsound.

8. Problems with the HRA – the integrity test and temporary adverse effects

8.1 Two recent and significant judgments from the ECJ - Case C-521/12 T.C. *Briels and others -v- Minister Van Infrastructuur en Milieu* and Case C-251/11 *Peter Sweetman, Ireland, Attorney General, Minister for Environment, Heritage and Local Government -v- An Bord Pleanala* – have given useful guidance on the application of Article 6 of the Directive.

8.2 It is worth noting that the DTA Report, prepared in February 2013, which the HRA states remains relevant to the HRA of the Pre-Submission CS, including by "*set(ting) out reference to recent relevant case law, which helps to interpret when effects should be considered as a likely significant effect, when carrying out HRA of a land use plan*", predates the ECJ judgments in both *Briels* and *Sweetman*.

8.3 Of relevance to the CS - and more particularly the role of the NMP in supporting the conclusions of the HRA - the judgement in the *Sweetman* case (which is repeated in the *Briels* case) makes it clear that:

"assessment carried out under Article 6(3) of the Habitats Directive cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned".

8.4 There is a very strong contrast between what the ECJ suggests is required to pass the 'integrity test' and what the NMP now delivers. Even if the HRA had gone on to apply the 'integrity test' - which, of course, it does not do in relation to phosphate issue, having already misapplied to the significance test to the effect that the phosphate issue has been screened out before the appropriate assessment stage – it is doubtful that the NMP is sufficient mitigation for the CS as it stands.

- 8.5 The NMP is as yet uncertain, in terms of whether what it seeks to deliver is both technically and politically possible. There is insufficient certainty that the NMP will deliver the proposed reductions in phosphate to the extent that the 'integrity test' as informed by the judgement in *Sweetman*, can be passed. Indeed, the DTA Report appears to acknowledge this – *“the timing, location and extent of such anticipated improvements will only become apparent once the NMP is implemented...it is difficult therefore at the current time, for the HRA of the core strategy to undertake an appropriate assessment of the potential effects of necessary permit changes to deliver the development ‘beyond existing permits’, which can take account of the beneficial effects of the NMP in a meaningful manner”*.
- 8.6 Recognising the inherent uncertainty in the NMP and that it may take some time to deliver phosphate reductions, the DTA report suggests that *“an effect may properly be characterized as not being adverse in relation to the integrity test if it is only temporary”* and that *“temporary increases in phosphate levels which are capable of being fully cancelled within a short period of time would not necessarily represent a likely significant effect or an adverse effect on the integrity of the site”*. The DTA Report draws upon an example of temporary adverse effect given by the Advocate-General.
- 8.7 However, that example given by Advocate-General in *Sweetman*, of a pipeline trench, covering a very tiny fraction of a terrestrial SAC, which is immediately back-filled and allowed to re-vegetate is clearly and easily distinguished from the situation of water quality impacts on a very substantial part of an aquatic SAC river, such as the River Wye.
- 8.8 The requirement that an appropriate assessment must contain complete, precise and definitive findings also casts doubt on the acceptability of relying upon an as-yet unspecified duration of increased phosphate levels in the River Wye SAC, pending such improvements under the NMP. In the 'trench' example, recovery begins the moment the trench is back-filled. That is certainly not the case with the NMP, which may take some time to reduce sufficiently existing phosphate levels in the River Wye SAC.
- 8.9 The Advocate-General expressly did not give an opinion on adverse effects that could be considered to be more than just 'strictly temporary' but fall short of 'permanent destruction', as might be the case of the River Wye SAC if the theoretical NMP were, at some unknown point in the future, to deliver the wished-for improvements. He suggests that *“it would be prudent to leave this point open to be decided in a later case”*, but he did conclude that *“an effect which is permanent or **long lasting** must be regarded as an adverse one”* [emphasis added].

8.10 It is also worth noting here the leap the DTA Report makes at paragraph 23(b) from arguing the permissibility of temporary adverse effects when addressing the question of site integrity under Article 6(3), to also being able to rule out “*by logical extension*” an effect as being significant (at the earlier ‘significance test’) on the basis of an effect being temporary. This is not supported by the Advocate-General in the Opinion cited nor in later Opinions or judgments of the ECJ. An effect, even if temporary, cannot be insignificant, particularly, as in the case of the River Wye SAC, if that effect is of unknown duration.

9. Conclusions

9.1 The conclusion of the HRA, with particular reference to the phosphate issue on the River Wye SAC - that the CS is not likely to have a significant effect on any European sites in and around Herefordshire - appears unsound.

9.2 The HRA should have applied the integrity test, following an appropriate assessment, to all Policies within the CS that are likely to increase phosphate pollution of the River Wye SAC.

9.3 The NMP, as mitigation, remains uncertain. There is doubt that what it seeks to deliver is both technically and practically possible. Given the uncertainty that the NMP will deliver the proposed reductions in phosphate, it is similarly unclear how the ‘integrity test’, as informed by the judgement in *Sweetman* can properly be passed.

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