

13 January 2015

NUTRIENT MANAGEMENT PLAN - CPRE FURTHER STATEMENT

This is a further statement to supplement CPRE's original comment relating to the Nutrient Management Plan (NMP) made in response to the Pre-Submission Publication of the Core Strategy (CS). We related the original comment to Policy SS2 and the associated place-shaping policies. We now think it relates most closely to Policies SS3 and SD4, although it still has ramifications for other strategic and place-shaping policies. The relevant EiP matters and questions (Draft Inspector's Matters and Issues Dec 2014 v2) appear to be Matter 2, questions 12, 14, and 15, Matter 11, questions 35, 37, and 40, and Matter 12, question 45.

CPRE's original comment submitted that the CS was not justified or effective because it relied on the NMP to provide certainty that there would be no adverse impact on the River Wye SAC as a result of the new housing proposed in the CS, but it was evident from the parts of the NMP issued by that time that there were still substantial uncertainties. The 'Action Plan' element of the NMP which might have provided that certainty had not yet been published, so CPRE was unable to make any constructive proposal about what if anything in the CS should be changed.

The NMP Action Plan became available to CPRE only in November 2014 when Herefordshire Council placed it on its own website. Subsequently CPRE obtained legal advice on how far the CS with the Action Plan in place met the obligations of the Habitats Directive (Advice dated 9 January 2015 from Guy Linley-Adams Solicitor - Appendix to this Statement). CPRE therefore wishes to make the following comments in the light of these documents.

1. The Action Plan was submitted to the Inspector without prior public consultation and placed on the Council website without any publicity, so there has been no consultation about this key element for the effectiveness of the CS and the protection of the county's environment. This compounds the lack of consultation over the earlier parts of the NMP, noted in CPRE's original comment.

2. The Action Plan is purely an administrative mechanism for promoting and monitoring future measures to reduce phosphate discharges. It provides no new information whatsoever to resolve the uncertainties, listed in our original comment, about those measures. Therefore those

uncertainties stand and it is not "reasonably foreseeable..that such temporary effects associated with additional capacity beyond existing permits might be offset by measures to be delivered through the NMP" (David Tyldesley and Assocs (DTA), Advice, February 2013, para 53). Moreover the scope of uncertainty is enlarged by the following:

a) In 2014 there was a prolonged outbreak of algal bloom on the upper Wye and this is axiomatic of increasing levels of phosphate, probably caused by run-off from chicken-rearing units during heavy rain. The data used by the NMP and the trend lines derived from them (NMP Pt1, Figs 3-1 to 3-3) stop at 2013, so do not take account of this possible change in pollution patterns.

b) Herefordshire and Powys Councils continue to receive and grant planning applications for additional chicken-rearing units in the SAC catchment.

c) Natural England is reviewing the SAC conservation targets and this is likely to lead to tighter targets within the CS period.

d) The upper boundary of the SAC on the Lugg was originally determined by a weir that restricted the movement of Atlantic salmon. This artificial barrier has now been bypassed and a case extending the SAC further up the Lugg has been presented.

e) SAGIS and FARMSCOPER are only approximate models of the movement of phosphates in the environment and contain inherent uncertainties. They require frequent updating and verification and there is no evidence that this is carried out. The reliability of their outputs will become clearer only as the NMP measures are executed.

3. Because the uncertainties about the NMP are still at this stage substantial and by their nature of indefinite duration, none of the development affected by this issue falls within DTA's 'Category C temporary effect capacity' which might apply to a "strictly temporary increase in phosphate load" (DTA Advice, para 52) and enable development to go ahead in advance of the successful implementation of NMP measures. Some development might be able to go ahead under DTA's categories A (insignificant capacity) or B (non-exceeded capacity), but the great majority will not. This must fall under Category D (bespoke capacity) which DTA advise will require "project specific mitigation [which] will need to be provided prior to the occupation/utilisation of the development concerned.." (DTA Advice, para 56).

4. In any event our legal advice (see Appendix) advises that, in the light of more recent case law, it is questionable whether the duration of reversible effects assumed in DTA's Category C could be considered "strictly temporary", while any longer lasting effect, albeit one that falls

short of permanent destruction, should lawfully be considered adverse in terms of the integrity test.

5. Our legal advice also notes that the Habitats Regulation Assessment (HRA) (LUC, May 2014) misapplies the significance test which is undertaken as part of the HRA. The HRA incorrectly takes account of mitigation at the stage of the significance test, rather than at the later (and more onerous) stage of the integrity test. The HRA is therefore unsound, and by extension the CS insofar as it relies on the HRA is also unsound.

6. As the DTA Advice recognises, drawing on the High Court case of Feeney, an assessment "...cannot do more than the level of detail of the strategy at that stage permits." At this EiP stage the uncertainties of the NMP, combined with the unsoundness of the HRA and the effect of more recent case law, means that it cannot be relied upon to show that there will be no adverse effect on the SAC. It is therefore essential that the wording of the conditional approval in the CS policies fully reflects the stringent precautionary principle of the integrity test. Policy SS3, second paragraph, fails by the use of the optional "may" and the inappropriate reference to the significance test. Policy SD4, second paragraph, fifth bullet point, is an obscurely worded condition that does not directly reflect the integrity test and will be impossible for future users of the CS to interpret clearly; moreover there is no reason why development "where the nutrient levels..are already exceeded" should be subject to a less stringent condition than where it "might lead to nutrient levels exceeding the limits" (as in the fourth bullet point).

7. The uncertainties of the NMP at this stage need to be taken into account in the housing trajectory (Figure 3.5 of the CS). Herefordshire Council has provided no evidence of whether or how it has done so. Moreover, the relevant entry of the September 2014 version of the Infrastructure Delivery Plan (Appendix 1, Environmental Quality, third entry) states "No measures or costs identified at this time" and records "n/a" for anticipated date of delivery. Para 5.3.62 of the CS promises planning guidance on phasing and funding for NMP measures, but it is not included in the latest January 2015 version of the Local Development Scheme, so there is not even a firm timescale for its production. Even if there were, it is questionable whether this could be timely enough since developers and others will need to start planning strategic allocations as soon as the CS is adopted.

8. We also draw attention to the following in relation to specific locations:

a) Hereford: although the Wye at Hereford is currently just within favourable condition, the new housing proposed there would push it into an unfavourable state unless fully mitigated. As the DTA Advice has noted (para 32), the EA/NE Statement of Intent precludes this happening, so

mitigation, ie upgraded sewage treatment, must be in place in time to deal with the impact. The earliest this could happen in Welsh Water's investment cycle is AMP7 2020-25 - and it is still highly uncertain whether even this is feasible - so at best most development in Hereford would have to be back-ended into the period 2026-31. We also note that so far as we are aware the MoU between the Council and Welsh Water - which DTA identify (para 33) as necessary to provide assurance that changed practices do not increase phosphate discharges in the meantime - has not yet been agreed.

b) Leominster: the situation is similar to Hereford with the added complication that agricultural discharges generate a greater proportion of phosphate pollution in the Lugg. Failure to sustain a downward trend in agricultural pollution, let alone an upward turn due to changed practices (eg increased poultry rearing), could in fact exacerbate this existing problem.

c) Kington, Bromyard and rural areas upstream of the SAC boundary: the DTA Advice implies that discharges into treatment works upstream of the SAC boundary could be treated as insignificant, presumably because they might be dissipated before they reach the SAC. It is unclear whether the Council has taken this into account in setting the trajectory for these locations. If it has, it should provide evidence, including the scientific basis for such an assumption. If not, it must be assumed that any phosphates discharged into the river system upstream of the SAC will move downstream into the SAC over time and take full effect - in which case these locations should be subject to the same constraints as Leominster.

Conclusion

9. We conclude that the CS is still unsound because:

a) it is still NOT LEGALLY COMPLIANT because there has been no public consultation about the NMP, including the recently issued Action Plan, which amounts to a key piece of evidence about the effectiveness and environmental impact of the CS.

b) it is still not lawful and therefore NOT EFFECTIVE because the wording of Policies SS3 and SD4 does not fully reflect the stringency of the integrity test required by the Habitats Directive.

c) it is still NOT EFFECTIVE because the continuing uncertainties about necessary NMP measures and lack of information about the timing and cost of upgraded sewage treatment means that the housing trajectory is very uncertain.

10. We therefore propose the following:

a) The full NMP should be published for consultation, including briefing material that will make this extremely complex but important matter and its ramifications readily understandable to the layperson.

b) Policy SS3, para 2, should be amended by deleting all wording after "sites" and substituting "will be phased or delayed if it is necessary to do so in order to ensure that necessary infrastructure is in place or to ensure that there is no adverse impact on the integrity of the River Wye Special Area of Conservation (SAC)."

c) Policy SD4, para 2, fifth bullet point, should be deleted entirely. The fourth bullet point should be amended by the insertion after "river" of "or where nutrient levels set for conservation objectives are already exceeded".

d) Herefordshire Council should provide evidence, for the purposes of the housing trajectory, of how it has categorised development in each of the place-shaping areas with regard to increased sewage treatment capacity (see para 3 above) and what assumptions it has made about the cost and timing of NMP measures. Unless this evidence robustly underpins the current trajectory, the latter should be revised to reflect more realistic assumptions.