

<b>Report to</b>	Strategic Planning Group
<b>Date of meeting</b>	22nd November 2021
<b>Lead Member / Officer</b>	Cllr Mark Young, Lead Member for Planning, Public Protection and Safer Communities
<b>Report author</b>	Karsten Brußk, Planning Officer
<b>Title</b>	River Dee and Bala Lake Special Area of Conservation – Introduction of tighter phosphate targets

## **1. What is the report about?**

- 1.1. Natural Resources Wales (NRW) set new phosphate targets for Welsh riverine Special Areas of Conservation (SACs) on 21st January 2021. This report is about the consequences of tighter phosphate targets for the River Dee and Bala Lake SAC for decision-making in Development Management and Strategic Planning & Housing.

## **2. What is the reason for making this report?**

- 2.1. To provide the latest information on how Planning are addressing the challenges, which have arisen from tighter phosphate targets for the River Dee and Bala Lake SAC, within the legal framework of the Habitats and Species Regulations.

## **3. What are the Recommendations?**

- 3.1. Members note the content of the report.

## **4. Report details**

### **Introduction**

- 4.1. On 21st January 2021, Natural Resources Wales (NRW) set new phosphate standards for the nine Welsh riverine Special Areas of Conservation (SACs).

NRW carried out an assessment of compliance which has shown that over 60% of relevant waterbodies are failing against the new standards, including the River Dee in Denbighshire. The objective is to improve the water quality by reducing the phosphate load through defining new targets, which are about 50 to 80% lower than the previous standards.

- 4.2. 'Phosphate' and 'phosphorus', are two frequently used terms in the evidence reports and guidance documents. 'Phosphate' ( $\text{PO}_4^{3-}$ ) is a chemical that contains the mineral 'phosphorus' (P), or 'phosphate' is an electrically charged particle when the mineral 'phosphorus' is combined with oxygen.
- 4.3. Phosphate is naturally occurring and released from natural sources at low levels. It can also enter rivers from land management practices such as agriculture, sewerage and foul water that contains detergents and food waste. Too much phosphate causes harmful changes to river ecosystems and increases the risk of algal blooms in combination with draught or loss of river shading. It is also an indicator for other water quality problems such as, ammonia or low oxygen.
- 4.4. Research by NRW has shown that the headroom to accommodate increased levels of phosphates may be limited in some waterbodies that currently meet the new standards but they could be at risk of failing should phosphate levels are allowed to rise any further. There is no headroom in waterbodies that already fail their targets, and further increases in phosphate loads will only worsen the condition of the SAC.

## **Habitats Regulations Assessment**

- 4.5. Habitats Regulations Assessment (HRA) refers to the entire process of testing whether a proposal or plan, alone or in combination, could significantly harm the designated features of a European site. Originating from the European Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (Habitats Directive), the UK Government transposed the Habitats Directive into national legislation in 1994. 'The Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019' includes necessary changes to 'The Conservation of Habitats and Species Regulations 2017' (Habitats and Species

Regulations 2017) to account for the UK's exit from the European Union. Besides the need for legal amendments, the prime purpose of protecting endangered habitats and species remains unaffected as does the HRA methodology.

- 4.6. 'European sites' is a collective term that subsumes the following international site designations: 'Special Areas of Conservation' (SACs), 'Special Protection Areas' (SPAs), candidate SACs, candidate SPAs, and SACs/ SPAs that are European Offshore Marine Sites. In Wales, Welsh Government is responsible for designating new sites or making amendments to existing site boundaries in light of recommendations made by Natural Resources Wales through the Joint Nature Conservation Committee (JNCC).
- 4.7. The HRA methodology is derived from the Habitats and Species Regulations 2017, and follows four steps in principle: (1) Screening of proposal or plan, (2) an Appropriate Assessment, (3) consideration of Alternative Solutions, and (4) test of Imperative Reasons of Overriding Interest. There is however no need to continue with an Appropriate Assessment if the proposal or plan has been 'screened out' for not having an adverse effect on the designated feature of concern at stage 1. Stage 2 also allows the consideration of any avoidance, mitigation or cancellation measures that could be implemented as part of the proposal or plan to prevent adverse effects from occurring in the first place. This can importantly not be considered in the stage 1 screening.
- 4.8. The JNCC produced a Core Management Plan for every European site in England and Wales that sets out in detail:
  - the protected features,
  - conservation objectives,
  - an assessment of the conservation status for every designated feature and,
  - if applicable, any management requirements.

It is important in HRA terms to focus on conservation status and conservation objectives when focussing on 'likely significant effects'.

- 4.9. River Dee and Bala Lake SAC Core Management Plan (2008) contains the following conservation objective for River Dee: *“Levels for nutrients, in particular phosphate, will be agreed between EAW and CCW for each Water Framework Directive water body in the River Dee and Bala Lake SAC, and measures taken to maintain nutrients below these levels”*, and *“Potential sources of pollution, nutrient enrichment and/or suspended solids that have not been addressed in the Review of Consents such as, but not confined to, diffuse pollution or disturbance to sediments, will be considered in assessing plans and projects.”* Environment Agency Wales (EAW) and Countryside Council for Wales (CCW) were combined into NRW in 2013. Awaiting further evidence from latest science and modelling exercises, the Core Management Plan is going to be subject to review in light of the tighter targets for phosphate levels for the SAC.
- 4.10. Appendix 1 contains a set of maps that depict for the River Dee and Bala Lake SAC: SAC site boundary, SAC phosphate compliance area and SAC phosphate sensitive catchments.

### **Habitats Regulations Assessments to inform Planning decisions**

- 4.11. The Habitats and Species Regulations 2017, Part 6 ‘Assessment of plans and projects’, puts the duty on Denbighshire County Council as ‘Competent Authority’ (i.e. the decision maker) to test, whether a project or plan - either alone or in combination - is likely to have a significant effect on a European site in view of that site’s conservation objectives, before deciding to give permission or authorisation. Development proposals must accordingly be considered in light of the legal requirements before making a determination.
- 4.12. The Denbighshire Local Development Plan 2006 – 2021 (LDP) was subject to a HRA and was adopted on the basis that the document would not support planning proposals which could adversely affect any qualifying site features.
- 4.13. Since the new targets for phosphate standards were introduced after the Denbighshire LDP was adopted, Officers cannot fall back on the LDP HRA assessment when dealing with planning applications that could have an effect on the River Dee and Bala Lake SAC. NRW are already a statutory consultee on

planning applications in terms of environmental protection and flood risk but also have a special role as set out in the Habitats and Species Regulations 2017. The LPA must not only consult NRW but they must have regard to any representation made by the organisation. It is not discretionary advice. The same provisions apply to planning appeals where the Planning and Environment Decisions Wales (PEDW), previously Planning Inspectorate Wales, becomes the 'Competent Authority' in the decision-making process.

- 4.14. Members are advised not to grant planning permission against NRW's advice. There is not only a risk that Welsh Government would 'call in' the planning application but there is a high risk of a Judicial Review (JR) in the courts, and great reputational damage to the Local Authority.

### **Impact of tighter targets on Development Management decisions**

- 4.15. In light of the previous paragraphs, all planning applications for sites within the River Dee and Bala Lake SAC - 'SAC Phosphate Compliance Area' or 'SAC Phosphate Sensitivity Catchments' must be subject to a HRA. The purpose is to identify phosphate neutrality or betterment.
- 4.16. If it is concluded at stage 1 'Screening' that the proposal does not adversely affect the conservation objectives of the SAC, and there would be 'no likely significant effects', then Officers can continue with making a determination on the basis of policy and material considerations.
- 4.17. If the proposals cannot be 'screened out', it must be subject to an Appropriate Assessment (stage 2), which looks in detail on the amount of phosphate to be entering the SAC, potential pathways and the appropriateness of any mitigation measures that could cancel, reduce or avoid adverse effects from occurring. If the conclusion is that they are acceptable, Officers may proceed towards determination depending on the results of the appropriate assessment.
- 4.18. NRW produced 'Advice to planning authorities for planning applications affecting phosphorus sensitive river Special Areas of Conservation', which can be found on their website. Link: <https://naturalresourceswales.gov.uk/guidance-and-advice/business-sectors/planning-and-development/our-role-in-planning-and->

development/advice-to-planning-authorities-for-planning-applications-affecting-phosphorus-sensitive-river-special-areas-of-conservation/?lang=en

It is recommended to visit NRW's website for the latest advice as the guidance is regularly updated in light of new evidence.

4.19. The guidance document sets out to Local Planning Authorities (LPAs) that the following forms of development can be 'screened out' in stage 1, without proceeding to stage 2, because there is unlikely to be a source of additional phosphate or pathway for impacts.

*(1) Any development that does not increase the volume of foul wastewater;*

*(2) Any development that improves existing water quality discharges by reducing the phosphorus load of wastewater, or by decreasing the volume of wastewater produced (e.g. by improvements to existing wastewater treatment infrastructure);*

*(3) private sewage treatment systems discharging domestic wastewater to ground, built to the relevant British Standard (BS 6297:2007 + A1:2008) as long as the maximum daily discharge rate is less than 2 cubic metres (m<sup>3</sup>), the drainage field is located more than 40m from any surface water feature such as a river, stream, ditch or drain and is located more than 50m from a SAC boundary; plus*

*to ensure that there is no significant in combination effect, the discharge to the ground should be at least 200m from any other discharge to the ground. The density of discharges to the ground should also not be greater than 1 for every 4 hectares.*

4.20. Officers are currently faced with a difficulty in carrying out 'Appropriate Assessments' for planning proposals. There is still not any available guidance on the technical process or calculations which are required to quantifying the amount of phosphate to be generated by new developments and how the additional load could impact on the site's conservation objectives. The LPA has no means of assessing the likelihood of significant effects or identifying detailed pathways between source and SAC area, and can therefore not comply with the Habitats and Species Regulations 2017.

- 4.21. There are currently circa 40 planning applications that cannot be determined because of lacking technical expertise and guidance. The LPA could simply refuse them but that would not solve the original problem. Applicants are entitled to lodge an appeal for non-determination with the PEDW. As PEDW is also bound by the Habitats and Species Regulations 2017, becoming the 'Competent Authority', and have access to the same data and guidance as LPAs, they will likely dismiss the appeal on the basis of not being able to satisfactorily demonstrate compliance with legislative requirements, as shown in all recent appeal decisions.
- 4.22. Llangollen Waste Water Treatment Works (WwTW) is the only facility with a phosphate stripping licence in the County. The Council cannot however rely on this licence when carrying out an HRA Appropriate Assessment as the original assessments for the extant environmental permits were undertaken by EAW in 2009. As such, the conclusions of the 2009 permits do not take account of the new tighter phosphorus targets for the River Dee and Bala Lake SAC.
- 4.23. There are plans for phosphate consents to be provided for WwTW in Denbigh, Dyserth, Henllan and Ruthin. However, all of these settlements are located outside the SAC phosphorus sensitivity catchments. Dwr Cymru Welsh Water (DCWW) has yet to confirm either a timetable for updating the phosphate stripping licences for WwTW in the Dee Valley or set out any upgrading works for facilities to be included in their Asset Management Plan 8 (2025 to 2030).
- 4.24. It must be highlighted that any works to DCWW facilities are only one form of contribution to the overall requirement to reduce phosphate loads in Welsh rivers. Development only relates to circa 10% of phosphate entering the rivers. Solutions also need to be found in areas that are not regulated by Planning such as, agriculture and land management procedures.
- 4.25. Welsh Government, Natural Resources Wales, Dwr Cymru Welsh Water and Local Planning Authorities are working in several groups on a solution for clearing the backlog of 'stalled' planning applications. This could be done by looking at a range of options but none have been recommended for approval yet. For example, Carmarthenshire County Council is in the process of developing a

'phosphorous' calculator but the model cannot easily be transferred to other unitary authority areas because of different local circumstances.

## **Impact of tighter targets on Strategic Planning & Housing**

- 4.26. The Council is in the early stages of producing a new LDP for the County which will be used in determining planning applications and appeals. Prior to Adoption, the draft document must be assessed regarding conformity with the legal provisions contained in 'The Conservation of Habitats and Species Regulations 2017'; applying the precautionary principle.
- 4.27. There is the requirement to carry out a HRA and consult with NRW at every stage in the plan-making process; it's an iterative process. Prior to public consultation in 2022, all elements of the deposit LDP will be scrutinised regarding the likelihood of significant effects on the qualifying features of a European site, alone or in combination. This will include the growth strategy, local policies and any prospective site allocations.
- 4.28. The introduction of tighter phosphate targets for the River Dee and Bala Lake SAC is going to be considered as part of the HRA for the forthcoming deposit LDP. There will be the need to carry out an Appropriate Assessment for proposals within the 'SAC phosphorus compliance area' and the 'SAC phosphorus sensitive catchment'.
- 4.29. Depending on forthcoming knowledge and evidence, individual candidate sites may not progress due to their additional phosphate loading without implementing appropriate mitigation measures. Officers will need to take further advice from NRW, Dwr Cymru Welsh Water and other stakeholders before determining which sites can be taken forward in the process. New information continues to emerge. Officers are therefore not in the position to set out a timetable for resolving the issues but remain optimistic that there won't be a delay to the overall process of producing a replacement LDP.

## **Next Steps**

- 4.30. Officers continue working with colleagues across different professions and sectors in Wales. There are regular meetings that aim to discuss potential solutions and share expertise. Members of the Strategic Planning Group will receive an update as and when progress is made in relation to progressing 'stalled' applications.
- 4.31. Welsh Government is in the process of commissioning training on the subject, and anticipates course delivery to LPAs by the beginning of next year. NRW is meanwhile looking at the permitting and licencing process to ensure strict control of any mitigation measures, as well as any solutions that could include private sector involvement such as, planning obligations for mitigation measures.
- 4.32. If Members have a query or wish to discuss individual sections of the document, please contact the Strategic Planning & Housing team via phone: 01824 706916 or email: 'planningpolicy@denbighshire.gov.uk'

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