ADVICE TO HEREFORDSHIRE COUNCIL

INFORMING THE HABITATS REGULATIONS ASSESSMENT OF THE HEREFORDSHIRE CORE STRATEGY

THE RIVER WYE SAC

Aligning the Habitats Regulations Assessment of the Core Strategy with the Statement of Intent and Nutrient Management Plan for the River Wye SAC

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DAVID TYLDESLEY AND ASSOCIATES
PLANNING, LANDSCAPE AND ENVIRONMENTAL CONSULTANTS

Background

1. DTA have been working with Herefordshire Council over several months providing advice in relation to the implications of planned development within the catchment of the River Wye upon the River Wye Special Area of Conservation (SAC).

2. Following from the advice provided, and in close liaison with the Environment Agency (EA), Natural England (NE) and Welsh Water (DCWW), a Statement of Intent (SoI) has recently been signed by EA and NE.

3. The SoI sets out a commitment by both organisations to produce and implement a nutrient management plan (NMP) for the River Wye SAC.

4. Whilst the above work has been ongoing, Herefordshire Council have been developing their emerging Core Strategy. Land Use Consultants (LUC) are undertaking the necessary Habitats Regulations Assessment (HRA) of the Core Strategy which, among other things, will need to refer to the SoI and forthcoming NMP when considering the potential effects of planned development on the River Wye SAC.

5. DTA have been asked to provide advice to Herefordshire Council on the manner in which the SoI and forthcoming NMP might align with the HRA of the Core Strategy.

The Statement of Intent

6. The purpose and relevance of the signed SoI is given as:

> *'This agreement is a formal commitment between Natural England and Environment Agency to develop and deliver a Nutrient Management Plan for the River Wye SAC in England. The Plan will embody measures which will ensure the favourable conservation status of the SAC in respect of phosphate levels as soon as possible and at the latest by 2027 taking in to account the existing river phosphate levels and existing water discharge permits'*
>
> *' The plan will also seek to identify actions that would enable additional development (beyond existing consents) to proceed during the period 2013 to 2031 of the type and amount, and in the locations specified in or pursuant to the emerging Herefordshire Core Strategy and other relevant development plans'*

7. Section 1.3 of the SoI goes on to state that local planning authorities '*may have regard to the plan and the commitment to deliver its actions, when considering the potential effects of new development upon the SAC under the provisions of the Habitats Regulations'.*

8. Section 4 of the SoI sets out the aims of the NMP. Section 4.1refers to the establishment of the necessary conservation measures which *'correspond to the ecological requirements of the site in relation to phosphate'*, and sets out the basis upon which the phosphate target within the favourable condition table corresponds to the conservation objectives for the site and the ecological requirements referred to.

The NMP can therefore be regarded as the vehicle through which the conservation objectives for the SAC, in relation to phosphate levels, will be delivered.

9. Section 4.2 states that '*the aims of the NMP are therefore to control and reduce phosphorous and in doing so to facilitate the delivery of new development'*, and goes on to state that the plan will '*identify and deliver the management actions required to achieve these aims'*.

10. In a recent letter to the leader of Herefordshire Council[1], the Director of Land Use at Natural England stated that:

> *" I would like to emphasise Natural England and the Environment Agency's commitment to continue to work with the Council to find a solution which delivers development and ensures that the conservation objectives for the Rivers Wye and Lugg SAC can be achieved. Natural England are confident that commitment to the Nutrient Management Plan (NMP) and critically the implementation of actions by relevant parties will enable delivery of both objectives"*

11. The implications of the SoI on planned development within the catchment of the River Wye SAC are therefore dependent upon whether the planned development can be accommodated within the 'existing water discharge permits' at the receiving WWTW as set out below:
    a. Where development can be accommodated within the 'existing water discharge permits' at the receiving WWTW, the plan '*will ensure the favourable conservation status of the SAC in respect of phosphate levels as soon as possible and at the latest by 2027'*
    b. Where development is 'beyond existing consents' the NMP will '*seek to identify actions'* that will enable such development.

Policy SD4 in the core strategy

12. Policy SD4 within the core strategy refers to wastewater treatment and river water quality. The supporting text in relation to the policy specifically refers to both the SoI and the NMP. SD4 identifies potential mitigation that may need to be delivered in respect of development connecting to the existing mains wastewater infrastructure network. This mitigation may involve:

    - *incorporating measures to achieve water efficiency and/or a reduction in surface water discharge to the mains sewer network, minimising the capacity required to accommodate the proposal, in accordance with policy SD3*
    - *phasing or delaying development until further capacity is available*
    - *the use of developer contributions/community infrastructure levy funds to contribute to improvements to waste water treatment works to release capacity to accommodate new development*

[1] Letter to Mr Jarvis at Herefordshire Council from Rob Cooke at Natural England dated 28th January 2013

- *in the case of development which might lead to exceedence of the conservation objectives target 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 in view of the site's conservation objectives;*
- *Where the conservation objectives are already being exceeded, new development should not compromise the ability to reduce phosphate levels to those which are defined as favourable for the site*

Development which can be accommodated within 'existing water discharge permits'

13. The HRA of the core strategy will need to make an assessment of the proposed development on the SAC, taking account of the potential effects of wastewater disposal. Where proposed development can be accommodated within the existing permits, the NMP will embody measures which will ensure *'the favourable conservation status of the SAC in respect of phosphate levels as soon as possible and at the latest by 2027'*.

14. In accordance with EC case law[2], '*in assessing the potential effects of a plan or project, their significance must be established in the light, inter alia, of the characteristics and specific environmental conditions of the site concerned by that plan or project'*.

15. Prior to the SoI, there were no robust commitments to reduce phosphate within the SAC. With regard to *'the characteristics and specific environmental conditions of the site' a*ny additional loading regarded as likely to have a significant effect alone or in combination with other proposed development, represented potential long term deterioration to water quality which generally prevented a conclusion of no likely significant effects, or no adverse effect on the integrity of the site being ascertained.

16. Since the production of the SoI however, there is now a robust commitment by the statutory bodies to deliver measures to reduce phosphate and to meet the conservation objectives for the SAC in terms of phosphate levels as soon as possible and at the latest by 2027. As such, additional loading now needs to be assessed in combination with other plans and projects and the NMP; ie: within a context of what will be an *improving* trend in phosphate levels within the SAC.

17. Whilst there is now a clear commitment to produce and implement a nutrient management plan, it is not yet in place; decision making as part of the HRA for the core strategy needs to acknowledge the necessary lead in time associated with:

    - The production of the plan itself
    - The implementation of measures to reduce phosphate
    - The actual delivery of reductions in phosphate levels within the SAC (whilst some measures will result in immediate reductions, others will deliver more gradual improvements).

[2] ECJ Case C-127/02 'Waddenzee' Jan 2004 (para 48).

18. With the SoI now in place, and the anticipation of an improving trend in phosphate levels, it is not necessarily the case that all development which contributes additional phosphate will have a likely significant effect, or an adverse effect upon the integrity of the SAC, even when considered in combination with other plans and projects. Temporal and spatial elements of potential effects will need to be taken into consideration in coming to any such conclusions, with reference to existing case law and relevant guidance.

Underlying Principles

19. In assessing the effects of the core strategy in accordance with regulation 102 of the Conservation of Habitats and Species Regulations 2010, there are potentially two tests to be applied by the competent authority, a "Significance Test", followed if necessary by an appropriate assessment which will inform the "Integrity Test". The relevant sequence of questions is as follows:

- Step 1 Under reg 102(1)(b), consider whether the plan is directly connected with or necessary to the management of the sites. If not –
- Step 2 Under reg 102(1)(a) consider whether the plan is likely to have a significant effect on the site, either alone or in combination with other plans or projects ("the Significance Test"). If Yes –
- Step 3 Under reg. 102(1), make an appropriate assessment of the implications for the site in view of its current conservation objectives. In so doing, it is mandatory under reg 102(2) to consult Natural England, and optional under reg 102(3) to take the opinion of the general public.
- Step 4 In accordance with reg 102(4), but subject to reg 103, give effect to the land use plan only after having ascertained that the plan will not adversely affect the integrity of the SAC.

20. In Waddenzee (Case C-127/02) the European Court of Justice ruled on the interpretation of Article 6(3), including that:

- An effect should be considered 'likely': *"if it cannot be excluded, on the basis of objective information, that it will have a significant effect on the site"* (para 45)
- An effect should be considered 'significant' *"if it undermines the conservation objectives"* (para 47)
- A conclusion of no adverse effect on integrity : *".... is the case where no reasonable scientific doubt remains as to the absence of such effects"* (para 59)

21. In relation to the likely significant effect screening stage (the significance test) Advocate General Sharpston, in a recent opinion delivered to the Court of Justice of the European Union[3] commented:

> *"*48 *The requirement that an effect in question be 'significant' exists in order to lay down a* de minimus *threshold. Plans or projects that have no appreciable effect on the site are thereby excluded. If all plans or projects capable of having* any *effect*

[3] Advocate General's Opinion to CJEU in Case C-258/11 Sweetman and others v An Bord Pleanala 22nd Nov 2012

whatsoever on the site were to be caught by Article 6(3), activities on or near the site would risk being impossible by reason of legislative overkill"

22. Of relevance to this paper, the case in question to which the opinion above refers considered the potential permanent loss of part of a SAC and the implications for the integrity of the site affected. The Opinion considered the temporal nature of effects in the following manner:

    "59. *A plan or project may involve some strictly temporary loss of amenity which is capable of being fully undone – in other words, the site can be restored to its proper conservation status within a short period of time. An example might be the digging of a trench through earth in order to run a subterranean pipeline across the corner of a site.* Provided *that any disturbance to the site could be made good, there would not (as I understand it) be an adverse effect on the integrity of the site*.

    60. *Conversely, however, measures which involve the permanent destruction of a part of the habitat in relation to whose existence the site was designated are, in my view, destined by definition to be categorised as adverse. The conservation objectives of the site are, by virtue of that destruction, liable to be fundamentally – and irreversibly – compromised*."

23. This opinion helpfully clarifies two important points:

    a. First, it allows for the authorisation of plans and projects whose possible effects, alone or in combination, can be considered 'trivial' or *de minimus;* referring to such cases as those '*which have no appreciable effect on the site'*. In practice such effects could be screened out at 'the significance test' as having no likely significant effect; they would be 'insignificant'.
    b. Second, the opinion recognises that if an adverse effect is temporary, that may be the reason, or amongst other reasons, why such an effect may properly be characterised as not being adverse in relation to 'the integrity test' (or, by logical extension, not being significant under the 'significance test') for the purposes of Article 6(3)/regulation 102. The example provided illustrates that a "short period of time" may extend to a few years (which is the timescale within which a given habitat might be expected to recover such as that given in the Advocate general's example).

24. In considering this question it is also appropriate to consider relevant existing guidance. In July 2011 the Environment Agency (EA) and Natural England (NE) produced a joint paper entitled "Advising on Growth and Water Quality in Natura 2000 sites and SSSIs: A Joint Environment Agency / Natural England approach". This paper excludes the potential effects from development where *'there is agreement that based on sound evidence that the impact of the resulting discharge (alone or in combination) is trivial'*. The joint paper refers to a separate paper by Natural England on triviality[4], this paper

[4] Natural England 'Review of Consents Stage 3 conclusions, the in-combination test and triviality' Helen Wake 2004.

was written to inform the Environment Agency review of consents work and should be read in that context, it defines a trivial effect in the following manner:

> *"A trivial effect is one where, due to the scale, nature and duration of the permissions considered, it is not reasonably foreseeable that their combined contribution to the effects on the site will result in any measurable change to the structure and/or function of the site. Thus there is not a realistic mechanism by which those plans or projects could act together 'in-combination' to produce an effect. In these circumstances a conclusion of no adverse effect on the integrity of the site arising as a result of Agency regulated permissions can be reached. In coming to this conclusion however, the Agency is not expressing a view on the effect, if any, that prevailing environmental conditions, beyond and in addition to those plans or projects under consideration, may be having on the integrity of the European site."*

25. This principle of what is a likely significant effect was also considered in the Boggis judgment[5]; the Court of Appeal ruled that there should be "*credible evidence that there was a real, rather than a hypothetical, risk"*. What the assessment needs to concentrate on are those aspects of the core strategy that could, realistically, be likely to have a significant effect, either alone or in-combination.

26. The point referred to in paragraph 23(b) above is endorsed in a Natural England internal guidance note on the concept of site integrity[6]. Section 4.3 of the paper specifically considers the duration of an impact and the potential for recovery/reversibility of effects. It states:

> "*The duration of any impact(s) and the potential for recovery/reversibility are important factors to consider when determining whether it is possible to demonstrate no adverse effect on integrity. The following key points need to be worked through:*
> - *What is the anticipated duration of any potential impact (as opposed to the duration of the plan or project)? The issue of duration should also be considered with reference to the issue of scale. For example a conclusion of no adverse effect on integrity may be able to be reached in the case of a small-scale effect from which the site/feature can quickly recover.*
> - *Is recovery possible and if so would it be natural recovery or would management be required?*
> - *What is the timescale of any anticipated recovery (for example vegetated shingle habitats take thousands of years to form and recovery times would be of this magnitude, other habitats may be expected to recover within a year)? The longer the recovery time the more difficult it will be to demonstrate no adverse effect on integrity.*
> - *Is there any uncertainty regarding whether recovery will take place?"*

27. With reference to the point in paragraph 23(b), such an interpretation would align with the guidance provided within the joint EA/NE July 2011 paper referred to in paragraph 24 above. The guidance states that the agencies would not object to development that would result in deterioration of existing water quality "*if a suitable management plan is in*

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[5] Peter Charles Boggis and Easton Bavants Conservation v Natural England and Waveney District Council, High Court of Justice Court of Appeal case C1/2009/0041/QBACF Citation No [2009] EWCA Civ. 1061 20th October 2009

[6] Natural England "Internal Guidance to decisions on 'site integrity': A framework for provision of advice to competent authorities", Chapman & Philp, May 2004

place which will improve water quality and aims to achieve the conservation objective within a reasonable timescale, and the proposed development will not compromise deliverability of that plan". In essence a temporary effect, capable of being undone, within a reasonable timescale would not attract an objection from the agencies under the provisions of the Regulations.

28. In summary therefore, the following principles are established:

- In the light of a forthcoming nutrient management plan to ensure the favourable conservation status of the SAC in respect of phosphate levels as soon as possible and at the latest by 2027, there may be a threshold for development, which has no appreciable effect, to be regarded as *de minimus*. The effects from such development would be regarded as 'insignificant' and, in any event, the forthcoming NMP will nevertheless cancel those effects.
- In the light of a forthcoming nutrient management plan to ensure the favourable conservation status of the SAC in respect of phosphate levels as soon as possible and at the latest by 2027, 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.
- It is reasonable for new development to be delivered in parallel with necessary measures to achieve site integrity through the NMP, without the need for project specific additional mitigation measures, so long as:
    a. the necessary <u>overall</u> improvement is delivered within a reasonable timescale, and
    b. the development does not compromise the deliverability of the NMP.

Applying the principles to the HRA of the core strategy

29. With reference to the <u>Waddenzee</u> ruling set out in paragraph 19 above, an effect is 'likely' if it cannot be excluded on the basis of objective information and 'significant' if it undermines the conservation objectives for the site. With reference to paragraph 8 above, the NMP is the vehicle through which the conservation objectives for the SAC, in relation to phosphate levels will be delivered.

30. Where development can be accommodated 'within existing consents', the SoI states that the NMP will 'ensure the favourable conservation status of the SAC in respect of phosphate levels as soon as possible and at the latest by 2027'. Section 4.2 specifically refers to the NMP facilitating the delivery of new development and specifies:

    '(i) Sections of the River Wye SAC where the phosphate levels currently exceed the favourable condition target (River Lugg) will be subject to measures to reduce phosphate levels to those which are defined as favourable for the site. The design and timing of these measures will be ***such as to ensure that, taking these measures into account, new development within existing water discharge permits can occur without any significant adverse effect*** *on the integrity of these sections of the SAC, and without compromising the achievement of the reductions in phosphate levels required as soon as possible and at the latest by 2027.*

(ii) Sections currently meeting the favourable condition phosphate target will be subject to measures to ensure that future inputs of phosphate will not ***at any time lead to any adverse effect on the integrity of the SAC*** *as a consequence of currently available capacity at the permitted discharges being utilised by new development'.*

31. Section 5.1 of the SoI sets out certain criteria that the NMP will have to meet, the first being:

    'The sum total of the results of the actions will ensure the site reaches favourable conservation status across its entire length with regard to levels of phosphate as soon as possible and at the latest by 2027, and will ensure that the sections currently meeting favourable conservation status but at risk remain in favourable conservation status'.

32. This criterion ensures that in facilitating development, the NMP will not allow stretches of the river which do not currently exceed the NE phosphate targets to be pushed into an exceeded state. This criterion is relevant to the phasing of development which can be accommodated within the 'existing water discharge permit' at the Rotherwas and Eign WWTW (referred to as the Hereford City WWTW). The stretch of the SAC downstream of the works is currently below the NE phosphate target. However, if utilised to the maximum permitted capacity, the stretch below the works would be pushed into an exceeded state. Such a scenario is specifically excluded by the criteria listed in 5.1 of the SoI, which will have implications for the phasing of the allocations which would connect to the Hereford City works, potentially meaning that the development would have to be 'back ended' within the overall Core Strategy timeframe, until such a time as the permit is subject to an amendment to impose a tighter phosphate limit.

33. In recognition of the implications for delivery of the core strategy, and the quantum of development which would connect to the existing Hereford City works, Herefordshire Council are currently seeking a Memorandum of Understanding (MoU) with DCWW in relation to the maintenance of current operating practices at the Hereford City works. The potential for exceedance of the NE phosphate target is a *hypothetical* possibility, if the current operating practices at the works were to change (but still remain within their permitted limits). DCWW do not envisage any need to make such changes to their operating practices and the MoU has been drafted to enable Herefordshire Council to rely on the current operating practices being so maintained. It is anticipated that the MoU between Herefordshire Council and DCWW will be agreed and signed by the time the Core Strategy is finalised.

34. With reference to policy SD4, development can be made subject to potential mitigation measures to ensure that it will not undermine the deliverability of the NMP. Development which does not undermine the NMP, which is the vehicle through which the conservation objectives for the SAC in respect of phosphate levels will be delivered, will not, by extrapolation, undermine the conservation objectives for the SAC.

35. Effects can be excluded on the basis of the objective information available through:

a. The Statement of Intent
b. Associated correspondence from Natural England
c. Relevant case law
d. The July 2011 joint EA/NE position paper
e. The Natural England paper on triviality
f. The Natural England guidance on the concept of site integrity
g. The emerging MoU between Hereford Council and DCWW in relation to the Hereford City WWTW

36. For the purposes of the HRA of the core strategy, on the basis of the reasoning set out above it is our opinion that development which can be accommodated within existing water discharge permits would not be likely to have a significant effect upon the River Wye SAC.

37. The decision on 'no likely significant effect' for such development will need to be made 'in combination' with other plans or projects. It is beyond the remit of this current advice to consider potential in combination effects, if any, other than the effects when combined with the Nutrient Management Plan itself. These will need to be assessed by LUC as part of the overall HRA of the core strategy. To be relevant, the effects of the other plans or projects, in this context, would need to combine with the residual effects of the Core Strategy on the River Wye SAC in ways that would make the Core Strategy's effects more likely or more significant.

Development which cannot be accommodated within existing water discharge permits

38. It is our understanding, on the basis of information currently available, that the majority of the core strategy development allocations can be accommodated within existing permits. In particular the allocations in relation to Hereford City (Rotherwas and Eign), Bromyard, Kington and Ross-on-Wye WWTWs can all be accommodated within existing permits. We understand that the most significant potential shortfall relates to the treatment works at Leominster, with the remaining shortfall being split across several of the rural treatments works, which are generally located some distance upstream of the SAC boundary.

39. Any proposal to increase capacity at existing works to accommodate further development will be subject to a full Habitats Regulations Assessment by the Environment Agency, as the competent authority in relation to the WWTW permits concerned.

40. In relation to development beyond existing permits, the SoI states that the NMP '*will also seek to identify actions'* that would enable such development to proceed. Section 4.3(iii) goes on to state that '*the plan will attempt to identify further actions which will facilitate further development within the catchment that is in line with the policies within the emerging core strategy and other strategic planning documents within the catchments of the SAC'*. The commitment here by the relevant agencies is more cautious than that given in relation to development within existing water discharge permits.

41. The rationale set out above in relation to development within existing water discharge permits is not therefore transferable to development beyond existing permits. It is our opinion, on the basis of information currently available, that such development would have a likely significant effect upon the River Mease SAC, in which case an appropriate assessment would be required as part of the HRA of the core strategy.

42. in the High Court case of Feeney[7] the judge said:

> *"Each appropriate assessment must be commensurate to the relative precision of the plans at any particular stage and no more. There does have to be an appropriate assessment at the Core Strategy stage, but such an assessment cannot do more than the level of detail of the strategy at that stage permits"*

43. As set out in paragraph 15 above, in accordance with EC case law[8], '*in assessing the potential effects of a plan or project, their significance must be established in the light, inter alia, of the characteristics and specific environmental conditions of the site concerned by that plan or project'*.

44. An 'appropriate' assessment of the effects of increasing the dry weather flow limits at existing wastewater treatment works to accommodate further development 'beyond existing permits' would need to take account of the potential effects of such permit amendments in light of the prevailing environment conditions at the time of the proposed permit changes. The implementation of the NMP up to 2027 will result in an improving trend in phosphate levels within the SAC; the timing, location and extent of such anticipated 'improvements' will only become apparent once the NMP is implemented.

45. 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.

46. In a judgment in the Court of Session in Scotland in October 1998[9], when considering the appropriate assessment requirements, Lord Nimmo-Smith stated that:

> *"Although counsel for the petitioners laid great stress on the words 'only after having ascertained', I do not accept that this means that there must be an absolute guarantee that the integrity of the site will not be adversely affected... There never can be an absolute guarantee about what will happen in the future, and the most that can be expected of a planning authority, as a competent authority under the regulations, or of SNH, as the appropriate nature conservation body, is to identify the potential risks, so far as they may be reasonably foreseeable in light of such information as can reasonably be obtained, and to put in place a legally enforceable framework with a view to preventing these risks from materialising"*

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[7] Sean Feeney v Oxford City Council and the Secretary of State CLG para 92 of the judgment dated 24 October 2011 Case No CO/3797/2011, Neutral Citation [2011] EWHC 2699 Admin

[8] ECJ Case C-127/02 'Waddenzee' Jan 2004 (para 48).

[9] *WWF-UK Ltd and RSPB v Secretary of State for Scotland et al* [1999]1 C.M.L.R. 1021 [1999] Env LR 632, Court of Session, Edinburgh, 28th October 1998. http://www.scotcourts.gov.uk/opinions/Nim0607.html

47. Whilst there can never be an absolute guarantee about what will happen in the future, in developing a core strategy, and because the effects are reasonably foreseeable, Herefordshire Council needs to have some degree of confidence that the avoidance of adverse effects on the integrity of the SAC, from allocated development 'beyond existing permits', can be the subject of a legally enforceable framework which would prevent such risks from materialising. In light of the later ruling from the ECJ in EC vs UK (Case C-6/04) it is not sufficient to simply rely on a later appropriate assessment at project stage to avoid adverse effects upon the integrity of the SAC. Some consideration of how such effects might realistically be avoided at the plan stage is necessary. In her opinion Advocate General Kokott stated in paragraph 44 that:

> *'The objectives of the Habitats Directive would be jeopardised if the requirements of site protection could in principle prevail over an opposing plan only at the last moment as an exception to the normal course of procedure'*

48. She went on to state in paragraph 49 that :

> *'Adverse effects on areas of conservation must be assessed at every relevant stage of the procedure to the extent possible on the basis of the precision of the plan. This assessment is to be updated with increasing specificity in subsequent stages of the procedure'*

49. Taking account of the forthcoming NMP, and the most likely scenarios that might apply to future required permit amendments to deliver development beyond existing permits, it is likely that the increased capacity would fall into one of the following categories:

Category A: insignificant capacity

50. Further capacity which is considered to represent so small a contribution to the SAC that it could not compromise the conservation objectives (even when considered in combination with other plans and projects). This would generally be expected to apply to further capacity being delivered at WWTWs which are a considerable distance upstream of the SAC boundary, or to very minor increases in capacity at works closer to the SAC boundary. Such capacity will not have any appreciable effect and could be regarded as *trivial* in light of the recent Advocate General's Opinion in Sweetman already referred to in paragraph 20[10], and as defined in the Natural England paper on triviality[11] referred to in the Joint Environment Agency and Natural England 2011 paper[12]. It is our opinion that such capacity could reasonably be assigned to new development without having an adverse effect upon the integrity of the River Wye SAC.

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[10] Advocate General Opinion to CJEU in Case C-258/11 Sweetman and others v An Bord Pleanala 22nd Nov 2012

[11] Natural England 'Review of Consents Stage 3 conclusions, the in-combination test and triviality' Helen Wake 2004.

[12] Advising on Growth and Water Quality in Natura 2000 sites and SSSIs: A Joint Environment Agency / Natural England approach. July 2011

Category B: non-exceeded capacity

51. Further capacity which can be assigned without causing an exceedence of the relevant NE phosphate targets within the SAC. It is our opinion that this capacity could reasonably be assigned to new development without having an adverse effect upon the integrity of the SAC, as it would not lead to an exceedence of the phosphate target and would not therefore undermine the conservation objectives.

Category C: temporary effect capacity

52. Further capacity which is considered to represent a strictly temporary increase in phosphate load within the SAC, where the phosphate levels in the receiving stretch already exceed the relevant phosphate target. In the absence of a NMP the duration, severity and spatial extent of such *permanent* effects would generally be expected to prevent a conclusion of no adverse effect on the integrity of the SAC, especially when considered in-combination with other plans and projects. However when the effects of planned development are considered in combination with the NMP, the potential effects can be regarded as temporary. The duration, severity and spatial extent of the temporary increase would be such that it would not undermine the deliverability of the NMP and would not therefore be expected to undermine the conservation objectives of the SAC. It is our opinion that such development may reasonably be delivered without adverse effects upon the integrity of the SAC.

53. It is considered reasonably foreseeable, with reference to the underlying principles set out in paragraphs 19-28, that such temporary effects associated with additional capacity beyond existing permits might be offset by measures to be delivered through the NMP and referred to within section 7 of the SoI.

Category D: Bespoke capacity

54. Further capacity that might be considered to require a 'bespoke' solution would be relevant to two reasonably foreseeable scenarios. Firstly, where the phosphate levels in the receiving stretch already exceed the relevant phosphate target, and further capacity *beyond existing permits* may result in effects for which the duration, severity and spatial extent of the potential increase in phosphate levels would be sufficient to cast doubt over whether the measures identified through the NMP could still be relied upon to ensure the favourable conservation status of the SAC in respect of phosphate levels by 2027. The delivery of such further capacity would therefore be considered to undermine the deliverability of the NMP, and hence undermine the achievement of the conservation objectives. There is a risk that it might not be possible to ascertain no adverse effect on the integrity of the SAC in relation to such development.

55. Secondly, where the WWTW permit discharges into a stretch that is currently below the relevant NE phosphate target and the further capacity would lead to an exceedence of the phosphate targets. Such a scenario is explicitly excluded within the statement of intent; the ecological implications of a stretch being pushed into an exceeded state from a non-exceeded state, even for a short period of time, would be considered to represent a threat of an adverse effect to the integrity of the SAC.

56. Further capacity that would fall into the category D scenario would therefore be subject to specific bespoke mitigation measures being agreed with the relevant authorities, over and above those being delivered through the NMP, which would need to ensure that the proposed development will have no adverse effect on the integrity of the SAC. It is generally expected that such project specific mitigation will need to be provided prior to occupation/utilisation of the development concerned, and will be the responsibility of the project proposer.

57. Development which is not able to deliver such mitigation measures is explicitly excluded within bullet points 4 and 5 of policy SD4 within the Core Strategy.

58. On the basis of the potential measures which are reasonably foreseeable in respect of further capacity which would fall within categories A-C above, it would appear to be reasonable for the Council to rely on the wider benefits to be delivered through the NMP in '*seeking to identify actions that would enable additional development (beyond existing consents)'* as potential mechanisms which would enable development beyond existing permits to be delivered without adverse effects upon the integrity of the SAC.

59. The HRA of the core strategy will, however, need to acknowledge the potential risks in association with further capacity which might fall into category D. Policy SD4 includes a specific safeguard condition in relation to such further capacity requirements which effectively provides a 'conditional approval' in relation to such development.

60. In the High Court case of Feeney already referred to in paragraph 37, the court specifically considers the use of such 'conditional approval' within the context of the HRA for the Core Strategy of Oxford City Council, and the proposed allocation referred to as the 'Northern Gateway'. The judge said:

> '97. *This conditional approval recognises that there may be a tension between the competing objectives of, on the one hand, achieving the Northern Gateway in its current form and, on the other hand, protecting the interests of the Oxford Meadows SAC. Conditional approval is the way in which the Council has reconciled these competing objectives; the tension is resolved ultimately in favour of protection of Oxford Meadows SAC'* and further...
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> 99. *The conditional approval is a permissible and lawful course of action; and there is no basis for concluding that this is an approach which no reasonable council could properly have taken. For these reasons, the Claimant has no real prospect of establishing that the Council's decision to approve the Core Strategy was Wednesbury unreasonable in this way'*

61. It would therefore appear that the reliance on the safeguard condition set out in policy SD4 is a reasonable approach to reconcile the competing objectives of, on the one hand, delivering the development 'beyond existing permits' and, on the other hand, protecting the interests of the River Wye SAC.

62. It is therefore our view that the HRA of the Core Strategy could reasonably ascertain no adverse effects upon the integrity of the River Wye SAC in relation to development which cannot be accommodated within existing water discharge permits with reference to:
    - The signed SoI and the forthcoming NMP
    - The protection afforded in policy SD4

63. It is beyond the scope of this advice to consider the effects of development which cannot be accommodated within existing water discharge consents in combination with other plans and projects, which will need to be assessed by LUC as part of the overall HRA of the core strategy. However, again to be relevant, the effects of the other plans or projects, in this context, would need to combine with the residual effects of the Core Strategy on the River Wye SAC in ways that would make the Core Strategy's effects more likely or more significant.

Dr Caroline Chapman MIEEM: Senior Habitats Directive Specialist
David Tyldesley FRTPI FIEEM FRSA: Principal
David Tyldesley and Associates
18th February 2013