

# **Title of report: Phosphate Credit Pricing and Allocation Policy**

**Meeting: Cabinet**

**Meeting date: Thursday 26 May 2022**

**Report by: Cabinet member Infrastructure and transport;**

**Classification**

Open

**Decision type**

Key

This is a key decision because it is likely to result in the council incurring expenditure which is, or the making of savings which are, significant having regard to the council's budget for the service or function concerned. A threshold of £500,000 is regarded as significant.

This is a key decision because it is likely to be significant having regard to: the strategic nature of the decision; and / or whether the outcome will have an impact, for better or worse, on the amenity of the community or quality of service provided by the authority to a significant number of people living or working in the locality (two or more wards) affected.

Notice has been served in accordance with Part 3, Section 9 (Publicity in Connection with Key Decisions) of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012.

**Wards affected**

(All Wards);

**Purpose**

Cabinet are asked to consider the proposed pricing arrangements for Phosphate Credits, an interim allocation policy pending a full allocation policy and to note the proposed Phosphate Credit Allocation Policy.

**Recommendation(s)**

**That:**

- a) To continue with all further necessary preparations to the point of commencing trading of credits but not to proceed with the sale of credits until a further report has been provided to Cabinet updating on Nutrient Certainty of the integrated wetlands

- b) To approve the pricing of Phosphate Credits at £14,000 + VAT per kilogram of offset required per year.
- c) To allocate and ring fence the Phosphate Credit income into the specific Wetland Revenue Reserve to fund the ongoing wetland maintenance, Phosphate Credit administration and investment in further phosphate reduction initiatives across the County;
- d) To approve an interim 'First Come First Served' policy in validation order allocation of Phosphate Credits for housing development applications received and validated on or prior to 31<sup>st</sup> October 2021 as outlined in this report;
- e) To note the Phosphate Credit Allocation Procedure as set out in this report;
- f) To agree that, where a planning application lapses or a developer chooses not to proceed to build, all unused Phosphate Credits will be forfeited and the fee paid for them returned to the developer less an administration fee, as part of the Section 106 agreement Process.
- g) To receive a report at a future date to agree a permanent Phosphate Credit allocation policy for applications received on or after 1<sup>st</sup> November 2021; and
- h) To delegate to the Corporate Director of Economy and Environment in consultation with the Cabinet Member for Infrastructure and Transport minor clarifications and amendments to the interim Phosphate Credit allocation policy as may be needed from time to time and to review and update the Phosphate Credit price as required.
- i) To review the price of phosphate credits in March 2026 based on actual final build and three years actual operating costs.

## **Alternative options**

1. Do nothing – not recommended.
  - a. Without a credit pricing and allocation policy credits cannot be traded. As phosphate levels remain in exceedance of conservation targets within the River Lugg catchment area any planning permissions unable to achieve onsite nutrient neutrality within the River Lugg catchment area and development would be unable proceed in the north of the county.
  - b. The council would have to return the £1m Getting Building Fund grant to the Marches LEP as it would be unable to meet the LEP output targets and the wetlands project cost would have to be further mitigated by the council.

## **Key considerations**

2. The River Lugg Special Area of Conservations (SAC) covers the last nine mile stretch of the river before it enters the River Wye. Under the Habitat's directive, SACs require the highest level of protection, appropriate management, enhancement and where necessary, restoration. In July 2019, Natural England advised Herefordshire Council of the need to seek legal advice pertaining to the ruling made by the Court of Justice of the European Union (the CJEU) on the interpretation of the Habitats Directive in the case of Coöperatie Mobilisation (AKA the Dutch Case12) (Joined Cases C-293/17 and C-294/17 ).
3. The Council took Counsel's advice and concluded that to protect the Lugg SAC, it was not possible to permit any development on the Lugg, Frome or Arrow catchments unless a Habitats Regulations appropriate assessment concluded in accordance with Regulation 63(5) of the Conservation of Habitats and Species Regulations 2017 that the proposed development would

not adversely affect the integrity of the site, ie that the development was “nutrient neutral” there being no likely significant effects on the Lugg SAC. This immediately prevented most development proposals across the north of the county from proceeding.

4. There are currently 147 planning applications in the planning system which are unable to progress for a positive determination as they are unable to demonstrate nutrient neutrality. These applications represent 1,965 homes in the River Lugg catchment area as at the 31<sup>st</sup> October 2021, the cut-off date for this policy.
5. A further approximate 52 applications, totalling around 252 have been received since the cut-off date for the first come first served policy and, in the event that they are unable to find other satisfactory private mitigation, they will be the subject of a new policy when sufficient credits become available. Ricardo have been commissioned to work with the Council and Developers to develop this policy. The total waiting list at the moment stands at applications for 2217 homes in the Lugg Catchment. We understand that other developers have chosen not to submit applications until credits become available and therefore the unmet demand for credits may well be higher than this.
6. Cabinet has today considered an update report on steps being taken by the Integrated Wetlands Project Team to ensure a robust determination of Nutrient Certainty in the very near future. In the meantime, this report will assist in setting the policy framework and provide clarity to developers to allow necessary preparations and updating of Planning Applications to proceed. However, the sale of credits cannot commence until such time as Cabinet is completely satisfied that Nutrient Certainty has indeed been achieved.

### **Proposed Pricing of Phosphate Credits**

7. In line with the Council’s charging policy the proposal is to recharge the cost of phosphate credits on a full cost recovery basis. This is also in accordance with the polluter pays principle where the full cost of offsetting the resulting phosphate load from a development is to be met within the costs of the development.
8. Some new developments are unable to connect to mains drainage and must connect to a Package Treatment Plant (PTP). As new developments connected to PTPs some have a significantly lower phosphate load than those connected to mains sewage, the proposal is to fairly reflect this in the cost of Phosphate Credits for these homes where such reductions are certified.
9. Some water treatment plants in the Lugg are fitted with Phosphate strippers. There is complex advice from Natural England about how each plant is treated. This advice has been built into the new NE calculator and an appropriate percentage reduction to the cost of the credit will be applied.
10. Typical prices will depend on the many variables in a four stage phosphate credit calculator provided by Natural England which produces very similar results to the Council’s own previously used phosphate credit calculator.

Type of development	Typical offset needed	Price*
Connects to a plant with a Phosphate Stripper	0.25kg per annum	£ 3,500
Connects to a plant without a Phosphate Stripper	0.74kg per annum	£ 10,360
Non Mains PTP Uncertified	1.31kg per annum	£ 18,340
Non Mains PTP certified to 80% reduction	0.26kg per annum	£ 3,640

\*Illustrative only price is dependent upon individual circumstances of each development which may increase or reduce the amount of offset needed.

\*A further £500 per Application will apply per development to cover the cost of entering into the section 106 Agreement with the Council where there are no other Section 106 planning obligations.

### **Proposed Interim Allocation Policy - First Come First Served**

11. In order to potentially qualify for a Phosphate Credit or Credits and have them reserved developers must have a planning application validated by 31<sup>st</sup> October 2021.
12. A developer's place in the queue will be ranked according to the date applications were validated with the earliest validation dates being first in the queue and the newest the last in the queue.
13. In order to receive Phosphate Credits a developer must have a valid Planning Application awaiting a positive determination subject to receipt of Phosphate Credits and have entered into a Section 106 legal agreement with the Council. Developers will also be asked to confirm that they are ready, willing and able to proceed with their development if approved to reduce the risk of credits being "banked" and not used.
14. In the event that a planning application subsequently lapses or the developer informs us that they will not be proceeding with development after receiving credits, then the credits will be forfeited and returned to the council and the developer will be reimbursed their credit cost subject to a 5% administration fee.
15. Any developer no longer requiring the obtained credits may seek a reimbursement from Herefordshire Council through the section 106 agreement process. Unused credits cannot be sold onwards to a 3rd party and must always be returned to the Council.
16. Phased developments:
  - a. For major developments the council has the right to reserve credits and allocate credits in a phased approach. This will be done by a variant of the Section 106 agreement. As there are likely to be further planning obligations the £500 legal fee will not apply and the Council's legal fees will be charged on an hourly rate.
17. Planning refused by the Herefordshire Council Planning Committee:
  - a. Where an Officer Recommends approval of a Planning application, credits will be held until the appeal has been heard, if the appeal is allowed developers will be able to purchase the credits. Where an Officer recommends approval of a planning application and there is no subsequent appeal to the Planning Inspectorate within the set time criteria for lodging an appeal the credits will be held until the time period has lapsed.
  - b. Where an Officer Recommends refusal of planning permission - Credits will no longer be reserved and the developer will no longer be in the queue for Phosphate Credits.

### **The Phosphate Credit Allocation Process:**

18. The Phosphate Credit Allocation Process is a staged process setting out how Phosphate credits that are generated by Herefordshire Council Integrated Wetlands can be secured by developers to offset the phosphate load of their development. The process necessitates a number of steps which can be run in tandem simultaneously. This process is monitored throughout and will span several services as well as requiring engagement with, statutory consultees, and developers themselves. Credits will only be released as they become available.
19. The process starts with developers working out the number of credits needed using the Council's Phosphate Calculator Budget Tool supplied by Natural England. The developers are then kept on a list according to 'first come first served' policy as stated above. As credits become available

and when applications are ready for determination, case officers will contact developers and provide them with an invitation to apply for credits. The developer submits this alongside their phosphate calculations, a S106 legal agreement and an online payment for their allocated credits. Their application is reviewed internally by Legal and Ecology and in consultation with Natural England.

20. Permission can then be granted or refused. If refused, developers have a set amount of time to go through the planning appeals procedure, credits will be held as stated above. Where permission is granted, HRA conditions are applied and they have a set amount of time and requirements they must fulfil otherwise the credits are returned to Herefordshire Council and payment is reimbursed to developers as stated above.

## **Community impact**

21. The creation and allocation of phosphate credits to facilitate nutrient neutral developments in the River Lugg catchment area will positively contribute to the following ambitions within the County Plan 2020-2024.
  - a. Seek strong stewardship of the county's natural resources.
  - b. Protect and enhance the county's biodiversity, value nature and uphold environmental standards.
22. The allocation of the phosphate credits will unlock significant economic development in a significant proportion of North Herefordshire.

## **Environmental Impact**

23. The Integrated Wetlands project has been designed to both mitigate the phosphate levels in the River Lugg SAC by enabling nutrient neutral development and to provide River Betterment described in the Nutrient Certainty report at this Cabinet.

## **Equality duty**

24. Under section 149 of the Equality Act 2010, the 'general duty' on public authorities is set out as follows:

A public authority must, in the exercise of its functions, have due regard to the need to –

  - a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
  - b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
  - c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
25. The public sector equality duty (specific duty) requires us to consider how we can positively contribute to the advancement of equality and good relations, and demonstrate that we are paying 'due regard' in our decision making in the design of policies and in the delivery of services. As this is a decision on back office functions, we do not believe that it will have an impact on our equality duty.
26. The certification of the phosphate credits from the Integrated Wetland sites will enable the Council to support sustainable housing growth in the north of the county which will benefit all

sections of the community. In addition to this the council will seek to provide education opportunities and the provision of public access for the enjoyment of all.

## Resource implications

27. There are no financial implications from this report in the £3m Capital Budget as the cost of building the Integrated Wetlands has been funded by capital grants as detailed in the nutrient report. Any income generated from the sale of Phosphate Credits will be ring fenced into the specific Wetland Revenue Reserve to fund the ongoing wetland maintenance costs, Phosphate Credit administration and investment in further phosphate reduction initiatives across the County.
28. The below table shows the current breakdown of the costs associated with the creation of the phosphate credits on a price per home basis

Item Estimate	
Design, land acquisition build, permitting	£2,220,128
Programme Administration	£251,095
Maintenance in Perpetuity	£2,074,600
Contingency and Risk	£327,000
Total	£4,872,823
Estimated mid-level yield from three Integrated Wetland Sites. Phosphate KG	348kg
Cost of credits per KG	£14,000

## Legal implications

29. This is an Executive function under the Council's Constitution Part 3 Section 3 as it is a key decision and which in the opinion of the monitoring officer is likely to be significant having regard to the strategic nature of the decision and/or whether the outcome will have an impact for better or worse, on the amenity of the community or quality of service provided by the authority to a significant number of people living or working in the locality (two or more wards in Herefordshire) affected. It is also likely to result in the council incurring expenditure which is, or the making or savings which are significant having regard to the Council's budget for the service or function concerned.
30. This report is for Cabinet to note the works undertaken to date on the proposed pricing arrangements for Phosphate Credits, the interim allocation policy pending a full allocation policy and the proposed Phosphate Credit Allocation Policy.
31. This is in line with the Cabinet decision on 10 August 2020 and there are no other legal considerations or problems with Cabinet or the portfolio holder doing what is proposed.

## Risk management

Risk / opportunity	Mitigation
Achieving the required phosphate reduction	A robust and externally verified assessment of nutrient certainty has been undertaken and peer reviewed as set out in the accompanying Cabinet report – Nutrient Certainty.
Maintaining the wetland sites in perpetuity	An 80yr management plan has been developed which will be resourced through the proposed ring fenced credit sale income.

32. In addition a live project risk register is maintained and regularly reviewed by the Integrated Wetland project team and is regularly reported to the Integrated Wetland Project Board.

## Consultees

33. Political groups have been consulted and comments were received from Cllr Milln, Central Ward, and Cllr Hewitt, Golden Valley North. Both expressed support for the development of integrated wetlands to reduce phosphate pollution, however are not supportive of the creation of phosphate credits to offset local development. These comments have been considered and the recommendation is to allocate 20% of the phosphate reduction for river betterment.
34. The Integrated Wetlands project has been developed in discussion with the Nutrient Management Board comprising Natural England, Wye & Usk Foundation, Welsh Water and the Environment Agency.

## Appendices

- None

## Background papers

- None

## Report Reviewers Used for appraising this report:

**Please note this section must be completed before the report can be published**

Governance	Sarah Buffrey, Democratic Services Officer	Date 11/05/2022
Finance	Louise Devlin, Karen Morris	Date 11/05/2022
Legal	Dawn Evans	Date 17/05/2022
Communications	Luenne Featherstone	Date 18/05/2022

Equality Duty	Carol Trachonitis	Date 29/03/2022
Procurement	Mark Cage	Date 25/03/2022
Risk	Kevin Lloyd	Date 29/03/2022

Approved by	Ross Cook	Date 18/05/2022
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