

Title of report: Nutrient Certainty - Luston Integrated Wetland

Meeting: Cabinet

Meeting date: Thursday 28 July 2022

Report by: Cabinet member Infrastructure and transport;

Classification

Open

This report is open but appendices 1, 2 and 3 are exempt by virtue of the following paragraph(s) of the Access to Information Procedure Rules set out in the constitution pursuant to Schedule 12A of the Local Government Act 1972, as amended.

- 3 Information relating to the financial or business affairs of any particular person (including the authority holding that information)

Decision type

Key

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

As the competent body under the Conservation of Habitats and Species Regulations 2017 (as amended) Cabinet is asked to note the progress being made towards creating Integrated Wetlands phosphate reduction and steps being taken to ensure Nutrient Certainty to the required standard of beyond reasonable scientific doubt.

Recommendation(s)

That:

- a) To agree that all necessary due diligence to confirm Nutrient Certainty has now been achieved,
- b) To authorise the Corporate Director Economy and Environment to commence the trading of credits as outlined in the Phosphate Credit Pricing and Allocation Policy agreed by Cabinet on 26 May 2022,
- c) To establish a Cabinet Phosphates Commission- Restoring the River Wye to consider how the Council and its partners can progress the wider systemic and strategic issues needed to address Phosphate Pollution in the Wye; and
- d) To delegate to the Leader of the Council final sign off of the Terms of Reference for the Cabinet Commission- Restoring the River Wye.

Alternative options

1. The options to purchase and build Integrated Wetlands were determined in the August 2020 Executive Member decision. This is an update report following that decision and no options are presented on the Integrated Wetland Projects. This report is available here:
 - <https://councillors.herefordshire.gov.uk/documents/s50081736/The%20construction%20and%20management%20of%20Integrated%20Wetlands%20as%20tertiary%20treatments%20for%20waste%20water%20treatm.pdf>
2. Not to form a Commission to take any further action to protect Water Quality in River Wye and Lugg. This is not recommended. There is strong resident support for taking further action. Inaction would delay river restoration and the Commission will increase the capacity available to address the issue beyond what is currently being provided through the important work of the Nutrient Management Board.

Key considerations

3. Herefordshire Council has chosen to voluntarily exercise its well-being powers to build constructed integrated wetlands in the Lugg Catchment to provide development headroom and some improvement called “river betterment” to provide phosphate credits to developers in the catchment who are unable to otherwise demonstrate nutrient certainty. Through its work to support the Wye Catchment Nutrient Management Board the Council is also actively supporting efforts to improve water quality in the Wye and Lugg catchment.
4. At its meeting on 26 May 2022 Cabinet received a comprehensive report setting out the process and chronology of the steps being taken, to design, build and commission the Council’s first Constructed Integrated Wetland at Luston. The report identified that further work was needed before a recommendation could be made that all necessary due diligence had been completed.
5. Cabinet agreed through a separate report on 26 May 2022 a Credit Pricing and Allocation Policy which was subject to Nutrient Certainty being achieved.
6. Since the May Cabinet meeting extensive work has been undertaken by the Council’s designer, the Wye and Usk Foundation and the Council’s Peer reviewer Ricardo Consulting and the appointment of specialist external legal advisors.
7. A final Design report (Appendix 1 - **exempt**), Peer review Assessment (Appendix 2 - **exempt**) and further commentary from Rob McInnes of RI Consulting - a leading international expert on

Constructed Integrated Wetlands (Appendix 3 - **exempt**) was reviewed by all parties including the Council's external legal advisor on 8 July 2022. Following those discussions the Council's Project Team is now able to recommend that all necessary due diligence steps have been undertaken to provide the necessary assurance that Nutrient Certainty has been achieved and that Phosphate Credit Trading may commence.

8. The project team will provide a certificate of offset to the Local Planning Authority and Trading in Phosphate Credits will commence in August 2022 and will increase as further Wetlands arrive on stream. Credits will be allocated on the agreed first come first served policy. A successor policy with weighted allocation criteria aligned to the County Plan is under development and will be consulted upon in the autumn.

Cabinet Commission- Restoring the River Wye Catchment

9. In January 2022 the Council voted unanimously for a Water Protection Zone. The Leader wrote to Minister Pow- Secretary of State- Defra to join the Nutrient Management Board in calling for a Water Protection Zone. Minister Pow rejected this because she believed further evidence is necessary and because of the additional burdens it would place on business in the catchment.
10. Also in January, the Environmental Audit Committee published its 4th Report on Rivers making recommendations which local authorities need to consider with particular focus on the Wye. On May 31st, 2022 [RePhoKus](#) published its seminal report Re-focusing Phosphorus use in the Wye Catchment again with significant recommendations which local authorities including Herefordshire Council need to assess. In May 2022, Natural England issued revised more stringent Phosphate targets both the Lugg and the Wye recommending more action is taken to restore river quality. In July 2022, the latest source apportionment data for the Upper Wye was published indicating the main causes of phosphate pollution following sampling work in the river. This shows a further reduction from water companies and other sources and a 5% increase from agriculture.
 - 72% agricultural diffuse pollution including run-off
 - 23% sewage treatment works
 - 5% other (eg highways run off)
11. Herefordshire Council has undertaken a lead role in efforts to support the restoration of the Wye, developing the UK's first development Phosphate Calculator, delivering Integrated Wetlands and an Agricultural Supplementary Planning Policy which is about to be published for consultation. The Council has been a driver for supporting improvement around the Nutrient Management Board and has invested in a significant national influencing role to progress river restoration.
12. The recent reports described in paragraphs nine and ten above and failure to deliver a Water Protection Zone means that there is a need to consider what more can be done. A Cabinet Commission is proposed to undertake a more strategic and systems led review of river quality and in particular to consider how Herefordshire Council can use all the powers and influence available to it to progress the restoration of the Wye and Lugg.
13. The Technical Advisory Group of the Nutrient Management Board comprises of practitioner staff from partner agencies undertaking important work which will deliver incremental improvements within current systems approaches. TAG is not equipped or resourced to take a wider strategic role. The Cabinet Commission will therefore add value and capacity rather than duplicate the work of NMBs TAG. Close liaison will take place to ensure that activity compliments and supports each other.
14. An early task of the Commission will be to consider what more can be achieved by the Local Planning Authority and in particular identifying a package of measures that will create a staged

route map to move the planning regime for both agriculture and new housing development to demonstrate full Nutrient Neutrality for all new planning applications within the LPA area by April 2025. We would propose to introduce new measure in phases based on the source apportionment data as a priority for action. This would also allow time for agricultural and housing developers to prepare and to enable the council to complete the development of appropriate systems and safeguards.

15. In particular the Commission will consider whether it is now reasonable to use Planning Conditions and the Planning Enforcement regime to ensure that nutrient outputs from new developments are certified to ensure that they do not create down-stream impacts within the Lugg and Wye Catchments. The Commission will also address what more can be done to address river quality issues caused by current developments.
16. Over the summer recess work will be undertaken to finalise the Commissions terms of reference work programme and timetable regular progress reports will be provided to Cabinet. Additional capacity will be created by commission support where existing gaps exist. It is envisaged that the Commission will want to draw on expertise, leading national experts, other impacted local authorities and from our national regulatory partners.

Community impact

17. No new impacts have been identified beyond those identified in the 26 May Cabinet report.

Environmental Impact

18. No new impacts have been identified beyond those identified in the 26 May Cabinet report. The Cabinet Commission will undertake a comprehensive environmental impact assessment when making its final recommendations.

Equality duty

19. 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.
20. 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.

21. No new impacts have been identified beyond those identified in the 26 May Cabinet report. The Cabinet Commission will consult broadly with stakeholders and will undertake a comprehensive equalities impact assessment when making its final recommendations.

Resource implications

22. Grant funding of £100k has been provided for Phosphates work by DLUHC enabling a commissioning budget of £60k to be created to underpin the work of the Cabinet Commission.

Legal implications

23. This is an Executive function under the Council's Constitution Part 3 Section 3 and 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 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.
24. The Herefordshire Core Strategy 2015 states that the water quality of Herefordshire's main rivers and their tributaries is of strategic importance and it identifies unacceptable levels of nutrients along part of the rivers need to be addressed.
25. Most of Herefordshire is in the catchment of the River Wye and its waters are a measure of the health of the county's environment. In Herefordshire, the River Wye has a high level of protection under European law as a Special Area of Conservation (SAC). The SAC designated area includes the River Lugg sub catchment
26. Prior to July 2019, planning applications submitted for land that fell within the **River Lugg catchment area** of the River Wye Special Area of Conservation ("SAC") were determined taking into account, in particular, CS Policies SD4 and LD2 and the Nutrient Management Plan ("NMP"). The NMP considers proposed development growth within Herefordshire and calculates the predicted impact of development on phosphate levels within the SAC.
27. The judgment in the case of Cooperatie Mobilisation handed down in November 2018 by the Court of Justice of the European Union (Joined Cases C-293/17 and C-294/17) (known as the Dutch Case), has had implications for many parts of the country.
28. The 2018 Dutch Case concerned authorisations for schemes for agricultural activities in sites protected by the Habitats Directive and where nitrogen deposition levels already exceeded the critical load. Following the 'Dutch Case', all new development are required to demonstrate 'nutrient neutrality' to ensure that it would not contribute additional nutrient loads to a national site that is close to unfavourable condition or in an unfavourable condition due to nutrient pollution and to ensure that it is compliant with the 'Habitats Regulations'. This would be identified when a Habitats Regulations Assessment (HRA) is undertaken.
29. The Dutch judgement deemed that where a site is failing its water quality objectives and is therefore classed as being in unfavourable condition, there is limited scope for the approval of planning applications that give rise to additional damaging effects. Furthermore, the future benefit of mitigation measures cannot be relied upon in an appropriate assessment, where those benefits are uncertain at the time of the assessment.
30. Phosphorus levels were identified as an issue during the preparation of the 2015 Herefordshire Core Strategy. There were concerns raised that the proposed levels of development set out in the Core Strategy would result in unacceptable additional amounts of phosphorus entering the

River Wye catchment. In response to this a Nutrient Management Plan (NMP) was developed by the Environment Agency in partnership with Natural England and Herefordshire Council to support the Core Strategy policies that seek to protect the quality of the rivers in the county and also to address the impacts of practices not under the jurisdiction of the land use planning system.

31. Following discussions with Natural England during 2019 it was concluded that the NMP could not be relied upon. In Herefordshire, this has effectively resulted in restrictions on various types of development that could lead to an increase in the levels of phosphorus in the SAC. This has had the greatest impact on housing development, with restrictions in place in the Lugg Catchment which amounts to approximately 40% of the County's administrative area.
32. The Council produced an initial position statement in October 2019 which was updated in March 2020, with a list of FAQs, to explain the position and as advice for developers/applicants with applications/future applications within the SAC.
33. Since that time, the Council have worked with NE and its appointed consultant and legal advisers to implement a strategy to address the increased phosphate load in respect of the River Lugg SAC arising from new housing and a mitigation proposal through the development of integrated constructed wetlands, designed to deliver phosphate reduction to with a view to achieving nutrient certainty.
34. The Council appointed a QC to review the steps taken by the Council to ensure nutrient certainty and the robustness of the Luston Design and Feasibility Report Final. Counsel concludes the report to be robust and credible and has been subject to peer review pursuant to the correct legal framework. Counsel is satisfied that its authors of the report, have been subjected to rigorous challenge and have justified reports approach and conclusions.
35. In terms of the phosphorous budget calculator, the report by Ricardo Consulting on this also appears satisfactory, with the requisite tests being identified, and an explanation of differences between that calculator and the more recent Natural England one explained. Counsel is not aware of any reason why both may not be relied upon by the council in the next steps in the process.

Risk management

36. The robust approach to due diligence undertaken by the project team has significantly reduced the risks associated with the commencement of trading credits.

Consultees

37. No additional consultation has been undertaken as this is a technical update report on the approach previously agreed by Cabinet.
38. Extensive discussions have commenced with Natural England, Powys Council, Natural Resources Wales and the Environment Agency concerning ways in which strategic capacity can be created through the Cabinet Commission. Communication mechanisms are in place to ensure the Commission builds on and does not duplicate the Technical Advisory Group of the Nutrient Management Board.
39. A member briefing session was held on 19th July 2022 with good cross party attendance. Attendees expressed strong support on the progress to nutrient certainty for the Luston wetland, supported the creation of a cabinet commission with suggestions for the commission to explore and there was good cross party support for taking the next steps on this journey.

Appendices

- Appendix 1 - (Exempt) - Luston Design and Feasibility Report Final
- Appendix 2 – (Exempt) - Ricardo Wetland Sign Off Letter
- Appendix 3 – (Exempt) - RM Wetland & Environment Peer Review

Background papers

- 26 May 2022, Cabinet Report on Nutrient Certainty Report
<https://councillors.herefordshire.gov.uk/documents/s50100959/Nutrient%20Certainty.pdf>
- 26 May 2022, Credit Pricing and Allocation Report
<https://councillors.herefordshire.gov.uk/documents/s50100960/Phosphate%20Credit%20Pricing%20and%20Allocation%20Policy.pdf>

Report Reviewers Used for appraising this report:

Governance	John Coleman	Date 05/07/2022
Finance	Louise Devlin	Date 13/07/2022
Legal	Sharon Bennett-Matthews	Date 13/07/2022
Communications	Luenne Featherstone	Date 01/07/2022
Equality Duty	Carol Trachonitis	Date 01/07/2022
Procurement	Lee Robertson	Date 13/07/2022
Risk	Kevin Lloyd	Date 30/06/2022

Approved by	Ross Cook	Date 20/07/2022
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Please include a glossary of terms, abbreviations and acronyms used in this report.

- **Phosphate credit pricing and allocation**
- **Nutrient certainty**
- **Nutrient Management Board (NMB)**
- **Technical Advisory Group (TAG)**
- **Habitats Regulations Assessment (HRA)**
- **River Wye Special Area of Conservation (SAC)**