Llywodraeth Cymru
Welsh Government

‘Practical planning guidance to support development, particularly the delivery of affordable housing, in Special Areas of Conservation river catchments affected by phosphorus’

PRACTICAL GUIDANCE FOR PUBLIC AUTHORITIES

Prepared for Welsh Government

BY
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...continuing the work of
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Document title: **'Practical planning guidance to support development, particularly the delivery of affordable housing, in Special Areas of Conservation river catchments' – Practical Guidance for Local Planning Authorities**

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Doc. Ref. 1182 DTAE Draft Phosphates Guidance Date: December 2024

Document short title:	1182 WG Phosphates Guidance DTAE Practical Guidance for Local Planning Authorities
Date:	December 2024
Status:	FINAL
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1 Introduction

1.1 Introduction

1.1.1 This guidance has been commissioned by the Welsh Government to facilitate the delivery of development in designated river catchments affected by high levels of phosphorus. A particular focus of the work concerns the delivery of affordable housing, in recognition of potential conflict between the Welsh Government target to deliver 20,000 affordable homes by 2026, and their parallel duties to restore designated riverine Special Areas of Conservation (SACs) to a favourable conservation status.

1.2 Who is this guidance for?

1.2.1 This guidance is for public bodies and authorities involved in the assessment or plans and projects affecting riverine SACs and the management of such sites in accordance with statutory duties. Whilst it is applicable to all forms of development, it is of particular relevance to Local Planning Authorities and statutory consultees in respect of decisions concerning housing development within SAC river catchments affected by excess phosphorus levels. The guidance may also be helpful for Nutrient Management Boards and other catchment-based advisory groups.

1.3 When should this guidance be used

1.3.1 This guidance is drafted to facilitate the delivery of development in SAC River catchments affected by phosphorus. Applying this guidance is intended to enable statutory authorities to identify a pathway through which development applications can be determined, taking account of the requirements of the Habitats Regulations in respect of water quality related impacts associated with phosphorus only. Other effect mechanisms, including other water quality considerations (such as nutrient nitrogen or other pollutants) will need to be considered as part of a wider Habitats Regulation Assessment (HRA) in respect of the development proposals concerned.

1.3.2 The guidance is not HRA guidance; it does not set out the detailed approach for a full assessment of development proposals under the Habitats Regulations. Instead it provides a pathway to follow to determine *how* compliance with the requirements of the Habitats Regulations might be demonstrated, especially when a receiving SAC watercourse exceeds its phosphorus water quality target.

1.3.3 This guidance is developed with a specific focus on the delivery of affordable housing in SAC River catchments, but is also applicable to other types of development. Affordable housing is defined in paragraph 5.1 of 'Technical Advice Note 2: Planning and Affordable Housing'[1] as follows:

> *5.1 The definition of 'affordable housing' for the purpose of the land use planning system as described in this Technical Advice Note is housing where there are secure mechanisms in place to ensure that it is accessible to those who cannot afford market housing, both on first occupation and for subsequent occupiers. However, it is recognised that some schemes may provide for staircasing to full ownership and where this is the case there must be secure arrangements in place to ensure the recycling of capital receipts to*

[1] Technical Advice Note 2: Planning and Affordable Housing

provide replacement affordable housing. (Also see Glossary at Annex B). Affordable housing includes:

- *Social rented housing;*
- *Intermediate housing.*

1.4 Overview of approach

1.4.1 By way of an overview, the approach within this guidance document identifies four pathways through which relevant planning decisions can be determined.

1. Reliance on a threshold-based approach
2. Reliance on existing measures without a need for further mitigation
3. Reliance on a mitigation-based approach
4. Reliance on a derogation-based approach

1.4.2 The guidance is necessarily detailed. The issue of managing nutrient levels in Welsh Rivers is cross-cutting and requires careful consideration by public bodies, however not all users will need to read all the guidance. The key content is summarised below. Whilst some sections will need to be read by all users, other sections of the guidance will only be relevant under certain situations.

What?	Where?	Pages	Do I need to read it?
Introductory material	Sections 2-3	7-14	Yes, all users should read these sections.
Principles and Welsh Government policy	Section 4	15-18	Yes, all users should be familiar with the key principles and Welsh Government policy positions.
The delivery pathway	Sections 5-10	19-40	All users will need to read *some* of these sections but few users will need to read all of them.
Further guidance	Sections 11-15	41-63	Users will only need to read the further guidance sections which are relevant to them.
Appendices	Appendices 1-3	64-75	Users will only need to read the appendices which are relevant to them.

2 Background and relevant context

2.1 The need to deliver development

2.1.1 The delivery of housing is central to Welsh Government policy and the Minister for Climate Change produced a written statement in June 2021[2] which included a commitment to deliver 20,000 new low carbon homes for rent within the social sector during the current Government term (2021-2026). This is referred to as 'the affordable housing target' within this guidance.

2.1.2 Data prepared by local authorities in October 2021 indicates that across Wales the delivery of 1,725 affordable homes was anticipated to be impacted by concerns relating to excessive phosphate concentrations within designated rivers. Other types of development are also subject to phosphate related constraints.

2.2 How designated rivers are protected

2.2.1 The rivers designated as European sites (river SACs) in Wales were selected on the basis of specific habitat types or species considered to be most in need of conservation at a European level. Rivers may be affected by a range of threats and pressures and their designation affords specific legal protection under the UK Habitats Regulations[3].

2.2.2 The Habitats Regulations transpose the requirements of the Birds and Habitats Directive into UK law. In accordance with regulation 3(A) of the Habitats Regulations, following EU Exit, the Habitats Directive is to be construed as if any reference to 'Member State' included a reference to the UK meaning the Directives remain relevant within a UK context. There are four 'pillars' of protection provided under Article 6 of the Habitats Directive which are summarised in table 2.2.1 below. In the table 'Member States' is replaced with 'the UK'.

Table 2.2.1 – overview of Article 6 provisions	
Article 6(1)	The UK shall establish necessary conservation measures corresponding to the ecological requirements of the habitats and species for which the site has been designated.
Article 6(2)	The UK shall take appropriate steps to avoid deterioration of natural habitats and significant disturbance of species.
Article 6(3)	The UK shall undertake an appropriate assessment for new plans and projects which are likely to have a significant effect on a designated site (refer section 3 and appendix 1 for further detail). Permission can only be granted having ascertained that there will be no adverse effect to site integrity, either alone or in-combination with other plans and projects.
Article 6(4)	Potentially damaging proposals can, nevertheless, be permitted in the absence of alternative solutions for imperative reasons of overriding public interest. Compensatory measures must be secured.

2.2.3 **The courts have consistently held that Article 6 needs to be read as a whole.** The Article embodies the aims of the Habitats Directive to promote biodiversity by maintaining or

[2] https://www.gov.wales/written-statement-social-housing-wales
[3] The Conservation of Habitats and Species Regulations 2017 UK SI 2017 1012

restoring certain habitats and species at a favourable conservation status whilst taking account of economic, social, cultural and regional requirements, as a means of achieving sustainable development.

2.2.4 Within this overall structure, it can be seen that there is a distinction between Articles 6(1) and (2) which define a regime of general *proactive* obligations to manage the site and address ongoing threats / pressures, and Articles 6(3) and (4) which define a step-wise *reactive* assessment procedure when a new plan or project is being considered or proposed.

2.2.5 As a consequence of this distinction, new proposals are treated differently to existing activities under the Habitats Directive, and UK Regulations. This difference recognises the aspirational nature of new proposals compared to the ongoing nature of existing activities, and is important when considering how the parallel duties to deliver restoration under Article 6(2) and mitigation under Article 6(3) might be applied in practice.

2.2.6 Article 6(3) of the Directive is relevant to new proposals (those which are not yet operational or otherwise relied upon); it anticipates a more restrictive approach in order to avoid adverse effects to site integrity. Article 6(2) is relevant to ongoing activities; risks to site integrity must be recognised and addressed, and appropriate steps must be taken to avoid deterioration, but Member States can apply discretion over the nature of the steps and the timescales over which they will be taken (noting that such discretion may not be available for restoration duties under the Water Framework Directive). **There is nothing in the Directive to suggest that ongoing activities which represent a risk to site integrity must cease or pause *until* appropriate steps to avoid deterioration have been taken.** Any such an interpretation would have had profound implications for Member States given the extent to which existing sites are in need of restoration to achieve favourable conservation status. In practice therefore, **a degree of flexibility is afforded to existing activities which is not available to a new proposal.**

2.2.7 Further detail in respect of the assessment process under Article 6(3), as set out in regulation 63 of the Habitats Regulations, is provided in section 3 and Appendix 1.

2.3 How have nutrient levels been allowed to reach current levels within protected watercourses?

2.3.1 The detrimental effects of excess nutrient inputs to designated rivers is a well-understood problem. The requirement to review existing consented activities was included with the Habitats Regulations in light of duties under Article 6(2) of the Habitats Directive (as an appropriate step to avoid deterioration). In 2010, the original 'Review of Consents' under regulation 65 of the Habitats Regulations (then regulation 50) quantified the potential role played by diffuse sources of pollution to nutrient exceedances within SAC rivers.

2.3.2 The 2010 review of consents imposed limits / variations upon a range of permits across the UK but, for river SACs in particular, consistently identified a requirement for *further action*, over and above improvements to permitted sources, in order to avoid adverse effects to site integrity from the consents subject to review.

2.3.3 Many of the 2010 *reviewed* consent amendments relating to nutrients in SAC rivers were therefore affirmed on the basis of '*further action to be taken*' through the delivery of measures to address nutrient contributions from other sources. The ability to take account of action *to be taken* when reviewing an existing consent is provided for in regulation 66.

The other action relied upon was heavily dependent on voluntary approaches to securing improvements from diffuse sources. Whilst some improvements have been secured, the voluntary nature of the approaches were opportunistic in nature and the reductions secured fell short of what was required to avoid adverse effect from nutrient loading. Alongside slow progress in delivery of reductions from non-consented sources, permitting approaches for new agricultural proposals in the meantime, and a lack of control of associated manure spreading activities, have allowed additional nutrient contributions into affected catchments. The nutrient targets for designated rivers have also been tightened since the original 2010 Review of Consents, further exacerbating the scale of exceedance.

2.3.4 The Welsh Government recognises that the original Review of Consents did not therefore achieve its intended outcomes. Some lessons to be learnt are summarised below and have informed the approach taken to the development of the current guidance.

Table 2.3.1 –Potential pitfalls and recommendations on how they might be avoided

Potential pitfall	Recommendation
Reliance on action 'to be taken' that had not been secured.	**Recommendation: Future action relied upon to create capacity for growth should be associated with an appropriate delivery mechanism.**
Unrealistic expectation of reductions which can be achieved from non-permitted sources through voluntary approaches.	**Recommendation: Future improvement to non-permitted sources through voluntary approaches should not be relied upon to deliver a specific quantum of improvement to create capacity for growth. The proportionate exercise of statutory powers may be necessary to secure necessary improvements from non-permitted sources.**
Reliance on fair share approach in attributing limits of liability on different sectors and assuming all sectors are equally amenable to future control.	**Recommendation: A 'fair share' approach aligns with the polluter pays principle but only works in practice where all sectors are equally amenable to control and future control can be secured.**
Failure to include water quality related impacts from manure spreading within the scope of HRA assessments, where a development proposal gave rise to the production of organic manure (e.g. livestock activities).	**Recommendation: The creeping cumulative effects associated with agricultural activities represent a significant risk of deterioration to water quality if not properly considered as part of the planning/permitting procedures.**

2.4 NRW Advice for delivery of development in Wales affecting SAC rivers

2.4.1 Revised guidance on water quality targets, including those for phosphorus, was published by JNCC in 2016[4]. In January 2021, Natural Resources Wales (NRW) published a report which presented their assessment of how much phosphorus there is in Welsh SAC rivers measured

[4] https://data.jncc.gov.uk/data/1b15dd18-48e3-4479-a168-79789216bc3d/CSM-Rivers-2016-r.pdf

against revised water quality targets[5]. The evidence review showed that over 60% of the water bodies assessed in SAC river catchments were failing to meet the revised water quality targets for phosphorus with associated concerns for SAC rivers and their ability to meet their conservation objectives. NRW later reviewed the Conservation Objectives for river Special Areas of Conservation (SACs) in Wales and in 2022 published revised phosphorus targets for the 9 SAC rivers in Wales, along with a compliance assessment against those targets[6]. Targets for other water quality indicators have also now been published[7].

2.4.2 In August 2023 NRW, in their role as statutory nature conservation body, published associated advice to planning authorities for planning applications affecting phosphorus sensitive river Special Areas of Conservation, which competent authorities must 'have regard' to. This guidance has since been updated and, at the time of writing, the current version is dated June 2024[8].

2.4.3 The guidance explains that NRW are currently progressing a review of existing permits (Review of Permits) and that, where appropriate, development applications can take account of the findings of this review. The ongoing Review of Permits is thus an important step to facilitate the delivery of development but NRW advice is that growth may need to be constrained until permit improvements are implemented (implementation dates being either 2025 or 2030). This requirement to link growth to the delivery of planned improvements can therefore represent a potential constraint on the pace at which development can come forward.

2.4.4 The Review of Permits applies a 'fair share' approach whereby improvements to permitted sources are proportionate to their contribution to overall loading.

2.5 What is 'fair share'?

2.5.1 The NRW Review of Permits is being undertaken as an appropriate step to avoid deterioration under Article 6(2) of the Habitats Directive (reflected in Regulation 9(3) of the Habitats Regulations 2017 (as amended)). Article 6(2) is relevant to existing or ongoing activities that represent a risk of deterioration or significant disturbance to a European site. The requirement is for 'appropriate steps to be taken to avoid deterioration or significant disturbance'. Article 6(2) does not provide a timescale within which appropriate steps must be taken but in Case C-404/09[9] (The Alto Sil case) the European Courts ruled that allowing known disturbance to continue for at least 4 years represented a breach of Article 6(2) by the Spanish Authorities. **The expectation of Article 6(2) is therefore that, when a risk of deterioration or disturbance is identified, appropriate steps should be taken promptly.** Water dependent habitats sites (including river SACs) are also defined as protected areas under the Water Framework Directive (WFD). The WFD set a deadline of 2015 for achieving objectives for such sites, but in previous cycles of river basin planning deadlines for achieving the objectives have been extended for a range of reasons. WFD regulations now

[5] 2021 NRW Compliance Assessment of Welsh River SACs Against Phosphorus Targets
[6] 2022 Updated P targets and NRW compliance assessment
[7] https://naturalresources.wales/evidence-and-data/research-and-reports/water-reports/assessment-of-water-quality-in-protected-rivers-in-wales/?lang=en
[8] 2024 NRW advice to planning authorities for planning applications affecting phosphorus sensitive river Special Areas of Conservation
[9] Case C-404/09 EC v Spain (paragraph 152)

require that river basin plans must aim to achieve their objectives for all the remaining habitats sites protected areas by 2027.

2.5.2 The premise of a 'fair share' approach recognises that, whilst NRW permits contribute to deterioration within SACs, they are not solely responsible for such deterioration. In other words, action directed at permitted sources may not be sufficient to avoid deterioration. A 'fair share' approach ensures that improvements being delivered to permitted sources are proportionate to their contribution to overall loading. The fair share approach aligns with two key environmental principles of 'polluter pays' and 'rectification at source.'

2.5.3 Whilst the fair share approach is supported by the Welsh Government, the underlying implication is that, in order for river SACs to achieve their conservation objective targets, further action will also be taken to deliver necessary (proportionate) reductions from other sectors in addition to the planned permit improvements. **The achievement of the conservation objectives in SAC rivers is therefore dependent upon the improvements being delivered through Review of Permits and the timely delivery of other action to secure necessary reductions from other sources.**

2.5.4 Planning authorities are advised that NRW have stated that as part of the 'fair share' approach, other 'appropriate steps' (in accordance with Article 6(2) of the Habitats Directive) are being undertaken by NRW and other stakeholders to address other existing sources of P and restore SACs to favourable condition, in relation to rural land use[10].

2.5.5 Where a fair share approach has been taken by NRW a planning authority will need to be satisfied that the underlying assumptions for the SAC river concerned are robust. Before considering what this means in practice, it is necessary to understand how the provisions of Article 6(2) for existing/ongoing activities apply alongside those under Article 6(3) for new plans and projects.

2.6 New development which is dependent upon existing permits

2.6.1 New proposals are treated differently to existing proposals under the Habitats Directive, and UK Regulations. The assessment process for a new proposal aligns with duties under Article 6(3) of the Habitats Directive. In accordance with regulation 63, when making an assessment of a new plan or project, a decision maker must be satisfied that adverse effects to site integrity will be avoided. Assessment work in respect of an existing/ongoing activity aligns with duties under Article 6(2) of the Directive to 'take appropriate steps to avoid deterioration'. In accordance with regulation 66(3), when considering effects associated with existing/ongoing activities a decision maker can rely on 'action to be taken' where they are satisfied that the action will secure (at a future point) that an existing/ongoing activity will not adversely affect the integrity of a site.

2.6.2 In practice therefore **a degree of flexibility is afforded to existing/ongoing activities which is not available to a new proposal.** A public body complies with their duties in respect of ongoing activities which represent a risk to a European site once appropriate steps to avoid deterioration or disturbance are being taken. There may be a delay between steps being taken and favourable conservation status being achieved but that is acceptable in

[10] Refer NRW Briefing note: phosphorus discharges into SAC waterbodies not meeting their conservation objectives, 14th July 2023, SAC Rivers Project.

recognition of the ongoing nature of the activity concerned. The key requirement is for demonstrable progress to be made to address causes of deterioration/disturbance with a view to achieving conservation objective targets. **Duties in respect of new activities are different; steps to avoid damage from a new / aspirational activity need to be put in place before the proposal can go ahead;** a delay between such steps achieving their objective and permission being granted is not generally acceptable.

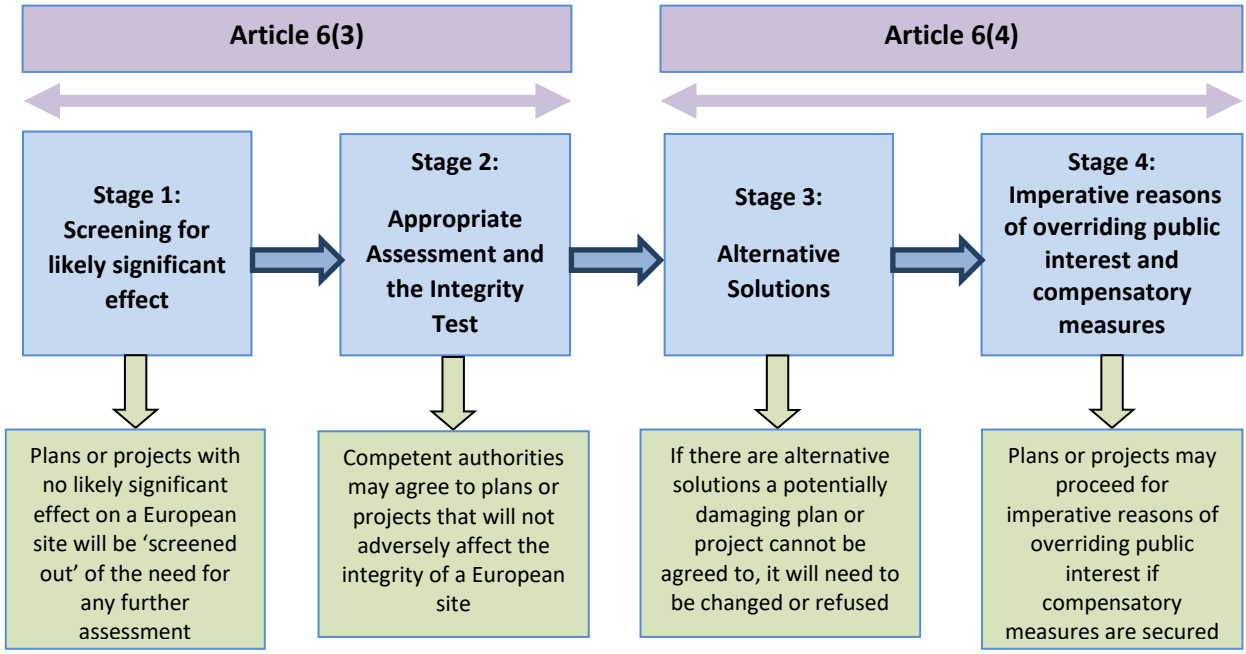
2.6.3 **The effects of wastewater disposal from development proposals which connect to wastewater treatment works represent an unusual situation where 'new' proposals (housing) are dependent upon 'existing' permits** (wastewater treatment works). Uncertainty therefore arises when applying the specific legal tests under the Habitats Regulations to a new proposal which is dependent upon an existing permit. **Policy WG2 (refer section 4) has been developed by the Welsh Government to address this uncertainty and to facilitate consistency for planning authorities.**

3 The aim of an assessment under Regulations 63 of the Habitats Regulations

3.1 What is HRA and what questions are being asked?

3.1.1 Before providing guidance, it is helpful to set out the aims of an assessment under regulation 63 of the Habitats Regulations, as they apply in respect of an assessment of water quality impacts. **Regulation 63 applies in respect of new plans or projects.** Any assessment under the Habitats Regulations is based upon a well-established four-stage approach, as summarised in figure 3.3.1 below, commonly referred to as a Habitats Regulations Assessment (HRA). Further information in respect of applying HRA tests in a water quality context is provided in Appendix 1.

Figure 3.1.1
Outline of the 4 stage approach to HRA



3.2 Stage 1 - Screening for a likely significant effect

3.2.1 When screening for a likely significant effect (stage 1), case law has established that, in spite of the everyday usage of the word 'likely', the screening test asks whether a significant effect is *possible*. An effect is 'significant' in this context only if it undermines the conservation objectives[11]. The question being asked at the screening step can therefore be rephrased as follows 'is it possible that the plan or project might undermine the conservation objectives?' The likely significant effect question must be asked '*either alone or in combination with other plans or* projects'

[11] Case C-127/02 *Waddenzee* refer para 47

3.3 Appropriate assessment and integrity test

3.3.1 Where it is identified that a proposal *might* undermine the conservation objectives, either alone or in combination with other plans and projects, an appropriate assessment is required. Following an appropriate assessment, permission can be granted only after having ascertained that the proposal will not have an adverse effect on the integrity of the European site (the integrity test). Following logically on from the screening test, EC guidance[12] on the concept of site integrity is grounded in the potential for a site to meet its conservation objectives. Section 4.6.4 of the EC guidance explains that *'it is clear from the context and from the purpose of the Directive that the 'integrity of a site' relates to the site's conservation objectives'*. The application of the integrity test is thus concerned with the inherent potential for a site to achieve its conservation objectives.

3.4 The derogation process

3.4.1 The Habitats Regulations provide for a step-wise approach to decision-making as summarised in figure 3.1.1. If it is not possible, following an appropriate assessment and consideration of mitigation measures, to conclude that there will be no adverse effect to site integrity, it is not inevitable that permission/consent must be refused. The derogation provisions are set out in regulations 64 and 68 of the Habitats Regulations and it is clear that a step-wise approach to the derogation tests is anticipated. Taken together, regulations 64 and 68 mean that, where it is not possible to conclude 'no adverse effects to site integrity' from proposed development, and a competent authority is minded to apply the derogation provisions, they must:

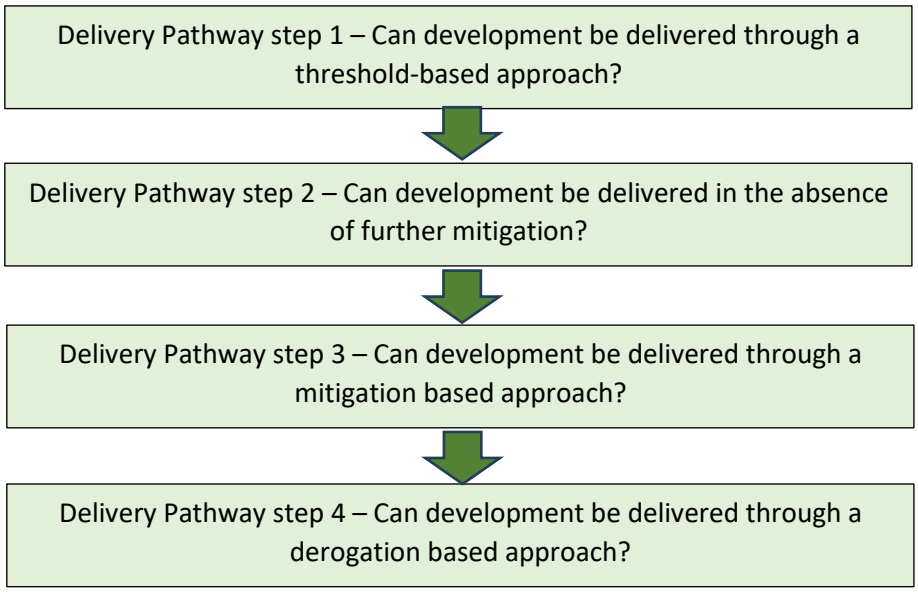
- Firstly, satisfy themselves that there are no alternative solutions to the plan or project subject to assessment.
- Secondly, take a decision as to whether the plan or project must be carried out for imperative reasons of over-riding public interest (subject to certain criteria); and
- Thirdly, satisfy themselves that necessary compensatory measures to ensure that the 'overall coherence of the National Site Network is protected' can be secured by the appropriate authority (the Welsh Ministers[13]).

[12] Managing Natura 2000 (November 2018) – refer section 4.6.4
[13] Refer regulation 3

4 Key principles and Welsh Government policy

4.1 Overview

4.1.1 The delivery pathway set out in sections 5-9 essentially comprise an overarching 4 step process as summarised below. Some key principles which are relevant to applying the delivery pathway are outlined in sections 4.2-4.3 and associated Welsh Government policy positions are provided at 4.4.



4.1.2 The delivery pathway set out within this guidance is designed to facilitate consistency in decision-making whilst providing sufficient flexibility to take account of local circumstances. In applying the delivery pathway for each SAC catchment the following key principles should be applied:

- Principle 1: **Least Onerous** – Where numerous options might achieve a desired outcome, the option selected should be the least onerous to those affected
- Principle 2: **Catchment-specific** – The pathway for any given SAC catchment should be informed by local knowledge and expertise to encourage ownership by delivery partners and to take account of local circumstances.

4.2 Key Principle 1- Least onerous

4.2.1 The 'least onerous' principle is included to facilitate agreement between stakeholders over the selection of measures to be delivered within a given catchment. Especially where different options will have different implications for stakeholders.

4.2.2 The **Least onerous** principle has its origin in regulation 66 of the Habitats Regulations which applies in respect of a review of an existing consent under regulation 65. The development of an approach to excess nutrients within a SAC river catchment, where nutrients arise from ongoing activities, has many parallels with the intention and purpose of a regulation 65 review. The regulations provide greater flexibility where an existing activity is subject to

assessment, compared to a new or aspirational plan or project, and regulation 66 establishes an important principle which applies where decision-makers have options as to how adverse effects to site integrity from ongoing activities might be avoided. It reads as follows (emphasis added):

> **Consideration on review**
>
> **66.—(**1) The following provisions apply where a decision, or a consent, permission or other authorisation, falls to be reviewed under regulation 65.
>
> (2) Subject as follows, the provisions of regulations 63(5) and (6) and 64 apply, with the appropriate modifications, in relation to the decision on the review.
>
> (3) The decision, or the consent, permission or other authorisation, may be affirmed if it appears to the competent authority reviewing it that other action taken or to be taken by it, or by another authority, will secure that the plan or project does not adversely affect the integrity of the site.
>
> (4) **Where that object may be attained in a number of ways, the competent authority or authorities concerned must seek to secure that the action taken is the least onerous to those affected…**

4.2.3 When applying the least onerous principle it is anticipated that a broad view is taken to the identification of stakeholders. Implications for parties which are *directly* affected by a preferred approach (e.g. landowners, water companies) should therefore be weighed against the implications for those indirectly affected by ongoing barriers to the delivery of development (e.g. those affected by housing shortages) in view of duties under the Well-being of Future Generations (Wales) Act.

4.3 Key Principle 2 - Catchment-specific

4.3.1 The need for an approach to be **catchment-specific** recognises the unique characteristics and specific environmental conditions of each SAC river catchment. Whilst excess nutrients is a widespread problem, local circumstances relevant to each catchment will differ. Stakeholder involvement will vary across catchments, as will the relative contributions from different sectors. A need for consistency is important, but it is inevitable that approaches will need to be tailored accordingly. Recognising a requirement to take account of catchment specific issues as a 'key principle' emphasises the importance of such matters and will provide confidence to both expect and accept differences between catchment approaches.

4.3.2 The pathway approach set out within this guidance is designed to provide a degree of flexibility to allow approaches to be tailored to take account of local circumstances. **The objective of the guidance is to provide a common framework and approach (for reasons of consistency) whilst providing sufficient flexibility to be shaped and informed by local knowledge. Stakeholder engagement is enhanced when local knowledge and expertise is recognised and allowed to influence and steer option selection. The importance of local ownership of an approach, in terms of delivery outcomes, is also recognised.**

4.4 Welsh Government Policy Positions

4.4.1 Addressing the challenges of excess nutrients in Welsh SAC rivers requires statutory bodies to engage with potentially conflicting stakeholder interests and cross-cutting objectives. When applying the delivery pathway, and the two principles outlined in section 4.2 - 4.3, the Welsh Government expects all statutory bodies to take decisions in accordance with existing Government policy positions and legislative duties. The Welsh Government recognises that the need to balance differing stakeholder interests will create uncertainty for statutory agencies tasked with identifying and delivering solutions and associated uncertainty for project proposers.

4.4.2 In order to a) provide reassurance to project proposers; b) to clarify expectations upon public bodies; and c) to facilitate consistency, the Welsh Government have produced a series of policy positions which statutory agencies are expected to have regard to. These are listed below with accompanying explanatory text.

Achieving 'fair share' outcomes and the Well-being of Future Generations Act

The Well-being of Future Generations (Wales) Act places Welsh public bodies (including the Welsh Ministers) under a duty to act "in accordance with the sustainable development principle", which means that these bodies must act in a manner which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs. Improvements being delivered by NRW under the current Review of Permits apply a 'fair share' approach. The fair share approach assumes that corresponding action will be taken to deliver improvements from other sources of nutrients within an affected catchment. This assumption is relevant to the key environmental principles of polluter pays, integration and rectification at source.

Policy WG1 –The achievement of the conservation objective targets within SAC rivers is central to the Well-being of Future Generations Act goals for 'A resilient Wales', 'A prosperous Wales', 'A healthier Wales' and 'A globally responsible Wales'. Improvements being delivered by NRW under the current Review of Permits apply a 'fair share' approach and the Welsh Government expects public bodies, including statutory agencies, to work together to ensure that further action to reduce nutrient loading to SAC river catchments under a fair share approach is identified and delivered in accordance with the sustainable development principle. In the interests of future generations, public bodies must make proportionate use of statutory powers to deliver necessary actions as soon as reasonably practicable. A fair share approach can be relied upon by local planning authorities and project proposers where the necessary commitment to actions required by all sectors can be demonstrated.

New projects which are dependent upon existing permits

Development proposals within SAC catchments involve 'new' proposals (for example, housing) which are dependent upon 'existing' permits (wastewater treatment works). New proposals are treated differently to existing proposals under the Habitats Regulations. The assessment process for a new proposal aligns with duties under Article 6(3). In accordance with regulation 63, when making an assessment of a new plan or project, a decision-maker must be satisfied that adverse effects to site integrity will be avoided. This process for existing activities aligns with duties under Article 6(2) to take appropriate steps to avoid deterioration. In accordance with regulation 66(3), when considering effects associated with existing or ongoing activities a decision-maker can rely

on 'action to be taken' where they are satisfied that the action will secure that an ongoing activity will not adversely affect the integrity of a site. Uncertainty may therefore arise for competent authorities on the extent to which they may rely on action to be taken when applying the specific legal tests to a new proposal which is dependent upon an existing permit.

Policy WG2 – Where a new proposal is dependent upon an existing permit that represents a risk of deterioration, and a decision-maker is satisfied that appropriate steps (other action) to avoid deterioration under Article 6(2) have been secured, a decision-maker can rely upon the action to be taken when applying the integrity test under regulation 63 in respect of the new proposal. Action to be taken (appropriate steps) can be regarded as 'secure' if:

- **The scale of further improvements necessary to avoid deterioration from existing/ongoing activities has been estimated (as far as reasonably possible on the basis of information currently available);**
- **The 'appropriate steps' to be taken have been clearly identified and associated with an appropriate delivery mechanism, making proportionate use of statutory powers as necessary to facilitate delivery as soon as reasonably practicable;**
- **There is a clear timeframe for implementation of 'appropriate steps' to be taken with associated delivery progress milestones towards achievement of the conservation objective phosphorus targets;**

Where new development relies upon action to be taken, interdependence must be established through a policy caveat approach (refer section 14) to ensure that decision-making for new development is conditional upon associated delivery progress milestones being achieved.

Ensuring mitigation does not undermine delivery of restoration objectives

Competent authorities have a duty to protect, conserve and restore European sites and the delivery of mitigation must not compromise the ability of other initiatives to deliver necessary restoration. With reference to policy WG1 the Welsh Government expects public bodies to work together to ensure that further action to reduce nutrient loading to SAC river catchments under a fair share approach is identified and delivered in accordance with the sustainable development principle. The Welsh Government encourages public bodies to implement an integrated approach to the delivery of management, restoration and mitigation in Welsh SAC Rivers affected by excess phosphate. Under an integrated approach, action to achieve the conservation targets will be identified and associated with defined delivery milestones and a need for mitigation arises in recognition of the risk that delivery of development might compromise the delivery of restoration outcomes. When identifying mitigation options the primary issue for planning authorities is therefore to ensure that mitigation does not compromise restoration timescales.

Policy WG3: When considering effects associated with nutrient pollution a degree of overlap exists between measures to deliver management/restoration and those which might be relied upon to deliver mitigation. Developer-led mitigation must not involve the delivery of measures which are already identified as management/restoration measures and associated with an appropriate delivery mechanism or which may compromise future management / restoration by eroding the catchment capacity for future interventions. Mitigation can be integrated with management and restoration where developer contributions:

- **increase the scale, magnitude, or scope of planned management/restoration measures; or**
- **speed up delivery of planned management/restoration measures beyond what would be normally delivered, where the current implementation timescales risk meaningful ecological deterioration in the interim.**

5 Before you begin - Obtaining the baseline Information

5.1 Understanding your baseline

5.1.1 When assessing the significance of an effect on a European site, case law has established that the assessment of risk must be undertaken in light of the characteristics and specific environmental conditions at the site concerned[14], otherwise known as the 'prevailing environmental conditions' or 'baseline'.

5.1.2 A starting point for the development of a catchment-specific decision-making pathway is to understand the scale and extent of nutrient exceedance within the SAC concerned, on the basis of best available information. Unless reliable local data sources are available, information currently available in the NRW Compliance Assessment of Welsh River SACs against phosphorous targets[15] is considered to be best suited for this purpose. It provides information on the number of waterbodies which fail targets, the scale of exceedance and the nature of exceedance (whether episodic or consistent). Subsequent updates were made to P targets for six waterbodies in 2022[16].

5.1.3 Having defined the baseline conditions, as far as reasonably possible, in light of best available information, it is then necessary to understand anticipated future improvements and the extent to which they might 'avoid deterioration' (in respect of duties under Article 6(2) of the Habitats Directive), and whether such improvements are secured or aspirational.

5.2 What level of improvements will be delivered through other initiatives

5.2.1 When considering the effects of proposed development planned improvements in the baseline scenario can be taken into account. In other words, where other action is anticipated to deliver improvements it is acceptable to consider the effects of proposed development in light of anticipated changes to the current baseline conditions[17]. This is appropriate as an assessment in respect of site integrity needs to consider the effects of proposed development over the short, medium and long-term compared to a without consent scenario. The need to take account of 'other plans and projects' when applying the integrity test explicitly allows for the effects of other proposals (which may be either positive or negative) to inform decision-making.

5.2.2 NRW are undertaking a Review of Permits and information is available on planned permit improvements. The Review of Permits will deliver reductions in nutrient loadings across all SAC catchments and the reductions to be delivered are calculated on a 'fair share' approach. The underlying premise of 'fair share' is that the improvements, in and of themselves, are unlikely to be sufficient to achieve downstream conservation objective nutrient targets, unless local evidence is available to the contrary.

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[14] Refer Case C-127/02 The Waddenzee Ruling (para 49)

[15] NRW Compliance Assessment of Welsh River SACs Against Phosphorus Targets

[16] NRW Update to phosphorus targets for water bodies in Special Area of Conservation (SAC) rivers in Wales

[17] In the Examination in Public of the 2018 Submission Wealden Local Plan, and in spite of evidence that local measurements did not reflect nationally forecast improvements, the Planning Inspectorate nevertheless concluded that predicted forecasts based on nationally-agreed emissions factors (which account for measures which are already in place or which can reasonably be relied upon to be in place) provide an adequate basis upon which to assess the anticipated effects of future development. The Planning Inspectorate had regard to advice from Natural England in coming to this position.

5.2.3 Planning authorities will need to seek information from NRW to understand the scale of improvements to be delivered by the scheduled Permit amendments and the extent to which 'other action' will be required to deliver further improvements. Source attribution data compiled as part of the Review of Permits to determine the 'fair share' improvements to the permits subject to review is already held by NRW and should be made available in a suitable format.

Box 5.2.1 Example of baseline information sharing

Total P loading at bottom of catchment = XX kg

Fair share action on wastewater treatment works is anticipated to reduce water company P contribution by X% and 'fair share' assumes an equivalent reduction from other sources.

P loading and assumed fair share reductions from each sector as follows:

Sector	Total P loading to catchment (kg)	Assumed fair share reduction (Kg P)
Wastewater treatment works	X	XX
Agricultural sources	Y	YY
Other	Z	ZZ

5.2.4 Having understood the assumed reductions to be delivered from other sources at a strategic catchment level through a 'fair share' approach, it is then possible to consider future improvements which are anticipated from other ongoing initiatives. For example, enforcement work being delivered by NRW in accordance with The Water Resources (Control of Agricultural Pollution) (Wales) Regulations 2021, and river restoration work to be delivered through the Four Rivers for LIFE project[18]. There will be considerable uncertainty in attempts to quantify the scale of the improvements that might be delivered from such initiatives. However, relevant competent authorities should apply professional judgment to agree a confidence level (High/Medium or low) that the initiatives will be sufficient to achieve the 'fair share' reductions over a defined timeframe.

Box 5.2.2 Example of estimating reductions to be achieved from NRW enforcement action

80% of the 83 dairy farms inspected by Natural Resources Wales between 2020 and 2022 were non-compliant with anti-pollution regulations[19]. On average, compliance and enforcement action is anticipated to secure at least a x% reduction in overall P loading to waterbodies from a non-compliant farm. It is therefore anticipated that planned enforcement action will result in a x multiplied by 80 percentage reduction in P loading from agricultural sources.

[18] https://naturalresources.wales/about-us/what-we-do/our-projects/nature-projects/4-rivers-for-life/?lang=en#:~:text=Four%20Rivers%20for%20LIFE%20is,%2C%20Cleddau%2C%20Tywi%20and%20Usk.
[19] https://www.theguardian.com/environment/2024/apr/19/most-uk-dairy-farms-ignoring-pollution-rules-as-manure-spews-into-rivers

5.2.5 An element of uncertainty in understanding future improvements is acceptable. The purpose of understanding the baseline conditions is to provide an *indication* of the extent to which further action, over and above measures which have already been implemented or are already secured might be required in order to achieve the fair share improvements. Duties under Article 6(2) to take appropriate steps to avoid deterioration are ongoing in nature. In the event that measures do not deliver sufficient improvements in water quality an ongoing duty will exist to identify further measures. Whilst a level of precaution is sensible, **it is not necessary for authorities to adopt an excessively precautionary approach when assigning a confidence level. The legal test to remove 'reasonable scientific doubt' does not apply in respect of duties to take appropriate steps to avoid deterioration under Article 6(2). The European Courts have instead ruled that '*the term appropriate steps contained in Article 6(2) of the Habitats Directive implies that Member States enjoy discretion when applying that provision*'[20].**

[20] Case C-399/14 Reference for a Preliminary Ruling in the Grüne Liga Sachsen case (Refer paragraph 40)

6 Delivery Pathway step 1 – Can development be delivered through a threshold-based approach?

6.1 What is a threshold-based approach?

6.1.1 For the purpose of this report, a threshold can be defined as an agreed criterion against which decision-making for plans and projects can be evaluated. Where the effects of proposed development are below an agreed threshold it is deemed not likely to have a significant effect, either alone or in-combination with other plans and projects. As such, the threshold is used to identify plans and projects whose contribution to any combined effect can, for purpose of decision-making, be deemed inconsequential i.e. where further assessment in-combination will not change the outcome of the decision.

6.1.2 The Courts have consistently established that the use of decision-making thresholds under the Habitats Regulations is acceptable in principle. Further information on relevant Court decisions is provided in Appendix 3. When applying a threshold-based approach **the central question is whether it can be demonstrated that a defined level of growth will not undermine the achievement of the conservation objectives.** This question is important as effects which do not undermine the conservation objectives are not 'significant' in HRA terms (refer Appendix 1).

6.1.3 The absence of decision-making thresholds in respect of plans and projects contributing nutrients in SAC rivers in Wales is largely a consequence of a) the practical challenges of deriving an evidence base to support a generic threshold, which can be applied across all projects affecting SAC rivers; and b) concerns over the potential for 'salami-slicing' and similar attempts by project proposers to subvert the correct application of the Regulations by artificially sub-dividing projects in order to meet a given numerical value. **For the purpose of this guidance a threshold based approach which applies on a project-by-project basis in an unlimited manner is not advised.**

6.1.4 With regard to the delivery of affordable housing, points (a) and (b) warrant further reflection. Affordable housing targets relate to a specific type of development which can be quantified allowing an overall phosphate loading to be estimated. Where a threshold is derived to apply to a defined type of development (e.g. affordable housing) rather than to all development types, the risk of 'salami-slicing' is no longer relevant.

6.1.5 When considering effects of increased nutrient loading to SAC rivers from housing development, a common-sense sector based approach (in 6.3 below) – concerning the conceivable risk from a defined quantum of proposed development - warrants further consideration. **A threshold based approach derived on a common-sense basis must be taken with reference to the overall contribution from affordable housing over a defined timeframe**.

6.2 Step 1a: Quantifying the additional P loading from affordable housing

6.2.1 The first step in considering a threshold-based approach is to understand the additional P loading which is anticipated to arise from affordable development within the SAC catchment concerned. It is reasonable to anticipate that a defined quantum of affordable housing in a

given catchment might be known, or could be planned for on a precautionary basis, and that the additional nutrient loading from such development can reasonably be estimated. Two elements are relevant to any such estimation:

1) Assumptions about water usage and occupancy rates for new residents.

2) Assumptions about occupancy of affordable housing and what proportion of occupants represent new residents, compared to existing residents already living within the catchment .

6.2.2 Occupancy rates and the proportion of new residents within a catchment compared to those already living in the catchment can be derived from Local Housing Market Assessments. In terms of water usage, average water use for domestic customers in Wales (based on 2023 data) are 150.7l per day per person for Dwr Cymru Welsh Water and 130.6l per day per person for Hafren Dyfrdwy. It should be noted, however, that Building Regulations stipulates that new properties should have a maximum water usage of 110l per day per person and Ofwat are expected to set targets for water companies to reduce their per capita consumption at the price review to be published in December 2024.

6.2.3 In estimating the additional P loading from planned affordable housing the following steps should be taken:

i) Estimate the overall quantum of affordable housing to be delivered within the SAC catchment over a defined timeframe.

ii) making reasonable assumptions about water usage, estimate the overall P loading from affordable housing as a % of overall P loading to the catchment from wastewater treatment works over a defined timeframe.

iii) On a precautionary basis, estimate a maximum % of occupants which might represent *new* residents to the catchment.

6.3 A common sense sector-based approach

6.3.1 A decision can be taken as to whether the relative contribution from affordable housing can be regarded as sufficiently inconsequential (in terms of whether it might undermine the conservation objectives and hence be 'significant' in HRA terms). Where this is the case a common-sense approach might be applied, without a need for further work to quantify or draw comparisons with anticipated future improvements. Having defined the overall additional loading from affordable housing over a defined timeframe a planning authority may have sufficient evidence with reference to baseline conditions (refer section 5) and anticipated future improvements to argue that that any residual effect will not represent any conceivable risk to the site.

6.3.2 Such a decision might be justified in view of the extent to which the additional loading will meaningfully hinder the ability of parallel initiatives (both current and future) to achieve the

necessary improvements, taking account of the anticipated delay that the contributions from affordable housing will introduce to the delivery of future improvements.

6.3.3 The derivation of a level of additional loading that can be regarded as acceptable without a need for further assessment in-combination, can be informed by:

- What needs to be done, in practice, to achieve the conservation objective nutrient targets.
- The extent to which other initiatives are in place to deliver improvements.
- The rate and pace at which anticipated improvements from existing measures might come forwards and the delay which might arise from 'below threshold' development.

6.3.4 In the case of Welsh river SACs the Review of Permits is a parallel initiative which will deliver improvements irrespective of growth. The improvements delivered through the Review of Permits can be regarded as secure in accordance with NRW policy, but the timescale for delivery and the extent to which further action is required to achieve the conservation objectives will be a relevant consideration.

6.3.5 To agree a threshold approach planning authorities will need to be satisfied that the additional loading from affordable development will not, over a defined timeframe, undermine the achievement of the conservation objectives. In other words, the additional loading will not exert any meaningful influence over the effectiveness of action to be taken to achieve the conservation objectives, or otherwise delay the achievement of such objectives. Determining that a quantum of development within a catchment will not adversely affect the integrity of a site is different to a determination of no effect at all. The concept of site integrity is central and not all effects represent an adverse effect to site integrity.

Box 6.3.1: Example of common-sense sector based reasoning

Timescale for delivery of improvement through NRW RoP = YYYY

Anticipated reduction in loading from NRW RoP improvements = Xkg/day

Over that timeframe the additional loading from planned affordable housing within the catchment will contribute xkg/day which will delay achievement of RoP improvements by xxxx.

The combined effects of planned affordable housing proposals will not undermine the achievement of the conservation objectives through other initiatives, and will not represent an adverse effect to site integrity.

6.3.6 This approach aligns with the Dutch Nitrogen Ruling (refer Appendix 3) which explicitly affirmed that the Directive does not preclude the use of threshold-based approaches. The ruling established a requirement for any threshold based approach to be supported by an 'assessment in advance' to demonstrate that there is no reasonable scientific doubt as to the lack of adverse effects (from the combined effects of proposals falling within the scope of a threshold approach) on the integrity of the sites concerned.

6.3.7 A common-sense approach is also supported by the UK Courts in the ***Boggis*** case[21] which recognises that, whilst a precautionary approach is required under the Habitats Regulations, there must be credible evidence that a perceived risk to the site concerned is real, rather than hypothetical. The relative contribution from affordable housing development can therefore be considered in light of the extent to which there is credible evidence that it represents a real risk to the integrity of the site concerned, or whether that risk is hypothetical.

6.3.8 Finally, this approach is also supported by principle 8 in section C.8 of the HRA Handbook[22] which recognises that certain situations…

> *'might lead to a conclusion that the risk of the subject proposal contributing to a significant adverse effect in combination is hypothetical rather than realistic. Where this is the case, cumulative effects are taken into account, and excluded on the basis of lack of credibility, without having to identify all other plans and projects and undertake what might be a costly and time consuming assessment, on the basis of effects which are not credible. To put it another way, such an effect can properly be described as: an 'insignificant effect'; or a 'de minimis' effect; or a 'trivial' effect; or as having 'no appreciable effect'.*

6.3.9 The underlying assumption with a common-sense sector based argument is that other development proposals within the catchment will be subject to full assessment either alone or in-combination with each other to ensure that 'significant' effects (i.e. those which represent a meaningful risk to the conservation objectives) will still be addressed.

6.4 How the use of a threshold-based approach informs the HRA

6.4.1 A threshold based approach can be applied at the likely significant effect decision. It is justified on the basis that the development has been determined to not undermine the conservation objectives and cannot therefore be 'significant'.

6.5 Next steps

6.5.1 If a threshold based approach is not considered to be appropriate, or the quantum of development is such that a threshold based approach will not be appropriate it will be necessary to proceed to step 2 in section 7.

[21] Boggis v Natural England and Waveney DC paragraph 37 [2009] EWCA Civ 1061

[22] Tyldesley, D., and Chapman, C., (2013) The Habitats Regulations Assessment Handbook, (Feb) (2024) edition UK: DTA Publications Limited

7 Delivery Pathway step 2 – Can development be delivered in the absence of further mitigation?

7.1 NRW Advice to planning authorities

7.1.1 NRW published advice to competent authorities in August 2023 (current version dated June 2024). In considering the advice, planning authorities remain responsible for their own assessments under the Habitats Regulations and they must therefore be satisfied that the approach suggested by NRW, and any underpinning assumptions, is/are appropriate.

7.1.2 The Review of Permits applies a 'fair share' approach whereby improvements to permitted sources are proportionate to their contribution to overall loading. The fair share approach aligns with the polluter pays principle to ensure that burdens placed on different sectors are fair. **The underlying assumption is that, in addition to the planned permit improvements, other action to deliver necessary (proportionate) reductions from other sectors will also be delivered. Under a fair share approach, the achievement of the conservation objectives can therefore be dependent upon the improvements being delivered through Review of Permits *and* the timely delivery of other action to secure necessary reductions from other sectors.**

7.1.3 Planning authorities will need to consider the implications of a fair share approach for the SAC catchment concerned. Given the underlying premise of a fair share approach, unless local evidence is available to the contrary it should be assumed that planned NRW Review of Permit amendments alone will not be sufficient to achieve downstream P targets. However, if local evidence suggests that scheduled NRW permit amendments for a particular treatment works might be sufficient to meet downstream phosphorus targets, the fair share question does not apply. The first question to be addressed is therefore:

Q. Will planned NRW Review of Permit amendments achieve the downstream P targets?

Yes – Go to 7.2
No - Go to Section 8.

7.2 Can development be delivered in accordance with NRW guidance?

7.2.1 Where improvements delivered to NRW permits are sufficient to achieve downstream P targets, planning authorities **do not need to satisfy themselves in respect of assumptions made under a 'fair share' approach** and NRW advice available here can be followed. NRW advice sets out criteria which should be met to allow development to rely upon the Review of Permits scheduled improvements and should be followed accordingly.

7.2.2 NRW advice to planning authorities is to condition timing of development to correspond with delivery of future improvements at wastewater treatment works scheduled under the Asset Management Programme. As a consequence it may be necessary for planning authorities to consider the implementation dates for scheduled improvements and the extent to which development can be delivered in time.

Q. Can the relevant criteria within the NRW advice be met such that development can be delivered?

Yes - Assuming the sewerage undertake has confirmed capacity to treat additional wastewater from the proposed development, permission can be granted with necessary conditions.
No – Go to Section 8

8 Delivery pathway step 3 – Can development be delivered in accordance with a mitigation based approach?

8.1 Introduction

8.1.1 The need to consider mitigation options arises where a threshold based approach is not appropriate, and development cannot be delivered through reliance on NRW permit amendments. When considering mitigation options the timely delivery of development should be taken into account as explained in box 8.1.1 below.

Box 8.1.1: The timely delivery of development when considering mitigation options

For the purposes of this guidance, it is necessary to recognise that the approach to mitigation options may need to take account of delivery timescales. The delivery of some development may be linked to Government targets (e.g. affordable housing) and delays may represent a public interest. Where the target cannot be met through reliance on mitigation based options planning authorities should consider the derogation tests before refusing permission for affordable housing development proposals.

Whilst this timeframe will influence the options which are considered to be achievable, every effort must be made to agree a mitigation-based approach and challenging timeframes should not be used as an excuse to avoid a full assessment of options. It is only where mitigation-based approaches are demonstrably not feasible that derogation-based options can then be explored. **In excluding mitigation-based options on the basis of timescale constraints for development proposals which deliver a public interest it is expected that *all* options will have been explored, including those which rely on the exercise of statutory powers.** It is not therefore acceptable to progress to a derogation-based approach on the basis of a preference to avoid the exercise of statutory powers.

8.2 Has other 'fair share' action to achieve further improvements been secured?

8.2.1 Where improvements delivered to NRW permits are not sufficient to achieve downstream P targets, planning authorities will need to satisfy themselves in respect of assumptions made under a 'fair share' approach and 'other action' which needs to be taken in order to deliver further improvements to satisfy duties under Article 6(2) to avoid deterioration, being mindful of associated duties upon public bodies in Wales to protect, conserve and restore European sites[23].

8.2.2 The criteria set out in policy WG2 should be applied to determine if other action relied upon by NRW in adopting a fair share approach has been 'secured'. Policy WG2 is clear other action can be regarded as 'secure' if:

- The scale of further improvements necessary to avoid deterioration from existing/ongoing activities has been estimated (as far as reasonably possible on the basis of information currently available);

[23] https://www.gov.wales/duty-protect-conserve-and-restore-european-sites-html

- The 'appropriate steps' to be taken have been clearly identified and associated with an appropriate delivery mechanism, making proportionate use of statutory powers as necessary to facilitate delivery as soon as reasonably practicable;
- There is a clear timeframe for implementation of 'appropriate steps' to be taken with associated delivery progress milestones towards achievement of the conservation objective phosphorus targets;

Q. With reference to policy WG 2, is other 'fair share' action to achieve further improvements already 'secured'?

Yes – Go to 8.4
No - Go to 8.3

8.3 Is other 'fair share' action to deliver necessary improvements achievable in practice?

8.3.1 Where 'fair share' action to deliver necessary improvements has not yet been secured planning authorities should determine whether such action can be secured. In other words, is further action to deliver fair share improvements from other sources achievable in practice?

8.3.2 Relevant statutory bodies are expected to deliver further action as may be necessary to secure required improvements and avoid deterioration of SACs. The proportionate use of statutory powers should be considered to deliver improvements in water quality as soon as reasonably practicable. In addressing this question, the Welsh Government expects relevant public bodies to act in accordance with policy WG1, the sustainable development principle, and the '5 ways of working' needed for public bodies to achieve the seven well-being goals[24].

8.3.3 The taking of appropriate steps to avoid deterioration is largely within the remit of Natural Resources Wales and work being progressed through the SAC Rivers Project will inform the extent to which necessary improvements are achievable in practice. Planning authorities will need to work closely with NRW and other stakeholders to understand what further action is already being taken by them to address existing sources of phosphate. Progress with other steps might not currently meet policy WG2 criteria for having already been secured but planning authorities can consider what additional work might be necessary to satisfy the WG2 policy criteria.

8.3.4 Detail on the measures which might be taken to achieve downstream phosphorus targets are contained within section 12 and statutory bodies must work together to identify any further steps that may be required to deliver fair share reductions. The proportionate exercise of statutory powers to deliver targeted measures to maximise ecological outcomes and cost efficiency considerations should be used and the least onerous principle applies. The exercise of statutory powers is considered further in section 13.

[24] Refer https://www.futuregenerations.wales/about-us/future-generations-act/

Q. With reference to policy WG2, and NRW assumptions during the Review of Permits, is other 'fair share' action to deliver necessary improvements achievable in practice?

Yes – Go to section 8.4
No - Go to section 8.6

8.4 An integrated approach to the delivery of management, restoration and mitigation

8.4.1 The Welsh Government expects public bodies to act in accordance with policy WG2 and to apply the 5 ways of working as required by the Future Generations of Wales Act; integration, long-term, prevention, involvement and collaboration. In order to ensure that the delivery of development will not undermine the achievement of restoration objectives, to facilitate integration involvement and collaboration amongst stakeholders, and ensure development decisions are in accordance with the sustainable development principle, unless local circumstances indicate otherwise, **the Welsh Government expects public bodies to work together to implement an integrated approach to the delivery of management, restoration and mitigation in Welsh SAC Rivers. In the context of this guidance, the integrated approach should aim to coordinate actions to deliver a long-term improving trend in nutrient levels within SAC catchments whilst managing growth (and other threats and pressures) in accordance with the sustainable development principle. Further guidance on an integrated approach to the delivery of management, restoration and mitigation is provided in section 11**.

8.4.2 Competent authorities have a duty to protect, conserve and restore European sites. This duty applies when competent authorities take decisions that might affect a site and Welsh Ministers expect competent authorities to act in accordance with that duty when considering their role in an integrated approach to management restoration and mitigation. If a public body can take action but decides not to, they should be able to give clear and proper reasons why they have made that decision[25]. Public bodies have a duty to consider how they can help to:

- protect, conserve or restore the designated features of the site to meet their conservation objectives.
- prevent the deterioration of the site's habitats from human activity or natural changes, including habitats that support designated species
- prevent significant disturbance of the site's designated species from human activity or natural changes

8.4.3 Where planning authorities determine that an integrated approach to management, restoration and mitigation is not achievable in practice, they should provide an explanation to the Welsh Government in support of this position when proposing to use the derogation pathway.

8.4.4 Where an integrated approach to the delivery of management, restoration and mitigation is achievable in practice, planning authorities will need to consider if developer contributions

[25] Refer https://www.gov.wales/duty-protect-conserve-and-restore-european-sites-html

could be used to deliver integrated mitigation measures to allow development to be delivered. **Further guidance on identifying mitigation options as part of an integrated approach to restoration, management and mitigation is provided in section 11.**

Q. Taking account of policy WG3, can developer contributions be used to deliver integrated mitigation measures to allow development to be delivered?

Yes: Go to section 8.5
No – Go to section 8.6

8.5 Does a policy caveat approach to ensure interdependence between associated delivery milestones and planned growth enable development to be delivered in a timely manner?

8.5.1 Steps being taken (or to be taken) to avoid deterioration under Article 6(2) will result in an improving baseline condition at the site concerned. When applying the integrity test under regulation 63, planning authorities can have regard to improving baseline conditions which have been 'secured' (refer 5.2).

8.5.2 The need for development to be delivered 'in time' recognises that some development proposals may be connected to Government targets which potentially brings in matters of public interest (refer box 8.1.1). The 'in time' element is only relevant where the need for development to come forwards within a given timeframe is in the public interest, such that delays in delivery of relevant Government targets might be weighed against the conservation interest potentially at risk from allowing further deterioration in water quality within the SAC river catchment concerned. Where 'other action' has been secured, planning authorities can consider whether a policy caveat approach (refer section 14) to ensure interdependence between associated delivery milestones and planned growth will enable development to be delivered in a timely manner. If so, permission can be granted with necessary conditions.

8.5.3 With reference to policy WG2, where a planning authority is satisfied that *new* development is dependent upon an *existing* permit, and that appropriate steps **to be taken** to deliver fair-share improvements can be relied upon such that new development will not represent an adverse effect to site integrity in view of the action being taken, a policy caveat approach should be applied and the permitted capacity can be allocated to growth. Further detail on a policy caveat approach and how it should be applied is provided in section 14.

Q. Will a policy caveat approach to ensure interdependence between associated delivery milestones and growth allow development to be delivered in a timely manner?

Yes – Assuming the sewerage undertaker has confirmed capacity to treat additional wastewater from the proposed development, permission can be granted under a policy caveat approach with necessary conditions.
No - Go to section 8.6

8.6 Can developer-led mitigation to secure nutrient neutrality over the lifetime of development be secured?

8.6.1 Where public bodies agree that 'fair share' action to achieve the necessary improvements cannot be secured (and NRW have confirmed that the P targets for the river stretches concerned remain appropriate) or where an integrated approach to the delivery of management, restoration and mitigation is not achievable in practice, or might compromise delivery of relevant Government timescales, it will be necessary to consider developer led mitigation to achieve nutrient neutrality over the lifetime of proposed development.

8.6.2 Further guidance on nutrient neutrality is provided in section 15 and measures which might be deliverable to provide neutrality are considered in section 12.

Q. Can developer-led mitigation to achieve NN over lifetime of development be secured to deliver development in a timely manner?

Yes: Assuming the sewerage undertaker has confirmed capacity to treat additional wastewater from the proposed development, permission can be granted under a policy caveat approach with necessary conditions.

No – Go to section 9.

9 Delivery pathway step 4 – Can development be delivered through a derogation based approach?

9.1 Introduction

9.1.1 Options to deliver development through a derogation based approach should be viewed as a last resort. It is an expectation of Welsh Government that every effort will be made to identify threshold-based and mitigation-based approaches.

9.1.2 The Welsh Government recognises the importance of the catchment-led principle and, where threshold-based or mitigation-based options are not considered to be available a derogation-based approach can be considered as a last resort. The Welsh Government should be informed if a decision to progress with a derogation-based approach is taken with justification as to why threshold or mitigation approaches are not achievable.

9.1.3 In considering how a derogation-based approach might work in practice, it is necessary to recognise that development associated with defined Government policies or targets are more likely to be relevant, although it will be necessary to recognise that Government targets often apply at a country level rather than a catchment level. By way of example, the affordable housing target at the time of writing[26] applies across Wales as a whole. No individual competent authority is tasked with delivering 20,000 new homes; the overarching objective is simply to deliver 20,000 new low carbon homes for rent in Wales within the social sector during the current Government term (2021-2026).

9.1.4 However**,** individual competent authorities are tasked with making provision for affordable housing led housing sites in their development plans. Such sites will include at least 50% affordable housing based on criteria reflecting local circumstances set out in the plan. They will be defined as social rented housing provided by local authorities and registered social landlords and intermediate housing where prices or rents are above those of social rent but below market levels and there are secure arrangements to recycle receipts to use for future affordable housing where full ownership is achieved. **In order to apply the derogation tests at the level of SAC river catchments, the overarching Welsh 'objective' in respect of affordable homes may need to be translated to local or strategic development plans via Local Housing Markets Assessments (LHMA).** The 'objective' of development applications within a given catchment could be described in terms of the number of affordable homes which need to be delivered within that catchment in light of the overall target for Wales. This will ideally be achieved through Corporate Joint Committees and the preparation of strategic development plans, or through appropriate collaboration between local planning authorities when preparing LDPs.

9.1.5 The derivation of local or regional targets for development will need to be justified and be informed by the LHMA. Government targets in respect of affordable housing are intended to facilitate access to affordable housing where need arises and it is anticipated that Development Plans will already include targets for affordable housing and sites will be allocated to address this need. Planning authorities will need to make the case for windfall sites which can be justified in accordance with a LHMA. Both allocated and windfall sites

[26] Targets which are in place currently may change over time. When applying this guidance, the latest and most up to date targets should be used

should contribute to the meeting of locally derived targets relative to identified need and satisfy the catchment-specific principle (refer section 4).

9.2 Demonstrating the absence of alternative solutions

9.2.1 The test of alternative solutions is the step of the derogation process which is most frequently misunderstood. The wording is important; the requirement is for the competent authority to satisfy *themselves* as to the absence of alternative solutions; this is a different question to the absence of 'alternatives' in a more general sense.

9.2.2 To be an alternative solution it is first necessary to understand what it is that needs to be *solved* in a different way. In other words, what is the objective that the plan or project is seeking to deliver and is there another way of delivering it? Or, what problem does the plan or project solve and is there another way of solving it? In asking that question (whichever way you frame it) an alternative solution within the context of the derogations is one which delivers the objective, or solves the problem, in a way which is less damaging to European site(s) when compared to the original proposal.

9.2.3 The first step is therefore to define the objective of the proposal, or the problem it seeks to solve. The objectives or purposes will set the framework within which the search for alternative solutions is constrained and focuses the investigative work accordingly. EC guidance[27] puts it like this '*The first task is to review possible alternatives that could exist for achieving the objectives of the plan or project*'.

9.2.4 It will be for planning authorities to set their own objectives but they should be in accord with policy and guidance in PPW and TAN 2 Planning and Affordable Housing and be based on effective collaborative across administrative areas where this is necessary to ensure needs can be met in appropriate localities within SAC River catchments.

9.2.5 An assessment to demonstrate the absence of alternative solutions can then be undertaken with reference to the place based objectives. The Welsh Government has currently identified a target which is to be delivered within a given timeframe. Alternative solutions are not feasible alternatives if the delivery of housing will be delayed beyond timeframes associated with specific targets.

9.2.6 The reference to delivery timeframes within project objectives for the purpose of applying the derogation tests was affirmed by the SoS when considering the absence of alternative solutions to the Hornsea Project 3 offshore windfarm[28]. In this case the final objectives drafted by the SoS, against which alternative solutions were evaluated, included an objective to '*deliver a significant volume of offshore wind in the 2020s*.'

9.2.7 Box 9.2.1 below sets out relevant Welsh Government policy relevant to consideration of alternative solutions as derived from case law and authoritative decisions and guidance.

Box 9.2.1: When demonstrating the absence of alternative solutions the following policy positions apply:

[27] Assessment of plans and projects in relation to Natura 2000 sites – Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive, EC 2021.

[28] https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010080/EN010080-003267-EN010080%20Hornsea%20Three%20-%20Habitats%20Regulations%20Assessment.pdf

- **There is a real difference, in both substance and effect, between 'alternative solutions' in the Habitats Directive and 'reasonable alternatives' in the SEA Directive. It is not necessarily unreasonable or irrational to include an alternative as a 'reasonable alternative' under SEA whilst rejecting it as an 'alternative solution' under HRA[29].**
- **An assessment of alternative solutions is necessarily directed at identified objectives or purposes of the original proposal[30]. In other words, what is the problem that the plan or project seeks to solve and is there another way to solve it?**
- **Objectives or purposes of a proposal should be defined in light of relevant Government policy objectives which underpin the need for the proposal[31].**
- **When considering alternative solutions the choice is not inevitably determined by which alternative least adversely affects the site concerned, instead a balance should be struck between the adverse effects and the relevant reasons of overriding public interest[32].**

9.3 Imperative reasons of over-riding public interest

9.3.1 If a decision-maker is satisfied that, there are no alternative solutions to enable the project objectives to be met, it will then be necessary to weigh the public interest being served against the conservation interest which is at risk. This step will require the ecological implications of additional nutrient loading to be considered in light of the public interest which is served through the delivery of development. The decision which needs to be taken is whether the public interest overrides, or carries greater weight, than the conservation interest potentially at risk.

9.3.2 In considering imperative reasons of overriding public interest decision-makers must firstly be satisfied that the proposal serves a public interest. It is not necessary for the proposal to serve a *solely* public interest (which is unlikely) but there must be a public interest which is delivered. Plans and projects which deliver solely private interests should not be considered further.

9.3.3 The 'overriding' element of the decision is a judgement which essentially asks whether the need for the project outweighs (or overrides) the conservation interest that might be lost/damaged. This can be obvious in some cases. For example the overriding nature of a tsunami bund to protect Dungeness Nuclear Power Station was readily apparent when facing the potential loss of vegetated shingle habitat. In other cases, the decision needs to be informed by the relative weight or importance of the conservation interest at risk.

9.3.4 Paragraph 2 of regulation 64 can cause confusion. This paragraph states that where the site hosts a priority habitat or species, imperative reasons of overriding public interest must be reasons relating to human health, public safety or beneficial consequences of primary importance to the environment. This first sub paragraph has been interpreted to suggest that only these reasons can be taken into account where such priority features are affected.

[29] Plan B Earth v SoS and Heathrow Airport [2020] EWCA Civ 214 – refer para 113
[30] Spurrier v SoS and Heathrow Airport [2019] EWHC 1070 (Admin) – refer para 334
[31] Spurrier v SoS and Heathrow Airport [2019] EWHC 1070 (Admin) – refer para 335
[32] Case C-239/04 EC v Portugal (The Castro Verde case) - AG Opinion para 45

That assertion is incorrect as the regulation continues with an important 'or'… and goes on to refer to *any other reasons*… having due regard to an opinion of the Welsh Ministers. Subject to seeking such an opinion therefore, other reasons of public interest (including those of a social or economic nature) can be taken into consideration and override the conservation interest where priority habitats or species are at risk.

9.3.5 Box 9.3.1 below sets out relevant Welsh Government policy relevant to imperative reasons of overriding public interest.

Box 9.3.1: When considering imperative reasons of overriding public interest for an development proposal the following policy positions apply:

- **In considering imperative reasons of overriding public interest it is necessary to weigh the public interest being served against the conservation interest put at risk.**
- **Housing delivers a national scale public interest and considerable weight should be given to affordability as a key factor influencing housing demand and need.**
- **Given the urgency of the current housing crisis, and the relative magnitude of additional phosphate loading from affordable homes, Welsh Ministers consider it likely that the public interest served by delivery of affordable proposals will override the conservation interests potentially at risk.**

9.3.6 If the competent authority is satisfied that the public interest overrides the conservation interest potentially at risk, permission for the development can be granted and compensatory measures secured.

9.4 Compensatory measures

9.4.1 Compensatory measures can be delivered on a project-by-project basis or at a strategic level. Should a derogation based option be progressed within a given SAC catchment, it will be most effective to secure and deliver compensatory measures at a strategic level in respect of the quantum of development that is likely to be delivered. However a case-by-case approach can also be taken where better suited to local circumstances, the catchment-specific principle applies.

9.4.2 The objective of compensatory measures is to protect the overall coherence of the National Site Network. Where the overall quantum of development is anticipated to be low, it is not anticipated that compensatory measures will be excessive or overly burdensome to identify and deliver. The underlying question to be addressed when evaluating compensatory measures is whether the measures can be relied upon to achieve their objectives. In practice this requires an evaluation of:

- the spatial scale of the measures
- the location of the measures
- timescales for delivery of measures
- how uncertainty will be addressed
- the 'additionality' of measures

9.4.3 There is no 'rule-of-thumb' to be applied as to the spatial scale over which measures should be delivered. Generally speaking it is accepted that compensation ratios should be well in excess of 1:1. Larger compensation ratios are frequently associated with higher risks of harm, uncertainties or delays in measures achieving ecological outcomes.

9.4.4 As a point of principle compensatory measures should be located in areas that provide the best opportunities for ecological outcomes. In many cases the local conditions necessary to reinstate ecological assets will most likely be found in close proximity to the area impacted. Where a conflict arises between proximity to the site and ecological outcomes, the overarching objective of optimum ecological outcomes should prevail. Compensatory measures must be targeted to the qualifying feature(s) which are at risk but can be delivered to benefit a different site to that which is affected if there are barriers to the delivery of effective measures at the affected site.

9.4.5 When demonstrating the sufficiency of compensatory measures, EC guidance states that, in order to ensure the overall coherence of the network, compensatory measures should be 'additional' to the actions which are normal practice under the Habitats and Birds[33] Directives. Confusion can arise as to how this concept of 'additionality' (i.e. the need for compensatory measures to be 'additional to the actions that are normal practice) should be interpreted when defining compensatory measures.

9.4.6 The reference to 'normal/standard measures' emphasises that the measures which the commission intends to exclude are those which are reasonably accepted as 'normal practice' (i.e. within the bounds of everyday financial and political realities). A recent consultation by Defra in respect of the delivery of compensatory measures in marine protected areas[34] has provided further clarification and states that 'normal measures' can be identified by

- referring to current and past management and restoration practices relating to the site concerned (or equivalent sites), provided the past practice is not connected to a past consented activity and that changes to the condition of the of the site have not rendered the past activity unacceptable
- checking if there is an identified delivery mechanism (including any necessary regulatory and enforcement action by a public body), and
- where necessary, checking whether funding is in place or there is a reasonable expectation the measure will be funded.

9.4.7 The Welsh Government has recently reviewed draft guidance published by Defra in respect of how the concept of additionality should be interpreted and applied when designing compensatory measures. In the absence of equivalent Welsh guidance the views expressed by Defra are set out below as they reflect the Welsh Government preference on such matters at the time of writing. Draft Defra guidance suggests that measures cannot be considered to be additional if they are:

- reasonably accepted as part of normal protected site management

[33] -The Birds Directive (Directive 79/409/EEC) was adopted in 1979. It was amended in 2009 (Directive 2009/147/EC) - changes were made to Annex II part B due to the accession of new Member States.
[34] https://consult.defra.gov.uk/offshore-wind-environmental-improvement-package/consultation-on-updated-guidance-for-environmental/

- normal steps to avoid deterioration or disturbance (or both) or address threats and pressures to protected sites

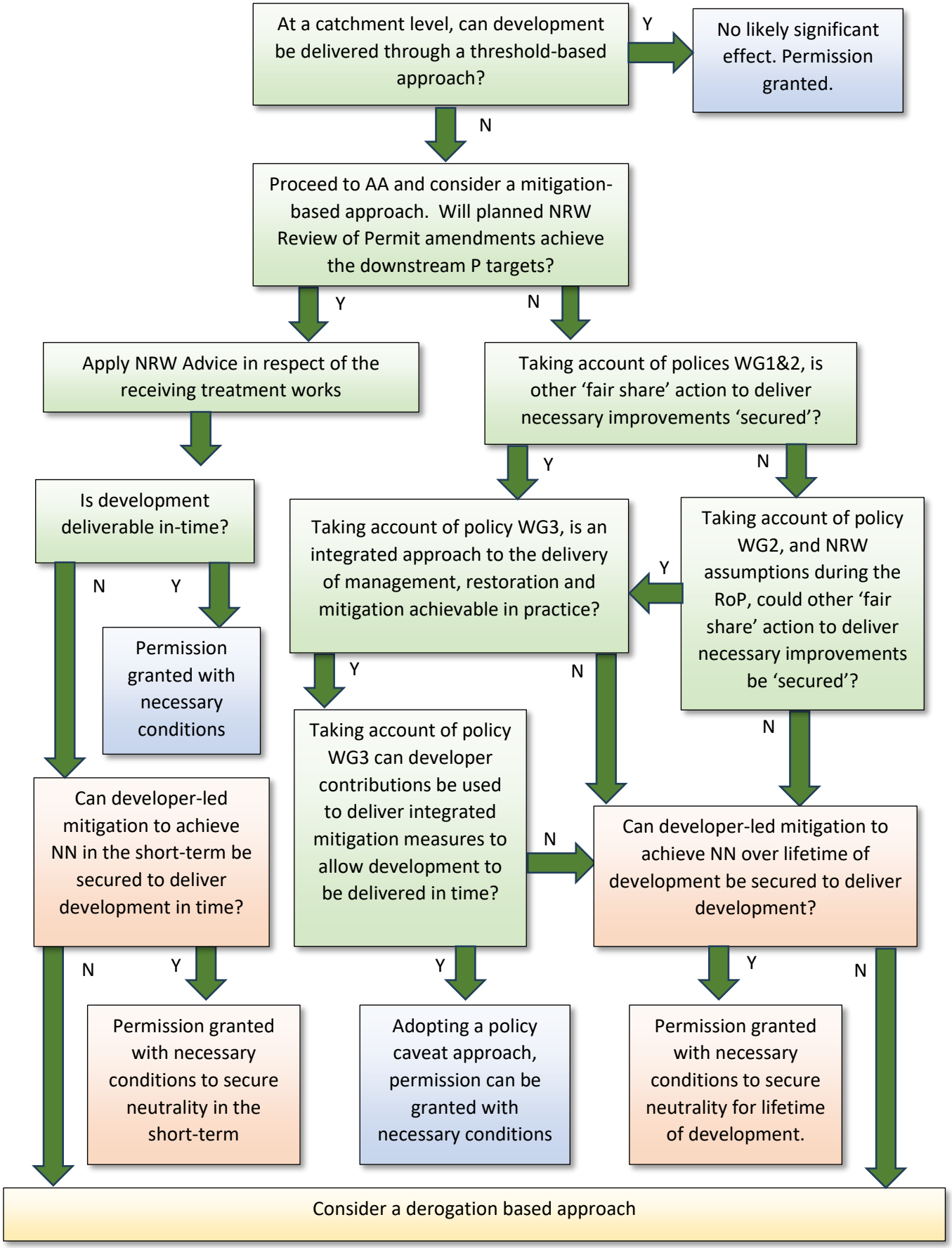
9.4.8 The guidance continues to state that measures *can* be considered to be additional if they enhance or extend or complement either normal site management measures or the normal steps to avoid deterioration or disturbance (or both). This includes measures which would:

- increase the scale, magnitude, or scope of normal measures
- speed up delivery beyond what would be normally delivered in the absence of the plan or project coming forwards and where the current implementation timescales risk meaningful ecological deterioration in the interim

9.4.9 The timescales for delivery of development will require careful consideration when identifying compensatory measures. As a general principle, compensatory measures should be in place and effective before a risk of damage arises and must be effective for the duration over which adverse effects are anticipated to arise. The design of compensatory measures should make all reasonable efforts to recognise and make allowances for the time required for habitats/species to recover or become established but there are exceptional circumstances where this will not be possible and over-compensation can be considered where a delay is anticipated.

9.4.10 The competent authority will need to be satisfied that compensatory measures will be delivered in a timely manner and can be relied upon to secure the overall coherence of the national site network. Monitoring, and clear commitments to take appropriate action where measures are failing to work as expected, is an important element of any compensatory measures package.

10 Overview of approach



11 Further guidance - An integrated approach to delivery of restoration, management and mitigation

11.1 Aims of an Integrated approach to the delivery of restoration, management and mitigation?

11.1.1 The overall aim of an integrated approach to restoration, management and mitigation (hereafter referred to as an integrated approach) is to deliver restoration across the Welsh SAC River network whilst facilitating development in accordance with the sustainable development principle[35]. For the purpose of this guidance, and the consideration of water quality impacts, an integrated approach should be designed to deliver three overarching **outcomes.**

- Outcome 1: **Restoration** - To deliver a consistent long-term improving trend in nutrient levels within the catchment, with a timetable to achieve the conservation objective targets by an estimated date.
- Outcome 2: **Management** - To manage growth (and other threats and pressures) within the catchment in accordance with the sustainable development principle such that the ability to deliver outcome 1 will not undermined.
- Outcome 3: **Mitigation** - The delivery of outcome 2 growth requires the implementation of an integrated approach to mitigation.

11.1.2 A **Restoration** outcome is important in light of the duty upon competent authorities to 'protect, conserve and restore European Sites'[36]. The Courts have established that, where an environmental standard is already exceeded, the capacity for further growth is 'necessarily limited'. As such, in the absence of proactive initiatives to deliver restoration, the delivery of development within SAC catchments which already exceed phosphate targets will be indefinitely constrained.

11.1.3 An improving baseline, with a defined timeframe to meet the phosphate targets is central to creating capacity for growth in accordance with the sustainable development principle. The Nutrient Trading Stakeholder Task and Finish Report Group, when exploring the feasibility of nutrient trading in Wales, agreed that all stakeholders wanted to see SAC rivers improve and that *'There is no point investing time, energy and money in this solution unless a trading mechanism includes an element of betterment'.*[37]

11.1.4 **Management** of growth and other threats and pressures is necessary if outcome 1 is to be achieved. The scale of development being delivered in SAC catchments during a period of restoration must be managed in accordance with the principle of sustainable development. The delivery of growth must not compromise the ability of other initiatives to deliver outcome 1.

11.1.5 A need for **Mitigation** follows naturally from outcomes 1 and 2. Having designed an approach to deliver an improving trend in water quality to achieve a defined target by a

[35] As defined by section 2 of the Well-being of Future Generations (Wales) Act
[36] https://www.gov.wales/duty-protect-conserve-and-restore-european-sites-html
[37] Feasibility of Nutrient Trading in Wales slides, 3rd River Pollution Summit, November 2023.

specified date, a mitigation approach can then be agreed to facilitate the delivery of the sustainable quantum of development defined by outcome 2.

11.1.6 As set out in policy WG3, in order to ensure that the delivery of development will not undermine the achievement of restoration objectives and to facilitate integration, involvement and collaboration, **unless local circumstances indicate otherwise, the Welsh Government expects public bodies to work together to implement an integrated approach to the delivery of restoration management and mitigation in Welsh SAC Rivers.**

11.1.7 Sections 11.3 to 11.6 explain how an integrated approach will work in practice with further supporting guidance being provided in sections 11.7-11.9. Before considering an integrated approach to management, restoration and mitigation in more detail it is first helpful to consider how uncertainty should be handled.

11.2 Handling Uncertainty

11.2.1 An integrated approach to management, restoration and mitigation should be approached in a pragmatic and proportionate manner. Public bodies are expected to apply professional judgment and best available information, but the nature of the challenges posed by excess phosphorus and the variables within the natural environment mean that a degree of uncertainty will be unavoidable.

11.2.2 It is important to keep firmly in mind that the implementation of conservation measures under Article 6(1) and the delivery of appropriate steps to avoid deterioration under Article 6(2) are not subject to the case law which applies in respect of Article 6(3). Having said that, the Courts have ruled that Article 6 must be construed as a coherent whole and emphasised that Articles 6(2) and (3) are designed to ensure the same level of protection[38], so a precautionary approach is required.

11.2.3 This need to take appropriate steps under Article 6(2) is triggered on the basis of a *risk* of deterioration. In the *Grüna Liga Saschen* case[39] the Court reiterated an established principle that '*the very existence of a probability or a risk… is capable of constituting an infringement of Article 6(2) of the Habitats Directive, without a cause and effect relationship… having been proved*'. This risk-based approach is comparable to the approach to avoiding adverse effects to site integrity under Article 6(3). In practice however, applying a risk based approach towards action in respect of an *ongoing* deterioration is very different to one towards a decision in respect of a new *aspirational* activity.

11.2.4 Caution is required therefore in extending case law relevant to Article 6(3) to Article 6(2). The *Grüna Liga Saschen* case continued to observe that *'the wording of Article 6(2) does not define any particular criterion for implementing the measures to be taken'.* When evaluating the confidence that deterioration will be avoided, arguments that the 'no reasonable scientific doubt' test[40] should apply lack coherence. This is due to the inherent differences between an ongoing activity and an aspirational one. Article 6(2) applies to ongoing activities which already represent a risk to a site; constraining the taking of steps to avoid deterioration until it can be demonstrated, beyond reasonable scientific doubt, that they will be effective would serve no useful purpose in achieving the overall objective of the Directive

[38] Case C-404/09 EC v Spain (Refer para 142)
[39] Case C-399/14 Grüne Liga Saschen Reference for a preliminary ruling
[40] Refer the Waddenzee Ruling Case C-127/02.

to maintain or restore habitats and species to a favourable conservation status. It is also necessary to recognise that Article 6(2) is a *proactive* ongoing duty upon the Welsh Government; it does not apply at a specific point in time (as is the case with Article 6(3)). The taking of appropriate steps can be approached in an adaptive manner, being reviewed and refined in accordance with monitoring and available evidence until the desired outcome is achieved.

11.2.5 Article 6(3) is a *reactive* provision, which applies at a defined point in time when a decision is being taken as to whether to allow a potentially damaging project to proceed, or not. The requirements to remove reasonable scientific doubt as to the absence of adverse effects to site integrity as part of a decision-making process is entirely appropriate given the reactive nature of Article 6(3) and the fact that the activity is not yet exerting any influence over the site concerned and opportunities to address adverse effects which might subsequently arise are limited. Further case law relevant to handling uncertainty is considered in Appendix 2.

11.2.6 When designing steps to be taken to avoid deterioration under Article 6(2), and/or restoration steps under Article 6(1), it is the advice of the Welsh Government that:

- A requirement to take appropriate steps to avoid deterioration or to implement restoration measures is triggered on the basis of a risk of deterioration / damage. A precautionary approach is taken to the *need* to implement measures.
- Once the need for steps/measures has been identified the regime to be followed should be specific, coherent and complete, based on best available information.
- The proactive duties under Article 6(1) and (2) are ongoing in nature; steps to avoid deterioration and deliver restoration should be subject to regular review and adapted or refined as necessary until the desired outcomes are achieved.

11.3 How does an integrated approach to restoration, management and mitigation work in practice – Step 1 securing steps to avoid deterioration / deliver restoration

11.3.1 When considering integrated mitigation options, public bodies should have regard to policies WG2 and 3. In accordance with policy WG3, where a decision-maker is satisfied that appropriate steps to deliver 'fair-share' improvements and avoid deterioration have been secured, a decision-maker can rely upon the action to be taken when applying the integrity test under regulation 63 in respect of a new proposal, and when identifying potential mitigation options. A first step is therefore to identify and secure restoration and management measures. With reference to WG2 action to be taken can be regarded as 'secure' if:

- The scale of further improvements necessary to avoid deterioration from existing/ongoing activities has been estimated (as far as reasonably possible on the basis of information currently available);
- The 'appropriate steps' to be taken have been clearly identified and associated with an appropriate delivery mechanism, making proportionate use of statutory powers as necessary to facilitate delivery as soon as reasonably practicable;

- There is a clear timeframe for implementation of 'appropriate steps' to be taken with associated delivery progress milestones towards achievement of the conservation objective phosphorus targets;

Estimating further improvements to avoid deterioration

11.3.2 Baseline information obtained under section 5 (including modelling work undertaken by NRW as part of their Review of Permits to define a 'fair share' approach) will inform an estimate of the additional improvements which are necessary in order to achieve the fair share improvements. It is assumed that this step will be taken at a strategic catchment level, drawing on source attribution data which is already held by NRW (refer box 5.2.1).

Identifying appropriate steps to be taken

11.3.3 It is anticipated that the delivery of fair share improvements will require a suite of steps/measures including:

- **Regulatory measures –** e.g. the NRW Review of Permits and enforcement of existing environmental legislative requirements.
- **Management/Restoration measures -** to reduce threats and pressures from surrounding activities and land use. These are likely to need to be targeted to optimise ecological outcomes (refer section 13). And may include 'legacy measures' to remove phosphate already present within the catchment which represents a significant risk to the timescales to achieve conservation objective targets.

11.3.4 The identification of 'appropriate steps' will be informed by work under section 5 to estimate the improvements to be delivered under the Review of Permits and any further initiatives (such as planned NRW enforcement action or local restoration projects). Section 5 requires a confidence level to be assigned as to the sufficiency of the improvements already identified to deliver necessary improvements. Where there is a high or medium level of confidence that existing measures will be sufficient it may not be necessary to identify further measures. However where there is a low level of confidence that existing initiatives will be sufficient further management/restoration measures will need to be identified.

11.3.5 Further information on measures which might be taken to reduce P loading to the catchment are contained within section 12. Steps/measures to be taken should be selected with the aim of delivering necessary improvements as soon as reasonably practicable. Where landowner agreement is a barrier to the delivery of measures, the proportionate exercise of statutory powers (refer section 13) should be fully explored to facilitate delivery in accordance with the sustainable development principle. The least onerous and catchment-specific principles should apply (refer section 4).

11.3.6 When selecting measures it is necessary to have confidence that measures will be beneficial in nature and that they will deliver actual reductions in P loading to the catchment. Precise quantification of the reductions which will be delivered from a given suite of measures may not be technically feasible and it will be necessary to work with estimates and probabilities.

11.3.7 The suite of steps/measures to be taken should be defined as far as possible in terms of the location and anticipated spatial scale over which measures might be implemented. A key element of an integrated approach is to ensure that mitigation does not erode the catchment's capacity for restoration or otherwise delay the delivery of restoration. As such,

the scale and extent of the suite of steps/measures identified should be 'safeguarded' as steps/measures required for restoration or the avoidance of deterioration.

11.3.8 Duties under Article 6(1) and (2) are ongoing in nature; the list of steps/measures will be subject to regular review and it is anticipated that a list of measures may be amended and updated in response to monitoring outcomes (see section 11.6).

A timeline and delivery milestones

11.3.9 A timeline for the delivery of management/restoration measures and delivery progress milestones is necessary for an integrated approach in order to reduce uncertainties in the reliance on measures to be taken. This timeline should be defined on the basis of best available information and professional judgement concerning the steps to be taken.

11.3.10 **Delivery progress milestones** relate to when identified steps/measures will be taken. Parties involved in delivery will need to specify such dates as part of any coordinated approach to implementation. It is anticipated that such dates can be set through the Nutrient Management Board (or other group tasked with delivery of measures). The NRW SAC Rivers Project have identified a suite of measures, over and above scheduled permit improvements, to be taken to address nutrient loading from other sources within SAC catchments. The enforcement work in respect of the Control of Agricultural Pollution regulations are subject to Service Level Agreements with the Welsh Government and it is anticipated that ongoing work being delivered through NRW will therefore be a helpful starting point for setting delivery milestones. It is also anticipated that other restoration work (e.g. through the Four River LIFE project[41]) will also be associated with delivery timeframes as part of the oversight of that project.

11.3.11 **A delivery date for achieving the necessary improvements in water quality** is more challenging. A degree of uncertainty is unavoidable given the complexity of addressing nutrients within natural riverine catchments and the variables which will influence the effectiveness of the steps to be taken. A delivery target for achieving the conservation objectives will necessarily be an estimate informed by local knowledge and best available information. Articles 6(1) and (2) provide a framework which requires proactive steps to be taken but they do not impose a deadline by which outcomes must be achieved. Whilst duties in respect of the restoration of European sites apply to all competent authorities, NRW will take a leading role. **Delivery dates for achieving the necessary water quality improvements should therefore be estimated by NRW as it may be necessary to have regard to restoration timelines under the Water Framework Directive.**

11.4 How does an integrated approach to restoration, management and mitigation work in practice – Step 2 identifying integrated mitigation

11.4.1 Policy WG3 is relevant when considering what integrated mitigation looks like in practice. Where a suite of management/restoration measures has been identified and associated with a delivery timeline, the application of the integrity test is concerned with ensuring that the delivery of development does not undermine the achievement of restoration objectives or otherwise compromise future restoration by eroding the catchment capacity for future restoration interventions.

[41] NRW Four Rivers for LIFE project.

11.4.2 With this in mind, developer-led integrated mitigation should not involve the delivery of measures which are already identified as restoration measures and associated with an appropriate delivery mechanism. The scale and extent of the suite of measures identified under 11.3 should therefore be 'safeguarded' as restoration measures.

11.4.3 Policy WG3 is relevant to how mitigation might be integrated with the delivery of restoration such that it acts to avoid delays in delivery of restoration. The delivery of restoration is a duty upon the Welsh Government to be delivered by public bodies and funds. Delivery targets and the rate of progress will therefore be constrained by available resources. Where appropriate steps are being taken to achieve the conservation objective targets, the need for mitigation from new development arises in recognition of the risk that the delivery of development might compromise the delivery of restoration. **Under an integrated approach the effectiveness of proposed mitigation is evaluated against the improving baseline conditions in accordance with current delivery targets and the extent to which delays to the delivery of restoration targets have been avoided. Integrated mitigation may involve entirely new measures but mitigation can be more closely integrated with the delivery of restoration where developer contributions:**

- **increase the scale, magnitude, or scope of planned restoration measures (over and above what would otherwise have been delivered); or**
- **speed up delivery of planned restoration measures beyond what would normally be delivered, where the current implementation timescales risk meaningful ecological deterioration in the interim.**

11.4.4 The criteria above are informed by Welsh Government's review of draft Defra policy in respect of the concept of additionality in the identification of compensatory measures for offshore wind farms in England, and how compensatory measures are evaluated in view of measures otherwise being taken under Article 6(1) and (2)[42]. Further information on integrated mitigation and the integrity test is provided at 11.8.

Box 11.4.1 Examples of integrated measures

Example 1 - a new measure: Developer contributions can be secured to deliver a strategic mitigation measure such as a constructed wetland. This is likely to be most relevant where work on such schemes may already be in progress.
Example 2 - increasing the scale, magnitude, or scope of planned restoration measures: Developer contributions might be secured to extend the scale of planned restoration measures to provide additional operational efficiencies, such as increasing the length of a riparian buffer which is being delivered under a separate initiative.
Example 3 - speeding up delivery of planned restoration measures: Developer contributions to fast-track delivery of restoration measures may be relevant where regulatory compliance and enforcement measures have been identified but delivery timescales are constrained by available resources. Under such circumstances developer contributions might be secured to fund an additional catchment-based post within the NRW compliance and enforcement team to fast track the delivery of measures within the catchment concerned. This option is best suited where the scale of development is sufficient to ensure developer contributions per dwelling are not excessive.

[42] https://consult.defra.gov.uk/offshore-wind-environmental-improvement-package/consultation-on-updated-guidance-for-environmental/

11.4.5 Integrated mitigation measures are to be identified centrally, through the Nutrient Management Board. Opportunities for integrated mitigation must be identified with reference back to 'safeguarded' steps/measures defined in step 1. For purpose of transparency there should be a clear distinction between planned management/restoration measures and potential integrated mitigation opportunities.

11.4.6 It is anticipated that integrated mitigation measures will be designed and implemented at a strategic level. Developers may fund the measures (in accordance with the polluter pays principle) but they will generally be delivered by another party.

11.4.7 Once opportunities are identified they can be shared with developers. The delivery of mitigation as part of an integrated approach provides greater flexibility when compared to case-by-case mitigation approaches. This is because:

- Integrated mitigation is primarily concerned with avoiding any delay to the delivery of steps being taken to avoid deterioration, rather than demonstrating 'neutrality'. The key measures of effectiveness is more simple to demonstrate and is determined in terms of the confidence that delivery of restoration will not be undermined. Once this is demonstrated mitigation can be regarded as effective.
- Integrated mitigation options allow for the developer contributions to be used to extend the nature or scale or delivery timeframe of measures already being delivered through the exercise of statutory powers allowing mitigation to be delivered more effectively and efficiently.
- Centrally co-ordinated integrated approaches can involve the collection of developer contributions into a centrally managed fund to deliver catchment wide integrated mitigation. The need for bespoke case-by-case mitigation approaches can be minimised with associated benefits for staff input and associated enforcement considerations.

11.4.8 Implementation timescales will be important where the delivery of development is proposed to be secured through mitigation being delivered as part of an integrated approach. In some catchments initiatives may already be underway to deliver restoration or to manage existing threats and pressures and opportunities to extend the nature or scale of such measures may provide mitigation in a timely manner.

11.4.9 Where there is uncertainty in respect of the timescales for delivery of restoration measures, and the extent to which development might delay restoration targets cannot be reliably quantified, **integrated mitigation measures which have the effect of speeding up delivery of measures, such that restoration targets will be delivered sooner than they would have been in the absence of development, may be necessary to provide sufficient confidence that adverse effects to site integrity will be avoided.** Such an approach to the precautionary principle, of applying precautionary rates to variables, is endorsed by the UK Courts in the Wyatt Ruling. Where the Court ruled that the whole point of the precautionary principle is that *'uncertainty is addressed by applying precautionary rates to variables, and in that manner reasonable scientific certainty as to the absence of a predicated adverse outcome will be achieved'.* The Court explicitly rejected an argument whereby scientific uncertainty meant that no development could properly be permitted because deleterious impacts could not logically be excluded. The issue of uncertainty is considered further in Appendix 2.

11.4.10 In selecting between mitigation options, the least onerous principle should be applied. Where new development relies upon action to be taken, interdependence should be established through use of a policy caveat approach (refer section 14) such that the decision-making for new development is conditional upon the associated delivery progress milestones being achieved. Inherent uncertainty should be addressed by applying precautionary rates to variables.

11.5 How does an integrated approach to restoration, management and mitigation work in practice – Step 3 securing and delivering integrated mitigation

11.5.1 The use of developer contribution to deliver strategic approaches to mitigation is well-established in respect of mitigation approaches for recreational pressure affecting European sites[43]. The Welsh Government expects the approaches to securing and delivering mitigation measures to be informed by the model for recreational pressure where relevant.

11.5.2 In accordance with the 'polluter pays' principle, even where integrated measures may be delivered by, or in partnership with, a statutory body, it is important to ensure the full costs are borne by project proposers. An important aspect of the strategic approaches to recreation is that costings involve developer contributions to secure necessary staff resource to oversee and implement the mitigation approach. For example:

- The Thames Basin Heaths Delivery Framework[44] includes staffing costs for the 20 year plan period.
- The Solent SPAs Recreational Disturbance Avoidance & Mitigation Strategy (RAMS)[45] includes costs for rangers and other staff.
- The Essex Coast Recreational Disturbance Avoidance & Mitigation Strategy (RAMS)[46] included costs for two water bailiffs to enforce bylaws and the provision of jet skis to enable bailiffs to do their jobs.

11.5.3 When addressing the delivery of measures NMBs can therefore consider whether an integrated mitigation project officer role may be necessary to co-ordinate the delivery of measures and associated monitoring requirements. Delivery approaches to strategic mitigation measures which avoid adverse effects from recreational pressure are well established and the financial and legal mechanisms for securing financial contributions provide a model which can readily be adapted.

11.5.4 The first step in determining individual contributions is to calculate costs for the delivery of the integrated mitigation measures to facilitate the delivery of development. Costs should include provision for staff resources and all associated costs that can reasonably be anticipated to arise from the implementation of an integrated approach. Once the overall costs have been agreed, a second step might reasonably involve initial discussions with stakeholders concerning how costs might be assigned to individual projects. It is anticipated

[43] Refer Thames Basin Heaths Delivery Framework, Dorset Heathlands Planning Framework, Deben Estuary Pertnership.
[44] https://www.bracknell-forest.gov.uk/sites/default/files/documents/thames-basin-heaths-spa-delivery-framework.pdf
[45] https://birdaware.org/solent/about-us/our-strategy/
[46] https://birdaware.org/essex/bird-aware-essex-about-us/our-strategy/

that these can be fairly equitably assigned on the basis of overall phosphate loading from development.

11.5.5 Having defined a way to attribute costs, the final step would be in securing the financial contribution. With reference to strategic approaches to recreational pressure the determination of planning applications for development and contributions are sought through a variety of mechanisms. Most commonly through use of a section 106 agreement but other options include the use of Community Infrastructure Levy (CIL) contributions. Some of the approaches also accept up-front payments by applicants (which are refunded in the event that permission is refused)[47]. Up-front payments are well-suited to a scenario whereby lots of small applications are affected as it avoids the need for Councils to engage in numerous s106 negotiations on all applications and reduces the burden on applicants.

11.6 How does an integrated approach to restoration, management and mitigation work in practice – Step 4 monitoring and adaptive management

11.6.1 The use of a policy caveat based approach (refer section 14) is central to the delivery of integrated mitigation. The objective of a policy caveat approach is to render the delivery of development conditional upon any measures relied upon actually being delivered in accordance with a pre-established timeline. Monitoring is therefore a central part of an integrated approach to restoration, management and mitigation.

11.6.2 From a restoration and management perspective, monitoring of outcomes is required to understand if the measures have achieved the desired objective, or whether further measures may be required. Monitoring of outcomes is necessary in terms of compliance with proactive duties under Article 6(1) and (2). The Directive does not impose a timeframe within which conservation objectives must be achieved; the legal duty relates to the taking of appropriate steps so, as long as appropriate steps are being taken in a timely manner, and continue to be taken until the conservation objectives are achieved, no matters of compliance arise.

11.6.3 Monitoring in respect of mitigation is different. Under an integrated approach, mitigation is concerned with demonstrating that new development will not undermine or compromise the delivery of secured management/restoration measures, and hence will not undermine the achievement of the conservation objectives. The link between conservation objectives and site integrity is explained further in section 11.8.

11.6.4 Monitoring to support mitigation is therefore concerned with the timely delivery of management/restoration measures which were taken into account when applying the integrity test, and the delivery of additional steps (integrated mitigation) to avoid any delay in the achievement of the anticipated improvements.

11.6.5 Monitoring under an integrated approach will therefore be comprised of two elements:

- Monitoring of ecological outcomes. This is linked to the restoration and management duties and will feed into an adaptive management approach. Duties under Article 6(1) and (2) are proactive and ongoing and it is anticipated that measures will be refined and amended in light of monitoring outcomes.

[47] Eastleigh District Council – Guidance on making up-front payment in lieu of entering s.106 agreements

- Monitoring the delivery of management/restoration measures and any additional steps to avoid any delay in the achievement of anticipated improvements. Where decisions under Article 6(3) take account of management/restoration measures, and rely upon their delivery, monitoring is necessary to ensure that they are delivered. Where decisions under 6(3) rely on measures *to be taken* a policy caveat approach should be used to ensure that the delivery of development is conditional upon measures relied upon being implemented.

11.7 An integrated approach and the planning system

11.7.1 Whilst it will be for public bodies to decide how an integrated approach to restoration, management, and mitigation should be implemented within the catchment concerned, an integrated approach to the delivery of mitigation should be clearly set out in supplementary planning guidance. Where appropriate an addendum can be produced to the Local Development Plan HRA to formally update earlier HRA conclusions in respect of development to be delivered within the current plan period. The supplementary planning guidance can refer to any plan HRA addendum and explain how planning authorities can adopt the findings of the plan HRA when making planning decisions within affected catchments.

11.7.2 A policy caveat approach should be followed where an integrated mitigation approach is adopted. Further guidance on a policy caveat approach is provided in section 14.

11.7.3 The Welsh Government will provide further advice on the development of supplementary planning guidance and further support to fast track their adoption.

11.8 How does an Integrated approach to mitigation relate to the integrity test?

11.8.1 An integrated approach to restoration, management and mitigation enables decision-makers to take account of planned restoration and management measures when applying the integrity test in respect of new development. In doing so, the effects of a new plan or project are assessed against a 'without consent' scenario where restoration and management measures will lead to an ongoing improvement in P levels within the SAC.

11.8.2 In this respect it is an established position of the Courts that an effect is only 'significant' (in HRA terms) if it 'undermines the conservation objectives'[48]. EC guidance has explained that the concept of site integrity relates to the sites conservation objectives and that, when applying the integrity test '*if none of the qualifying feature are 'significantly' affected site integrity cannot be considered to be adversely affected'.* It therefore follows that, when applying the integrity test under an integrated approach to restoration, management and mitigation, **a risk to site integrity from new proposals is evaluated in terms of whether the development will undermine the achievement of the conservation objectives through the delivery of management and restoration measures.**

11.8.3 Another way of looking at the question to be addressed when applying the integrity test under such a scenario is whether new development will undermine progress towards achieving the conservation objectives from appropriate steps which are being taken under

[48] Case C-127/02 The Waddenzee Ruling (refer para 47)

Articles 6(1) or 6(2)? If it can be demonstrated that new development will not compromise or 'undermine' the achievement of the conservation objectives for the site concerned, new development will not *significantly* affect the site and, as a consequence, site integrity cannot be adversely affected.

11.8.4 When considering an integrated approach it is therefore assumed that:

- the risk to site integrity from new development can be directly linked to a need for appropriate steps/measures to be taken to avoid deterioration or deliver restoration from existing activities.
- If such steps/measures were to be taken, the risk to site integrity from new development would be diminished or avoided.
- Any steps/measures relied upon are targeted to the effect mechanism which represents the risk to site integrity from proposed development.

11.8.5 The parallel delivery of management/restoration measures is thus a necessary prerequisite when considering an integrated approach to the delivery of mitigation, and management/restoration measures must be targeted to the effect mechanism which represents the risk to site integrity from proposed development.

11.8.6 As set out in policy WG2, where a new proposal is dependent upon an existing permit that represents a risk of deterioration, and a decision-maker is satisfied that appropriate steps to avoid deterioration have been secured (taking account of action on other sources as may be appropriate), a decision-maker can rely upon the action to be taken when applying the integrity test under regulation 63 in respect of the new proposal.

11.8.7 Securing steps to avoid deterioration is insufficient, in and of itself, to avoid adverse effects to site integrity. Such an approach would fail to recognise the potential for adverse effects to arise from new development whilst such steps are being taken. Instead policy WG2 allow a decision-maker to *have regard* to steps which are being taken to deliver restoration when applying the integrity test to new development proposals, and identifying potential mitigation options.

11.9 Considering the in-combination requirements

11.9.1 An integrated approach to management, restoration and mitigation is a strategic approach which takes account of the potential for development to act in combination with other plans and projects. Where development is delivered in accordance with a strategic approach to management, restoration and mitigation it is deemed to have avoided its effects. No residual effects remain where all necessary requirements of a strategic approach are satisfied and **no further assessment in combination with other plans and projects in respect of water quality considerations relevant to phosphate is required.** For purpose of clarification, further assessment in combination may be required in respect of other impact mechanisms which are not addressed by this guidance.

12 Further guidance - Types of mitigation which are relevant to reducing nutrients

12.1 Introduction

12.1.1 Measures to deliver improvements in nutrient loading, whether through nutrient neutrality approaches or integrated approaches to the restoration, management and mitigation will need to be selected on a catchment-specific basis. The purpose of this section 12 is to provide an overview of the measures that may be available.

12.1.2 Generally speaking measures which are relevant to reducing additional nutrient loading can be broadly categorised into

- on-site measures (developer-led measures delivered within the development site boundary),
- off-site measures (measures delivered beyond the development site boundary by the developer or by another party) and
- regulatory measures (delivered using the exercise of statutory tools and powers).

12.1.3 On-site and Off-site measures are introduced in sections 12.2 and 12.3 below. The design and delivery of such measures needs to take account of best available information.

12.1.4 Regulatory measures are considered in more detail in section 12.5 where a table of potential measures is provided.

12.2 On-site measures

12.2.1 These will generally be under the control of the developer to lead and to implement. They may be further divided into:

- Input mitigation measures – constraints or conditions placed on the development to reduce the amount of additional nutrient generated by the development and include occupancy levels, timings of occupancy and water use and management.
- Output mitigation measures – nutrients arising from the site are tackled directly within the development boundary. These can include urban-based solutions to remove nutrients such as package treatment plants (with integrated constructed wetlands for larger schemes), SUDs and storm water wetlands. Where sufficient land is available within the site other measures may be feasible such as buffers alongside watercourses or woodland planting to slow flows.

12.2.2 In all cases a sound knowledge is needed of the development site, its land use and existing nutrient budget. Larger sites will need a bigger masterplan which should take account of opportunities offered for innovative nature-based solutions working alongside ecological corridors, buffering watercourses and using integrated approaches. Flexibility may be built into a scheme, for example to enable future connection to wastewater treatment works, especially where there is limited capacity in the catchment to meet future restoration objectives for water quality.

12.3 Off-site measures.

12.3.1 These may be smaller-scale bespoke actions led by the developer or may be part of a strategic approach to delivery of restoration or mitigation operating at a larger (e.g. catchment-wide) scale. These includes the measures referred to above as well as measures such as riparian buffers, river re-naturalisation, engineered logjams, drainage ditch blocking and others listed in 12.5 below. These may be delivered at a large spatial scale to provide nutrient credits which can be purchased by developers as mitigation for individual proposals.

12.3.2 Delivery of for off-site measures is characteristically led by groups of interested parties (as in farmer-led nutrient trading schemes) or centrally coordinated by public bodies such as water companies and government agencies. Delivery of all projects is developer-funded and reliant upon landowner agreement. Hence statutory bodies can provide administrative oversight and may be involved in negotiation of solutions and implementation, but all costs are covered by developer contributions.

12.3.3 Integrated mitigation may be part of a wider centrally co-ordinated approach to management, restoration and mitigation for the catchment and its associated designated sites. Integrated mitigation may be delivered alongside other schemes aimed at restoring functionality in catchment such as the recently launched Natural Flood Management Accelerator Project and other landscape recovery schemes and protected sites initiatives.

12.3.4 More conventional measures to create additional environmental capacity for nutrient management within the catchment, such as improvements to WwTW funded through water industry Periodic Reviews, are also potentially part of such a strategic mitigation scheme. Creation of additional capacity in this way can allow more flexibility in local mitigation options. For example temporary mitigation (like changes to less nutrient intensive agricultural practices) may be acceptable as a short term measure pending the implementation of more long-term strategic options like WWTW upgrades, where it may otherwise be difficult to demonstrate long term commitment.

12.3.5 Upfront land purchase to enable habitat creation at scale in response to development pressures on biodiversity may be part of a strategic approach to nutrient mitigation. Developers can buy credits in such schemes which can be supported through government initiatives such as the Government's Natural Environment Investment Readiness Fund (NEIRF). The Wildlife Trusts Habitat Banking Investment Model is supported in this way and although designed to encourage more valuable habitat creation under Biodiversity Net Gain, such an approach could potentially align with strategic approaches to reducing nutrient loading within a catchment.

12.4 Regulatory – led measures.

12.4.1 These include enforcement of existing legislation in relation to site protection, water protection, waste management and agricultural regulation or the application of existing mechanisms such as Water Protection Zones to require actions to improve water quality at the catchment level or wider. Regulatory powers can also include the introduction of other legal requirements or policy mechanisms which can be used to facilitate delivery of measures at scale or in a targeted manner, or to fast track delivery to secure or bypass the need for landowner agreement. Such measures may range from enhanced advice on water protection and nutrient management to landowners; legal requirements for more stringent

waste water treatment standards; managing or controlling existing land-use, threats and pressures through management agreements and enforcement (statutory nature conservation orders[49]) relevant to European sites as envisaged under Articles 6(1) and (2) of the Habitats Directive.

12.4.2 These regulatory and policy measures can create opportunities to consider developer contributions to enhance or extend measures that would otherwise be delivered, or to provide staff to fast track regulatory action within affected catchments.

12.4.3 A summary of regulatory measures is provided in table 12.4.1 below.

Table 12.4.1: Summary of Regulatory Measures	
Regulatory Measure	**Observations on feasibility and delivery**
Regulatory compliance and enforcement: Waste Regulations; Water Resources Regulations;	Enforcement powers available under Control of Agricultural Pollution Regulations 2021. Powers are available under certain circumstances to treat manure and slurry as waste, requiring a permit.
Powers under Environmental Permitting Regulations: regulation of discharges, reviewing of permits	NRW has an enforcement role to take action where a person causes or knowingly permits a water discharge activity. NRW has a statutory duty to periodically review environmental permits.
Requirements for investigations under the Water Framework Directive	Action can be taken by NRW as a consequence of WFD investigations. Can lead to requirement for additional measures to ensure achievement of WFD objectives under the Programme of Measures in the River Basin Management Plan, which includes action on SACs / SPAs
Powers under Conservation of Habitats Regulations: duties to manage the site network; powers to enter into management agreements; powers to make Special Nature Conservation Orders (SNCOs) ; by-law making powers	Regulation 16(A) provides for the Welsh Ministers to support the delivery of strategic solutions to achieve the conservation objectives of SAC rivers. A management agreement under Regulation 20 can impose obligations upon landowners, is enforceable by NRW and can provide for the making of payments. This power is not widely used but could be an important mechanism. Similarly SNCOs have not been widely used but can be targeted to parcels of land in a catchment as a means of changing land use. Bylaw making powers[50] are also not widely used but can be relied upon to secure reductions in phosphates entering the river as a result of adjacent land uses.
Compulsory purchase powers. Section 226 of the Town and Country Planning Act and Section 13 of Local Government Miscellaneous Provisions Act 1976 concerning compulsory purchase of rights.	Section 226 of the Town and Country Planning Act provides powers to local planning authorities to acquire land compulsorily where doing so will contribute to the achievement of: (a) the promotion or improvement of the economic well-being of their area; (b) the promotion or improvement of the social well-being of their area; (c) the promotion or improvement of the environmental well-being of their area.

[49] Regulation 27 of the Habitats Regulations

[50] Regulations 32 and 33 of the Habitats Regulations

Table 12.4.1: Summary of Regulatory Measures	
Regulatory Measure	**Observations on feasibility and delivery**
	Section 13 of the Local Government Miscellaneous Provisions Act 1976 extends these powers to the compulsory acquisition of rights over land (rather than purchase of the land itself). The compulsory purchase of land is a complex process but the compulsory purchase of rights may provide opportunities where securing land owner agreement is hindering the delivery of targeted measures. The compulsory purchase of rights may be used to incentivise a landowner entering into a management agreement where this is the case.
Wider powers available to Local Planning Authorities	LPA powers, including S106 agreements and CIL, will be important in securing financial contributions from developers. In principle planning policies could also make provision for supporting applications for land use change where it will deliver significant reductions in phosphate loading to the river.
Policy e.g. AMP TAL in PR24, fair share	Policy requirements for specific Waste Water Treatment Works improvements (as well as catchment based measures) can be introduced through statutory resource planning mechanisms like water industry Periodic Reviews.
Water Protection Zone (under Water Resources Act 1991 as amended by Water Resources Act 1991 (Amendment) (England and Wales) Regulations 2009)	WPZs can be used to limit or control activities that can be carried out within a catchment and authorisation of such activities may then be required. This is a potentially important tool to manage nutrient or other pollutant loadings from several sources (including diffuse sources) within a catchment but, to date, has only been used in one instance (River Dee).
Policy – integrated funding schemes to support wider actions like biodiversity gain, carbon and flood risk mitigation	Opportunity for wider gains across catchment. Need to identify key locations in catchment where water quality benefits and other opportunities maximised.
Powers under the Environment (Wales) Act 2016 to direct NRW; duties on public bodies to have regard to guidance; to direct NRW to enter into management agreements	Umbrella legislation under which phosphate reduction might be required. Management agreements are entered into voluntarily. Guidance from WG might help policy direction and minimise delays

12.5 Mitigation Option selection

12.5.1 Mitigation can be delivered as a developer led approach, independent of wider action to restore the site and the exercise of statutory powers, or as part of an integrated approach to restoration, management and mitigation is preferred. In accordance with policy WG3, **unless local circumstances indicate otherwise, the Welsh Government expects public bodies to work together to implement an integrated approach to the delivery of management,**

restoration and mitigation in Welsh SAC Rivers affected by excess phosphate. The flowchart at section 10 and accompanying guidance on pathways in sections 5-10 will indicate what mitigation approach should be selected.

12.5.2 Where an integrated mitigation approach is not considered to be achievable (for whatever reason), a developer-led approach will be necessary. In the absence of parallel initiatives to deliver restoration, a developer-led approach will need to demonstrate nutrient neutrality. Further guidance on nutrient neutrality is provided in section 15.

13 Further Guidance - The proportionate exercise of statutory powers

13.1 The Well-being of Future Generations (Wales) Act 2015

13.1.1 It is anticipated that the use of regulatory powers will generate discussion at a catchment level. Policy WG1 recognises that the achievement of the conservation objective targets within SAC rivers is central to the Well-being of Future Generations Act goals for 'A resilient Wales', 'A prosperous Wales', 'A healthier Wales' and 'A globally responsible Wales'. Healthy functioning ecosystems underpin social, economic and ecological resilience and the capacity to adapt to change (including climate change). The description of the goal for 'A prosperous Wales' recognises the limits of the global environment and the need to use resources efficiently and proportionately.

13.1.2 Improvements being delivered by NRW under the current Review of Permits apply a 'fair share' approach which recognises a need for further action to be taken in order to fully address the nutrient problems facing Welsh SAC rivers. The Welsh Government expects statutory agencies to work together to ensure that further action to reduce nutrient loading to SAC river catchments under a fair share approach is identified and delivered in accordance with the sustainable development principle which is defined in section 5 of the Well-being of Future Generations (Wales) Act as follows:

> *'In this Act, any reference to a public body doing something "in accordance with the sustainable development principle" means that the body must act in a manner which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs'.*

13.1.3 Continuing high levels of nutrients in Welsh rivers will compromise the ability of future generations to meet their own needs; decisions taken over how to deliver necessary improvements must therefore take the needs of future generations into account. The Welsh Government expects relevant statutory bodies to make every effort to avoid the pitfalls encountered during the original 2010 'Review of Consents' (refer section 2.3) through reliance on 'soft' and voluntary measures.

13.1.4 In the interests of future generations, and with regards to legal duties under the Well-being of Future Generations Act, public bodies should therefore **make proportionate use of statutory powers to deliver necessary actions as soon as reasonably practicable and, in any event, in accordance with timescales under the Water Framework Directive**. The exercise of statutory powers to deliver targeted measures with a catchment to achieve the most efficient ecological outcomes can and should be explored.

13.2 The need for statutory powers

13.2.1 The delivery of measures to address diffuse source of pollution is complex and requires engagement across a range of stakeholder interests. Experience has demonstrated that voluntary approaches to manage diffuse pollution, require significant up-front time inputs and the improvements which are achieved can be modest by comparison.

13.2.2 The opportunistic nature of voluntary approaches also means that measures are often delivered where opportunities arise rather than where ecological outcomes can be

maximised or where specific nutrient targets need to be met. For purpose of example, riparian buffers intercept a defined percentage of the nutrients running off the land so targeting delivery to the right parts of a catchment is of the utmost importance in terms of cost benefit considerations and maximising ecological outcomes.

13.2.3 Delivering the necessary improvements in SAC rivers will require measures to be identified and delivered in an intentional and targeted manner. The use of statutory powers is considered to be of central importance to:

- Secure changes in practice promptly and with certainty
- Ensure best use of available funds
- Maximise ecological outcomes (by delivering measures in optimal locations)
- Secure the ability of future generations to meet their own needs
- Deliver on government duties to protect the environment
- Remove barriers to the delivery of development.

13.2.4 the use of statutory powers in respect of compliance and enforcement is already part of planned work under the NRW SAC Rivers Project.

13.3 The proportionate use of statutory powers

13.3.1 Where public bodies are of the opinion that the use of statutory powers is necessary to ensure improvements are delivered in a timely manner, and that development can be delivered in accordance the principle of sustainability, it will still be necessary to ensure that the use of powers is proportionate. Caution is advised against a knee-jerk reaction to the use of statutory powers as implications for those affected will vary widely depending on the type of powers which might be exercised and the spatial/temporal scale over which the powers might be exercised.

13.3.2 When considering the exercise of statutory powers, and comparing different approaches to achieve the conservation objectives, the least onerous principle (refer 4.2) must be applied. this means that '*where that object may be attained in a number of ways, the competent authority or authorities concerned must seek to secure that the action taken is the least onerous to those affected'*.

13.3.3 The proportionate use of statutory powers should therefore balance the implications for 'those affected' with the consequences for others of the powers not being taken (i.e. the conservation objectives not being achieved, or being achieved at a later date and associated implications for the delivery of development).

13.3.4 The Welsh Government expects public bodies to fully explore how improvements to SAC rivers may be facilitated through the proportionate exercise of statutory powers.

14 Further Guidance - A policy caveat approach

14.1 The need to address uncertainty

14.1.1 Where mitigation is required to avoid adverse effects to site integrity from new development (under regulation 63), the general rule is that mitigation should be effective before damaging effects from permitted development arise, and that mitigation should also be secured before consent or permission is granted. This is on the basis that any reliance at a decision-making stage on assumptions in respect of future measures *to be delivered* introduces an inherent degree of uncertainty; there will always be the possibility that action relied upon when consent or permission is granted does not, for whatever reason, take place. The need for mitigation to be secured before consent can be granted can introduce constraints on decision-making.

14.1.2 In respect of new development where a more strategic approach is taken to the delivery of mitigation the UK Courts have recognised a need for a degree of flexibility to avoid excessive approaches[51]. The use of policy specific 'caveats' or 'restrictions' are accepted by the UK Courts as a suitable way of addressing uncertainties at the decision-making stage where mitigation relied upon by proposed development will be delivered at a future date, or where certain details in respect of mitigation relied upon have not been finalised at the time that a decision is taken.

14.1.3 Policy WG2 is important in this regard. Where new development is dependent upon an existing consent (as is the case with housing development connecting to a permitted wastewater treatment works) there is a greater degree of flexibility in the extent to which a decision under regulation 63 might have regard to 'action to be taken'.

14.2 What is a policy-caveat approach?

14.2.1 This flexibility can be provided by a policy-caveat approach which works by providing a feedback loop to ensure a decision which relies upon future measures/action being taken is subject to some form of policy constraint. For example the application of an overarching planning policy affecting development within a SAC catchment is rendered conditional upon evidence that the action relied upon is progressing as intended. If delivery milestones are not met, the application of the planning policy to development proposals can be temporarily suspended until the situation is rectified. A policy-caveat approach therefore creates an interdependence between development coming forwards and mitigation measures relied upon being delivered in accordance with agreed milestones.

14.2.2 Interdependence can apply both at a project and a plan level, but greater flexibility is provided in respect of interdependence when designing mitigation in advance, at a strategic level, for an overall quantum of development. This would usually be done as part of a plan HRA or an addendum to an existing plan HRA (perhaps following a change in circumstances

[51] Refer Cairngorms Campaign v Cairngorms NPA [2012] CSOH 153; Feeney v Oxford City Council [2011] EWHC 2699 (Admin); and No Adastral New Town Ltd v Suffolk Coastal District Council [2015] EWCA Civ 88.

during the plan period). Section F.10 of the HRA Handbook[52] refers to the use of such policy based restrictions or caveats as follows:

> *'In some plans… in order to ascertain no adverse effects on site integrity, other kinds of mitigation measures may be required at this stage…*
>
> *Further mitigation measures that may be introduced during or after the 'appropriate assessment' stage may be:*
>
> - *Case-specific policy restrictions;*
> - *Case-specific policy caveats;…*
>
> *… To be an appropriate restriction or caveat (in (a) or (b) above), enabling the plan-making body to ascertain no adverse effect on the integrity of a European site, the restriction must be –*
>
> - *case-specific;*
> - *explicit; and*
> - *added to the policy and not merely added to the explanatory text or commentary, or not merely inserted into the implementation or monitoring chapters.'*

14.2.3 Where case-specific policy caveats or restrictions are relied upon, the monitoring of progress against pre-agreed milestones can be part of an interdependent approach to enable permission to be granted ahead of measures having been implemented or effective. The approach often works in respect of a suite of measures being delivered over a defined timeframe which provides mitigation for development coming forwards within that timeframe.

14.2.4 A policy-caveat approach starts from a position that future development decisions are reliant upon the delivery of a suite of measures. The approach recognises that, at the time that assumption is made a risk remains that measures relied upon may not, for whatever reason, be delivered. The policy-caveat has the effect or rendering development decisions conditional upon pre-agreed milestones being met; creating an ongoing requirement to *check* that of the delivery of measures relied upon to avoid adverse effects to site integrity is progressing. The policy support provided by the plan in respect of such development becomes conditional upon measures being delivered according to the planned milestones. In the event that delivery milestones are missed, the delivery of development is then paused until the situation can be rectified.

14.2.5 Interdependence can also apply at a project level where development is permitted on the basis of future measures being delivered. The requirement being to ensure that development is subject to some form of condition or restriction which prohibits potentially damaging effects until measures relied upon have been implemented and are effective. The use of Grampian conditions has been accepted by the Planning Inspectorate under some nutrient neutrality related circumstances[53] and are referred to in current NRW advice.

[52] Tyldesley, D., and Chapman, C., (2013) The Habitats Regulations Assessment Handbook, (Feb) (2024) edition UK: DTA Publications Limited

[53] Planning Inspectorate reference APP/L2630/W/21/3289198

15 Nutrient neutrality approaches

15.1 When to consider nutrient neutrality approaches

15.1.1 The need for nutrient neutrality approaches is identified in the flowchart provided at section 4. There are three scenarios which may lead to a requirement for nutrient neutrality:

A. Where planned NRW Review of Permit amendments achieve the downstream P targets, but improvements will not be delivered before impacts from planned development arise – SHORT TERM NEUTRALITY REQUIRED

B. Where other 'fair share' action to achieve downstream P targets cannot be 'secured - NEUTRALITY REQUIRED FOR LIFETIME OF DEVELOPMENT.

C. Where an integrated approach to the delivery of management, restoration and mitigation is not achievable in practice - NEUTRALITY REQUIRED FOR LIFETIME OF DEVELOPMENT.

15.2 NRW nutrient neutrality principles

15.2.1 NRW have published 'Principles of nutrient neutrality in relation to development or water discharge permit proposals'. Nutrient neutrality is described as:

> *'an approach for managing new development and water discharge permit proposals to prevent them from causing any net increase in nutrients for the duration of the authorisation'.*

15.2.2 NRW advice explains that demonstrating neutrality for proposed development is a recognised approach to show that a development will not have an adverse impact. There are seven nutrient neutrality principles which are set out in box 16.2.1 below:

The NRW nutrient neutrality principles	
1	Calculations must be based on best available scientific evidence and research, including key inputs and assumptions at the time of the Appropriate Assessment.
2	Measures are effective and in place for the lifetime of the development/permitted activity effects, demonstrating how this will be secured, such as legal agreements.
3	Evidence mitigation will be in place when proposed development becomes active. The nutrient neutrality mitigation must be in place and functioning when the proposed development or water discharge permit will start to discharge (directly or via a sewerage system) to the river. If the impact will be phased, it may be that a range of measures may be needed to address impacts over time.
4	Mitigation must not compromise the restoration of the SAC. This means not constraining those measures already in place or which may be required in future to maintain or restore the SAC. Implementation of mitigation measures through nutrient neutrality should not undermine the objectives in the Habitat Regulations aimed at restoring the site to favourable condition. For example, where there are limited options of mitigation available these should be used to maintain or improve the site rather than to enable more discharges to the SAC river.
5	Measures used to demonstrate Nutrient Neutrality must not be double counted. A national register of schemes is likely to be required in order to ensure no double counting occurs.
6	Measures should, where possible be within the development site. Where this is not achieved there must still not be detriment to the SAC. Permissions will not be granted unless the

	competent authority is satisfied that the SAC will not be impacted. Development or water discharge permit proposals within a SAC river boundary will need to be mitigated at the site or upstream. Development affecting a watercourse that joins a SAC river boundary can have mitigation at the site, up or downstream providing the offsetting occurs before the point at which the development impacts the SAC boundary.
7	Nutrient calculations must be based on precautionary principle. The uncertainty in the nutrient calculations is dealt with by taking a precautionary approach through the use of buffers. This will involve adding a percentage onto the calculation when using a nutrient calculator. This should provide the necessary level of confidence to ensure that new developments or permitting activities will not increase the nutrient load entering SAC rivers.

15.2.3 A nutrient neutrality approach differs from the preferred integrated approach to mitigation referred to in section 11. **Under an integrated approach to restoration and mitigation the risk to site integrity arises from the risk that development may delay the delivery of measures already identified to achieve the conservation objectives; the effectiveness of mitigation measures is concerned with avoiding any such delay**. **Neutrality based approaches are relevant where appropriate steps to deliver restoration or avoid deterioration under Article 6(1) or (2) have not yet been identified, or are not yet associated with a delivery mechanism**. Where new proposals exacerbate a legacy problem, the relative risk to a site is directly proportionate to the extent to which steps are being taken to address the legacy issue. In the absence of any steps/measures being taken the risks from new proposals are permanent; they perpetuate (and may even exacerbate) an existing problem and represent a clear ongoing risk to site integrity. In order to avoid adverse effects under such a scenario, mitigation options must avoid further deterioration (e.g. through a neutrality approach) and are evaluated accordingly.

15.3 Demonstrating nutrient neutrality

15.3.1 The need to demonstrate that no further deterioration will occur means that neutrality based calculations can be more onerous. Some nutrient calculation tools are publicly available[54] but planning authorities will need to check their suitability for the scenario concerned at time of use. NRW advisers will be able to advise on nutrient calculator tools which may be relevant. The All Wales calculator and guidance can be found at: https://www.gov.wales/nutrient-budget-calculator

15.3.2 Generally speaking in order to demonstrate nutrient neutrality project proposers, or those acting on their behalf, will need to:

- Calculate the overall increase in nutrient loading from the proposed development and the existing nutrient loading from the current land use.
- Calculate the overall increase in nutrient loading
- Identify proposed measures to reduce nutrient loading (refer section 12)
- Calculate the reductions to be achieved from the proposed measures and demonstrate neutrality

[54] Defra have published tools and resources for calculating nutrient neutrality for English Rivers (including the River Lugg) here.

- Secure and deliver the measures in accordance with the nutrient neutrality principles

15.4 Nutrient neutrality in practice

15.4.1 Nutrient neutrality can be demonstrated on a case-by-case basis, taking each project in turn. This is resource intensive and can impose considerable burdens on project proposers, decision-makers and statutory consultees. Alternatively a strategic approach to neutrality can be taken whereby Government-led or landowner-led nutrient trading schemes can be developed. A nutrient trading scheme involves larger scale measures being delivered to reduce a defined quantum of nutrients which are then 'traded' to external parties to achieve neutrality for proposed development. The selection of nutrient neutrality options to deliver sufficient mitigation, in time, should apply the **least onerous** principle.

15.4.2 Where a developer-led approach is selected it will be necessary to identify a single measure, or suite of measures which will deliver sufficient nutrient reductions to mitigate for the additional nutrient loading from development concerned. In applying a developer-led approach the delivery of measures will frequently be dependent upon landowner agreement and consideration will need to be given to the extent to which securing landowner agreement is realistic.

15.4.3 When considering the delivery of affordable housing, it is relevant to note that the scale of additional nutrient loading from affordable housing is anticipated to be modest. A data collection exercise under the Action Plan[55] identified approximately 1795 affordable homes across Wales which are potentially held up by the phosphate issue and it is unlikely that these will all be affecting the same catchment. The delivery of a single strategic nutrient neutrality measures may provide the best opportunities in respect of efficiency in delivering affordable housing and ecological outcomes. Having said that, the distribution of affordable housing within a catchment will influence the location of measures. **Measures must be located to be effective and, wherever possible, should be delivered upstream of affected discharge locations**. As such, where a single measure option is pursued, those located higher up the catchment are more likely to be effective.

15.4.4 As part of strategic mitigation, authorities may consider a nutrient mitigation scheme comparable to that operating in England on the River Tees led by Natural England[56]. In that scheme, developers buy credits from Natural England to fund mitigation actions such as woodland or wetland creation that are targeted in strategic locations within a catchment and at a scale that would be not possible to achieve through a case-by-case approach to developer contributions. Nutrient neutrality approaches generally operate independently to the exercise of statutory powers (which are more associated with an integrated mitigation approach) so Natural Resources Wales would need to work proactively with land managers to identify suitable land for mitigation in catchments at high risk of nutrient pollution where there is significant pressure for new housing development. It may be possible for developers to combine environmental payments which may be required as part of securing a net benefit for biodiversity to facilitate delivery of actions that protect and restore the environment.

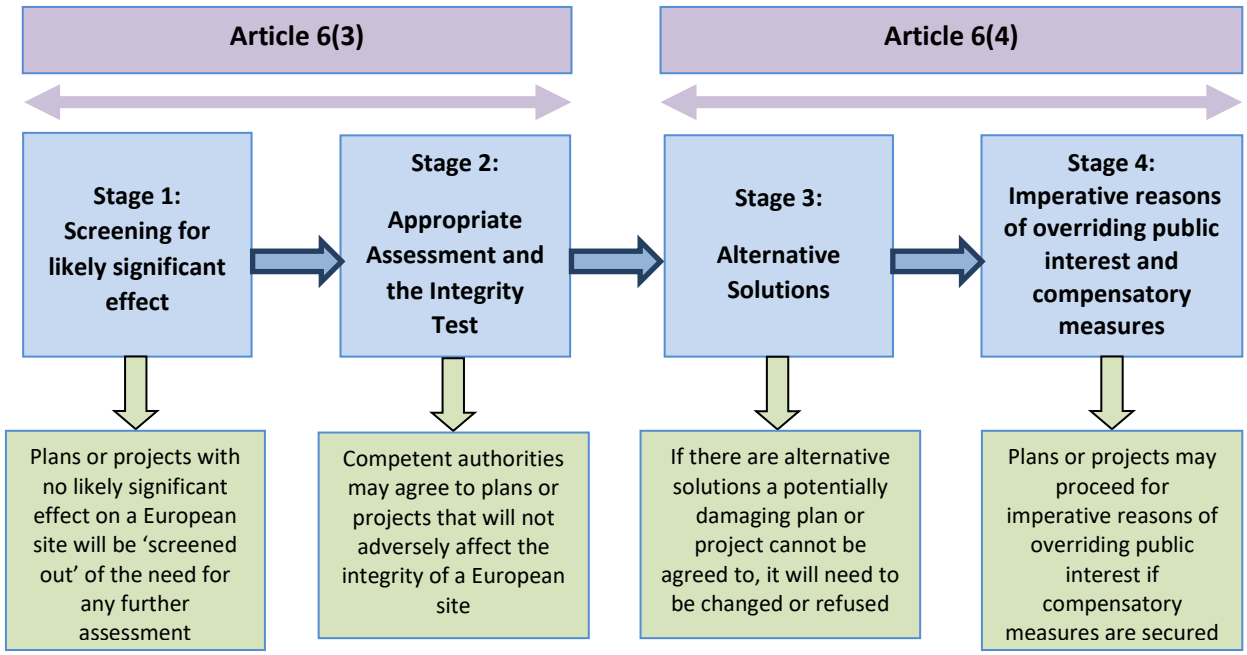
[55] Affordable housing provision: April 2021 to March 2022. Welsh Government, February 2023.
[56] Further detail of the operation of the scheme in the River Tees catchment can be found at: https://www.middlesbrough.gov.uk/planning-and-development/planning-policy/nutrient-neutrality/#:~:text=The%20term%20'nutrient%20neutrality'%20is,up%20in%20the%20River%20Tees .

Appendix 1: An overview of the HRA process and the questions being asked

What is HRA and what questions are being asked?

Any assessment under the Habitats Regulations is based upon a well-established four-stage approach, as summarised in figure A1.1 below, commonly referred to as a Habitats Regulations Assessment (HRA).

Figure A1.1
Outline of the 4 stage approach to HRA



Stage 1 - Screening for a likely significant effect

When screening for a likely significant effect (stage 1), case law has established that an effect is 'likely' if it cannot be excluded on the basis of objective information[57]. In practice therefore, and in spite of the everyday usage of the word 'likely', the screening test asks whether a significant effect is *possible*. An effect is 'significant' in this context only if it undermines the conservation objectives[58].

When addressing this question with regard phosphorus loading from proposed development, the conservation objectives for riverine SACs include phosphorus targets so, to re-phrase the question

[57] Case C-127/02 *Waddenzee* refer para 45
[58] Case C-127/02 *Waddenzee* refer para 47

when applying the likely significant effect test, a decision maker must decide if it is possible that the conservation objectives might be undermined.

The likely significant effect question must be asked '*either alone or in combination with other plans or* projects' and the in-combination provision exerts significant influence. Hence, where the effects of a project will not undermine the conservation objectives 'alone' it is necessary to consider whether the effects 'in-combination with other plans and projects' could do so. Strictly speaking therefore, it might be argued that even the smallest impact could represent a risk to a site, when considered in combination with other plans and projects. An excessive approach is to be avoided however as, in applying the likely significant effect 'screening' step, Advocate General Sharpston emphasised in the *Sweetman* case the importance of avoiding legislative overkill.

> *'The requirement that the effect in question be 'significant' exists in order to lay down a de minimis 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 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.'*

This establishes an important principle - the Habitats Regulations are not concerned with any effect whatsoever. This has implications for *how* the in combination assessment aspect of the assessment is triggered. In order to avoid legislative overkill some form of de minimis threshold must be allowed to influence a) when an in-combination assessment is necessary and b) which 'other plans and projects' should be taken into account. The concept of threshold-based approaches is explored further in section 5.

Appropriate assessment and integrity test

Where it is identified that a proposal *might* undermine the conservation objectives, either alone or in combination with other plans and projects, an appropriate assessment is required. Following an appropriate assessment, permission can only be granted having ascertained that the proposal will not have an adverse effect on the integrity of the European site (the integrity test). Following logically on from the screening test, EC guidance[59] on the concept of site integrity is grounded in the potential for a site to meet its conservation objectives. Section 4.6.4 of the EC guidance explains that *'it is clear from the context and from the purpose of the Directive that the 'integrity of a site' relates to the site's conservation objectives'*.

EC guidance refers to integrity as 'a quality or condition of being whole or complete', and explains that when looking at 'integrity' it is necessary to take account of short, medium and long term effects. The following helpful explanation of what it means for a site to have a high degree of 'integrity' is provided:

> *'A site has a high degree of integrity where the inherent potential for meeting site conservation objectives is realised, the capacity for self-repair and renewal under dynamic conditions is maintained, and a minimum of external management is required.'*

The reference to the conservation objectives when applying the integrity test is reiterated in another part of the guidance which states:

[59] Managing Natura 2000 (November 2018) – refer section 4.6.4

'If none of the habitat types or species for which the site has been designated is significantly affected then the site's integrity cannot be considered to be adversely affected… However, if just one of them is significantly* affected, taking into account the site's conservation objectives, then site integrity is necessarily adversely affected'.*

* With reference to para 3.2.1 above, a 'significant' effect being one which 'undermines the conservation objectives'.

When undertaking an appropriate assessment in respect of water quality, and phosphorus targets set out in the conservation objectives, the application of the integrity test is thus concerned with the inherent potential for a site to achieve its conservation objectives (i.e. meet its phosphate targets). This should be interpreted in a reasonable / pragmatic manner however, in light of what it means, in practice, for targets to be 'met'.

The derogation process

The Habitats Regulations provide for a step-wise approach to decision-making as summarised in figure 3.1.1. If it is not possible, following an appropriate assessment and consideration of mitigation measures, to conclude that there will be no adverse effect to site integrity, it is not inevitable that permission/consent must be refused.

In such a scenario, a decision-maker has a choice; they can either refuse consent or permission for the potentially damaging proposal, or they can grant consent in spite of a negative outcome to the appropriate assessment, if certain criteria can be satisfied.

The derogation provisions are set out in regulations 64 and 68 of the Habitats Regulations and it is clear that a step-wise approach to the derogation tests is anticipated. Taken together, regulations 64 and 68 mean that, where it is not possible to conclude 'no adverse effects to site integrity' from proposed development, and a competent authority is minded to apply the derogation provisions, they must:

- Firstly, satisfy themselves that there are no alternative solutions to the plan or project subject to assessment.
- Secondly, take a decision as to whether the plan or project must be carried out for imperative reasons of over-riding public interest (subject to certain criteria); and
- Thirdly, satisfy themselves that necessary compensatory measures which ensure that the 'overall coherence of the National Site Network is protected' can be secured by the appropriate authority (the Welsh Ministers for Wales[60]).

[60] Refer regulation 3

Appendix 2: An integrated approach and relevant case law in respect of certainty

The Dutch Nitrogen Ruling

The Dutch Nitrogen Ruling[61] is an important ruling of the European Courts in respect of the extent to which mitigation measures can take account of restoration. The case concerned a strategic approach to addressing impacts associated with atmospheric sources of nutrient nitrogen (primarily agricultural sources) on designated sites and parallels can therefore be drawn to strategic approaches to address waterborne nutrients. The ruling covers a range of questions and requires careful interpretation. Before considering the specifics of the case it is necessary to recognise that the strategic approach subject to scrutiny by the European Courts (PAS) started from an assumption that achieving the relevant standards (referred to as critical loads) was '*not very realistic'*. Instead the proposed approach was described as '*a balance between benefits to nature and burden to society*'.[62] It is also relevant to note that the effects of atmospheric pollution from agricultural sources generally have defined impact footprint whereas input to a flowing riverine watercourse will be more widespread (to affected stretches downstream).

The PAS approach identified 'room for deposition' and the premise of PAS was that nitrogen deposition would be reduced and that half of that reduction will offer 'room for growth' for new economic activities. The assumed reduction in nitrogen deposition was based on PAS including site-specific restoration measures and supplementary measures to the benefit of vegetation as well as source directed measures, but a key point is that 50% of the anticipated improvements were to be assigned to growth. The end result being that the delivery of development would delay the achievement of the conservation objectives. It is also relevant to note that PAS allowed decisions to take account of future benefits from anticipated measures which had not, at the time the decision was taken, been delivered.

Whilst parallels can be drawn between the PAS approach and the proposed Integrated approach to restoration, management and mitigation put forward here, there are important differences as summarised below.

- The Integrated approach identifies measures to achieve the conservation objective targets. The achievement of such targets are considered to be realistic.
- The Integrated approach does not assign any benefits to be achieved from the delivery of improvements to allow room for growth. Instead mitigation is integrated into an approach to ensure that development will not undermine the achievement of the conservation objectives or otherwise delay the delivery of restoration.
- The Integrated approach is underpinned by a policy caveat approach (refer section 14) which is endorsed by the UK Courts to ensure interdependence between measures being implemented and the delivery of development.

[61] Joined cases C-293/17 and C-294/17 'The Dutch Nitrogen Ruling'
[62] Joined cases C-293/17 and C-294/17 Advocate General Opinion para 65.

Some principles were established by the Dutch Nitrogen Ruling which are listed in table A2.1 alongside an evaluation of the extent to which they are relevant to the proposed Integrated approach to restoration, management and mitigation.

Table A2.1 legal principles established by the Ditch Nitrogen Ruling	
Legal principle	**Evaluation**
1. The positive effect of conservation measures under 6(1) and preventative measures under 6(2) cannot be *traded* to offset or mitigate for effects from proposed development under 6(3) (refer para 124).	The integrated approach does not allow the positive effects from restoration measures or steps to avoid deterioration to be relied upon as mitigation for new development. Instead, further mitigation is required to ensure that new development does not undermine the delivery or effectiveness of such steps.
2. The positive effect of aspirational conservation measures under 6(1) and preventative measures under 6(2) cannot be invoked to authorise potentially harmful effects from proposed development under 6(3) before they have been implemented (refer para 123).	The integrated approach to mitigation requires a policy caveat approach to ensure interdependence between the delivery of development and the delivery of restoration measures or steps to avoid deterioration.
3. An appropriate assessment may not take account of any measures if the expected benefits are not certain at the time of an assessment (para 132).	Refer paragraphs 10.8.4 – 10.8.x below.

Paragraph 132 can be open to misinterpretation and needs to be read alongside paragraph 126. Paragraph 126 provides a helpful summary of the Court's case law relevant to the reliance on mitigation measures under the Habitats Directive. It reads as follows (emphasis added):

> *126 Moreover, according to the Court's case-law, it is only when it is sufficiently certain that a measure will make an effective contribution to avoiding harm to the integrity of the site concerned, by guaranteeing beyond all reasonable doubt that the plan or project at issue will not adversely affect the integrity of that site, that such a measure may be taken into consideration in the 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive.'*

It is therefore clear that the Habitats Directive requires sufficient certainty as to the effectiveness of mitigation measures rather than absolute certainty. The sufficient certainty referred to relates to the extent to which a measure will make an effective contribution to avoiding harm to the integrity of the site concerned. With reference to the Waddenzee ruling it is reasonable to assert that a decision maker can be sufficiently certain in respect of mitigation measures where no reasonable scientific doubt remains that the measures relied upon will avoid an adverse effect to site integrity. The removal of reasonable scientific doubt is a high threshold but it does not imply a need for absolute certainty.

Paragraph 132 of the ruling then introduces to a need for certainty (in an unqualified sense) at the time of an assessment. This paragraph can be misinterpreted to argue that the Directive requires absolute certainty in respect of mitigation measures which creates an internal tension with paragraph 126. Paragraph 132 reads as follows (emphasis added):

> *132 … Article 6(3) of the Habitats Directive must be interpreted as meaning that an 'appropriate assessment' within the meaning of that provision may not take into account the existence of 'conservation measures' within the meaning of paragraph 1 of that article, 'preventive measures' within the meaning of paragraph 2 of that article, measures specifically adopted for a programme such as that at issue in the main proceedings or 'autonomous' measures, in so far as those measures are not part of that programme, if the expected benefits of those measures are not certain at the time of that assessment.*

The two paragraphs can be held together by understanding what the 'certainty' which is being referred to in each case relates to. The certainty (in an unqualified sense) required by paragraph 132 relates to 'expected benefits'. Novel or untested measures, or those where there is uncertainty as to whether they will deliver any relevant benefit are thereby excluded. The need for sufficient certainty in paragraph 126 arises in respect of the extent to which the certain benefits to be delivered can be relied upon to avoid adverse effects to site integrity. The two paragraphs can be summarised by concluding that

- an appropriate assessment can only take account of mitigation measures where there is certainty that they will be beneficial in nature.
- When applying the integrity test, a decision-maker needs to be sufficiently certain that mitigation measures will avoid adverse effects to site integrity, that is the case where no reasonable scientific doubt remains as to the absence of such effects.

It is not therefore accurate to assert that the Dutch Nitrogen Ruling requires absolute certainty that mitigation measures will avoid adverse effects to site integrity. Such a position would be contrary to established case law in respect of what it means to avoid adverse effects to site integrity, and a need to remove reasonable scientific doubt, as set out in the *Wadenzee* ruling.

The Wyatt Ruling

The approach to addressing uncertainty when identifying measures to avoid adverse effects from nutrients has also been considered in detail by the UK Courts in the *Wyatt* ruling[63]. When considering an argument concerning a need for 'certainty' in respect of mitigation measures the Court established that:

> *'the burden on the competent authority was to prove that there would be no adverse effects, not to a standard of absolute certainty, not to a standard of absolute certainty but to being "at least satisfied that there is no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned". A requirement of absolute certainty would be impossible of scientific attainment as well as being disproportionate' (para 32).*

The approach to mitigation endorsed by Natural England had instead adopted a precautionary approach by applying precautionary rates to nutrient budget calculations. The Court held such an approach to be fully in accordance with the precautionary principle.

> *'…In my judgment, this advice is impeccable in all material respects. Mr Jones came close to submitting that, because there was scientific uncertainty, no development could properly be permitted because deleterious impacts could not logically be excluded. that is the whole point of the precautionary principle: the uncertainty is addressed by applying precautionary*

[63] Wyatt v Fareham BC [2021] EWHC 1434 (Admin)

> *rates to variables, and in that manner reasonable scientific certainty as to the absence of a predicated adverse outcome will be achieved… (para 45)*

When considering the application of the precautionary principle as part of an assessment under the Habitats Regulations, the Court concluded:

> *We are in the realm of the empirical sciences where uncertainty is inevitable. It is in order to meet this unavoidable uncertainty that the precautionary principle has been devised. The apex of Mr Jones' submission must be that uncertainty rules out any development in the Solent Region, an unattractive argument given the exigencies of the real world. By requiring the competent authority effectively to rule out, to a very high standard, the possibility of relevant harm, the requirement under both articles 6(2) and (3) of the Habitats Directive is fully satisfied. (para 105)*

The Wyatt Ruling therefore endorses the approach in the Dutch Nitrogen Ruling that absolute certainty is not required when evaluating the effectiveness of mitigation measures. The whole point of the precautionary principle is that uncertainty is addressed by applying precautionary rates to variables. Where a decision-maker rules out, to a very high standard, the possibility of relevant harm, the legal requirements under both articles 6(2) and (3) of the Habitats Directive are fully satisfied.

Appendix 3: Summary of case law relevant to the use of thresholds

Introduction

This appendix provides a summary of existing case law and identifies principles which have been established by the courts which are of relevance to the use of threshold-based approaches under the Habitats Regulations

The Wealden decision

In 2017 the High Court ruled in the case of Wealden[64] that the application of a de minimis threshold in the assessment of traffic growth associated with housing development, which had the effect of avoiding the need for further assessment in combination with other plans and projects, had brought about a clear breach of the Habitats Directive. Of particular concern to the Court, was that the use of the threshold could not be supported (under the circumstances) on logical and empirical grounds (para 101). In the words of the Court, it 'cried out for further explanation' (para 108).

The de minimis value in question was the use of a 1000AADT (1000 Annual Average Daily Traffic) threshold against which the effects from traffic associated with housing development had been screened out of the need for further assessment under the Habitats Regulations, either alone or in combination. The development pressure in the area, and the sheer number of residential schemes coming forward, meant that the application of such a threshold precluded an in-combination assessment of plans and projects which could reasonably be anticipated to represent a risk of a cumulative impact. The logic applied by the Court is sound and it is clear from a common sense approach that the threshold applied was not appropriate given the specific circumstances of the case in question. The rate at which development proposals were anticipated to come forwards provided credible evidence of a real risk that the combined effects or proposals below 1000AADT might undermine the achievement of the conservation objectives.

This decision prompted a widespread review of the approaches taken to the screening of plans and projects under the Habitats Regulation. Before considering the Wealden decision in more detail, it is relevant to take a step back to 'set the scene' with reference to earlier case law decisions which have shaped and informed a correct approach to the in-combination requirements. Working in chronological order, this appendix firstly considers an EC parliamentary question from 2005 before then turning to the cases of Walton (2011), Newry (2015) and the Dutch Nitrogen ruling (2018).

EC Parliamentary Question[65]

The EC parliamentary question concerns the nature of 'other plans and projects' within the context of the in-combination requirements. It reads as follows:

[64] Wealden District Council v Secretary of State for Communities and Local Government, Lewes District Council and South Downs National Park Authority [2017] EWHC 351 (Admin)
[65] https://www.europarl.europa.eu/doceo/document/P-6-2005-0917_EN.html

'The Commission has stated in its published guidelines entitled 'Managing Natura 2000 Sites' that it would seem appropriate to restrict the combination provision to other plans or projects which have been actually proposed. Does the Commission have a clear position on whether the term 'actually proposed' covers only plans or projects which have the force of law?'

The direct response to the question asked is set out below:

'The Commission does not consider that Article 6 applies only when the other plan or project has a full force of law...'

The answer provided is unsurprising, given current understanding, but of relevance to the purpose and intent of the in combination provisions (in a broader sense) in dealing with the question raised the response continues as follows:

'…In any event, any application of what is meant by 'actually proposed' needs to take account of particular circumstances of specific cases as well as the practical feasibility of making an assessment of combined effects. The combination provision must be applied in a manner that is proportionate to the timing, planning stage and the legality of the proposed plans and projects.'

This further clarification provides insight into the intent and purpose of the in-combination requirements. The EC anticipates that the scope of an in-combination assessment must be practically feasible; a member state therefore needs to adopt a proportionate approach to the interpretation of the in-combination provisions.

The case of Walton (2011)

The case of Walton concerned an appeal against the decision made by the Scottish Ministers in connection with the Aberdeen Western Peripheral Route (AWPR). The appellants argued that the decision was flawed because the report to inform the Appropriate Assessment had failed to properly consider in-combination effects. In this case the scale of the road scheme and the proposed route was such that, theoretically, a very large number of planning applications were likely to come forwards which were in geographic and chronological proximity to the AWPR. In light of the sheer number of plans and projects concerned the consultants had established criteria which had been applied to identify those with the potential to act in-combination. In considering the argument that the approach did not satisfy the in-combination requirements, the Court made explicit reference to the EC parliamentary question referred to above and ruled as follows:

'[decision makers] were entitled to exercise judgement as to the projects with whose effect the AWPR proposal had to be considered in-combination… As regards the in-combination point, I again accept the submission on behalf of the [decision maker]. In particular, I agree that there must be a degree of flexibility in assessing the projects with which a particular proposal should be regarded as having an in-combination effect. I can detect no

unreasonableness in the approach taken by the respondents and their consultants in the present case.'[66]

The Court clarified two important principles here; firstly, a competent authority is entitled to exercise judgement over which other plans and projects to take into account; secondly, there must be a degree of flexibility in an in-combination assessment.

The case of Sweetman (2012)

The Advocate General's opinion in the Sweetman[67] decision is relevant to the manner in which the in-combination provision is interpreted and applied and the extent to which a threshold based approach might inform decision-making under Article 6(3). Paragraph 48 states that:

> *'The requirement that the effect in question be 'significant' exists in order to lay down a de minimis 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 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.'*

This is a clear warning against what the Advocate General perceives as legislative overkill or, to put it another way, an excessive interpretation of legislative requirements. The Sweetman case concerned small-scale impacts and the potential for small impacts to act in-combination was therefore central to the underlying reasoning of the Court.

In spite of the need to consider the effects of an individual proposal either alone or in combination with other plans or projects, the Advocate General explicitly recognised the inherent dangers if that provision was extended to all plans and projects capable of having any effect whatsoever such that an in-combination assessment become a legal requirement irrespective of the magnitude of the effect concerned or any engagement with the potential for it to act in-combination with other plans and projects in a meaningful manner.

The case of Newry (2015)

The decision of Newry[68] in the Northern Ireland courts concerned a challenge against the grant of planning permission and the alleged potential for associated release of sediment during construction into a watercourse. The challenge was that the Northern Ireland Environment Agency (NIEA) had failed to undertake an in-combination assessment of potential effects on the Carlingford Lough SPA some 18km downstream of the development site. Of relevance to the approach taken to the in-combination assessment it was argued that the effects from the subject proposal were inconsequential…

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[66] Walton [2011]CSOH 131 Walton & ors v The Scottish Ministers [2011] ScotCS CSOH_131 (11 August 2011) (bailii.org) Para75

[67] Sweetman v An Bord Pleanála (C-258/11) [2014] P.T.S.R. 1092

[68] 2015 NIQB 65 (judiciaryni.uk)

'Ms Reeve further explains NIEA's position by reference to the proposal's distance from the SPA, the lack of direct disturbance to the qualifying features, and the fact that "any impacts from mobilised sediment from construction works on the supporting habitat of the qualifying features will be negated as a result of the tidal nature of Carlingford Lough (the associated mixing) and distance (dilution factors)"…

…As a result of the matters referred to by the NIEA including the 18 km distance involved it is considered that there will be no adverse effects on the SPA. The development will not therefore contribute to any in-combination effects with other developments, including the particular developments relied upon by the Applicant.'

NIEA had consulted the statutory nature conservation body and, recognising that they had agreed with the arguments as to the inherent potential for in-combination effects (and the lack of any credible evidence that the risk was real), the court concluded in paragraph 64:

'I am in agreement with the [NIEA] that these are matters of expert judgment which cannot legitimately be condemned as unreasonable. Furthermore…the decision maker was entitled in the circumstances to accept and act upon the independent expert view of the statutory consultee.'

This decision is relevant as it establishes the important principle that a decision-maker is entitled to eliminate the need to undertake an in-combination assessment on the basis of professional judgement, having regard to advice from the statutory nature conservation body. Such an approach to the application of the in-combination provisions certainly cannot be condemned as inherently unreasonable on legal grounds.

In considering the claim that the assessment had failed to identify whether, or if so to what extent, other projects were taken into account as part of the necessary in-combination assessment, the Court expressed a view (para 65) that it was pertinent to recall the reasoning in the case of Boggis (which had established a, now widely accepted, principle that any third party alleging that there was a risk which should have been taken into account must produce 'credible evidence that there was a real, rather than a hypothetical, risk'). The Court applied this reasoning to the asserted requirement to undertake an in-combination assessment when a decision-maker is of the opinion that the effects 'alone' will not contribute to any in-combination effects with other development in a meaningful manner. Para 66 concluded as follows:

'at no stage… did the applicant put forward credible evidence that there was a real, rather than a hypothetical risk which should have been taken into account.

This is a perfectly sensible and pragmatic decision. Hypothetically, the assessment of every plan or project, with even the slightest effect, should also include an assessment in-combination with other plans and projects. To do so however would create an overly burdensome and excessive approach which was cautioned against by Advocate General Sharpston in the case of Sweetman referred to at 2.5 above.

Back to Wealden

The Wealden judgment is significant, but it needs to be read and interpreted in light of other, well established principles. Looking back over the earlier decisions which have shaped our understanding of in-combination effects.

In ruling against the use of the 1000AADT threshold, nothing in the Wealden decision suggested that the use of a threshold based approach was unacceptable in principle. Indeed para 95 explicitly recognised that 'if it is known that specific impacts are very low indeed, or are likely to be such, these can properly be ignored' (emphasis added).

The Dutch Nitrogen Ruling (2018)

Subsequent to the Wealden decision, in 2018 the CJEU handed down their judgment in respect of a case which is commonly referred to as the Dutch Nitrogen Ruling[69]. This case was a reference for a preliminary ruling from the domestic courts in the Netherlands with reference to a wide ranging list of questions. A full analysis of the decision is not appropriate but one question is of particular relevance to the legality of the use of thresholds to inform decision-making under the Habitats Directive.

A key point acknowledged by the Court was that where the conservation status of a designated habitat is unfavourable, the possibility of authorising further activities which will add further pollutant loaded is 'necessarily limited'. The Court went on however to address a question of interest to the use of thresholds which was summarised by the Court as follows (para 105):

> *'whether Article 6(3) of the Habitats Directive must be interpreted as precluding national programmatic legislation, such as that at issue in the main proceedings, exempting certain projects which do not exceed a certain threshold or limit value in terms of nitrogen deposition from the requirement for individual approval, since the cumulative effects of all plans and projects likely to create such deposition were subject in advance to an 'appropriate assessment' within the meaning of Article 6(3)'.*

In responding to the question, paragraph 112 clearly establishes that, in principle, the application of thresholds or limit values is acceptable under the Directive. It states:

> *'Article 6(3) of the Habitats Directive must be interpreted as not precluding national programmatic legislation, such as that at issue in the main proceedings, exempting certain projects which do not exceed a certain threshold value or a certain limit value in terms of nitrogen deposition from the requirement for individual approval…'.*

However, paragraph 112 does not stop there. It continues to explicitly set out the criteria which must be met to enable such a threshold approach to be relied upon. It continues…

> *'…if the national court is satisfied that the 'appropriate assessment' within the meaning of that provision, carried out in advance, meets the criterion that there is no reasonable scientific doubt as to the lack of adverse effects of those plans or projects on the integrity of the sites concerned.'*

The acceptability of thresholds in principle reflects the Advocate General's Opinion in Sweetman (already referred to) that 'the requirement that the effect in question be 'significant' exists in order

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[69] CLEU Joined Cases C-293/17 and C-294/17 Cooperatie Mobilisation v Stitchting Werkgroep Behoud de Peel, 7 November 2018

to lay down a de minimis threshold. Plans or projects that have no appreciable effect on the site are thereby excluded.' Furthermore, it validates the approach taken by the High Court in the Wealden decision that the use of the threshold needs to be supported 'on logical and empirical grounds'.