Current Development in the River Lugg Catchment Area Position Statement 15th October 2019

Background

Herefordshire is an area rich in its natural features of special value; its landscape, wildlife, recreation and health benefits, as well as its local economy. The River Wye and its tributaries are recognised as being of international importance for their unique character and wildlife, requiring the highest level of protection, management, enhancement and where appropriate, restoration.

Herefordshire Council as the 'competent authority' under the Habitats Regulations, **(**The Conservation of Habitats and Species Regulations 2017) are legally required to assess the potential impacts of projects and plans, including planning applications, on internationally important sites which include the River Wye SAC (Special Area of Conservation).

The River Lugg, which is a tributary of the River Wye and forms part of the designated site covering predominantly the north of the Herefordshire administrative area (refer to plan), is currently failing its conservation targets of phosphate levels as a result of water pollution from both 'point' source; in particular sewage outlets and 'diffuse' source; agricultural run-off.

The council as the competent authority under the Habitats Regulations must carry out an 'Appropriate Assessment' on any relevant planning application that falls within the red and purple areas shown on the attached to plan and must be able to determine, with scientific certainty, that there would be no 'Likely Significant Effect' (LSE) on the designated site, from the project, either alone or in combination with other plans and projects, in order for the planning application to be granted.

In making this assessment, the council has a legal requirement to consult Natural England and to have regard to their advice. The approach taken by Herefordshire Council and Natural England, as the statutory consultee, has to date been that there is a route for development to be able to proceed in the River Lugg catchment, even when it may add to the existing phosphate levels in the river, as any increases would be mitigated by the River Wye's Nutrient Management Plan (NMP). The NMP is a partnership project developed to reduce phosphate levels in the Wye catchment, including the River Lugg, to below the target level by 2027 in line with the Water Framework Directive. The NMP is managed by the Nutrient Management Board (NMB), comprising of Herefordshire Council, Powys Council, Natural England, Natural Resources Wales, the Environment Agency, Dwr Cymru Welsh Water, CABA (WUF), National Farmers' Union and the County Land and Business Association.

For further information: on the Nutrient Management Plan; The Wye and Lugg Monitoring Dashboard web:
https://www.herefordshire.gov.uk/directory_record/2097/nutrient_management_plan

Recent developments

However, this approach regarding development with potential phosphate impacts in the Lugg catchment is currently under review following the judgment in the case of *Cooperatie Mobilisation* (the Dutch Case) (Joined Cases C-293/17 and C-294/17) handed down in November 2018 by the Court of Justice of the European Union (CJEU). Natural England provided initial advice to Herefordshire Council on 22nd July 2019 and subsequent further advice: In the light of the interpretation of the Dutch judgment (on the interpretation of the Habitats Directive, from which the Habitats Regulations arise in UK law), where a site is failing its water quality objectives, and is therefore classed as an unfavourable condition, there is limited scope for the approval of additional damaging effects and that the future benefit of measures cannot be relied upon at Appropriate Assessment, where those benefits are uncertain at the time of the assessment.

Natural England have advised that for any plans or projects with a significant effect (on phosphate levels in the River Lugg) and which require Appropriate Assessment, the effects are currently uncertain, as in their opinion there remains reasonable scientific doubt as to whether the NMP can provide appropriate mitigation (based on how much certainty this currently demonstrates).

The way forward

Herefordshire Council have sought their own legal advice on how to proceed and are in talks with Natural England and other partners to liaise closely to find an effective solution as soon as possible. This includes discussions with the NMB.

There remains potential for a positive Appropriate Assessment to enable development to proceed, on Natural England's advice, where it can be demonstrated that any impacts would be neutral (where avoidance / mitigation measures included in the plan or project, counterbalance any nutrient (phosphate) increase from the plan or project), **or would lead to 'betterment'**.

In relation to discharges to drainage fields in the red zone, Natural England have indicated that if the following criteria are in place then phosphorous would be unlikely to reach the river and there is therefore no pathway for impacts, the development could therefore be acceptable:

- The drainage field is more than 50m from the designated site boundary or sensitive interest feature (includes Habitats of Principal Importance and other designated ecological important features identified through Core Strategy SD4/LD2/SS6 **and**;

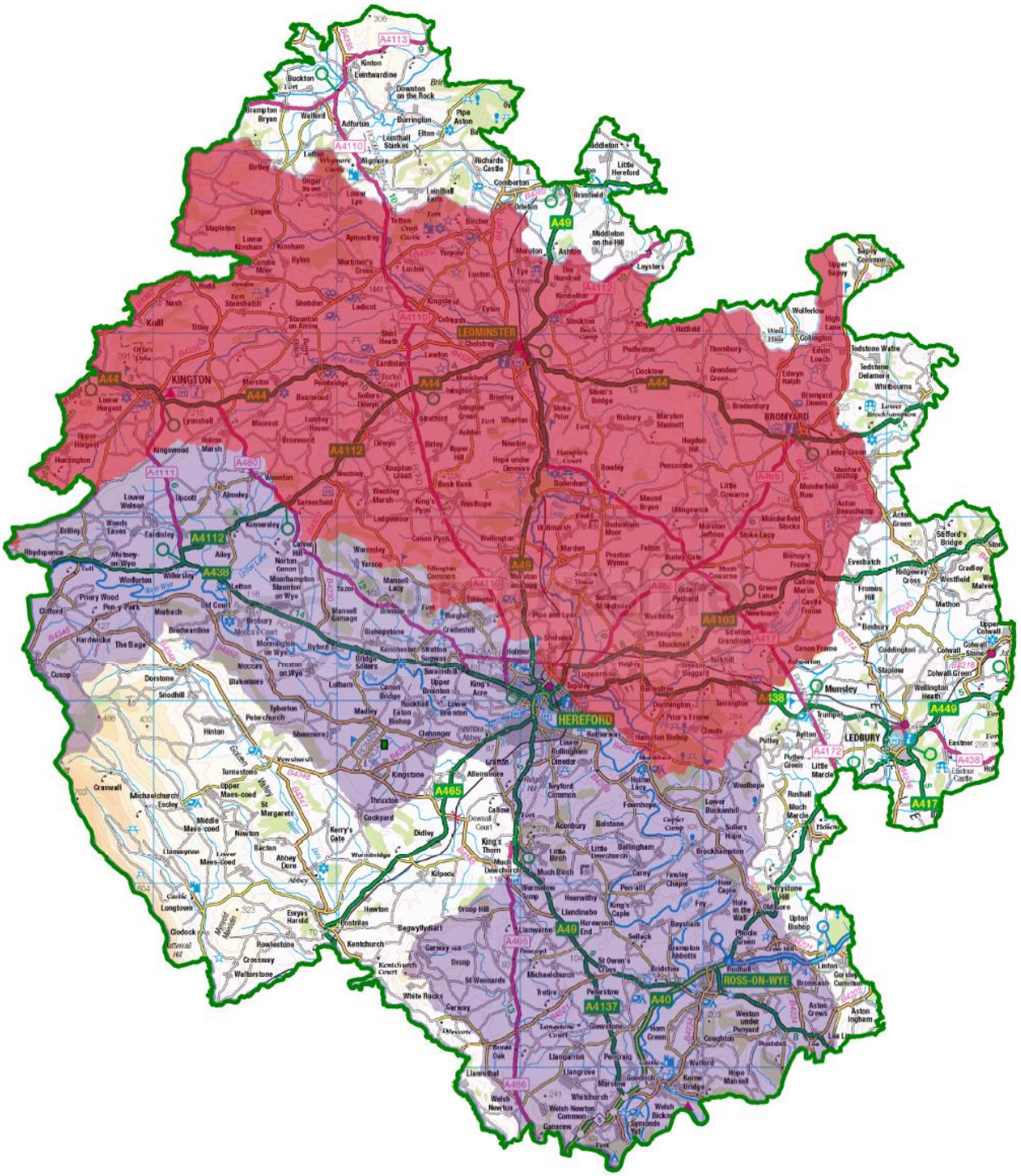
- The drainage field is more than 50m from any surface water feature e.g. ditch, drain, watercourse, **and**;

- The drainage field in an area with a slope no greater than 15%, **and**;

- The drainage field is in an area where the high water table groundwater depth is at least 2m below the surface at all times **and**;

- There are no other hydrological pathways which would expediate the transport of phosphorous e.g. fissured geology, flooding, shallow soil.

The Map below shows the area affected by this;



NORTH

River Lugg (SAC) sub-catchment - Red
River Wye (SAC) sub-catchments - Purple

Herefordshire Council

Scale (approx) 1: 300,000 at A4

Herefordshire Council

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