

15 April 2022

Our ref: River Camel SAC

Your ref:



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### **By email only**

Dear Kate

## **Matters regarding development in relation to the River Camel Special Area of Conservation (SAC)**

### **Background**

I am writing to your Authority regarding the implications of the CJEU case known as the “Dutch case” (Joined Cases C-293/17 and C-294/17 *Coöperatie Mobilisation for the Environment UA and Others v College van gedeputeerde staten van Limburg and Others*) in relation to planning matters that may affect the River Camel SAC protected site.

The Dutch case concerns agricultural nitrate pollution affecting protected heathland sites. However, the general principles involved are applicable to other pollutants or other receptors – the essential point being that where the conservation status of a protected natural habitat is unfavourable, the possibility of authorising activities which may subsequently compromise the ability to restore the site to favourable condition and achieve the conservation objectives is “necessarily limited”.

The ruling has resulted in greater scrutiny of plans or projects that will result in increased nutrient loads that may have an effect on:

- Special Protection Areas (SPAs) designated under the Habitat Regulations 2017
- Special Areas of Conservation (SAC) designated under the Habitat Regulations 2017
- Sites designated under the Ramsar Convention, which as a matter of national policy are afforded the same protection as if they were designated under the Habitat Regulations 2017

By informing the way in which Reg. 63 of the Habitats Regulations 2017 should apply to pollution-related

<sup>2</sup> *Gladman Developments Limited v S of S for Housing, Communities and Local Government and another* [2019] EWHC 2001 (Admin)

<sup>3</sup> *Sweetman vs Coillte Teoranta CJEU C-323/17* (“People over Wind”)

matters, the Dutch case has resulted in the need for greater scrutiny of the effect of plans or projects that are likely to, either directly or indirectly, increase nutrient loads to internationally important sites where a reason for unfavourable condition is an excess of a specific pollutant. Following the Dutch case ruling, the legal difficulty in authorising plans or projects that lead to further inputs of that pollutant is clear.

## River Camel Protected Site

The River Camel is designated as a SAC under the Habitat Regulations 2017, covering some 69km from the headwaters of the Camel and De Lank rivers to the confluence with the River Allen near Wadebridge. The primary reasons for the selection of this SAC are the populations of Bullhead *Cottus gobio* and Otter *Lutra lutra*. The Camel represents **bullhead *Cottus gobio*** in the extreme south-west of its range in England. The river encompasses a range of ecological conditions with both upland and lowland characteristics. The clean, fast-flowing, relatively oligotrophic waters with their stony bottoms are particularly suitable for bullhead, which forms an important part of the total fish biomass. The Camel represents **otter *Lutra lutra*** in its main stronghold in England in the south-west of the country. Surveys have indicated a dense population along this river. Records show that these populations persisted even during the period when the otter was in serious decline over much of the rest of its range in England, and this area has acted as a nucleus for recolonisation of other parts of England. The river and its tributaries represent the more upland as well as lowland habitat types utilised by otters, satisfying requirements for adequate food supply throughout the year. The wooded lower reaches of the river provide excellent habitat for resting and breeding. Other qualifying features are Atlantic salmon, *Salmo salmo*, European dry heaths, old sessile oak woods and alluvial alder forests. Further information relating to the unfavourable condition of the SAC and the underpinning SSSI designated under the Wildlife and Countryside Act 1981 (as amended is available on <https://designatedsites.naturalengland.org.uk/SiteSearch.aspx>

Based on our current understanding, we consider the interest features of the River Camel SAC to be unfavourable, or at risk, from the effects of eutrophication caused by excessive phosphates. Furthermore, although improvements to some sewage treatment works such as Nanstallon, together with Catchment Sensitive Farming advice to reduce agricultural pollution and measures set out in the River Restoration Plan have been secured, these will not reduce phosphate levels sufficiently to restore the condition of the SAC features. Consequently, the scope for permitting further development that would add additional phosphate either directly or indirectly to the site, and thus erode the improvements secured, is necessarily limited unless mitigation measures designed to avoid an adverse impact form part of the development proposal. The use of mitigation is established in domestic case law<sup>2</sup> and European case law<sup>3</sup>.

Natural England therefore advises that Cornwall Council, as the Competent Authority under the Habitat Regulations 2017, considers the implications of these matters on the River Camel SAC. Before permitting any further development, which has the potential to result in additional phosphate loads entering the catchment, an Appropriate Assessment of plans and projects will be required. Having carried out that assessment, permission for the plan or project may only be given if the assessment allows you to be certain that it will not have an adverse impact on the integrity of the site.

We would also advise that Cornwall Council can no longer rely on previous HRAs for site allocations where there is potential for developments to impact on the conservation objectives of SAC, or to rely on the previous HRA undertaken during the development of the Cornwall Local Plan. As part of the 5-year Local Plan review, which we understand is due to be undertaken by November 2021, we suggest it would be prudent to review current development policies in the light of this increased level of new developments affecting the Camel catchment.

You will no doubt be aware that Local Authorities elsewhere have needed to review planning policy and approach to development management in the light of the Dutch case judgement.

## Implications for development management within the hydrological catchment of the River Camel SAC

Before permitting further development impacting on the nutrient status of the River Camel SAC an

<sup>2</sup> *Gladman Developments Limited v S of S for Housing, Communities and Local Government and another* [2019] EWHC 2001 (Admin)

<sup>3</sup> *Sweetman vs Coillte Teoranta CJEU C-323/17* ("People over Wind")

Appropriate Assessment undertaken Cornwall Council must rule out any reasonable doubt as to the likelihood of an adverse impact on the integrity of the SAC, having regard to its conservation objectives. It has been established that a 'nutrient neutrality' approach to development is likely to be a lawfully robust solution to enable the grant of permissions that give rise to an appreciable effect. Examples of local authority catchment solutions include the [nutrient neutrality](#) methodology in the Solent, the River Avon Local Authorities phosphorus [interim development plan](#) to deliver phosphate neutrality and [Nitrogen Reduction](#) in Poole Harbour Supplementary Planning Document. Your authority may wish to consider this approach to enable developments to proceed in the catchment that will result in additional phosphates being discharged into the River Camel. It is however emphasised that for such an approach to be lawful, it is likely that the measures used to offset such impacts should not compromise the ability to restore the designated site to favourable condition and achieve the conservation objectives.

## Development types affected

### 1. Additional residential units and commercial development

Additional residential units within the catchment are likely add phosphate to the designated site via the wastewater treatment effluent, thus contributing to the existing unfavourable condition and further preventing the site in achieving its conservation objectives. Cornwall Council as Competent Authority under the Habitats Regulations, will need to undertake an appropriate assessment on all planning applications that will result in a net increase in population served by a wastewater system, including new homes, student and tourist accommodation. If Cornwall Council are is satisfied that new commercial development will not significantly increase loadings at the catchment's waste water treatment works then they may be screened out from further assessment on the basis that people living in the catchment are also likely to work and use facilities in the catchment, and therefore wastewater generated by that person can be calculated using the population increase from new homes and other accommodation. Tourism attractions (e.g. theme parks) are normally considered as in scope as these land uses attract people into the catchment and generate additional wastewater within the River Camel catchment. There may also be cases where planning applications for new commercial or industrial development could result in the release of additional phosphates into the system, for example through processes that add phosphates, or significant volumes of additional wastewater to the sewage treatment works.

Where applicable, the appropriate assessment should consider the improvements to South West Water's sewage treatment works secured under Asset Management Plans (PR19 & PR24). Once up and running these improvements will significantly reduce (although not remove) the offsetting requirements for new residential development in perpetuity. However, additional more temporary measures may be required to take account of the increased nutrient loads in the interim period.

### 2. Infrastructure that supports agricultural intensification

Increased agricultural intensification within the catchment of the River Camel will also lead to increased nutrient loading. For example, planning applications for new or expanded livestock housing (e.g. cattle sheds, chicken, or pig farm facilities, etc.) are all forms of agricultural intensification that if located within the catchment are likely to increase nutrient loads to the designated site and should be subject to an Appropriate Assessment.

#### *Additional considerations relating to slurry storage*

The Water Resources (Control of Pollution) (Silage, Slurry and Agricultural Fuel Oil) (England) Regulations 2010, abbreviated to the SSAFO Regulations, require agricultural holdings to provide storage infrastructure for silage, slurry and agricultural fuel oil to a given standards, sizes and lifespan to prevent water pollution. The size of a slurry store needed by a holding is determined by factors including the number of livestock, area of uncovered yard, presence of a separator, volumes of parlour washings etc. The installation of a new slurry store, or in some cases the enlargement of an existing slurry store, requires planning permission.

<sup>2</sup> *Gladman Developments Limited v S of S for Housing, Communities and Local Government and another* [2019] EWHC 2001 (Admin)

<sup>3</sup> *Sweetman vs Coillte Teoranta CJEU C-323/17* ("People over Wind")

When determining applications for new or enlarged slurry stores on agricultural holdings within the catchment of the River Camel SAC Cornwall Council will need to consider the plan or project that underlies the application for planning permission in accordance with Reg. 63 of the Habitats Regulations 2017. The need for a new slurry store will in many cases be part of a broader plan or project, for example an increase in livestock numbers on the holding in question, with the slurry store being a legally necessary means of enabling that plan or project. The granting of planning permission for a new slurry store is likely to unlock the ability to intensify the use of the holding in question and will need to be considered within the scope of the new HRA requirements

When carrying out an Appropriate Assessment of this sort, we would advise that Cornwall Council proceed on the basis of an analysis of the added livestock capacity that a new slurry store would unlock. This principle has been established in decision making (see Torrridge Council Appropriate Assessment under the Habitats Regulations of Planning Application 1/1041/2015/FULM: Land at Beckland Farm, Hartland).

### 3. Anaerobic digesters

There are particular concerns relating to the potential impacts of anaerobic digester (AD) plants within the River Camel catchment. AD plants require the input of organic matter, often in the form of farmyard manure and arable plant matter. Livestock and arable crops within the catchment are significant contributors to the elevated phosphate and unfavourable condition of the designated sites, in particular at locations where there are runoff pathways. New (or increased capacity) of AD is therefore likely to be driving local land use changes such as the production of maize, which is known to be a significant contributor to diffuse water pollution.

It follows that permitting new, or increasing the capacity of existing, AD plants through the grant of planning permission is likely to unlock land use change which is known to contribute phosphorous and sediment to the catchment watercourses. We would advise that Cornwall Council will need to consider new or enlarged AD facilities as simply one aspect of a plan or project of land use change. In this regard, when an application for a new or extension to an existing AD plant is within (or within close proximity) to the catchment of the River Camel, your authority should consider the risk that the development will indirectly increase the amount of phosphates entering the designated site. If an increase in the catchment's phosphate loads is considered likely then the implications of the proposals, along with any measures that may be implemented to alleviate that risk, should also be considered through an appropriate assessment.

### 4. Other development types

We have focused here on the main types of development that result in additional phosphates in the River Camel catchment. There may be other types of development that fall into that bracket and we would welcome further discussion in that respect.

## Mitigation options

Mitigation to enable development within the Camel catchment will need to include nutrient offsetting so as to avoid either permanent, or temporary increases in phosphate loads to the designated site and must be effective for the duration of the effect. In the case of new housing the duration of the effect is typically taken as in perpetuity, with the costs of maintaining, monitoring and enforcing mitigation calculated for a minimum of 80 – 125 years. It does not, however, follow that mitigation is not needed after that period, rather the expectation is the mitigation will continue indefinitely (e.g. through securing appropriate permanent land use change). In contrast, phosphate offsetting measures for agricultural intensification or AD plants need only be effective for the duration of the operation facilitated by the permission and therefore less permanent mitigation measures may be appropriate. We would be happy to discuss potential phosphate mitigation options for different types of development.

<sup>2</sup> *Gladman Developments Limited v S of S for Housing, Communities and Local Government and another* [2019] EWHC 2001 (Admin)

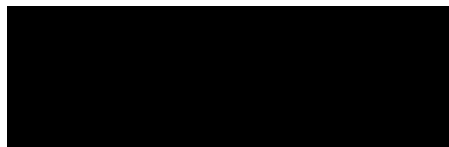
<sup>3</sup> *Sweetman vs Coillte Teoranta CJEU C-323/17* ("People over Wind")

My reason for writing to you is to alert you regarding the implications for Cornwall Council in applying the new requirements highlighted by the Dutch case. The contents of this letter are intended to help your authority understand how the Dutch case judgement will affect the delivery of your planning services. However, you will no doubt wish to take your own legal advice.

We are keen to help Cornwall Council understand the scope of the issues I have set out and to bring forward solutions, including mitigation measures, which do not undermine the delivery of your plan policies. We are also happy to engage directly with applicants through our Discretionary Advice Service.

If you have any queries relating to the advice in this letter, please come back to me.

Yours sincerely



Wesley Smyth  
Area Manager  
Devon, Cornwall & Isles of Scilly Team,  
Natural England



Cc Louise Wood, Richard Grant, Stephen Kirby, Helen Fearnley, Robert Lacey

<sup>2</sup> *Gladman Developments Limited v S of S for Housing, Communities and Local Government and another* [2019] EWHC 2001 (Admin)

<sup>3</sup> *Sweetman vs Coillte Teoranta CJEU C-323/17* ("People over Wind")