

Working arrangements between the Scottish Environment Protection Agency (SEPA), NatureScot and Perth & Kinross Council (PKC) in respect of phosphorus mitigation for development management proposals within the catchment of Loch Leven

Legislative context

The Habitats Directive, implemented in Scotland through the Conservation (Natural Habitats &c) Regulations 1994, (the “1994 Regulations”) requires appropriate steps to be taken to avoid *“the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant.”*

Both PKC and SEPA are competent authorities in respect of the 1994 Regulations. The 1994 Regulations (Reg 48) require all competent authorities (prior to issuing any authorisation) to carry out an appropriate assessment of a plan or project if that plan or project (either alone or in combination with others) is likely to have a significant impact on a European Site (which includes Special Areas of Conservation and Special Protection Areas) where the plan or project is not connected with or necessary to the management of the site. The appropriate assessment must consider the implications for the site in view of that site’s conservation objectives.

The competent authority must consult NatureScot, as the appropriate nature conservation body and have regard to any representations made by NatureScot. If it is considered appropriate opinions may also be taken from the general public.

If the competent authority considers, in the absence of any other alternative solutions, there is or are overriding public interest reasons that the plan or project must be carried out (i.e. social or economic reasons) the competent authority may agree, subject to consultation with the Scottish Ministers, to the plan or project notwithstanding a negative assessment of the implications for the site. Regulation 49 of the 1994 Regulations sets out the circumstances in full that must be considered.

Regulation 52 of the 1994 Regulations provides for co-ordination where more than one competent authority is involved, where a plan or project requires the consent, permission or authorisation of more than one competent authority.

Duties of the three parties

Perth and Kinross Council, as planning authority, can only agree to development proposals in the catchment of Loch Leven Special Protection Area (SPA) after having ascertained that the proposals will not adversely affect the integrity of the SPA.

SEPA, in addition to other legislative controls, regulates activities likely to impact on the water environment under the Water Environment (Controlled Activities) (Scotland) Regulations 2011 (CAR). Under Regulation 15 of CAR, before determining an application SEPA must assess the risk to the water environment posed by the carrying on of the activity referred to in the application. This includes, in respect of an activity considered to have or likely have a significant adverse impact on the water environment assessing indirect effects on other aspects of the environment likely to be significantly impacted.

When assessing any proposal likely to have a significant adverse impact on the water environment, CAR requires inter alia SEPA to consider the proposal’s likely environmental, social and economic benefits. Weighting these benefits enables SEPA to reach a judgement

on whether or not the proposal's adverse impacts are acceptable by reasons on them being outweighed by the proposal's benefits to human health, the maintenance of human safety or sustainable development or by reason that the proposal's benefits are of overriding public interest.

In determining an authorisation under CAR SEPA must also have regard to the provisions of specific legislation which includes the 1994 Regulations. In particular, Regulation 84B of the 1994 Regulations confirms that Reg 48 referenced above applies in relation to the grant (and variation) of an authorisation under CAR.

SEPA may grant or vary an authorisation, where considered that any adverse effects of a plan or project on the integrity of a European site would be avoided if the grant or variation of the authorisation were subject to conditions.

Where any applicable identified benefits (social, economic environmental) do not outweigh the identified likely adverse impacts, there are no overriding public reasons (i.e. social/economic that would justify approval), and the significant adverse impact(s) cannot be mitigated, (or doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered), then the likely outcome is that SEPA would refuse the authorisation.

NatureScot has a duty under Habitats Regulations 3(2) to exercise its functions so as to secure compliance with the Habitats Directive. NatureScot may give a view, if requested by a Competent Authority, as to whether a plan or project is likely to have a significant effect. Where this is considered to be the case, the Competent Authority should consult NatureScot on the content of an appropriate assessment.

Introduction

In order to ensure that there is no adverse affect on the integrity of Loch Leven SPA any phosphorus discharge from a new development must either be diverted out with the Loch Leven catchment, be connected to the Drum, Milnathort or Kinross Wastewater Treatment Works or include phosphorus mitigation proposals which will be capable of removing from the catchment 125% of the phosphorus likely to be generated by the development. Any foul drainage infrastructure delivering this phosphorus mitigation must be suitably maintained.

To this end, policy 46: Loch Leven Catchment Area of the Adopted Perth and Kinross Local Development Plan 2019 sets out the requirements in terms of drainage infrastructure necessary for phosphorus mitigation and to promote the ecological recovery of Loch Leven.

To date, if development proposals provide adequate phosphorus mitigation which can be applied through appropriate planning conditions, Perth and Kinross Council and SEPA have concluded that the development is not likely to significantly affect Loch Leven Site of Special Scientific Interest (SSSI) and the development will not adversely affect the integrity of Loch Leven Special Protection Area (SPA).

A 2018 judgement at the Court of Justice for the EU in the case of 'People over Wind v Coillte Teoranta' has concluded that Article 6(3) of the Habitats Directive must be interpreted as meaning that in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications of a plan or project, it is not appropriate, at the screening stage, to take account of measures intended to avoid or reduce the harmful effects of the plan or project on a European site .

NatureScot are interpreting this legal case and now advising competent authorities as follows:

A proposal which includes a phosphorus discharge into the Loch Leven catchment is likely to have a significant effect on the qualifying interests of Loch Leven SPA.

Consequently, the advice to the competent authorities is that they should carry out an appropriate assessment in view of the site's conservation objectives for its qualifying interests.

Our view is that:

- providing the provisions of *Advice to planning applicants in relation to phosphorous and foul drainage in the catchment* PKC Adopted Local Development Plan Supplementary Guidance are followed and the conditions contained therein are applied and fully implemented
- this should be sufficient to allow the competent authorities to conclude (with respect to phosphorus discharge to the Loch Leven Catchment) that proposals, which meet the mitigation requirements set out in these conditions, will not adversely affect the integrity of the site.

In such circumstances where Phosphorus discharge is the only issue of concern, NatureScot is content that any appropriate assessment following the above procedure will be able to conclude no adverse effect on site integrity. We therefore do not need to see or be consulted on individual appropriate assessments in these circumstances.

Agreed working arrangement

The purpose of this working arrangement is to:

- streamline the planning process,
- reduce the need for the use of Section 75 agreement and
- ensure that the phosphorus mitigation is in place and its maintenance is secured by the appropriate planning conditions, detailed below, for proposals within the Loch Leven catchment which include a phosphorus discharge which is not removed from the catchment or connected to Drum, Milnathort or Kinross Wastewater Treatment Works.

Condition 1 - Prior to the occupation of the development hereby approved, foul drainage infrastructure capable of achieving not less than 125% phosphorus mitigation shall be installed.

Reason: To ensure appropriate drainage arrangements are installed and retained to remove phosphorus from the Loch Leven Catchment Area thereby ensuring compliance with policy 46: Loch Leven Catchment Area in the Adopted Perth and Kinross Local Development Plan 2019 .

Condition 2 - The foul drainage infrastructure capable of achieving not less than 125% phosphorus mitigation associated with this development shall be undertaken in a phased manner:-

a) No development shall commence on the approved development site until the mitigating foul drainage infrastructure at the remote property/properties [variable address and owner] has been installed and evidence of the installation has been submitted to and approved in writing by the Planning Authority.

b) Following the installation of the foul drainage infrastructure at the remote property/properties the development site shall only be occupied once the foul drainage infrastructure for the development site has been installed.

Reason: To ensure appropriate drainage arrangements are installed and retained to remove phosphorus from the Loch Leven Catchment Area thereby ensuring compliance with policy 46: Loch Leven Catchment Area in the Adopted Perth and Kinross Local Development Plan 2019 and Enterprise and Infrastructure Committee Resolution of 28 August 2013.

Condition 3 - Development shall not commence until the applicant has submitted approved CAR **authorisation(s)** under the Water Environment (Controlled Activities)(Scotland) Regulations 2011 for the drainage infrastructure associated with this project to the Planning Authority and the Planning Authority has confirmed receipt of the documentation in writing.

Reason: To ensure appropriate drainage arrangements are in place to remove phosphorus from the Loch Leven Catchment Area thereby ensuring compliance policy 46: Loch Leven Catchment Area in the Adopted Perth and Kinross Local Development Plan 2019 and Enterprise and Infrastructure Committee Resolution of 28 August 2013.

Phosphorus mitigation can therefore be achieved by either:

Scenario 1 - When the phosphorus mitigation is delivered within the boundary of the planning application site – in this situation, conditions 1 and 3 would apply.

Scenario 2 – When the phosphorus mitigation is delivered by a combination of infrastructure both on the application-site and separate/remote to the application site – in this situation, conditions 2 and 3 would apply.

Parties to undertake the following:

- No consultation with NatureScot if acceptable mitigation proposals in place, NatureScot to advise on adverse effect on site integrity where there is uncertainty or novel cases;
- PKC to consult SEPA on all detailed planning applications, proposing private waste water drainage, within the Loch Leven catchment, when acceptable mitigation proposals have been submitted, clearly specifying the reason for the consultation. SEPA to confirm to PKC that the submitted 125% phosphorus mitigation acceptable and figures are correct;
- PKC grant planning permission with relevant conditions; (1 & 3 or 2 & 3)
- PKC confirms receipt of a copy of CAR authorisation(s) including for any remote mitigation property prior to commencement of the development;

PKC confirms receipt of evidence of installation for any remote mitigation property prior to commencement of the development

- Building standards inspect new drainage infrastructure (s);
- PKC to maintain spreadsheet of mitigating properties;

- All parties to promote the Loch Leven Code of Practice: *Advice to planning applicants for phosphorus and foul drainage in the catchment.*
- Liaison meetings to be convened if requested by any party
- NatureScot and SEPA to provide PKC with scientific information pertaining to the status of the loch and the impacts of private waste water treatment systems on request/ or as required.

Note these conditions will be applied to all Full (FLL/FLM) planning permission and Approval of Matters Specified in Conditions (AML/AMM) planning permission. In the case of Planning Permission In Principle (IPL/IPM), PKC will include a condition that the development will need to comply with the Drainage Policies for the Loch Leven Catchment.