

HDLP Inspector hearings Written Statement – Water Neutrality

MIQ Matter 3 - Issue 2 - Question 1 - Water Neutrality

Hearing Thursday 12 December.

Submitted and to be presented on behalf of **Save Rural Southwater** and to be considered in conjunction with **SRS Consultation response 1186954** and attached detailed consultation comments.

Plan Strategic Policy 9 - Water Neutrality - (SRS Consultation response 1186954).

The Inspector has raised the question whether Strategic Policy 9 (Water Neutrality is “sound” (Matter 3 Issue 2 Question 1). In particular;

(Q1.b) whether “***the restriction for residential development of 85 litres of mains supplied water per person per day justified and effective***” and

(Q1. d) “***Is the approach to water offsetting justified and effective?***” and

(Q1.e) “***Has achieving Water Neutrality been adequately assessed as part of the viability evidence...***”

These questions cannot be addressed without a clear understanding of how the Water Neutrality (“WN”) policy came about, what it is designed to achieve, and how it is being applied in practice.

1. Background to WN

The Sussex North Water Resource Zone (SNWRZ) is the most over-stressed water supply zone in the country. This is the result of very large scale housebuilding and population growth across our region over recent decades, massively increasing demand on the finite water supply source, namely the Arun aquifer at Hardham, near Pulborough.

This critical threat to water supply across the SNWRZ, and the resulting adverse effects upon a number of designated sites within the SNWRZ (the “Protected Sites”) were recognised by the Government’s Environment Agency (EA) and by Natural England (“NE”) and other stakeholders, including Southern Water and the affected local planning authorities (“LPAs”). Following engagement and consultation between these bodies, NE established the policy, uniquely applied to the SNWRZ, of “Water Neutrality” (“WN”), specifically designed to meet the duties imposed under the Habitats Regulations 2017 to avoid damage to, or adverse effects on, the Protected Sites.

The WN policy was designed to set the standard by which developers and LPAs should demonstrate, with certainty, that any proposed development will not contribute further to the existing adverse effects upon the Protected Sites. The WN policy supplements the existing, and broader, obligations to meet the requirements of the Habitats Regulations 2017.

NE has required the LPAs within the SNWRZ to work together to prepare and implement a legally robust and enforceable joint strategy under which all affected LPAs can **apply, monitor and ensure enforcement of WN across the SNWRZ**. NE has further required that such strategy must be integrated by each of the affected LPAs into their respective Local Plans.

In order to develop and implement a WN strategy which complies with the requirements of the Habitats Regulations 2017, it is well established that LPAs must adopt a strictly ‘precautionary approach’ where, as in the case across the SNWRZ, Protected Sites might be affected. A legal briefing commissioned by the Planning Advisory Service for the benefit of LPAs in November 2023, makes it clear that:

- 1. development can only be consented where the decision maker is sure, meaning that there is no scientific doubt, that it will not affect the integrity of the Protected Site;*
- 2. any assessment [of policy or its implementation] must be particularly robust to a high standard of investigation, based upon the best up-to-date scientific knowledge and not based upon the bare assertion of an expert. Any scientific uncertainty should be addressed by applying precautionary rates to variables.*

In all, the assessment can have no gaps, and must contain complete, precise and definitive conclusions “capable of removing all scientific doubt” as to the effects on the Protected Site;

- 3. case law provides that an LPA must be able to rule out all reasonable scientific doubt that a proposal would have an adverse effect on the integrity of a Protected Site. This doubt must be ruled out at the date of the decision authorising a project, not based on something that might or should happen later;*
- 4. any mitigation measures can only be considered as part of the assessment when it is sufficiently certain that the proposed measures will be effective in avoiding the harm. In all the LPA must be able to guarantee beyond all reasonable doubt that the mitigation will mean that a project will not adversely affect the integrity of a Protected Site. This represents a particularly high bar. Relevant considerations will include how the measures will be implemented and monitored, and how any enforcement will take place*
- 5. the appropriate assessment of a plan or project on a Protected Site may not take into account the future benefits of such mitigation measures if those benefits are uncertain, inter alia because the procedures needed to accomplish them have not yet been carried out or because the level of scientific knowledge does not allow them to be identified or quantified with certainty*
- 6. when considering measures that seek to achieve neutrality, the measures will need to be preventative rather than compensatory*

To repeat, this is legal advice obtained expressly for LPAs by the Planning Advisory Service (“PAS”), part of the Local Government Association (joint participants DEFRA, NE and the Ministry of Housing, Communities and Local Government). Note the emphatic language in the advice – “an LPA must be able to rule out all reasonable scientific doubt that a proposal would have an adverse effect on the integrity of a protected site” and “an LPA must be able to guarantee beyond all reasonable doubt that the mitigation will mean that the project will not adversely effect the integrity of the Protected Site”

What is clear, beyond any doubt, is that the way in which WN is currently being applied in the Horsham District and the means by which the draft plan seeks to

enshrine WN ,do not satisfy and fall very far short of the legal requirements mentioned in the PAS advice to LPAs

The process to identify an effective WN strategy remains incomplete and requires further evidence and evaluation before any policy, consistent with the legal requirements mentioned, can be finalised and incorporated into the draft plan. Without a legally robust and WN enforceable policy in place, the draft plan simply does not comply with the WN requirements.

Water Neutrality – the theory.

NE designed and has imposed the WN policy and in its published guidance robustly and unambiguously defines what WN means;

“The definition of water neutrality is the use of water in the supply area before the development is the same or lower after the development is in place”

To meet the WN test, any new development (which will inevitably introduce very significant new water supply demand) will need to show that it can match (or better) this new demand through offset savings, either on existing council-owned residential or commercial buildings or through other supply sources unconnected to the Arun/Hardham aquifer e.g. bore holes, rain water harvesting or grey water recycling.

In September 2021, NE published guidance on how this policy should be implemented within SNWRZ. The guidance sets out how new building developments can demonstrate compliance with WN requirements. Developers must show both significant water efficiency in new-build properties, through a combination of water flow restriction and water efficient appliances, and offsetting through alternative supply sources and reducing water use in already built properties through retro-fitting of water flow restriction devices.

But is this combination of build efficiency and offsetting delivering WN. Absolutely not.

Water Neutrality – the reality.

The NE guidance promotes a target for water use 'per person per day' (l/p/d) of 85 litres for new builds. NE states that this target is "reasonably achievable". However, it is not based on any *actual* water use data from new build properties fitted with flow restriction/water efficient devices, but rather on aspirational and theoretical calculations, prepared by water consultants retained by the SNWRZ LPAs, and seemingly accepted without question or independent validation by the LPAs/NE.

How does the fictional target stand up against actual widely and readily available water use data? A target consumption of 85 litres l/p/d is:

1. far below Southern Water's **estimated** average daily water consumption of 136 l/p/d based on metered usage;
2. far below national average **estimated** use data from the water industry of 146 litres l/p/d;
3. far below the **actual** data of 166 l/p/d (after fitting flow restriction devices) advised by the consultants retained on behalf of Crawley, Horsham and Chichester District councils in a pilot scheme conducted in Crawley where 100 Council properties were fitted with flow restrictors.
4. Far below **actual** water use data from a sample of new build properties (fitted with water saving appliances/flow restrictors) on the Berkeley Homes Broadacres Southwater development which revealed average water use of 180 l/p/d in households of 2-4 occupants and considerably higher than that in single occupancy properties.

What is happening is that developers are submitting applications based on the NE target of 85 litres l/p/d, but they are not being required to demonstrate that this vastly lower consumption will ever be achieved. They merely have to show that, in theory, it could be. Recently submitted development applications reveal that, to meet the theoretical 85 l/p/d target, the developer's calculations simply reduce the number of baths to be taken, showers taken and shower duration, and WC flushes to *well below* the freely available *actual* average use data. This target might be achieved if residents took two weeks holiday each month. Or if they took one bath a week, one short shower a day and did not always flush the WC after use, but that is not what happens in the real world. **And WN is a real world issue.**

Why is this theoretical approach so fundamentally wrong and fatally undermining WN? Simply because the lower the theoretical water use target, the easier it is for the developer to “demonstrate” water neutrality through offset. **The developer will only have to offset 85l/p/d whereas the actual consumption in the homes built will be nearer ,or over double, that figure.** This unrealistically low target adopted by NE and the LPAs is a gift for developers and the developer’s theoretical water use calculations are not challenged by LPAs.

To illustrate this fundamentally flawed approach, a newbuild development application based on the NE 85 l/p/d target, recently approved by HDC included the following water use allowances (all l/p/d);

Baths – 14 litres, equivalent to 2 ½ inches of water in a standard sized bath. A normal bath, half-filled, will use 80-100 litres so this daily allowance would permit one decent bath every 6/7 days. Data collected by the Energy Saving Trust (EST) on bath use showed that users in the Thames water region bathed 4/5 times a week.

Showers – the developer limited shower time to 4.37 minutes per day. The Energy Saving Trust survey revealed an average duration of around 7 ½ minutes per shower. And many people shower more than once per day.

WC flushing – the developer limited WC flushing to 4 ½ times per day - around half the national average.

External water use (e.g. Garden/Car washing/Pressure washing) - the developer allowed 5 litres l/p/d. A car wash using a hose will use around 250 litres and very recent research from SW shows that a hose used for watering/garden sprinkler can use up to 1000 litres per hour.

NE has abdicated from all its responsibility for ensuring WN in new development. It has stated that scrutiny/approval/rejection of applications for WN compliance, monitoring actual water use and enforcement where actual water use demonstrates that the development is not water neutral, is **the exclusive remit and responsibility of LPAs**. This blanket delegation to LPAs is a dereliction of NE’s fundamental duty as the approving and oversight body for developments under the Habitats Regulations.

HDC is not prepared to challenge the theoretical target of 85l/p/d, and it has further made it clear, in agreeing the development application mentioned, that it will not test or monitor actual water usage. Unsurprising perhaps, given that *actual* use data would clearly explode the myth of achieving 85 litres l/p/d (and of the water neutrality compliance of the applications already approved and continuing to be approved). This would be a very inconvenient truth for NE and LPAs. This “blind eye” approach, and the lack of any actual use monitoring, will inevitably encourage and result in the removal of water flow restriction devices by home owner/occupiers further exacerbating the problem. This is already happening in many new build developments where devices have been fitted from new and subsequently removed.

WN does not and will never work without effective testing and on-going monitoring of actual water use, and the strict application of robust enforcement measures where this evidences non-compliance.

SRS has engaged with HDC, with NE and with Southern Water over many months (including prior to the publication of the draft plan) on these issues, sharing the data and conclusions set out above and seeking clarification on the achievability of the notional 85 l/p/d water use target. None of our conclusions above have been challenged and the only actual use data SRS has been referred to is the Energy Saving Trust technical study and the Crawley Pilot scheme, neither of which get anywhere close to supporting the 85 l/p/d target ,and in fact both sources very clearly contradict it.

A simple question repeatedly put to all three bodies “ **How can water neutrality be achieved if a developer only has to offset 85 l/p/d to gain approval for a home which will consume nearer double that figure when built**” remains unanswered with no justification given for the 85 l/p/d offset benchmark other than that “the figure was accepted by the Inspector reviewing the Crawley Borough plan’. In fact, the figure was not challenged by objectors to the Crawley plan, although the Inspector did pose the very sensible question to the Crawley Planning officers what would happen if a WN approved new build used more than 85l/p/d? In response he was informed that there was “allowance built in” to the figure to take account of possible overconsumption. Meaning, following their logic, that for every water user exceeding

(by as much as double) the 85 litres, there will be another using a correspondingly lesser amount than 85 litres. SRS asked NE to confirm this “built in” allowance though they have ignored this request. If there was indeed such an allowance then this would make the 85 litre figure even more absurd when compared with actual use data. But if no allowance was built in, then it appears the Crawley Inspector was misled.

During the debate in HDC on 11 December 2023 at which the Council by a strong majority supported the draft plan a number of Councillors queried the 85 l/p/d target and why the Building Regs Part G target had not been used. This higher target (125 or 110 l/p/d) would certainly go some way to addressing the fundamental flaws highlighted above, however these provisions in the Building Regs are aspirational and were not designed to address the water neutrality situation, nor would they do so. The only way to meet the test of offset for water neutrality is to assess this by reference to ***actual water use***, not unsupported theoretical and aspirational water use.

So where does that leave the residents, present and future, of the SNWRZ?

If, as the available actual use data unarguably confirms, the 85 litres l/p/d target is unachievable in practice, then the outcome for SNWRZ is that **development applications will be approved which will not be, and have no chance of ever being, water neutral, in clear breach of the requirements of the Habitats Regulations 2017 and of the mandatory policy of water neutrality. This will mean even more, and potentially terminal pressure on the already hugely overstressed water supply in the SNWRZ.**

The only way the WN policy can be made to work effectively is by ;

- (i) substituting a realistic water use target for any new development in the draft plan. A target which is evidence based, using actual consumption experience from recent new developments of which there are countless

across the district, so that LPAs can, as the PAS legal advice mandates, “be able to guarantee beyond all reasonable doubt that the mitigation (namely the water offsetting) will not adversely affect the integrity of the Protected Site”; and

- (ii) including in the draft plan requirements on LPAs to strictly apply the policy through (a) rigorous scrutiny of applications and supporting actual water use evidence, (b) actual post build water use monitoring and (c) enforcement for non-compliance with water use targets, duties already delegated to them by NE but which are not being observed.

So, to answer the Inspector’s questions:

(Q1.b) ***“the restriction for residential development of 85 litres of mains supplied water per person per day justified and effective”***

The 85 litres restriction is neither justified nor effective.

(Q1. d) ***“Is the approach to water offsetting justified and effective?”***

The approach to offsetting is neither justified nor effective.

(Q1.e) ***“Has achieving Water Neutrality been adequately assessed as part of the viability evidence...”***

The current approach to delivering water neutrality is fundamentally and fatally flawed and is self-defeating due to its core reliance on aspirational and unachievable theoretical assumptions of water use behaviour which are contradicted by the wealth of available actual water use data and which set an absurdly low benchmark for the developer’s off-set requirement.