

**POSITION STATEMENT ON NUTRIENT NEUTRAL DEVELOPMENT –  
INTERIM NITROGEN MITIGATION SOLUTION**

**1. RECOMMENDATIONS**

1.1 It is recommended that Cabinet:

(a) approves the approach to mitigation as set out in the report;

(b) notes that the Planning Committee will be advised of the mitigation approach agreed by the Cabinet, as a material planning consideration in their determination of planning applications;

(c) continues to work through the Partnership for South Hampshire (PfSH), the Local Government Association and Members of Parliament to lobby central government to resolve the contradictory positions held by agencies within DEFRA and the Ministry of Housing, Communities and Local Government (MHCLG) and to develop a comprehensive, long term, funded mitigation strategy for the Solent area;

(d) notes that a further report will come back to Cabinet to seek agreement of a definitive Nitrate Mitigation solution.

**2. THE PURPOSE OF THE REPORT**

2.1 This report considers an Interim Nitrate Mitigation solution for the District. This report details the present situation for the District in relation to advice from Natural England (the statutory advisor on protected sites), that developments in the District must be nitrogen neutral to mitigate any likely significant effect on internationally important protected sites in the Solent.

2.2 The Local Plan Review Inspectors have been advised of the updated position together with details of the work being carried out through PfSH.

2.3 This report details a package of measures which together form an interim mitigation solution which enable the Council to move forward to a position where planning permissions can continue to be issued. In the absence of an interim strategy the Council would not be able to issue permissions for development of 1 dwelling or more or developments that would result in an increase in overnight accommodation.

- 2.3 Further the report gives an update on progress made by the (PfSH) to develop a sub-regional, long term strategy to address the sources of nitrate pollution in the Solent with central government agencies.

### **3 BACKGROUND**

- 3.1 The Council has a significant housing need to meet within the District. To meet this housing need significant housing development has been promoted through the Local Plan Review. The Council also has committed to build a significant number of new homes as set out in the Council's Housing Strategy.
- 3.2 The Council takes seriously its responsibility to provide for sustainable development in the New Forest. Sustainable development is that which respects equally the three pillars of sustainability: economy, environment and social. This is a key element of the National Planning Policy Framework.
- 3.3 The Council is committed through the New Forest Local Plan Review 2016- 2036 to new development only taking place if it is sustainable development that includes the relevant environmental protections incorporating features to encourage biodiversity and retain and where possible enhance existing features of nature conservation value. Part of the consideration of this is whether there would be a detrimental impact on the water quality of the nearby European designated nature conservation sites in the Solent.

#### **The Habitat Regulations**

- 3.4 The Conservation of Habitats and Species Regulations (2017 as amended), hereafter referred to as the Habitats Regulations is the UK's transposition of the European Union Directive 92/43/EEC Conservation of Natural Habitats and of Wild Fauna and Flora. The Regulations place significant responsibilities on the Council as competent authority for the protection of ecology. Regulation 63 requires competent authorities to undertake an 'Appropriate Assessment' of the implications of the permission, if it is likely to have a significant effect on a European site.
- 3.5 The Appropriate Assessment considers potential impacts against the conservation objectives of any European sites designated for their nature conservation importance. If a likely significant effect is predicted, planning permission can only be granted if the competent authority can determine that there will be no adverse effect on the integrity of the site having regard to any proposed mitigation measures. Therefore, if mitigation measures are not available or sufficient to avoid the adverse effect, then the competent authority would not be able to conclude that

the plan or project would not have an adverse effect.

- 3.6 Such European sites include Special Protection Areas (SPA) designated to conserve important or threatened bird species and Special Areas of Conservation (SAC) designated to conserve important and rare habitats. Significant effects on European designated sites can be caused through a number of impact pathways such as direct/indirect habitat loss, increase of recreational disturbance, construction, activities, air and water pollution.
- 3.7 It is also necessary for the competent authority to consider not only the impact of a single plan or project in isolation but the likelihood of a significant effect occurring in combination with other plans and projects.

### **Recent case law**

- 3.8 An established approach is that the Appropriate Assessment must use the 'precautionary principle' when determining likely significant effects. If it is not possible to rule out a likely significant effect, the competent authority must work on the basis that one exists and undertake an Appropriate Assessment. The precautionary principle also dictates that there must be certainty over the effectiveness of the mitigation measures to rule out any adverse effect. This precautionary principle has been reinforced by a recent case determination from the European Court of Justice commonly referred to as the 'Dutch Case'.
- 3.9 The Dutch Case also clarified the requirement that mitigation is to be secured at the time of carrying out an Appropriate Assessment for the competent authority to conclude with certainty that any mitigation proposed would sufficiently mitigate any adverse effects arising from the plan or project in question.

### **Water Quality in the Solent**

- 3.10 PfSH authorities commissioned an Integrated Water Management Study (IWMS) looking into the effects of planned future development on water quality and water resources. The IWMS noted that the majority of the Solent water bodies had in most cases, less than good ecological status for elements such as dissolved inorganic nitrogen (made up of nitrates, nitrites and ammonium). The IWMS also identified that some Wastewater Treatment Works (WwTW) would reach capacity in the early to mid-2020s and that by this point, action would have to be taken to ensure that these issues are satisfactorily mitigated. Therefore, at present, the impact on the Solent SPA and SACs from development is uncertain and the effectiveness of any proposed mitigation is unknown.
- 3.11 The Integrated Water Management Strategy was approved in 2018. Given the

need for a comprehensive and definitive mitigation strategy to be agreed which will enable nutrient neutral development to take place into the future, a Water Quality Working Group was set up through PfSH to look in more detail at the issue of nutrient neutrality. The Working Group includes representatives from Natural England, the Environment Agency and Southern and Portsmouth Water. Ideally the Strategy would be facilitated by Government, however failing that, a PfSH strategy addressing the issue will be prepared in collaboration with Natural England, the Environment Agency and the Water Companies.

- 3.12 One of the causes of a deterioration in water quality is new developments creating additional wastewater which is treated at Wastewater Treatment Works (WWTWs) and discharged into the Solent. The percentage of nitrate coming from this source varies depending on the location in the Solent but is small (3-18%) in comparison to run-off from agriculture (20-77%) and background levels already in the waterbody (12-67%).

### **Natural England's Advice**

- 3.13 Based on the existing condition of the Solent water bodies and considering the implications of the more recent Dutch case ruling, Natural England advised the New Forest District Council verbally on the 9<sup>th</sup> August 2019 that development which would result in an increase in 'overnight' stays, should achieve nitrate neutrality to not have any likely significant effects. Natural England has also now confirmed its position in a consultation response relating to a specific application. The Council as competent authority under the Habitats Regulations, must have regard to Natural England's advice as a statutory consultee, and national body responsible for the natural environment. The Council should only depart from the advice of Natural England for good and justified reasons.
- 3.14 The affected catchment is all parts of the Plan Area west of, and including New Milton, which are serviced by Southern Water waste water treatment plants (Pennington, Ashlett Creek and Snowhill Copse). Any development in this area served by local treatment plants or septic tank arrangements discharging to water courses that drain to the Solent are also affected including most of the New Forest National Park.
- 3.15 Several other planning authorities across the Solent in considering negative comments from Natural England on specific planning applications and, following Counsel's opinion, have taken the decision to temporarily cease granting planning permissions whilst mitigation strategies are developed. Some Councils have not been able to issue permissions for several months as they have explored options for mitigation.

- 3.16 Advice to local planning authorities in the Solent region, Natural England has acknowledged that there is 'uncertainty as to whether new growth will further damage designated sites'. It is Natural England's advice to local planning authorities and applicants to be 'as precautionary as possible' when addressing uncertainty and calculating nutrient budgets. The contrast between 'scientific proof' and 'as precautionary as possible' may become significant if decisions by local planning authorities are challenged through the Court.

### **Environment Agency Advice**

- 3.17 By contrast, the Environment Agency in a technical note states 'using our evidence we have confirmed that no further investment is needed to treat wastewater to a tighter nitrogen limit for any of the treatment works in the Solent area. The Environment Agency go on to say that 'Where new development can be accommodated within the current waste water discharge activity permit limits individual Wastewater Treatment Works i.e. that there is capacity to take the extra wastewater flows from new development whilst still treating affluent to the same standard, then we consider the development would be acceptable.'
- 3.18 Both Natural England and the Environment Agency are agencies of the Department for Environment, Food & Rural Affairs (DEFRA). DEFRA is also responsible for OFWAT, Water UK and the regulation of the farming industry. Water quality degradation from nitrates and phosphates largely stems from agricultural practices which tend to operate within existing consenting regimes.

### **Calculating nitrate neutrality**

- 3.19 Natural England has produced guidance on how to calculate nitrogen budgets for developments. The calculations compare the existing land use to the proposed land use in terms of nitrate loading and use assumptions on water use and occupancy rates to help planning applicants determine whether more or less nitrate will come from the site (either through run off or via the sewerage system) if permission was granted. Natural England suggest that larger sites, particularly those on agricultural land may achieve neutrality by providing enough open space. Achieving neutrality on smaller sites and brownfield developments is likely to require off-site mitigation.

## **PfSH Work**

- 3.20 Though PfSH there has been various lobbying to highlight the issue to central government and the impact on housing delivery, investment confidence and survival of SME developers across the area. At the PfSH Joint Committee on 31 July 2019, it was agreed, amongst other things, that there was a need to gain a greater understanding of the nature of the issue, that lobbying continues and that there was a need to develop a long-term water quality and mitigation plan, to achieve nutrient neutral development.
- 3.21 PfSH has also made representation to the Ofwat report proposals (published in June 2019) to impose a penalty on Southern Water for a range of failings in its statutory duties as sewerage undertaker, including planning and investment in their infrastructure.
- 3.22 Natural England met with MHCLG on 19 June 2019 to discuss the need to address the source of the problem (environmental permitting regimes and insufficient wastewater treatment practices by statutory undertakers) and the impacts of local planning authorities from housing delivery. MHCLG agreed to organise a cross government/department meeting. MHCLG also attended a meeting with PfSH Planning Officers group on the 20th August which was the start of an on-going conversation with Government on the matter. One proposal is that the Environment Agency should be instructed to commence review of the permits of Waste Water Treatment Works earlier and undertake a robust Appropriate Assessment on the permits.
- 3.23 The PfSH Water Quality Working Group, in partnership with the relevant Government bodies, is considering several interventions, both to reduce the inputs of nitrates into the local catchment and to manage the input of nitrates into the sensitive areas of the Solent. Most of these mitigation measures are medium to long term and will form the basis of a PfSH wide Strategy.

## **Approach of other PfSH authorities**

- 3.24 Several PfSH authorities that have been faced with withholding the issue of planning permissions have now identified a package of potential short to medium term mitigation measures that can assist developments where on-site avoidance and/or mitigation is not possible. These authorities have either formally adopted Interim Strategies or are currently seeking Member approval. These Interim Strategies acknowledge the Council's responsibilities and the need for mitigation, the kind of mitigation packages that will deliver mitigation and the approach towards securing these through a Grampian Condition on planning permissions. The first authority that moved forward with this approach sought Counsel Opinion

on the proposed approach which has confirmed its validity. The approach taken by these Councils has been supported by Natural England.

- 3.25 In all cases further work by individual Councils is necessary to clarify precisely what package of mitigation measures will be enacted in the short term together with calculation to the resultant cost for development schemes of providing the mitigation. Each authority will then use a Grampian style condition to enable permissions to be granted. It should be noted that whilst this is providing a solution, for some applicants the use of a Grampian style condition is not acceptable.

### **Nitrogen Budget for the District**

- 3.26 An exercise has been carried out by officers applying Natural England's nitrogen budget methodology to planned development within the District. This has confirmed that planned development, including the development promoted in the emerging NFDC Local Plan, will generate a large increase in nitrogen discharge to the Solent (a total load of 11,000kg N per annum for 6500 additional homes 2018-2036).
- 3.27 The affected catchment is all parts of the Plan Area west of, and including New Milton, which are serviced by Southern Water waste water treatment plants (Pennington, Ashlett Creek and Snowhill Copse). Any development in this area served by local treatment plants or septic tank arrangements discharging to water courses that drain to the Solent are also affected including most of the New Forest National Park.

### **Implications**

- 3.28 Whilst the longer-term partnership work is intended to create a sustainable mitigation strategy to enable growth in the region, the inability to grant planning permission would have significant implications for housing delivery and meeting housing need within the District and the overall economy of the area. On a more technical note it would also have serious implication for the Housing Delivery test and the Council's 5-year housing land supply. Whilst larger sites should be able to demonstrate nitrate neutrality this will be difficult to achieve at application level on smaller sites.
- 3.29 Given the recent advice from Natural England, any permissions issued without achieving Nitrate neutrality or having a mitigation strategy to address the issue, would be at risk of legal challenge through the Courts.
- 3.30 The emerging Local Plan already requires Nitrate neutrality for larger sites in

accordance with previous Natural England advice. Nitrate neutrality was not debated in the recent Local Plan examination hearings but will be an issue at Main Modification stage in autumn 2019.

- 3.31 Policy 10 (Mitigation) will need to be slightly modified to reflect the current position, and supplementary Habitats Regulations Assessment or commentary may be needed. This will form part of the Main Modifications, however given the significance of the issue the Inspectors have been informed of the position and the proactive approach of the Council in terms of considering this report, the initial progress towards finding solutions to enable development to take place in the period before strategic solutions emerge together with an update on the work through the PfSH WQWG. All of which will demonstrate to the Inspector the deliverability of the Local Plan in the current Nitrate context.
- 3.32 Officers have also now spoken with the promoters of the main strategic sites with further meetings scheduled to identify plausible Nitrate offset mechanisms for planned development in the Local Plan Review, including any early wins that might create head room to enable permissions on smaller schemes to be issued on the short to medium term.

### **Proposed Approach to mitigation**

- 3.33 Given the uncertainties around outcomes and timescales in the PfSH process and the need to progress the Local Plan Review Main Modifications, it is proposed that officers explore options that can be delivered locally alongside participating in PfSH initiatives. Initial discussions with the NFNPA indicate scope for and benefits from taking a District wide approach.
- 3.34 Given the complexity of the issue and the ability for some solutions to come forward more quickly than others, it is likely that a suite of measures will be needed to deliver nitrate neutrality in the District. These measures could include a mix of the following:
- Acquiring and retiring agricultural land: 600 -1,400 hectares would be required to offset the Local Plan in full, depending on the intensity of agricultural production on the land obtained. If obtainable at agricultural values this might cost £15-45 million (£2,300-£7,000 per dwelling) with serious consequences for viability and affordable housing provision. This option does not appear practicable unless offered by a developer who also has suitable offset land available.
  - Woodland planting: this may increase the efficacy of agricultural land set-aside and reduce the amount of offset land needed. This could also form part of on-site mitigation on larger sites, within (parts of) areas provided for recreational habitat mitigation. Up to £6,800/ha. may be available to offset costs via the [Countryside Stewardship Woodland Creation Grant](#).



- A strategic-scale woodland could also help to provide Solent-wide recreational mitigation for recreational impacts on the New Forest SPA/SAC. Some element of commercial return to land owners may also help offset costs, and it may not be necessary to acquire the land.
  - Installation of Waste Water Treatment Works (WWTW) filter wetlands: ideally downstream of WWTW to strip out additional. This approach appears to offer the most tangible opportunity in NFDC/NFNPA to secure a significant long-term benefit in a relatively short timeframe. Site SS3 Marchwood Farm is next to Slowhill Copse WWTW through which 40% of Local Plan Nitrate load will be discharged. The Fawley planning application extends to land adjoining Ashlett Creek WWTW (40% NFDC Nitrate load). All would require Southern Water and land owner cooperation, and where applicable cooperation with NFNPA, but the developers affected also need to achieve Nitrate neutrality. There is also land south of Pennington WWTW owned by HCC which can be explored (20% NFDC Nitrate load).
  - Wetland efficiency and achievability is being investigated further starting with initial land owner soundings (Barker Mill Trust, Fawley Waterside / Cadland Estate). Funding may be available through the LEP Solent Prosperity Fund, provided there is a private sector contribution (bid rounds late September and late November 2019).
  - SUDs and urban drainage: run off from urban areas including open space contributes to Nitrate loads, as well as waste water treatment discharge. Where SUDs are appropriate and can be designed to receive urban and other run off before discharging to drains, there may be some scope to trap Nitrate in on-site mini wetlands or silt traps. Such opportunities will vary by site at planning application stage, but it may be possible to identify and estimate potential Nitrate savings given site specific Nitrate load has been calculated using Local Plan concept masterplans and land budgets.
  - NFNPA Land Advice Service grants: grant funding may be possible to support landowner-led environmental improvement projects e.g. to reduce Nitrate run off from agriculture. Based on experience in the Avon catchment, Natural England are unlikely to agree that such measures would create permanent / in perpetuity changes to Nitrate levels, but they may generate early headroom whilst longer term solutions are identified. As an established service it also offers a direct connection to local land owners.
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- ENtrade: this is an environmental trading platform run by Wessex Water but open for use in other areas. Land owners or other relevant parties can submit bid proposals to deliver defined objectives such as Nitrate reduction. A District-wide or PfSH-wide bid round could be considered. This approach is also best considered as creating temporary headroom.
- Water efficiency measures in existing Council housing stock; As the wastewater treatment works operate on a permissible amount of nitrogen per litre of water, reducing the number of litres discharged from the works also reduces the amount of nitrogen going into the Solent. Installing water efficiency measures in existing housing stock, such as Council owned housing stock, could provide enough reductions in water use to offset some new development. Developer contributions could be used to fund the provision and installation of water efficiency kits. This could also benefit our tenants.
- Review of use and quality of fertilizers on NFDC/Town and Parish Council land; for Parks, open space, playing pitches and green space in our control, specialist advice may provide more informed analysis over the use and quantity of fertilizer applied. Managing fertilizer use to reduce nitrate leeching would however need to be balanced in its consideration to ensure continuation of the quality of open space and the impact on grass playing surfaces.
- Measures to provide additional water efficiency measures throughout residential accommodation in the District: this would look at retro fitting measures and partnership arrangements with for example Water companies to further promote water efficiency for all residents in the District.
- Role of current open space and SANG provision; to review all current land held by the Council for open space purposes to assess whether it could play a role in nitrate mitigation.

3.35 Further discussions are required with third parties to advance many of these options. Early work suggests that a combination of measures would be enough to provide a solution for housing development going forward. This information would be developed in a Definitive Nitrate Mitigation Solution that would confirm the level of mitigation is enough to offset the scale of development, both for several current planning applications and the Local Plan. As the Definitive Solution is being worked up, the Council would be able to issue permissions with Grampian style conditions, subject to agreement with applicants, which would prevent occupation of the dwellings until such a time as the Council can be satisfied that enough mitigation is secured to be able to conclude that there would be no adverse effect on the European sites. For those developments that will depend upon the Council's mitigation solution, there will be a financial charge to the developer

secured through a legal agreement or similar.

- 3.36 However, it is important to note that each case will be dealt with on its merits and different mitigation may be proposed or secured depending on the circumstances. For example, if the development can provide enough mitigation on or off-site to demonstrate nitrate neutrality, the planning application can be determined on that basis and Grampian style conditions need not apply. The Council may be able to conclude no adverse effect on integrity of designated sites in a number of ways.
- 3.37 The analysis that officers have undertaken suggests that there would be ample headroom for all NFDC planned development if current Nitrate permit levels for the Solent area Waste Water Treatment Works in the District were tightened to current best affordable technology. Whilst the prospects of securing such investment appear limited in the short to medium term before the next water industry Price Review (2024) and associated 2025-2030 investment plans, it is possible that the currently elevated profile of this issue with Government might unlock other funding opportunities to achieve investment sooner, and that on a cost neutral basis that the water industry might support them.

### **Agreeing the solution with Natural England**

- 3.38 Natural England has supported similar approaches with other local planning authorities. A meeting has been arranged with Natural England to agree this approach. If Natural England do not agree, a further report will be brought back to Cabinet.
- 3.39 In practice, this means that when consulted on the Appropriate Assessment for a planning application, Natural England would raise the issue of water quality and the need for nitrate neutrality on developments and note that mitigation is not secured at the present time but will be secured via a Grampian condition. They would therefore not object to the granting of planning permission. Before discharging that condition, the Council would re-consult Natural England on a revised Appropriate Assessment demonstrating how the proposed mitigation would be secured to ensure no adverse effect on the European sites.

### **Practical Arrangements**

- 3.40 Several practical arrangements will need to be put in place to manage current applications, pre-application enquiries and appeals and communicate to current and potential applicants.
- 3.41 For information it is proposed that the wording of the Grampian condition should be:-
- 'The development hereby permitted shall not be occupied until: a) A water efficiency calculation in accordance with the Government's National Calculation

Methodology for assessing water efficiency in new dwellings has been undertaken which demonstrates that no more than 110 litres of water per person per day shall be consumed within the development, and this calculation has been submitted to, and approved in writing by, the Local Planning Authority; b) A mitigation package addressing the additional nutrient input arising from the development has been submitted to, and approved in writing by, the Local Planning Authority; and c) All measures forming part of that mitigation package have been provided to the Local Planning Authority.'

Reason: There is existing evidence of high levels of nitrogen and phosphorus in the water environment with evidence of eutrophication at some European designated nature conservation sites in the Solent catchment. The PUSH Integrated Water Management Strategy has identified that there is uncertainty as to whether new housing development can be accommodated without having a detrimental impact on the designated sites within the Solent. Further detail regarding this can be found in the appropriate assessment that was carried out regarding this planning application. To ensure that the proposal may proceed as sustainable development, there is a duty upon the local planning authority to ensure that enough mitigation for is provided against any impacts which might arise upon the designated sites. In coming to this decision, the Council have had regard to Regulation 63 of the Conservation of Habitats and Species Regulations 2017, Policy 10 of the Local Plan Review 2016-2036

#### **4. FINANCIAL IMPLICATIONS**

- 4.1 This report sets out a suite of mitigation measures in conjunction with a Grampian condition which officers consider will allow the LPA to conclude in any appropriate assessment that a development will not cause an adverse effect on the integrity of the relevant designated site allowing planning permissions to be granted. Each application must be treated on its merits and determined in accordance with section 38(6) of the Planning and Compulsory Purchase Act 2004. Any mitigation measure identified for an application will need to be considered as part of the appropriate assessment for that application.
- 4.2 The cost of the proposal will be at no overall cost to the Council in the medium term, however there may be some upfront costs with the planning and finance team working together to agree funding options. Any additional budgetary pressure will be reported back to the Cabinet.

- 4.3 For those developments that will utilise the Council's nitrogen mitigation solution, financial contributions will be required from the developers which will cover the upfront costs borne by the Council. It may be that the costs and income span more than one financial year, but this will be monitored closely to make sure the money is received correctly.

## **5 CRIME & DISORDER, ENVIRONMENTAL IMPLICATIONS**

- 5.1 The Environmental implications are set out in the report. There are no Crime & Disorder implications.

## **6. EQUALITY & DIVERSITY IMPLICATIONS**

- 6.1 The recommendations of this report have no impact on the protected equalities groups.

## **7. PORTFOLIO HOLDER COMMENTS**

- 7.1 The portfolio holder supports the recommendations as a pragmatic way forward to ensure the delivery of the required housing development while ensuring legal compliance and the protection of the environment.

### **For further information contact:**

Claire Upton-Brown  
Chief Planning Officer  
023 8028 5588  
[Claire.upton-brown@nfdc.gov.uk](mailto:Claire.upton-brown@nfdc.gov.uk)

### **Background Papers**

Environment Agency Technical Guidance Note Solent and South Downs

Natural England Advice on Achieving Nutrient Neutrality for New Development in the Solent Region

Notice of Ofwat's proposal to impose a penalty on Southern Water Services Limited;  
[www.ofwat.gov.uk/publication/notice-of-ofwats-proposal-to-impose-a-penalty-on-southern-water-services-limited](http://www.ofwat.gov.uk/publication/notice-of-ofwats-proposal-to-impose-a-penalty-on-southern-water-services-limited)

PfSH(June 2018) Integrated Water Management Study prepared by Amec Foster Wheeler Environment & Infrastructure UK Ltd.  
[www.push.gov.uk/wp-content/uploads/2018/07/Item-10-Integrated-Water-Management-Study-Cover-Report.pdf](http://www.push.gov.uk/wp-content/uploads/2018/07/Item-10-Integrated-Water-Management-Study-Cover-Report.pdf)