

REPORT TITLE: NITRATE NEUTRALITY UPDATE

22 JULY 2020

REPORT OF CABINET MEMBER: CLLR JACKIE PORTER, CABINET MEMBER FOR BUILT ENVIRONMENT & WELLBEING

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WARD(S): ALL WARDS

PURPOSE

Cabinet received a report in January 2020 about 'Nitrate Neutrality' (CAB3219) and the issues this was causing in terms of permitting housing developments. The requirements of the Habitats Regulations and recent European case law regarding their interpretation meant that housing development could not be permitted within the catchment of the Solent unless it would avoid an increase in the discharge of nutrients to the Solent. As a result it was not possible at that time for the Council to grant new planning consents across the district, for housing or other development involving overnight stays. Cabinet agreed a 'Position Statement' on the issue and asked for an update in 6 months time, which is the purpose of this report.

Since the Position Statement was agreed the Council has been granting planning consents, where appropriate, subject to a 'Grampian' condition. This limits occupancy of the dwelling/overnight accommodation until it is demonstrated that the development will either not result in a nitrates increase, or will mitigate it. This report sets out the scale of development affected and updates other matters relating to the nitrates issue, including initiatives to enable development to proceed.

It is recommended that Cabinet supports the proposal to start collecting off-site financial contributions towards mitigation solutions which will be delivered either by the City Council or in partnership with another agency.

It is also recommended that Cabinet confirms its support for proposals by the Partnership for South Hampshire for a strategic mitigation scheme and project officer.

RECOMMENDATIONS:

1. That the current position in relation to nitrates is noted and that Cabinet agree to the proposal to collect off-site financial contributions (by S106 obligation) towards mitigation solutions which will be delivered either by the City Council or in partnership with another agency (to start with immediate effect).
2. That Cabinet confirms its support for proposals by the Partnership for South Hampshire to address nitrates issues (see paragraphs 11.11-11.12).
3. That a further report be brought to Cabinet in twelve months up-dating progress made on the nitrate neutrality issue.
4. That Winchester City Council pursues the issuing of EA permit limits on Southern Water Treatment sites in the district.

IMPLICATIONS:

1 COUNCIL PLAN OUTCOME

- 1.1 This report sets out the position with regard to nitrate neutrality, which raises a number of issues relevant to the new Council Plan. In relation to the aim of 'housing for all', housing development is being delayed by the nitrates issue which is harmful to this objective and to maintaining a 'vibrant local economy'. Measures that could be taken to address the issue may include the creation of habitats and green infrastructure, which could be beneficial in terms of tackling the climate emergency, creating a greener district and living well.

2 FINANCIAL IMPLICATIONS

- 2.1 Some of the measures mentioned in this report may have financial implications if taken forward but it is not possible to properly quantify them at this point. Consideration of the detail of these would be undertaken as part of the process of determining whether to proceed with those measures; for example the acquisition of land by the Council or through the Partnership for South Hampshire to create a nitrate credit scheme which developers could access. In the case of land acquisition for mitigation, or creation of mitigation schemes, the costs would be potentially recoverable from developers through payments for the purchase of nitrates 'credits' which could be managed by way of a S106 legal agreement. It is estimated that 1kg nitrate mitigation will cost the Council in the region of £3,500. Each single dwelling in a development may require around 2.5kg nitrate off-set to ensure the development is nitrate neutral, although this will vary based on the nitrate budget calculated in each case. The contribution would be made by the applicant under a S106 legal agreement to ensure their scheme is nitrate neutral.
- 2.2 The nitrate issue also applies to schemes brought forward by the City Council in its role of delivering new housing as these will be required to demonstrate nitrate neutrality, which could have financial implications for such schemes.

3 LEGAL AND PROCUREMENT IMPLICATIONS

- 3.1 Under the Conservation of Habitats and Species Regulations 2017 ('the Habitat Regulations'), there are significant responsibilities conferred on the Council as a 'competent authority'. Primarily, it requires the Council to only approve plans or projects (such as planning applications or a Local Plan) if there is no likelihood of a significant effect on internationally protected ecological sites.
- 3.2 A significant effect could be caused by a number of potential impacts including direct or indirect habitat loss, air pollution, water pollution, or an increase in recreation. In order to assess whether there is a 'likely significant effect' a Habitats Regulations Assessment (HRA) is carried out. This generally includes an Appropriate Assessment (AA), which is the second more detailed stage 4 of an HRA. Natural England must be consulted on the findings of an

HRA and there is a duty to consider their response. An established principle under law is that appropriate assessments must use the 'precautionary principle'. This means that evidence must demonstrably show that there *would not* be a likely significant effect on the protected sites before planning permission could be granted or a local plan approved. If there is uncertainty or a lack of information, the planning application or plan should be refused. It is also necessary to consider not only the impact of a single plan or project in isolation but where there is any likelihood of a significant effect in combination with other plans and projects.

- 3.3 It is also important to note that this is a legal requirement as opposed to a material planning consideration. Material planning considerations form part of a planning balance and permission can potentially be granted for something which causes harm if the benefits outweigh that harm. This is not the case here and it must be shown that there would not be a likely significant effect in order for the Council to lawfully grant planning permission or approve a local plan. Failure to do this could result in the permission being subject to legal challenge.
- 3.4 The Habitats Regulations transpose two EU Directives: The Habitats Directive and The Birds Directive. As such, the processes and legal requirements effectively cannot be changed at this time. Government has proposed that once the UK exits the EU, the regulations would remain effectively as they are now, so no change in approach is envisaged as a result of Brexit.
- 3.5 The European Court of Justice recently determined a case related to considering water quality in Appropriate Assessments. This is generally referred to as 'The Dutch Case' and the judgement refines the definition of plans and projects and effectively includes significantly more operations within the definition which have an impact on water quality, most notably runoff from agriculture. It is this case in particular which is relevant to the issue of nitrates in the Solent.
- 3.6 There are no immediate procurement implications as a direct result of this report. If land is to be procured it will be subject to seeking separate approval by Cabinet.

4 WORKFORCE IMPLICATIONS

- 4.1 The proposals in this report will be implemented initially within existing staff resources. Identifying appropriate land that could be used for mitigation will impact on a number of teams across the Council and there is potential that additional resources may be required, subject to progress with this matter. The Partnership for South Hampshire is considering the appointment of a project manager to develop a strategic mitigation scheme, which will supplement the work of the council's team.

5 PROPERTY AND ASSET IMPLICATIONS

- 5.1 The Council could make changes to its own housing stock and potentially other assets which would then contribute towards schemes being able to demonstrate nitrate neutrality, including the Council's own development schemes. These options are discussed at section 11 below.

6 CONSULTATION AND COMMUNICATION

- 6.1 Officers have engaged with Natural England as the statutory consultee and with adjoining authorities, both individually and through the Partnership for South Hampshire.
- 6.2 The matter is discussed at the regular Winchester Agents' Forum.

7 ENVIRONMENTAL CONSIDERATIONS

This issue affects the Solent European Sites which are protected as Special Protection Areas. This report looks at potential options for developments in the District to achieve nitrate neutrality and would not therefore itself result in any adverse environmental impact.

8 EQUALITY IMPACT ASSESSEMENT

- 8.1 None

9 DATA PROTECTION IMPACT ASSESSMENT

- 9.1 None required.

10 RISK MANAGEMENT

Risk	Mitigation	Opportunities
<i>Property</i>	N/A	N/A
<i>Community Support</i>	N/A	N/A
<i>Timescales While planning consents are being issued, many developments are still being held up in the absence of a widely available mitigation scheme.</i>	This report refers to various potential measures.	Some mitigation measures may have wider benefits, such as for nature conservation, recreation and health.
<i>Project capacity</i>	N/A	N/A
<i>Financial / VfM Nitrate neutrality issues could increase the cost of Council led schemes and providing mitigation that</i>	Identify appropriate initiatives and resources, including recovering costs from private developers.	Opportunities to retrofit existing Council housing stock and enhance other assets.

<i>private developers could access will have financial implications.</i>		
<i>Legal Risk that applicants will not be able to demonstrate nitrate neutrality or implement appropriate mitigation measures and are therefore unable to fulfil the Grampian condition or Section 106 Agreement obligations. Risk of Council accepting financial contributions with no mitigation scheme available to allow expenditure to ensure mitigation.</i>	Various mitigation measures are being considered but ultimately it is for the applicant to demonstrate nitrate neutrality. This is usually likely to be an off-site solution as it will rarely be feasible for developers to resolve the issue solely by measures incorporated into their schemes	To work pro-actively with other authorities, applicants and agents.
<i>Innovation</i>	N/A	N/A
<i>Reputation Ongoing failure to resolve nitrates issues will impact on housing delivery and could attract criticism from developers, agents and other parties involved in the building industry.</i>	Continue to seek practical solutions.	Work with Natural England and other partners to secure future opportunities for nitrate neutrality.
<i>Other Housing Land Supply/Delivery test – delays to residential schemes may start to impact on the Council's land supply and Housing Delivery Test results, possibly leading to pressure for un-planned development, Government intervention, and fewer new homes available.</i>	Continue to seek practical solutions.	N/A

11 SUPPORTING INFORMATION:

Background

- 11.1 Cabinet received a report in January 2020 about 'Nitrate Neutrality' (CAB3219) and the issues this was causing in terms of permitting housing developments. Section 11 of CAB3219 explains the issue in detail, but

essentially the requirements of the Habitats Regulations and recent European case law regarding their interpretation mean that development cannot be permitted within the catchments of the Solent European Sites unless the Council can be satisfied that it will avoid an increase in the discharge of nutrients to the Solent. Given the catchment area of the Solent, this impacts on development within the whole of Winchester district as well as many other authorities in southern and central Hampshire.

- 11.2 As a result of this issue it was not possible at that time for the Council to grant new planning consents for housing or other development involving overnight stays. Cabinet agreed the recommendations of the report, including the endorsement of a 'Position Statement' on the issue. Cabinet also agreed there should be an update in 6 months time, which is the purpose of this report.

Legal Matters / Natural England and Environment Agency Positions

- 11.3 There have been no changes to the Habitats Regulations or case law around them that affects the local situation since the last report. Natural England updated their advice note on achieving nutrient neutrality in March and June 2020 along with the accompanying nitrogen budget calculator. The advice note continues to take a 'precautionary' approach, stating that housing development across the Solent region has the potential to exacerbate impacts on protected sites and that nutrient neutrality is a means of providing the certainty required to ensure schemes can be delivered in line with the requirements of the Habitats Regulations.
- 11.4 CAB3219 appended a Joint Position Statement by Natural England and the Environment Agency (Appendix D to CAB3219) explaining the apparent inconsistency between the approaches taken by the agencies, whereby NE sought to prevent further nutrient discharges but EA were not reviewing the permits on discharges from wastewater treatment works draining to the Solent. This clarified that the two organisations were implementing different protection regimes and that they considered that there was not a conflict between them.
- 11.5 The agencies have continued to work together to consider whether there is evidence to justify a permit review of treatment works and they agree there are areas of uncertainty that need investigation before a decision on a permit review can be taken. Unfortunately this work has been delayed as staff have been involved with Covid-19 matters. In the mean time, Southern Water has voluntarily started to monitor nitrates at those treatment works that do not currently have permit restrictions for nitrogen. There has also been political interest in this issue, and the matter has been raised with the Government by MPs in the Solent area, but there is seemingly no imminent national solution to this constraint on development so the Council needs to push ahead with potential local solutions.
- 11.6 Pending a national solution the Council will continue to lobby the Environment Agency to review limits at each treatment works.

Planning Applications and Development

- 11.7 At the time of the last report all planning decisions on applications for housing or overnight accommodation were effectively 'on hold'. This meant that in Winchester district some 729 dwellings (including student or visitor scheme bedspaces) were significantly or principally backlogged because of nutrient issues, with 409 of these solely due to nutrients (in the Partnership for South Hampshire area as a whole the equivalent figures were 4,448 / 2,797 – PfSH Joint Committee report February 2020). The Position Statement approved by Cabinet appended a proposed 'European Sites Checklist' for planning applicants to complete. This gave applicants the option of confirming that the development would be nitrogen neutral, or accepting a 'Grampian' condition which would require nitrate avoidance and mitigation measures to be implemented before a development could be occupied. If neither applied permission could not lawfully be granted.
- 11.8 Following adoption of the Position Statement most applicants have either sought to demonstrate that their developments are nutrient neutral or have accepted Grampian conditions. As a result all planning applications are being determined in accordance with the Council's adopted Position Statement, but there are now a large number of schemes that cannot be occupied until nutrient avoidance or mitigation measures can be implemented, as required by the Grampian conditions. At the end of May 2020 these amounted to 362 dwellings and 151 student or visitor bedspaces which would require nitrates mitigation estimated at over 500kg per year. The vast majority of schemes are unable to provide mitigation themselves. A similar estimate has been made for the district's future 'housing trajectory' (2019-2031) which estimates that a further 2,173 dwellings and 148 bedspaces could be affected in the future, requiring over 5,700kg per year of nutrients mitigation.
- 11.9 Some developers are in a position to reduce the nutrient 'budget' of their schemes or to mitigate it. Various methods of doing this are being proposed, most commonly taking agricultural land out of production and/or converting it to wetland, woodland or other uses that reduce nutrient output, either on or off site. Few of these have been implemented yet as issues around the legal agreements required to secure the changes and their ongoing maintenance in perpetuity need to be resolved, and may involve the availability of suitable land, including in other local authority areas. Some landowners are now also coming forward with proposals to change land in their control so as to create 'nutrient credits' that housing developers can buy in order to mitigate their schemes. Again, few of these are operational yet.
- 11.10 Some local authorities are developing their own initiatives, particularly for their council home-building programmes, which include acquiring mitigation land, using land already in their ownership and retrofitting the council housing stock to reduce water consumption. While these initiatives may help some authorities and developers, where they control suitable land, have a relationship with landowners, or can create/purchase credits, this type of

solution may not be available for all applicants, even when up and running, especially smaller housebuilders.

- 11.11 The Partnership for South Hampshire (PfSH) is developing a proposal for a Solent Nutrient Fund which could fund strategic mitigation solutions to address nutrient neutrality which would involve the Council in cross-boundary monitoring and enforcement arrangements with other Councils. It is also considering a temporary project manager post to develop a PfSH-wide environmental strategy and take forward work on a strategic mitigation scheme. These initiatives could provide an effective way forward in developing strategic mitigation solutions and a nutrient fund to bring them forward, with the advantage that credits can be prioritised for schemes which accord with local plan policies and priorities and for developers who may not otherwise be able to implement developments.
- 11.12 At the time of writing, the Chief Executives of the PfSH authorities had given their 'in principle' support to these proposals, subject to the need for further work on the financial details. A report seeking the buy-in of the PfSH authorities to these proposals was considered by the PfSH Joint Committee on 7 July.
- 11.13 WCC Actions
- 11.14 Report CAB3219 referred to a number of actions that were being undertaken or were proposed:
- 11.15 **Position Statement:** The Position Statement was published on the Council's web site once endorsed by Cabinet and has proved useful in setting out the Council's position. Planning applications are no longer being held back, as a Grampian condition is now generally used, although development itself is generally still constrained for the reasons described in para 11.8 above.
- 11.16 **Water Reduction Measures in Council Stock:** such measures could generate nutrient 'credits' for use by the Council for its housing programme, or to sell to developers. Consultants have been appointed to assess the scope for this – see 'Assess the Scope to Use Council Land/Premises' section at paragraph 11.18 below. However, the water saving is only available where the waste water treatment works that are served by properties where the saving takes place has a permit limit. For Winchester, most of the HRA stock is served by works without a limit with only a few exceptions including Bishops Waltham.
- 11.17 **Agricultural Land Decommissioning:** the report suggested working with partners to identify opportunities to decommission land with a view to generating nutrient 'credits'. The PfSH initiatives mentioned above are being developed and the Hampshire and Isle of Wight Wildlife Trust has developed a proposal to acquire agricultural land and manage it for nature conservation so as to generate nutrient credits. The Trust has acquired its first site on the Isle of Wight, although the credits from this are fully subscribed, and are exploring a further site which may be available in the next 2-3 months. This

initiative is similar to the PfSH proposals and there is potential for them to work together.

- 11.18 Several landowners in the District and wider South Hampshire area are coming forward with proposals to decommission agricultural land and convert it to less nutrient-intensive use so as to generate credits. These are also similar to the Wildlife Trust scheme but on an individual private site/owner basis.
- 11.19 **Assess the Scope to Use Council Land/Premises:** CAB2319 suggested commissioning consultants to assess whether Council land or premises could be changed/used so as to generate nutrient credits. Consultants have been commissioned to develop a nutrients budget for the Council's housing programme and to review the scope to generate credits through water savings in the Council's housing stock. This is only applicable to schemes where the relevant wastewater treatments works has a nitrates permit limit, which in this district is only at Bishops Waltham. This initiative therefore has limited potential to generate credits. The potential to manage land in the Council's ownership in a way that could assist, or to acquire additional land to support Council led development, is also being investigated.
- 11.20 In the case of land acquisition for mitigation, provided there is sufficient certainty of delivery, the Council could start collecting off-site financial contributions from developers (by S106 legal agreement) to deliver the mitigation needed for its own development, either independently or as part of a wider Council scheme based on the acquisition and management of suitable land creating 'nutrient credits'. Alternatively the Council could act as an intermediary and purchase credits from a partner which manages such land (such as PfSH or Hampshire and Isle of Wight Wildlife Trust).
- 11.21 It is estimated that 1kg nitrate mitigation will cost in the region of £3,500. Each single dwelling in a development may require around 2.5kg nitrate off-set to ensure the development is nitrate neutral, although this will vary based on the nitrate budget calculated in each case. The Council can pool the contributions to enable delivery of a larger scheme. All fixed contributions would be subject to an indexation clause in any S106 legal agreement.
- 11.22 Cabinet is asked to support the proposal to collect an off-site financial contributions capped at £3,500 per 1kg nitrate mitigation (by S106 obligation) towards mitigation solutions which will be delivered either by the City Council or in partnership with another agency or party. The scheme would start with immediate effect and be secured by S106 obligation. The progress of the scheme should be reviewed in twelve months.

A recent appeal decision regarding a proposed residential development in Fareham was dismissed by the Planning Inspectorate based on lack of certainty regarding nitrate neutrality. Having carefully reviewed that decision, it is considered that the appeal dealt specifically with the merits of the case, which involved a unilateral undertaking which did not provide sufficient certainty on securing nitrate mitigation. This appeal decision is timely, and will

help in ensuring that any S106 obligation completed by the Council is sufficiently robust in its terms to address the issues raised in this appeal.

- 11.23 **Cabinet Member to Pursue Issue with Government:** Appendix B of CAB3219 was a letter from the Cabinet Member for Built Environment and Wellbeing to the Secretary of State for Housing, Communities and Local Government of 18 November 2020. Similar letters were also sent by PfSH and other South Hampshire authorities. Appendix A reproduces a reply from Rebecca Pow MP, Parliamentary Under Secretary of State at DEFRA, welcoming the work being done by PfSH and referring to the Environment Agency and Natural England work on permit reviews and strategic mitigation. There is reference to a funding bid that has been submitted by DEFRA and MHCLG to the Treasury to help with evidence base development and developing a strategic approach, but the result of this bid has apparently been delayed by Covid-19.
- 11.24 It appears that this funding could not be used for mitigation measures or a project manager but there is reference to exploring other funding options. Therefore, there seems little prospect of a 'solution' at national level, at least in the short term, making it important to press on with local initiatives.
- 11.25 A Nitrates briefing on the issue was given to our Winchester MP in March 2020.
- 11.26 **Work with Natural England on Acceptable Measures:** Various planning applicants are putting proposals forward for nutrient avoidance or mitigation schemes, sometimes involving land in another local authority area. As the City Council is the 'competent authority' for its own area in relation to the Habitats Regulations it is important that it can be satisfied that such measures are acceptable, effective, deliverable over the long term, and avoid 'double counting' of land / credits. Applicants or officers consult Natural England (NE) on these matters as proposals are developed or applications made, as NE is the statutory nature conservation advisor and consultee on appropriate assessments.
- 11.27 This advice is very valuable and NE are putting significant resources into providing advice to developers and local authorities across the Solent Area. NE is also working with the Environment Agency on evidence for a review of emissions permits and updates its 'Non-Technical Summary' guidance note and Nitrogen Budget Calculator on a regular basis.
- 11.28 **Other Measures:** Planning permissions are now monitored to establish the 'nutrients budget' of individual applications and the cumulative total. In addition, an estimate has been made of the nutrients budget for the housing trajectory looking forward. These are set out above and involve estimates in some cases because a precise budget cannot be calculated until the details of a scheme are known (existing/proposed land areas, number of units, drainage method, etc). As the new Local Plan is developed a nitrates budget will need to be produced and there is likely to be a need to allocate mitigation land as well as development sites.

- 11.29 The Council is contributing to several studies being undertaken by PfSH or groups of Solent authorities to clarify the scale and impact of the nitrates issue. Consultants have been appointed to update the inputs used by the PfSH Integrated Water Management Study 2018 to calculate the expected scale of nitrates arising from future development. It is expected that this may result in reduced nutrient projections, particularly from some treatment works areas, although there is expected to remain an issue overall. Similarly, a specific piece of work has been commissioned to investigate in more detail the scale and impact of emissions from the Budds Farm treatment works, which serves the south-eastern part of the District.
- 11.30 The Government's Planning Practice Guidance on appropriate assessment is being updated and DEFRA has apparently fed the Solent experience into this work. While this will not change the law or the requirements of the Habitats Regulations, it may be useful.

Conclusion

- 11.31 It is recommended that the various initiatives and areas of work mentioned above are pursued as set out with a view to developing mitigation or avoidance measures that will enable development to continue in accordance with adopted plans.

OTHER OPTIONS CONSIDERED AND REJECTED

- 11.32 The Council could choose not to investigate or take forward the initiatives mentioned above, or not to support the PfSH proposals. This would lead to continued uncertainty over how the nitrates issue will be resolved, and delay to development if applicants cannot demonstrate nitrate neutrality or a deliverable mitigation scheme. This is an unsatisfactory situation for all the reasons explained above, including the longer term implications for housing land supply, the Council's housing programme, and the Housing Delivery Test.

BACKGROUND DOCUMENTS:-

Previous Committee Reports:-

CAB3219 – Nitrate Neutrality, 22 January 2020

Other Background Documents:-

None

APPENDICES:

- A. Reply dated 20 April 2020 from Rebecca Pow MP, Parliamentary Under Secretary of State at DEFRA to Caroline Dinenage MP