

REPORT TITLE: NITRATE NEUTRALITY

22 JANUARY 2020

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

Contact Officer: Julie Pinnock, Service Lead Built Environment

Tel No: 01962 848 439 Email jpinnock@winchester.gov.uk

WARD(S): ALL WARDS (EXCLUDING SOUTH DOWNS NATIONAL PARK)

PURPOSE

In June 2019, Natural England advised that planning permission can only be granted where Local Planning Authorities in the Solent area are satisfied that housing proposals can demonstrate nitrate neutrality. As a consequence, the City Council has been unable to grant planning permission for residential development unless the applicant can demonstrate that their scheme will not contribute to the nitrate problem in the Solent which is a maritime area under special protection from the EU Habitats Directive.

In cases where nitrate neutrality cannot be shown the Council has, by agreement with applicants, tended to hold back from making a decision rather than refusing consent to see if a solution can be found. Nitrogen contained in wastewater generated by housing schemes which is discharged into, or otherwise reaches, the Solent, along with nitrogen from agricultural sources, can lead to “eutrophication” which is a process that causes excessive growth of green algae. This can harm wildlife habitats and bird species.

Recent European case law has indicated that Local Planning Authorities need to have regard to, and meet the requirements of, the Habitat Regulations which give effect to the EU Habitats Directive. In a local context, as the ‘Competent Authority,’ the City Council has to undertake an Appropriate Assessment where development proposals for new residential development and overnight accommodation are proposed because of the potential effects on the Solent maritime environment of increased nitrate levels. Planning permission can only be given therefore if a development can achieve a position where it is nitrate neutral. This can be difficult to deliver and has created a situation in the district, and in the wider Solent area, where it has not been possible for consents to be granted for a range of residential

schemes with an overnight stay.

The Council has therefore prepared a position statement which explains how we propose to deal with applications moving forwards, including pursuing options which can assist developers in demonstrating nitrate neutrality to avoid harm to the Solent European sites which will enable planning permissions to be granted for most housing schemes. Some other authorities in south Hampshire are adopting similar approaches as summarised in Appendix E.

RECOMMENDATIONS:

1. That Cabinet approves the Nitrate Neutrality Position Statement at Appendix A and recognises that the Nitrate Neutrality Position Statement will form a policy basis for the Statutory Planning Authority in considering planning applications for residential development outside the South Downs National Park within the District with immediate effect.
2. That any minor changes to the Nitrate Neutrality Position Statement be delegated to the Service Lead for Built Environment in consultation with the Cabinet Member for Built Environment and Wellbeing.
3. That a report be brought to Cabinet in six months up-dating progress made on the nitrates neutrality issue.

IMPLICATIONS:

1 COUNCIL STRATEGY OUTCOME

- 1.1 This report sets out the position that the Council will take in dealing with planning applications having regard to nitrate neutrality and raises a number of issues relevant to the new Council Plan:
- 1.2 In particular, the position statement aligns with the priorities in the new Plan of Tackling the climate emergency and creating a greener district, vibrant local economy and living well.

2 FINANCIAL IMPLICATIONS

- 2.1 Financial implications will be identified based on the precise combination of possible mitigation measures outlined in this paper. Clearly a number of measures identified in the Position statement will require resources in relation to potential land acquisition or commissioning of more detailed reports for example to enable the full implementation of the actions identified.
- 2.2 It is envisaged that certain costs will be recoverable from developers in the longer term as set out later in this report and position statement.
- 2.3 The nitrate issue applies to schemes brought forward by the City Council itself 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 the 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 as well.

- 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. 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. If the Council chose to grant planning permission contrary to advice on the matter from Natural England, there would be a risk of judicial review.
- 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 though that is not yet UK law. 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. The judgement in this case 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.

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. Further analysis on this will be included in the report back to Cabinet in six months.

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.

6 CONSULTATION AND COMMUNICATION

- 6.1 Officers have engaged with Natural England as the statutory consultee and the matter was discussed at the regular Winchester Agents' Forum on 19th September 2019.

7 ENVIRONMENTAL CONSIDERATIONS

The potential effect to Solent European Sites protected as Special Protection Areas. This report would ensure nitrate neutrality and would not therefore 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

10.1 None at this time.

Risk	Mitigation	Opportunities
<i>Property</i>	N/A	N/A
<i>Community Support</i>	N/A	N/A
<i>Timescales</i> <i>If the position statement is not adopted it will result in the delay in determining planning applications or refusals which will result in lengthy appeals</i>	Planning permission will be given where developments can achieve nitrate neutrality in accordance with position statement.	Cabinet adopt the position statement which will enable applicants to receive a grant of planning permission subject to condition to provide data on nitrate neutrality prior to occupation.
<i>Project capacity</i>	N/A	N/A
<i>Financial / VfM</i> <i>Nitrate neutrality can increase the cost of Council led schemes and providing mitigation that private developers could access will have financial implications.</i>	Identify appropriate resources and look at the possibility of recovering costs from private developers.	Opportunities to retrofit existing Council housing stock and enhance other assets.
<i>Legal</i> <i>Risk that applicants will not be able to demonstrate nitrate neutrality and are therefore unable to fulfil the Grampian condition.</i>	Officers are satisfied that mitigation will be achievable in line with the position statement but will require the applicant to demonstrate nitrate neutrality. This is likely to be an off-site solution.	To work pro-actively with applicants and agents.
<i>Innovation</i>	N/A	N/A
<i>Reputation</i>	Adopt the position	Work with Natural England

<i>Failure to agree the position statement will lead to the refusal or non-determination of residential planning applications with adverse impact on housing delivery which could attract criticism from developers, agents and other parties involved in the building industry.</i>	statement.	and other partners to secure future opportunities for nitrate neutrality.
<i>Other Housing Land Supply/Delivery test – In the longer term refusal or non-determination of residential schemes will adversely impact on the Council’s land supply and could lead to pressure for un-planned development and Government intervention. There will also be fewer new homes available for people to buy in the district.</i>	Adopt the position statement.	N/A

11 SUPPORTING INFORMATION:

11.1 Background

11.2 The Conservation of Habitats and Species Regulations 2017 (as amended), hereafter referred to as the Habitats Regulations, are the UK’s transposition of European Union Directive 92/43/EEC on the ‘Conservation of natural habitats and of wild fauna and flora’ (the Habitats Directive).

11.3 The Habitat Regulations place a duty on the Council as the ‘competent authority’ to only approve plans or projects (such as planning applications or a local plan) if there is no likelihood of any significant effect on any European designated nature conservation site.

11.4 This requires the Council, as local planning authority, to undertake a Habitats Regulations Assessment on relevant planning applications.

11.5 An established principle under law is that appropriate assessments must use the ‘precautionary principle’. An appropriate assessment must enable the local planning authority to apply the regulation 63(5) “integrity test” on a

“precautionary basis”. Authorisation may only be given if the competent authority has made certain there will be no adverse effect on the integrity of the site and where no reasonable scientific doubt remains. Conversely, that means where doubt remains as to the absence of an adverse effect on the integrity of the site linked to the plan or project being considered, the competent authority would have to refuse authorisation. 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 as well.

- 11.6 It would be unlawful to approve a scheme that did not have regard to the Habitat Regulations.
- 11.7 Planning issue
- 11.8 Recently an issue has arisen out of case law, which relates specifically to the impact from development on the natural environment due to a decrease in water quality, particularly from nitrates which causes eutrophication (increased plant growth which reduces the oxygen content in water).
- 11.9 New development necessitates the provision of connections to the foul water drainage network. This could increase nutrient load at the Solent European Sites protected as Special Protection Area (SPA) and Special Area of Conservation (SAC) under European law. There is now a particular focus to ensure that the qualities that contribute to these designations are not harmed from eutrophication.
- 11.10 Increases in nutrients cause this process which is found in effluent, fertilisers used in arable agriculture and faeces from animals. The excessive nutrients within a water body cause increased plant growth and this makes it difficult for aquatic insects or fish to survive, in turn removing a food source from the food cycle.
- 11.11 This has resulted in the Government’s agency, Natural England, advising local planning authorities in the Solent area that new residential development that creates an overnight stay must be nitrogen neutral. However, the Environment Agency, that regulates water discharge into the Solent, has not expressed this view.
- 11.12 Natural England has advised that any development proposed through planning applications providing overnight accommodation which would discharge into the Solent would be likely to cause a significant effect. This is due to the uncertainty as to whether the increase in waste water from new housing in the Solent catchment will have an adverse effect on the Solent’s European Sites.
- 11.13 Natural England recommends that the waste water issue is examined within the appropriate assessment and that the existing nutrient and conservation status of the receiving waters be taken into account. The achievement of

nutrient neutrality, if scientifically and practically effective, is a means of ensuring that development does not add to existing nutrient burdens.

- 11.14 Natural England has prepared a methodology setting out how this can be achieved (June 2019).
- 11.15 In many cases achieving nitrate neutrality for housing schemes is difficult, and this has led to planning applications being effectively 'on hold' as applicants are unable to demonstrate that their developments can meet this requirement.
- 11.16 Some Councils in Hampshire have prepared position statements which sets out an approach which will allow them to grant planning permissions for affected schemes (please see Appendix E).
- 11.17 The Cabinet Member for Built Environment and Wellbeing has written to the Secretary of State for Housing, Communities and Local Government seeking a national solution. The letter outlines the negative impact that this issue is having on housing supply. To date no reply has been received and so the Cabinet Member intends to pursue this with the relevant Government Ministers and will raise again the apparent disparity between Natural England and Environment Agency on this issue.
- 11.18 The NFU South East published a paper in October 2019 sets out similar concerns about the disparity between the two statutory agencies. The paper sets out the issues to nitrate neutrality and the NFU's position on nitrate neutrality options. They highlight concerns about taking productive agricultural land out of farming production, which they say may not be sustainable, due to limited land availability, time delays and strategic concerns as to whether farmland should be taken out of production in this manner.
- 11.19 The NFU'S favours changes to established farming practices on agricultural land to reduce nutrient losses such as the creation of wetlands alongside the use of covering cropping, catch cropping, nutrient budgeting and precision applications.
- 11.20 The Council is required to maintain at least a 5-year supply of available and suitable housing sites to meet its Local Plan / Government 'standard methodology' housing target. The Council monitors this through its Authority Monitoring Report (AMR) and has been successful in maintaining an adequate land supply in recent years and demonstrating this through the Local Plan and planning appeal processes. It is also subject to the 'Housing Delivery Test' which measures performance in the last 3 years against targets, and has 'passed' this test so far.
- 11.21 However, with various planning applications now 'on-hold' due to the nitrates issue there is an impact on whether a site can be treated as 'deliverable' within a 5-year period. Officers' current interpretation of the nitrates issue is that sites with pre-existing planning consent (full or outline) are 'commitments' and are not being held back, but any other sites would have to show nitrate neutrality. This includes any Local Plan allocations not already permitted,

windfall sites and sites that are identified within the SHELAA. Government advice would only allow these types of sites to be included as available supply if there is clear evidence that they will be developed within 5 years and this is not possible to show given that applications are currently on hold. In assessing the 5-year land supply position in the 2019 AMR it has therefore been necessary to discount (completely or in part) these types of sites.

- 11.22 The Council is able to demonstrate an adequate land supply in the AMR. It has been assumed that the nitrates issue can be solved in the short term, enabling some 'un-committed' sites to be developed towards the end of the 5-year period. If the nitrates issue cannot be addressed it will not be possible to uphold this assumption and there will be an increasing impact on 5-year land supply. As the Housing Delivery Test is 'backward-looking' it may take longer for a significant impact to be felt here, but this will also start to suffer if the issue is not resolved promptly.
- 11.23 Position statement
- 11.24 The attached position statement at Appendix A sets out the issues as well as the relevant legislation and case law providing detailed context to the Habitat Regulations and the statutory duty placed on the Council.
- 11.25 The position statement sets out the approach Natural England expect in the submission of any planning application, which includes the submission of a nitrate budget.
- 11.26 Whilst complex it will set out the issues for planning applicants and their agents clarifying the approach the Council expects applicants to take in dealing with nitrate neutrality.
- 11.27 The position statement would allow the Council to grant planning permission subject to the imposition of a Grampian planning condition. Applicants will be able to secure planning permission and commence development, but it would prevent occupation prior to the required mitigation being provided. Depending on the form of mitigation to be delivered the applicant and any relevant land owners may need to enter into planning obligations to make sure the nitrate neutrality measures required to make the scheme acceptable are secured in perpetuity.
- 11.28 The position statement sets out two key options to enable nitrate neutrality to be achieved; the first is that the Council intends develop its own avoidance and mitigation package. This will require further technical study and feasibility work to develop a strategy. Such measures could include:
- Achieving water efficiency standards of at least 105 cubic litres of water per day. Policy CP11 of the Winchester District Local Plan Part 1 requires development to achieve the equivalent of the former Code for Sustainable Homes level 4 for water
 - On-site open space appropriately managed in a low nitrogen manner;

- Create new wetland environments in SUDS systems that act as nitrogen sink and remove nitrogen from surface water;
- Exploring a Strategy with Hampshire Wildlife Trust.
- Any other off-site mitigation measure that leads to a permanent net reduction in nitrates

- 11.29 The other option, which is gathering momentum, is a market led solution, which involves the applicant seeking out land owners willing to take out of use productive agricultural land, which would enable the applicant to demonstrate nitrate neutrality by effectively off-setting the nitrate load of their scheme against the reduction of nitrates from the decommissioning of farm land. This would require a section 106 legal agreement between all the parties to secure the long term mitigation. The concerns raised by the NFU are noted in this approach.
- 11.30 This position statement sets out the mechanism through which applicants may be able to achieve planning permission whilst protecting the Solent's European sites from the significant effect that would otherwise arise through development.
- 11.31 In order to support the implementation of the position statement we also intend to pursue the following actions:
- Review the scope for additional water use reduction measures in Council housing stock with a view to identifying potential nitrate credits for Council and other development.
 - Work with partners to identify opportunities for the Council to secure agricultural land de-commissioning.
 - Commission consultancy support to assess the scope for existing Council land and premises to contribute to enabling development to achieve nitrate neutrality and to establish whether the nitrate issues effects development across the whole district.
 - Cabinet Member for Built Environment & Wellbeing to pursue the issue with the relevant Government ministers.
 - Continue to work with Natural England to establish acceptable measures to contribute to net nitrate neutral development.
- 11.32 This statement has been prepared based on the most up to date information, including the joint statement prepared by Natural England and the Environment Agency (18th November 2019) which will ensure a review of existing permits.
- 11.33 Natural England has been consulted and is reviewing the document at the time of preparing this report and their comments will be reported to Cabinet at the meeting.
- 11.34 Conclusion

- 11.35 It is recommended that the position statement is adopted. This will enable the Council to offer options to applicants/agents whilst they prepare nitrate budgets to mitigate the potential off-site effects of their development, so that they are able to secure a planning permission.
- 11.36 The use of a Grampian condition will give applicants choice and time in preparing nitrate budgets to secure nitrate neutrality and to avoid their applications being refused or undetermined.
- 11.37 OTHER OPTIONS CONSIDERED AND REJECTED
- 11.38 The Council could choose not to have a position statement on nitrate neutrality. This would lead to uncertainty and would result in the refusal of applications where the applicant cannot demonstrate nitrate neutrality which would be in contravention of the Habitat Regulations or proposals remaining un-determined. This is an unsatisfactory situation for all the reasons explained above.
- 11.39 It is likely many applicants would appeal such a decision and a government appointed appeal inspectors would make the final decisions. It would be for the Council (rather than Natural England or the Environment Agency) to defend these decisions. This could generate a significant workload for the planning team. Appeal decisions in other authorities where this matter has been addressed have been dismissed.

BACKGROUND DOCUMENTS:-

Previous Committee Reports:-

None

Other Background Documents:-

None

APPENDICES:

- A. Draft position statement – Nitrate Neutrality
- B. Letter to Rt Hon Robert Jenrick MP – Secretary of State MHCLG 18th November 2019
- C. Natural England – Advice to Local Planning Authorities 2nd June 2019
- D. Joint position statement – Natural England and Environment Agency 18th November 2019
- E. Summary of approaches by some other Hampshire authorities.