

FAREHAM

BOROUGH COUNCIL

Report to the Executive for Decision 02 September 2019

Portfolio:	Planning and Development
Subject:	Interim Nitrogen Mitigation Solution
Report of:	Director of Planning and Regeneration
Corporate Priorities:	Protect and Enhance the Environment

Purpose:

To consider the Interim Nitrate Mitigation Solution for Fareham Borough Council.

Executive summary:

This report details the present situation in the Planning Service in relation to advice from Natural England, the statutory advisor on protected sites, that developments in the Borough must be nitrogen neutral in order to mitigate a likely significant effect on internationally important protected sites in the Solent. As a result, planning permissions have been curtailed for a number of months. The report details a package of measures which together form an interim mitigation solution which would move the Council towards a position of issuing planning permissions.

Recommendation:

It is recommended that the Executive:

- (a) approves the approach to mitigation as set out in paragraph 16 of the report; and;
- (b) notes that the Planning Committee will be advised of the mitigation approach agreed by the Executive, as a material planning consideration in their determination of planning applications.

Reason:

To ensure sufficient options for mitigation to address any adverse effect of wastewater upon European Sites from new residential and overnight accommodation.

Cost of proposals:

The cost of the proposal will be at no overall cost to the Council in the medium term, however there may be some up-front costs to initiate some of the proposals which can be met from within existing budgets.

Background papers: None

Reference papers: None

FAREHAM

BOROUGH COUNCIL

Executive Briefing Paper

Date:	02 September 2019
Subject:	Interim Nitrogen Mitigation Solution
Briefing by:	Director of Planning and Regeneration
Portfolio:	Planning and Development

INTRODUCTION

1. This report outlines the issue surrounding nitrates in the Solent, the advice from Natural England as statutory advisors on European Sites, and the interim nitrogen mitigation solution. This report seeks Executive approval for the mitigation solution set out in the report, which will be a material consideration in the determination of planning applications.

BACKGROUND

Legal framework

2. 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. 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, it is only if the competent authority can determine no adverse effect on the integrity of the site having regard to any proposed mitigation measures that permission may be granted. 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.
4. 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.

5. 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

6. 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 in order 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'.
7. The Dutch Case also clarified the requirement that mitigation is to be secured at the time of carrying out an Appropriate Assessment in order 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 and Natural England's subsequent advice

8. The Partnership for South Hampshire (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.
9. One of the causes of a deterioration in water quality is new developments creating additional wastewater which is treated at 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%).
10. Based on the existing condition of the Solent water bodies and taking into account the implications of the more recent Dutch case ruling, Natural England's advice to competent authorities is that any new development which would result in an increase in 'overnight' stays¹, should achieve nitrate neutrality in order to not have any likely significant effects. 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.

Calculating nitrate neutrality

¹ This includes all new residential dwellings, Gypsy Traveller accommodation, hotels and other tourist accommodation

11. Natural England have 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 were granted. Natural England suggest that larger sites, particularly those on agricultural land may achieve neutrality by providing a sufficient amount of open space. Achieving neutrality on smaller sites and brownfield developments is likely to require off-site mitigation.
12. As a result, the Council has not been able to issue planning decisions for a number of planning applications until they can demonstrate neutrality either on-site or via suitable off-site mitigation. At present, Fareham Borough Council has in excess of 50 undetermined planning applications (excluding Welborne) for new residential development under formal consideration. In total these applications propose over 3,000 dwellings. An Appropriate Assessment will need to be carried out on all applications that the Council decide to permit. Twelve of the planning applications, comprising 916 dwellings, have a resolution to grant planning permission from the Council's Planning Committee, pre-dating Natural England's current advice.
13. In addition, the Local Plan will need to consider the ability of developments coming forward to 2036 to be nitrate neutral through its own Habitats Regulations Assessment. Without certainty on the impact of this development and any required mitigation, Natural England would most likely lodge an objection to the plan.

Proposed approach to mitigation

14. In order to provide mitigation for current planning applications and for the Local Plan, particularly where developments cannot provide on-site mitigation, it is necessary to find a solution that allows the Council to meet its obligations both in terms of housing need and as a competent authority for the Habitats Regulations.
15. 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 Borough. These measures could include a mix of the following:

- a) Management of existing agricultural land

This solution involves altering the management of agricultural land to manage it in a way that involves the use of less nitrogen fertiliser. This result would be less nitrogen entering the European sites. Mitigation land could be publicly or privately owned and would be used to offset development via a legal agreement.

- b) Wetland creation

Wetlands are a good way of stripping nitrogen from water and so by creating wetlands on land adjacent to watercourses or wastewater treatment works, there would be a reduction in the nitrogen entering the European sites. Developer contributions could be secured for the creation and maintenance of such sites.

- c) Water efficiency measures in existing FBC 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 sufficient reductions in water use to offset some new development. Developer contributions could be used to fund the provision and installation of water efficiency kits.

d) Improvements to Peel Common wastewater treatment works

There is a need to understand the possible additional technology that could be employed at wastewater treatment works to strip out the maximum amount of nitrogen from wastewater. Developer contributions could be secured to fund additional measures which are required over and above existing regulatory practices.

e) Additional mitigation land secured through the Regional Habitat Creation Scheme

Through the Eastern Solent Coastal Partnership, there is a need to create additional habitats along the coastline. Additional land could be brought into this scheme, funded by developer contributions to create additional coastal habitats and offset development in the borough.

f) Catchment Sensitive Farming Advisors and advice

Developer contributions could be used to fund a Catchment Sensitive Farming Advice scheme whereby advisors would work with agricultural landowners on ways to minimise nitrogen input to their land.

16. Further discussions are required with third parties to advance many of these options. Early work suggests that a combination of measures would be sufficient 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 sufficient to offset the scale of development, both for a number of 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 conditions, subject to agreement with applicants, which would prevent occupation of the dwellings until such a time as the Council can be satisfied that sufficient 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.
17. 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 sufficient mitigation on or off-site to demonstrate nitrate neutrality, the planning application can be determined on that basis and Grampian conditions need not apply. The Council may be able to conclude no adverse effect on integrity of designated sites in a number of ways.

Agreeing the solution with Natural England

18. Importantly, early discussions with Natural England suggest that this approach would be acceptable. In practice, this means that when consulted on the Appropriate Assessment for a planning application, they 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 so as to ensure no adverse effect on the European sites.

Legal and Financial Implications

19. This report sets out a suite of mitigation measures which officers consider, in conjunction with the Grampian condition, 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 the LPA to grant planning permission. 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 particular mitigation measure identified for a particular application will need to be considered as part of the appropriate assessment for that particular application.
20. 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 to make changes to council owned properties or purchase additional land which can be initially met from within existing budgets.
21. 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.

Other considerations

22. Officers are continuing to work with the Environment Agency to understand their role in relation to regulating permits for the wastewater network and the environmental assessments that they and Southern Water have undertaken. In addition, through PfSH, the Council is responding to OFWAT consultations on appropriate levels of infrastructure investment and environmental mitigation funding within the Southern Water region.
23. PfSH members are working collaboratively on this issue and have an ongoing dialogue with the Ministry for Housing, Communities and Local Government (MHCLG) and the Department for the Environment, Food and Rural Affairs (DEFRA) in finding a solution. The PfSH Joint Committee recently tasked the Water Quality Working Group with reviewing the IWMS with more up to date population figures and occupancy rates. The Joint Committee will receive a further update on the situation in October.
24. In addition to water quality, there is an ongoing study into the potential for increased nitrogen deposition from traffic on European Sites. This air quality study will be important in assisting the Council to understand whether there is a likely significant effect from new development.

Enquiries:

For further information on this report please contact Lee Smith or Gayle Wootton (Ext 4427 or 4328)