

**Title of meeting:** Cabinet

**Date of meeting:** 11 June 2019

**Subject:** Water Quality Issues in the Solent Catchment Area and Planning Decisions

**Report by:** Interim Assistant Director of Planning & Economic Growth

**Wards affected:** All

**Key decision:** No

**Full Council decision:** No

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## **1. Purpose of report**

- 1.1 The purpose of this report is to inform Cabinet of a key issue affecting development in the city. This report outlines the water quality and management issues in the Solent, the consequences of recent legal rulings and the subsequent advice by Natural England (NE).
- 1.2 At the current time this issue is affecting the granting of planning permissions for additional dwellings (or an intensification of dwellings), tourism related development and development likely to generate an overnight stay, unless proposals can demonstrate development is 'nitrate neutral'.

## **2. Recommendations**

- 2.1 Cabinet is recommended to:
- 1. Note the issues covered in this report, in particular the implications for the authority and determination of planning applications;**
  - 2. Endorse the actions and mitigations proposed in section 3.9 to respond to this issue.**

## **3. Background**

- 3.1 The Solent has recognised problems from nitrate enrichment; high levels of nitrogen from housing and agricultural sources in the catchment have caused excessive growth of green algae (a process called eutrophication) which is having a detrimental impact upon protected habitats and bird species. The Partnership for Urban South Hampshire (PUSH) authorities, Natural England and the Environment Agency jointly developed an *Integrated Water Management Strategy (IWMS)* (June 2018) to assess any implications from the region's planned growth on water resources and the quality of the water

environment. The report acknowledged that there are significant uncertainties beyond the year 2020 relating to water quality, quantity, the capacity for accommodating future growth and the impacts on European nature conservation designations. The PUSH Water Quality Working Group (WQWG)<sup>1</sup> was set up find a way forward on these issues and to develop strategic mitigation measures for the sub-region if necessary.

- 3.2 Since the PUSH IWMS was published, changes in case law mean that the water quality problems in the Solent have become an immediate issue for local planning authorities. A Court of Justice of the European Union (CJEU) decision, known as the 'Dutch Case'<sup>2</sup> (in combination with the 'Sweetman' judgement<sup>3</sup>) has implications for areas where the conservation status of a habitat type is already known to be "unfavourable" (as in the case in the Solent) and the authorisation of activities (i.e. new housing) which would add further nitrogen loading to that habitat (through additional sewage output).
- 3.3 The judgement affects the internationally designated sites in the Solent catchment (Special Protections Areas (SPAs), Special Areas of Conservation (SACs), and potential Special Protection Area (pSPA) and Ramsar Sites) and therefore applies to the Local Planning Authorities that fall within this area. Although water quality degradation from nitrates and phosphates largely stems from agricultural practices (with contributions from sewer network overflows, private discharges, industrial discharges and natural sources) such practices often operate within existing consent regimes. There is therefore an argument that the planning system has scope to (and must) address the issue explicitly where new consents for developments could result in additional nitrate outputs.
- 3.3 Following the CJEU ruling, Natural England (NE), the government's adviser for the natural environment, advises that, under the requirements of the Habitat Regulations, the existing uncertainty about the deterioration of the water environment must be appropriately addressed in order for the assessment of a proposal to be legally compliant. They recommend that this is addressed by securing suitable mitigation measures to ensure that proposals achieve 'nitrate neutrality'. It is recognised that it would be difficult for small developments or sites on brownfield land (which form the majority of applications in Portsmouth) to be nitrate neutral.
- 3.4 NE has therefore advised a neighbouring planning authority that 'planning permission[s] should not be granted at this stage'<sup>4</sup> whilst the uncertainty around this issue means that a comprehensive assessment of the impacts of a proposal cannot be satisfactorily carried out and while an interim strategic solution is being developed for the sub-region'. Natural England's advice is that proposals

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<sup>1</sup> Comprised of the PUSH LAs, Natural England, Environment Agency and water companies.

<sup>2</sup> Joined Cases C-293/17 and C-294/17 *Coöperatie Mobilisation for the Environment UA and Others v College van gedeputeerde staten van Limburg and Others* issued on 07 November 2018.

<sup>3</sup> *People Over Wind, Peter Sweetman v Coillte Teoranta* judgement issued in April 2018 by the CJEU. This ruling means that mitigation measures cannot be

<sup>4</sup> Email from Natural England to Havant Borough Council on 09.04.19.

for new employment or leisure uses which do not entail an overnight stay are generally not subject to these concerns.

- 3.5 Officers sought advice from Queen's Counsel on the matter, which confirmed the validity of Natural England's position (as of 05.05.19). As per the legal advice received, and in the absence of any pre-existing mitigation strategy, the City Council has temporarily ceased granting planning consent for additional dwellings (or an intensification of dwellings), tourism related development and development likely to generate an overnight stay at this time. Such applications can still be considered on an individual basis if they are able to demonstrate that the development would be 'nitrate neutral'. It is understood that other Local Authorities within the Solent catchment have also temporarily stopped granting planning consent for development affected by this matter whilst mitigation strategies are being developed.

### **Consequences and Risks for the Council**

- 3.6 There are consequences for the Council (procedural, political, reputational and financial) from the current stop on residential permissions. This includes the following:

- a. Planning applications and permissions in principle: In the short term the Council would be susceptible either to challenges by developers for refusal or for non-determination, or by persons concerned about the environmental implications of a potentially inadequate Appropriate Assessment (under the Habitat Regulations).

This presents significant consequences for residential development where decision notices are imminent.

Certain proposals, approved at Planning Committee, but awaiting legal agreements or other matters prior to the issue of planning permission, may have to return to Committee for determination as the material considerations of the application have now changed.

- b. Prior Approval applications: for additional dwellings and development likely to generate an overnight stay<sup>5</sup>. Development affecting designated habitat sites cannot commence before the developer has received written notice of the approval of the Council, essentially removing any permitted development rights for additional dwellings. Prior approvals are also time sensitive and are usually deemed consented if decisions are not issued within the set time period.
- c. Planning Decision Appeals: The Planning Inspectorate has been notified of the eutrophication issue in statements of case sent to the Inspectorate on

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<sup>5</sup> Under Schedule 2 of the Town and Country Planning (General Permitted Development) Order (England) 2015.

29<sup>th</sup> April 2019 as a key issue to reach a determination on in appeal cases in Portsmouth. The Planning Inspectorate must follow the case law in the same way as the Council. The Council awaits the Inspectors' decisions with great interest as any further appeal to the High Court would set a precedent on the issue and help raise awareness with Government.

- d. Financial losses: Potential loss of planning applications fees, either from dissuading applicants to apply at this time, or from refunds due to non-determination (from 26 weeks or after an agreed extension of time). There could also be reductions in Community Infrastructure Levy (CIL) and New Homes Bonus payments (over £500k in 2018/19), either temporary or permanent which may also impact upon the Council's revenue and capital budgets. Beyond the Council, there could be an impact on the Portsmouth economy, particularly for small and medium sized builders that operate in the area.
- e. Uncertainty for the service: in the interim there may be an impact on the planning service's targets, reputation and morale. This includes impacts on the ability to meet the Government's Housing Delivery Test; if a Local Planning Authority's housing delivery falls below its requirements (under 95%), then the government will introduce sanctions depending on the extent of the shortfall. The Council is also promoting significant regeneration and economic development (including housing-led regeneration) and a key element of this will be the Council (and especially Planning) as being "open for business". The current position does not necessarily reflect such an approach.

- 3.7 However, the current situation does present an opportunity for the Council to further consider how it can minimise the environmental impacts of its processes and decisions, and how possible mitigation options could contribute to the Council's wider climate change aims. In this context, further reports on this matter will be considered by the new Climate Change Board.
- 3.8 An option open to the Council would be to ignore the advice of NE and continue to issue planning consents for residential development. Whilst this may seem an attractive option in light of the negative impacts of abiding by the advice, it is a more complex matter. First, officers have exercised "due diligence" and sought Queen's Counsel's advice on this matter. Second, making such a decision will open the council to legal challenge by way of Judicial Review. This will have reputational and financial issues, and which will potentially be exacerbated by having our own legal advice on this matter that clearly sets out the respected status to be accorded to statutory consultees in their specialist areas.

### **Actions and Mitigation Options**

- 3.9 The Council, together with partner authorities and agencies, are actively exploring a number of both direct and in-direct mitigation options that will help to

both improve water quality in the Solent and enable development to resume in the city expediently. It is clear that a combination of management measures at the catchment level are needed to address the main sources of the problem. A mix of short and long term options are being considered.

- 3.10 The Council's work will be supplemented by:
- an interim strategic solution for the sub-region to be developed via the PUSH Water Quality Working Group that will ensure the uncertainty for the water environment can be fully addressed by all applications; and
  - a review of the IWMS which will assess the sensitivity of the whole catchment, consider the impacts of nutrients from both housing and agricultural sources and comprehensively assess existing uncertainties.
- 3.11 Immediate actions being progressed are as follows:
- a) Portsmouth and the PUSH authorities to lobby central government on the approach to the matter. There appears to be disconnect between government agencies on their advice to Local Authorities, including a clear conflict between the approach to the water quality issue and the pressure to meet the government's housing delivery targets. We will be urging Government to examine the sources of the nitrates problem, including its own environmental permitting regimes and insufficient wastewater treatment practices by statutory undertakers, rather than solely focusing on the planning system/ development industry to present solutions.
  - b) PUSH authorities have agreed to explore a strategic solution to the nitrates problem that can be used as mitigation by all authorities.
  - c) Officers are identifying and exploring with Natural England and other relevant parties short term measures which could enable planning consents to resume in the short term while a more comprehensive and strategic solution is determined.
  - d) Officers are arranging to meet with Southern Water to explore any existing capacity for improvements in the operation of the existing waste water treatment infrastructure and the scope, timescales and mechanisms to improve the existing treatment.
- 3.12 As noted in para. 3.6, whilst the current risks and uncertainties raise significant issues for the Council and other parties, the new legal position, and advice from Natural England, does provide added impetus to dealing with the long-term issue of nitrates in the Solent, with longer term environmental and ecological benefits. Therefore, when progressing the options for mitigating this issue, officers will be considering the potential for all mechanisms to have additional benefits for the city, including any contribution it can make towards the city's response to the climate emergency declared at Council in March 2019.
- 3.13 Positive outcomes in addressing this issue will be reported to Members as soon as possible. .

#### **4. Equality impact assessment**

- 4.1 An equality impact assessment is not required as the recommendations do not have a disproportionately negative impact on any of the specific protected characteristics as described in the Equality Act 2010 for the following reasons:
- This report updates members on issues affecting all types of residential and tourism related development, rather than the needs of specific groups.
  - The report recommends that this information is noted and does not seek a decision on the topic at this time.
  - Any supplementary planning documents to be developed on this topic will be subject to an Equality Impact Assessment if required.

**5. Legal implications**

- 5.1 These are embedded in the main body of the report.

**6. Director of Finance's comments**

- 6.1 Financial implications for the Council are outline in section 3. The finance implications of any proposed mitigation measures will be reported back to Cabinet in subsequent reports.

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Signed by:

**Appendices:** None.

**Background list of documents: Section 100D of the Local Government Act 1972**

The following documents disclose facts or matters, which have been relied upon to a material extent by the author in preparing this report:

Title of document	Location
PUSH (June 2018) <i>Integrated Water Management Study</i> prepared by Amec Foster Wheeler Environment & Infrastructure UK Ltd	Summary report to PUSH available from: <a href="https://www.push.gov.uk/wp-content/uploads/2018/07/Item-10-Integrated-Water-Management-Study-Cover-Report.pdf">https://www.push.gov.uk/wp-content/uploads/2018/07/Item-10-Integrated-Water-Management-Study-Cover-Report.pdf</a>

The recommendation(s) set out above were approved/ approved as amended/ deferred/ rejected by ..... on .....

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Signed by: