

Title of meeting:	Cabinet
Date of meeting:	8 th February 2022
Subject:	Nitrate Mitigation - Updated Nutrient Neutral Mitigation Strategy for New Dwellings
Report by:	Ian Maguire, Assistant Director for Planning and Economic Growth, Regeneration
Wards affected:	All
Key decision:	Yes
Full Council decision:	No

1. Purpose of report

- 1.1 The purpose of this report is to seek approval from Cabinet Members on the proposed nitrogen mitigation scheme in partnership with the *Hampshire and Isle of Wight Wildlife Trust* (HIOWWT) to help enable minor third party and PCC housing development to come forward. There will be an upfront cost to Council intended to be recovered through developer contributions. The arrangements for the new mitigation scheme will require an update to Council's *Interim Nutrient Neutral Mitigation Strategy for New Dwellings* (Nov 2019), alongside other minor changes, for which this report seeks approval.
- 1.2 Additionally, the report gives an update on the progress made with the Partnership for South Hampshire (PfSH) to develop wider strategic solution for the sub-region and the emerging 'nitrate trading' platform to be delivered jointly by the Department of Environmental, Food and Rural Affairs (DEFRA) and the Ministry of Housing, Communities and Local Government (MHCLG).

2. Recommendations

Cabinet is recommend to:

- 2.1 To approve the decision to enter into a proposed agreement with the *Hampshire and Isle of Wight Wildlife Trust* to provide nitrogen offsetting mitigation for minor third party and PCC development at up front expenditure of £3.75m.
- 2.2 To note the details of the updates and approve the *Updated Interim Nutrient Neutral Mitigation Strategy* as guidance for applicants (See Appendix 1).
- 2.3 To note the progress of the work of Partnership for South Hampshire (PfSH) and government bodies on a wider strategic solution to the nitrate pollution issue affecting house building in the Solent catchment.



- 2.4 To delegate authority to the Assistant Director of Planning and Economic Growth to make any necessary minor amendments to *the Updated Interim Nutrient Neutral Mitigation Strategy* following the finalisation of the agreement with the *Hampshire and Isle of Wight Wildlife Trust*, in consultation with the Cabinet Member for Planning Policy and City Development (if required).

3. Background

- 3.1 The water environment within the Solent region is one of the most important for wildlife in the United Kingdom. It is recognised that high levels of nitrogen draining from the Solent catchment area have caused excessive growth of green algae (a process called eutrophication) which is having a detrimental impact upon protected habitats and bird species.
- 3.2 Following changes in European Case law, Natural England (the Government's advisor for the natural environment) began advising local planning authorities in the Solent catchment in 2019 that all new development involving, or generating additional, overnight stays should be 'nutrient neutral' to ensure it does not add to the existing nutrient burdens. Impacts on water quality from additional wastewater generated by new development must therefore be subject to an Appropriate Assessment¹ (under the Habitat Regulations) to conclude that there are no adverse effects on European protected habitats / sites and for the Council's decisions to be legally compliant.
- 3.3 With the need for a solution to address the temporary 'hold' that this advice placed on the granting of relevant planning permissions in Portsmouth in 2019, Cabinet approved the an *Interim Nutrient Neutral Mitigation Strategy for New Dwellings* in November 2019 which detailed three possible routes for proposals to achieve nutrient neutrality, agreed in principle with Natural England. Relevant permissions have since been granted and implemented in Portsmouth in accordance with this Strategy without legal challenge.
- 3.4 The Strategy to date has mostly relied on the use of 'mitigation credit', largely accumulated from water efficiency upgrades to the Council's housing stock, ensuring there is no net increase in nitrogen output from the city. This Council 'business as usual' generated source of mitigation was only envisioned to be able to provide 'credit' for a limited time (potentially 2-3 years), subject to monitoring of both the water efficiency upgrade works and demand for/ uptake of the accumulated 'credit bank' by the development industry. The projected capacity of this source is diminishing as the Council's programme of upgrades continue, though the actual accrual of water savings was limited in 2020/21 by Covid-19 pandemic restrictions limiting works to essential only.

¹An assessment required by the Habitats Directive (transposed by the Conservation of Habitats and Species Regulations 2017 (as amended)) to determine whether a plan or project is likely to have a significant impact on a Special Protection Areas (SPA) and Special Area of Conservations (SACs) which are collective known as the Natura 2000 network sites



3.5 Following Case Officer discussions with applicants and further revision of the Council's projected five-year land supply, it is considered that mitigation provision provided by the water efficiency upgrades will not be able to continue to provide for the anticipated scale of housing development that is expected to seek planning permission within the next 3-5 years. To continue to support the delivery of housing development in the city, an additional, legally compliant mean of securing nitrogen mitigation is required in order to provide sufficient certainty² for the grant of planning permission that suitable mitigation would be in place before the occupation of development.

3.6 PCC Officers have continued to engage with colleagues in other affected Local Authorities in the Solent through the PfSH Water Quality Working Group and sub group led by work with the PfSH Strategic Environmental Planning Officer who was appointed to co-ordinate work on this issue full-time.

Hampshire and Isle of Wight Wildlife Trust Scheme

3.7 The Hampshire and Isle of Wight Wildlife Trust (HIOWWT) has developed a 'nature-based solution' to provide nitrogen mitigation. The scheme works by acquiring intensively managed farmland that currently release high levels of nutrients (nitrogen) into the Solent and changing the way it is managed (i.e. grazed less intensively or left to 'rewild') to produce a much lower nitrogen output. The difference in nitrogen output will be used to offset the impact of new developments. There is also the potential for wider environmental benefits through biodiversity net gains. Natural England has approved the compliance of the Trust's scheme in principle with the requirements of the Habitat Regulations.

3.8 The Trust are acquiring a lease on the Nunwell Estate on the Isle of Wight, which is suitably located to provide mitigation for the East Hampshire catchment, including Portsmouth. PCC has had informal discussions with the Trust to reserve around 3,000kg of nitrogen mitigation credit for the anticipated development needs arising for the next three to five years. This would include the direct purchase by PCC of 750kg to 1,500kg³ of mitigation credit to help enable the delivery of minor third party and PCC development. The remaining 1500kg of credit would be provisionally reserved for major development proposals in Portsmouth, for which the applicant would be directed to HIOWWT to secure.

3.9 A purchase contract for minor/ PCC development mitigation credit has been agreed in principle by all parties at the Officer level. This is to be accompanied by legal agreement(s) to secure the enforceability of the scheme between Portsmouth City Council as the Local Planning Authority (LPA) for the proposed development, the Isle of Wight Council as the LPA for the mitigation land and the leaseholder (HIOWWT) / freehold owner. A separate legal agreement (as

² For the Appropriate Assessment of development under the Habitat Regulations and for the granting of planning permissions with appropriate conditions.

³ 1500kg is approximately equivalent to 1,875 units if based on a residential (C3) dwellings at an assumed 2.4 occupancy at 110 litres per person per day.

signed by other south Hampshire authorities) would secure similar arrangements for the applicants of major schemes who are purchasing mitigation credit directly from the HIOWWT.

- 3.10 The Council would still be able to utilise the remaining PCC mitigation credit being generated under the current Strategy to help enable development as appropriate on a case by case basis. Equally, applicants would still have the option to secure alternative mitigation solutions, in agreement with the Council and Natural England, as per the existing Strategy. All mitigation proposals will continue to be assessed on a case by case basis.

Costs and Cost Recovery (Developer Contributions)

- 3.11 It is proposed that the Council would purchase credits directly from the HIOWWT in three to six tranches, with an annual minimum of two tranches of 250kg credits per year (i.e. an annual minimum of 500kg Nitrate Credits). Each batch of 250kg credits would require an upfront cost to the Council of £625,000.
- 3.12 The use of mitigation credit (kgs) would be subject to cost recovery from the applicant (including PCC where PCC is the applicant). The indicative costs of the mitigation scheme, at a rate of £2,500 per kg, are indicated in Table 1 based on the current Natural England methodology calculations (version 5, 2020). PCC, though the direct bulk purchase of credit from the Trust, would absorb the associated legal and admin fees that would otherwise add to the cost of minor development (local small and medium sized house builders) per dwelling, thus helping to enable housebuilding in the city.

Table 1: Indicative Mitigation Costs (based on a C3 dwelling at an assumed 2.4 occupancy at 110 litres per person per day on brownfield land):

Number of net new dwellings	Average number of credits (kgs) required per unit	Indicative Cost
1	0.8	£2,000
2	1.6	£4,000
3	2.3	£5,750
4	3.1	£7,750
5	3.9	£9,750
6	4.7	£11,750
7	5.4	£13,500
8	6.2	£15,500
9	7.0	£17,500

- 3.13 As under the existing Interim Strategy, planning permission, with relevant conditions, would not be granted until the mitigation credit (or alternative solution) has been secured through a legal agreement.



- 3.14 Offsetting 'Credits' (kgs) purchased from this scheme would be added to the existing PCC 'credit bank' and subject to on-going monitoring of the uptake and trajectory, as outlined in Section 3 of the Updated Interim Nutrient Neutral Mitigation Strategy.

Risk Management

- 3.15 The approach to nitrate mitigation and supporting local house building is supported by the 27th July 2021 PfSH Joint Committee decision to endorse all of the PfSH Strategic Environmental Planning Officer's recommendations for a sub-regional joint approach to nitrate mitigation. This included a recommendation that local planning authorities consider the purchase of nitrogen mitigation credits from mitigation suppliers specifically to meet the needs of minor development based on an individual authority's assessment of need, and that a standard suite of template legal agreements is used across the sub region to reduce the legal costs to developers and to make the determination of application process more efficient. Moving toward a more consistent approach across the sub region will help provide certainty for applicants.

Cost recovery potential and impact on scheme viability

- 3.16 The HLOWWT solution, at £2,500 per kg/N (plus fees) is the most competitive scheme available on the market at this time. Other currently available mitigation schemes within the catchment include The Warnford Estate (£5000 per kg/N) and Eastleigh Borough Council (£4,500 per dwelling plus admin costs). Given the limits of the east Hampshire catchment area and the comparatively higher cost of land on the mainland, the options for schemes more competitive than the current HLOWWT option are likely to be limited. The Government has previously announced its intention to invest £3.9 million to establish an online 'nitrate trading' auction platform, to be delivered jointly with Department of Environment, Food and Rural Affairs (Defra), Natural England and the Environment Agency, where developers will be able to buy mitigation credits direct from landowners looking to change their land management for this propose, which would potentially bring a greater range of options on to the market. However, the trading platform is expected to be trialled in the Test and Itchen river catchment in summer 2022, which would indicate that a full roll out of the scheme is unlikely to be imminent.
- 3.17 The potential cost of such habitat mitigation requirements on the deliverability of development were included in the draft *Viability Assessment* of the new Local Plan (December 2020); the report suggests that development in Portsmouth should be capable of providing up to £5,000 per dwelling in s.106 Habitat Regulations mitigation costs (inc. recreation disturbance ('Bird Aware' scheme) and nitrate offsetting) in principle, without affecting the viability of the scheme and delivery of other requirements (such as affordable housing provision). The Viability Assessment does however acknowledge that case by case viability assessments may still be necessary. PCC could still reserve the right to elect to



provide mitigation credit, on a case by case basis, where there are demonstrated viability issues for key/ enabling schemes for regeneration projects or to ensure the costs of mitigation would not prejudice the delivery of Council objectives such as affordable housing provision for instance, at its own discretion.

Potential for regulatory change

- 3.18 In May 2021, the Environment Agency announced their intention to undertake a review of the current scope and level of Wastewater Treatment Works (WwTW) Nitrogen permits in the Solent area (Solent focused review of consents). PCC are working with the other PfSH authorities and the Environment Agency on timescales and the scope of this review. A review of the Budds Farm WwTW permit could potentially lessen or negate the number of credits required under the current NE methodology, but this is likely to take a couple of years to complete.
- 3.19 The *Environment Act 2021*, given royal ascent in November, seeks to improve air and water quality, tackle waste, increase recycling rates and protect biodiversity. In terms of water quality, the Act will deliver: effective collaboration between water companies through statutory water management plans; a statutory duty on drainage and sewerage management planning; and modernisation of the process for modifying water and sewerage company licence conditions. The Act is seen as a positive step towards addressing the sources of nitrate pollution. While the Environment Act is now part of UK law, many of its requirements do not commence immediately and will require the preparation and implementation of secondary legislation or regulations to take place.

Potential for alternative solutions

- 3.20 Alternatives solutions proposed for private development to reduce nitrate output, such as ultra-high water efficiency systems, have generally not been deemed to have sufficient certainty *in perpetuity* to meet the legal tests under the Habitat Regulations by Natural England to date, whilst proposals for package treatment plants also raise wider infrastructure concerns and are subject to Environment Agency permitting. Agricultural land management schemes to date have been rolled out across the area with Natural England's in-principle support.

Potential for legal challenge

- 3.21 In May 2021, Fareham Borough Council (FBC) was the first Council in south Hampshire to have its approach to safeguarding the protected environment of the Solent from the effects of nitrates tested in the Courts. Two judicial reviews which challenged the approach of Fareham Borough Council in granting permission for two small housing developments (Greenway Lane and Brook Avenue) under Natural England's Advice on Achieving Nutrient Neutrality for New Development in the Solent Region (5th ed. 2020). The High Court



concluded that the approach taken by Fareham Borough Council to mitigate the effects of nitrates on the Solent was legally sound, though it is expected that Natural England will amend their advice note in respect of when bespoke occupancy assessments are appropriate, as suggested within the judgement. The outcome of these legal challenges supports the on-going use of the Natural England methodology as a means of assessing the need for nitrate mitigation (which allows for agricultural land use management change) and sets a precedent for future legal challenges.

Contingency planning

- 3.22 In the event of any market or legislative changes, such as those outlined above, PCC could allocate any remaining mitigation credit to help enable future PCC schemes⁴ and/ or enact a proposed break notice in the draft purchase agreement after the third tranche of 250kg is purchased (currently due to be early-mid 2023). The inclusion of the break notice reduces the risk to the Council and allows the flexibility to either purchase more credit if still required, transition to sending all applicants direct to the HIOWWT under a PfSH-wide agreement, or cease the scheme.

Updates to the Interim Nutrient Neutral Strategy

- 3.23 The *Interim Nutrient Neutral Strategy* (2019) has been updated to capture any progress in addressing nitrate pollution as a wider strategic issue and amended to reflect the potential new source of mitigation credit within the framework of routes available to applicants. This includes an amended Mitigation Route 3 to include the HIOWWT mitigation scheme and options available for minor and major development.
- 3.24 Further minor amendments may be made ahead of finalising the scheme, following discussion with applicants and following any changes to Natural England's advice.

4. Reasons for recommendations

- 4.1 Cabinet is asked to approve the decision to enter into a proposed agreement with the Hampshire and Isle of Wight Wildlife Trust to provide nitrogen offsetting mitigation for minor and PCC development for a recoverable expenditure of up to £3,750,000 and to note and approve the updates to *Interim Nutrient Neutral Mitigation Strategy* guidance for applicants (see Appendix 1).
- 4.2 A significant increase for PCC's 'mitigation credit bank' is needed to provide adequate certainty for the Appropriate Assessment of all relevant proposals expected to seek planning permission over the next three years. The HIOWWT scheme is currently the most competitive scheme available and endorsed by

⁴ Except any scheme within a Natura 2000 site (the protected Solent harbour environments and their associated habitat) which is prohibited under the terms of the draft purchase agreement in-line with Trust's charitable objectives.

Natural England. The PCC bulk purchase of credit would help to support the small and medium house building industry in Portsmouth and the developer contributions for cost recovery has been found to be viable in principle. Any upcoming legal/ legislative/ market change is expected to take several years to fully implement and a solution to enable the granting of planning permissions for new homes in Portsmouth is required imminently. It is considered that there are sufficient risk management measures in place should wider circumstances change.

- 4.3 The HLOWWT mitigation scheme would therefore help to provide certainty for the local development industry and a legally sound framework to help enable the delivery of new homes in Portsmouth.

5. Integrated impact assessment

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

6. Legal implications

- 6.1 Under the *Conservation of Habitats and Species Regulations 2017* ("the Habitat Regs") the Council cannot grant permission, consent or approval for development where a plan or project is likely to have a significant impact on a Natura 2000 site. PCC's credit bank provides developers with a mitigation option to overcome the impacts of additional wastewater outputs on the water environment of protected habitats in the Solent. It enables developers to achieve 'Nutrient Neutrality' which satisfies the legal requirements under the Habitat Regs.

- 6.2 Land agreements are excluded from the provision of the Public Contracts Regulations 2015.

- 6.3 To note, the Council may not use or allocate any of the agreed number of credits acquired under the proposed agreement as mitigation for any development located with any Natura 2000 sites (this means any land or property that is designated as a Natura 2000 site under the Habitats Directive (Council Directive 92/43/EEC) and the Wild Birds Directive (Directive 2009/147/EC) and/or pursuant to or referenced as being subject to the Conservation of Habitats and Species Regulations 2017 (as amended from time to time) and the European Site Conservation Objectives for Portsmouth Harbour SPA (UK9011051)).

7. Director of Finance's comments

- 7.1 The report asks for approval for the Council to incur expenditure up to £3.75m to purchase the nitrate mitigation offsetting credits. These will be funded by developer contributions as and when they are brought forward.

- 7.2 The amount of developer contribution costs have been calculated to cover the costs to the Council. The mitigation credits are not time bound but it is anticipated that the demand for these credits will be broadly in line with the amount of development that could come forward in the next 3-4 years.
- 7.3 The Council are required to pay £625,000 every 6 months with a break clause at £1.875 should the amount of forecast development not come forward.
- 7.4 The developer charge will apply to all developers of residential development including the Council, therefore we need to model the cost of this into any of our financial viability calculations when considering developing Social Housing.

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Signed by:

Appendices:

Appendix 1: Updated Interim Nutrient Neutral Mitigation Strategy for New Dwellings' methodology

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
Interim Nutrient Neutral Mitigation Strategy for New Dwellings' methodology (PCC, November 2019)	https://www.portsmouth.gov.uk/wp-content/uploads/2020/05/Interim-Nutrient-Neutral-Mitigation-Strategy.pdf plus appendices from: https://www.portsmouth.gov.uk/services/development-and-planning/planning-policy/nitrate-mitigation-strategy/
Natural England's 'Advice on Achieving Nutrient Neutrality for New Development in the Solent Region' June 2020	https://www.portsmouth.gov.uk/wp-content/uploads/2020/06/Solent-Nutrients-V5-June2020.pdf
Draft Development Viability Assessment (Oct 2020)	https://www.portsmouth.gov.uk/wp-content/uploads/2021/09/PCC-Viability-26.10.20-Report-and-Appendices_compressed.pdf
Report to the Partnership for South Hampshire Joint Committee - Nitrate Mitigation Recommendations	https://www.push.gov.uk/wp-content/uploads/2021/07/Item-13-Nutrient-Mitigation-Recommendations-part-exempt.pdf



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

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Signed by: