



Report to the Partnership for South Hampshire Overview and Scrutiny Committee

Date: 13 July 2021

Report of: Simon Kennedy, Strategic Environmental Planning Officer
Partnership for South Hampshire

Subject: Nutrient Mitigation - Recommendations of the PfSH
Strategic Environmental Planning Officer – Nutrient
Neutrality in the Solent

SUMMARY

This update report identifies the key findings of the work of the PfSH Strategic Environmental Planning Officer (SEPO) and outlines the recommendations which will be considered by the PfSH Joint Committee.

RECOMMENDATION

It is RECOMMENDED that the Overview & Scrutiny Committee:-

- a) NOTE the contents of this report;
- b) NOTE that the Joint Committee will be asked to NOTE the content of the report and ENDORSE the following recommendations:
 - i) Local 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.
 - ii) Authorities that wish to purchase credits are recommended to do so on a combined catchment basis to ensure best market value is achieved.
 - iii) Authorities use a standard suite of template legal agreements to reduce the legal costs to developers and to make the determination of application process more efficient; and
- c) pass any comments to the Joint Committee for consideration.

1. Background

- 1.1 The water environment around the Solent area is recognised as one of the most important for wildlife in the UK and sites within the Solent are protected by water environment, conservation of habitats and species regulations. The quality of the water, and impacts from wastewater outfalls, are therefore of potential concern for the condition of these sites in terms of the level of nutrient discharged in to them.
- 1.2 The impact of new build development on protected sites must be recognised in all proposals that are subject to a Habitats Regulations Assessment. Details relating to the impact of effluent from new development on the protected sites in the Solent, and the need for a nutrient neutral approach for future development has been reported to the Partnership for South Hampshire (PfSH) previously¹.
- 1.3 Advice available from Natural England² provides information on both the conservation status of the protected sites and the nutrient neutral approach. Natural England have also developed a nutrient calculator which enables a quantifiable assessment of the likely significant effect from development to be made, as well as the ability for different forms of land use change to mitigate that effect.
- 1.4 The Natural England nutrient calculator provides outputs expressed in kilograms of total nitrogen per year. The term total nitrogen (TN) is the sum of nitrate-nitrogen (NO₃-N), nitrite-nitrogen (NO₂-N), ammonia-nitrogen (NH₃-N) and organically bonded nitrogen. One kilogram of total nitrogen per year (kg/TN/yr) is commonly referred to as one 'mitigation credit'.
- 1.5 In light of the advice from Natural England, and associated case law, our aim is to develop a PfSH-wide strategic approach to mitigation in order to achieve nutrient neutral development – and assist in the delivery of planned housing development compliant with the Habitats Regulations.

2. Work Undertaken by Strategic Environmental Planning Officer (SEPO)

- 2.1 The primary purpose of the SEPO is to assess options to allow sustainable development to be undertaken in regard to its total nitrogen impact on protected sites.
- 2.2 In order to inform the work of the SEPO the first work undertaken was substantive stakeholder engagement. In the initial round of stakeholder engagement over 40 substantive stakeholder engagement meetings took place. The stakeholder engagement process is ongoing and iterative. However, the findings of the SEPO with regard to key themes has been verified by the same results arising from the stakeholder engagement programme undertaken by the DEFRA Solent Trading Platform Team. The main findings from this work were:

¹ [PfSH Joint Committee Meeting Page - Nutrient Neutrality Updates from 2019 - 2021](#)

² [Natural-England's-latest-guidance-on-achieving-nutrient-neutrality-for-new-housing-development-June-2020.pdf \(push.gov.uk\)](#)

- The availability of mitigation options to allow sustainable development is insufficient to meet the need for new housing
- There exists significant uncertainty (cost and time) relating to the legal framework to secure mitigation through the planning process.
- There is a disproportionate impact on SMEs and deliverers of minor development due to the administrative and legal costs associated with delivering mitigation through the planning process

2.3 The SEPO is on one of the working groups for the DEFRA Solent Trading Platform and this forms a key stakeholder engagement activity. The work of the SEPO and the DEFRA Solent Trading Platform are closely managed to ensure a joined-up approach to the issue of enabling sustainable development in the short, medium and long term.

3. Availability of Credits

3.1 In 2020 PfSH successfully bid for a £2m loan from the Solent Local Enterprise Partnership (LEP) from the Government's Getting Building Fund to be used to secure off site mitigation land in order to assist in unlocking the delivery of housing which has been on hold due to the nutrient neutrality issue. The Solent LEP advised that the Hampshire and Isle of Wight Wildlife Trust would act as its preferred strategic partner to oversee a land use change mitigation scheme funded with the proceeds of PfSH's bid.

3.2 Along with schemes brought forward by the Hampshire and Isle of Wight Wildlife Trust, there are also several other schemes available to mitigate the impact of nutrients for development

3.3 In order to ascertain whether availability of credits remains a key issue within the Solent region a full assessment of supply and demand for nitrogen mitigation was undertaken. The supply and demand assessment found that within the East Hampshire catchment there is sufficient supply of mitigation to meet the needs of development in the medium to long term (over 5 years of supply). Within the Chichester and Test and Itchen catchments there is sufficient supply of mitigation to meet the immediate need (backlog) and the short to medium term need (1-5 years of supply). The New Forest catchment is the only catchment that does not have sufficient mitigation to meet the immediate need for development (backlog).

3.4 As well as supply of mitigation already available in the market there are also a number of emerging schemes that are likely to provide further mitigation schemes including those that satisfy the need for the New Forest catchment.

4. Impact on Minor Development

4.1 The stakeholder engagement highlighted a disproportionate impact on the cost of delivering nitrogen mitigation through the current open market mechanism.

- 4.2 Further investigation has found that there is a disproportionate financial cost to smaller development in the current open market system. The disproportionate impact is due to legal and arrangement costs involved with securing mitigation, the extra arrangement cost is not considered sufficient to make any significant difference in viability.
- 4.3 Additionally to the direct financial costs to developers, smaller-scale developers can face difficulties in accessing mitigation credits for two reasons. Firstly, they tend to lack the in-house skills and resources required to deal in complex legal agreements and secondly, private mitigation suppliers tend to prefer to sell credits to larger developers where there is less administration time spent proportionately to the size of the purchase.
- 4.4 A reduction in legal costs through a strategic approach to the legal framework by local authorities may reduce the proportionate impact on smaller development and SMEs. However, without intervention by Local Planning Authorities a disproportionate impact will remain.
- 4.5 The potential consequences of a disproportionate impact could include detrimental repercussions relating to:
- Planning Implications
 - Meeting national and local planning objectives
 - Impact on brownfield and regeneration development
 - Reduced ability to ensure the right houses are built in the right places (housing supply)
 - Wider Implications
 - Jobs
 - Local economy
 - Skills

5. Legal Framework to Support Mitigation

- 5.1 The stakeholder consultation process highlighted that the complex legal agreements required to support third party mitigation land through the planning process is currently both expensive and time consuming. Securing available mitigation through the planning system involves complex, often multi-partite agreements, made under Section 106 of the 1990 Town & Country Planning Act (s.106), for each individual permission providing new overnight accommodation.
- 5.2 When considered in the context of the current and future supply of credits, a standardised approach to managing the risk of enforcement action for privately owned mitigation sites is a key factor in stimulating uptake of mitigation and delivery of sustainable development.
- 5.3 By dealing with the management and monitoring considerations up-front, to secure effective mitigation in perpetuity, it is likely that the backlog of development can be permitted more efficiently and in less time. It may also provide greater certainty to mitigation providers and facilitate further mitigation schemes coming forward.

- 5.4 Fareham Borough Council have developed an approach to the satisfaction of the LPA, Natural England, the mitigation provider and the development industry - that covers the majority of the required legal work up-front with mitigation providers. It is intended to use this approach to provide a framework of legal template agreements to substantially reduce both the cost and time related to securing mitigation through the planning process.

6.Options Assessment

- 6.1 In the context of LPAs meeting their policy objectives for housing need through the plan making and planning decision making processes, there are a range of potential options available to LPAs

No Intervention

- 6.2 Local Authorities have no statutory duty to provide mitigation for future development. However, they do have a legal requirement to consider the availability of mitigation in compliance with the Habitat Regulations, as a competent authority, when plan making or planning decision making.
- 6.3 There is now sufficient supply in the nutrient mitigation market to supply the immediate need for development across all catchments apart from the New Forest catchment. Evidence suggests that further mitigation sites will become available to the market across all catchments, including in the New Forest catchment.
- 6.4 Although the immediate and short term need are likely to be met, mainly from privately owned commercial mitigation schemes, it is clear that the emerging open market system may have a disproportionate impact on minor development and the speed at which planning applications can be determined may be limited due to the complex legal frameworks required.

Conclusion of do-nothing scenario

- 6.5 If LPAs take no action, and do not use a joined-up approach to the legal agreements to secure mitigation in perpetuity, then it is likely that the residential and overnight accommodation market will be slow to recover. The slowness of recovery would be a result of the length of time it would take to process the backlog of applications, and the expected rush of new applications, under the open market system.
- 6.6 It is anticipated that in a do-nothing scenario there could be a detrimental impact on LPAs ability to meet housing delivery test, and 5-year supply, benchmarks in the short term whilst also having a detrimental impact on place making and economic objectives as shown in sections 4 and 5 of this report. As a minimum LPAs should seek some level of conformity in the approach to a legal framework to support privately owned mitigation sites through the planning process.

Strategic Scheme – Local Authority Led Scheme

- 6.7 This option would consist of each local authority providing a contribution that would create a central funding pot. The funds would then be used to purchase the

control of land for nitrogen mitigation purposes, through either a long lease or freehold purchase.

- 6.8 As no river/groundwater catchments are able to serve all development over the impacted area, advice from Natural England suggests this option would require a minimum of six strategic sites to cover all of the local authorities in the Solent impacted by the issue.
- 6.9 The considerations when assessing the business case for a strategic, local authority led scheme, vary greatly between catchments and relate to factors such as market saturation, future price of credits and land cost and availability.
- 6.10 Although in a local authority led scheme there may be greater ability to ensure added benefits are provided through the control of a site for nitrogen mitigation, as well as some potential to receive a significant return on capital, there are also significant financial risks associated with the delivery of such a scheme. The risks mainly relate to future changes in the way nitrogen mitigation is provided and the future open market cost of credits.

Conclusions of Local Authority Led Strategic Scheme Option

- 6.11 It is clear that there is the potential for a return on investment to Local Authorities through the purchase or long lease of land for the purposes of nitrogen mitigation, this option would also provide the simplest and quickest route for developers to obtain their required mitigation as well as provide significant scope to deliver additional benefits on the site such as nature conservation or public access.
- 6.12 Notwithstanding the potential advantages of a local authority led scheme there is significant risk associated with the purchase or long-term lease of land to provide LPA led mitigation schemes. The risks relate to;
- uncertainty regarding the future quantum of credits available in the market and the associated impact on the market value of the credit in a competition scenario,
 - potential changes in the need for mitigation or the way mitigation is provided through interventions by stakeholders such as Southern Water or DEFRA and
 - the ongoing management and liability regarding control of the asset.
- 6.13 Local authorities should certainly not be discouraged from developing their own mitigation offer. However, due to the potential financial risks and variances across the catchment areas it is considered, in consultation with LPAs, that a fully strategic approach involving local authority led schemes is not appropriate for all local authorities.

Strategic Scheme – Local Authority Purchase of Credits from Existing Schemes

- 6.14 Local authorities have the option to purchase credits directly from mitigation providers. By purchasing credits under an overarching legal agreement local authorities will be able to sell mitigation credits directly to developers seeking planning permission. This approach would substantially reduce the time it takes for permissions to be granted and mitigate the impact on minor development.

- 6.15 In this scenario individual local authorities would buy relatively small amounts of credits in tranches. By purchasing a smaller amount of credits local authorities are much better placed to control financial risks. Based on potential changes in the market it is considered that LPAs should purchase credits for no more than their individually assessed need up to the summer of 2022. The situation can then be reviewed in 12 months and further tranches purchased as required.
- 6.16 To further reduce financial risk to the LAs, and to meet the identified need of minor development LPAs have the option to purchase credits to be made available only for minor development or below a threshold determined by an individual LPA. For some LPAs the assessment of need just for minor development up to the summer period of 2022 may be relatively low, in order to obtain best market value when purchasing credits, it would be advisable that LPAs purchase credits on a catchment wide consortium basis.
- 6.17 The business case for the bulk purchase of credits will vary between catchments and by Local Authorities through their individual assessments of need. Further information is available within Exempt Appendix 5 regarding the potential financial implications of this option to Councils.

Conclusion of Local Authority Purchase of Credits Option

- 6.18 The approach of bulk purchasing credits from existing mitigation providers would allow Local Authorities to 'pump prime' the mitigation market. This would allow sustainable development to re-commence whilst protecting Local Authorities from the financial risks associated to future changes in the market. This approach may also facilitate further mitigation sites to come forward or make emerging mitigation sites deliverable.
- 6.19 The potential to provide a small return on investment and make the administration of the scheme cost neutral, credits must be secured at below the current market rate. This is only possible if a significant amount of credits are being purchased (over 150 credits). As such this scenario is more effective if approached as a consortium of Local Authorities undertaking a purchase for their combined assessed need.
- 6.20 It is therefore the recommendation of this report that LPAs consider the purchase of credits from the mitigation market to meet the need of minor development up to summer 2022.

RECOMMENDATION

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 - iii) Authorities use a standard suite of template legal agreements to reduce the legal costs to developers and to make the determination of application process more efficient; and
- c) pass any comments to the Joint Committee for consideration.

Appendices: None

Background Papers: None

Reference Papers: None

Enquiries: For further information on this report please contact:-

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