

## **Introduction**

Natural England published advice for Local Planning Authorities on 2nd June 2019 which sets out the requirement for all new development in the Solent region to achieve nitrate neutrality.

The Solent water environment is internationally important for its wildlife and is protected under the Water Environment Regulations and the Conservation of Habits and Species Regulations as well as national protection for many parts of the coastline and their sea.

Natural England's advice has outlined serious concerns about high levels of nitrogen and phosphorous input in this water environment with evidence that these nutrients are causing eutrophication (a process which causes excessive growth of green algae) which is having a detrimental impact upon protected habits and bird species.

## **Legislation and case law**

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).

A Court of Justice of the European Union decision, Coöperatie Mobilisation for the Environment and Vereniging Leefmilieu (Case C0293/17) which is referred to at the 'Dutch case' (7 November 2018) considered EU and other law. The Habitats Directive states 'Whereas an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future'.

The judgement is a material planning consideration and an assessment on nitrogen deposition and the effect that has to the quality of habitat types being negatively affected by the acidifying and eutrophying effects of nitrogen deposition must be undertaken. The judgement sets out the requirement that any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in the future requires an appropriate assessment and that a plan or project likely to have a significant effect on the site concerned cannot be authorised without a prior assessment of its implications (judgement of 12 April 2019, People Over Wind and Sweetman, C0323/17, EU:C:2018:244).

## **Context**

There are significant responsibilities conferred on the Council as a 'competent authority' under the Habitats Regulations. 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 any European designated nature conservation site.

A significant effect could be caused by a number of potential impacts including direct or indirect habitat loss, air pollution, water pollution, increase in recreational disturbance, light pollution, tall buildings or construction activity.

In order to assess whether there is a 'likely significant effect' a Habitats Regulations Assessment (HRA) is carried out. The first stage of the HRA is to screen the proposal to determine if the project or plan will have a likely significant effect. Where a likely significant effect cannot be ruled out the HRA requires an Appropriate Assessment where the impact and any avoidance/mitigation is assessed in more detail. . Natural England must be consulted on the appropriate assessment and there is a duty to consider their response.

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.

It would be unlawful for the Council as decision maker to approve a scheme that did not have regard to the Habitat Regulations or undertake an Appropriate Assessment.

Recently an issue has arisen out of case law referred to above, 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).

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 and Special Area of Conservation under European law. There is now a particular focus to ensure that the qualifying features of the designated sites are not harmed by eutrophication from new development and therefore new development should be nutrient neutral.

The main sources of nutrients (nitrogen and phosphorus) that end up in the water environment include effluent from development and agricultural waste and run-off. Increases in nutrients cause eutrophication of waterbodies which involves excessive plant growth and subsequent decline in dissolved oxygen, with harmful consequences for the affected ecosystem' or similar.

This has resulted in the Government's agency Natural England requiring new developments to be nitrogen neutral.

### **Matter to address**

New development, residential or uses which create an overnight stay (e.g.. tourist or student accommodation) necessitates a connection to the foul water drainage network which could

increase the nutrient load at the Solent European sites. Nutrient enrichment can come from wastewater treatment required in support of new development.

Winchester City Council's Local Plan promotes sustainable development and an attractive place to live and work along with significant investment in housing growth. The Council is in the early stages of reviewing its local plan to ensure it continues to meet the government's requirements in the National Planning Policy Framework to boost the supply of homes and maintain at least a 5-year supply of available and suitable housing sites. The Council monitors this through its Authority Monitoring Report (AMR) and is also subject to the 'Housing Delivery Test'. While the Council can demonstrate an adequate supply of housing land, and meet the requirements of the Housing Delivery Test, housing sites need to continue to be delivered in order to satisfy these requirements in the future.

In preparing a new local plan the Council will be required to demonstrate that housing growth can be accommodated and adequately mitigated. The Local Plan review will be required to prepare a nitrogen budget, which must be prepared in line with the methodology and advice from Natural England and Southern Water. A HRA and any necessary mitigation strategy will accompany the local plan.

### **Partnership for South Hampshire and Natural England**

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.

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.

Natural England has prepared a methodology setting out how this can be achieved which is available from Natural England.

This has resulted in a number of planning applications the Council is considering being kept 'on hold' as applicants have not been able to secure mitigation. There are applications where the applicant has been able to ensure appropriate mitigation and development has been granted.

The Partnership for South Hampshire (PfSH), Natural England, and Environment Agency worked jointly to develop an Integrated Water Management Strategy (IWMS), this was published in 2018. This examines the potential for the sub-region to accommodate future housing growth without having a detrimental effect upon the water environment. A Water Quality Working Group has since been set up to identify and analyse the existing evidence gaps and evaluate the need for strategic mitigation measures, with a current focus on nitrogen neutrality.

The nutrient neutrality calculation includes key inputs and assumptions. These include predicted occupancy levels and water uses for each household as well as identifying current land / farm types and the associated nutrient inputs.

The methodology set out in Natural England's advice sets out key stages, which include calculating the load from the proposed development and the load from the current land use.

If there is a nitrogen surplus (a positive figure) then mitigation is required to achieve nitrogen neutrality. If the calculation identifies a nitrogen reduction (a negative figure), no mitigation is required.

Natural England advice explains that mitigation can be 'direct' through upgrading sewage treatment works and through alternative measures, e.g. interceptor wetlands or 'indirect' by offsetting the nitrogen generated from new development by taking land out of nitrogen intensive uses (secured for the duration of development, generally 80-125 years).

### **Area which is affected**

All of the City Councils area is within the catchment of a Wastewater Treatment works that drains into a Solent European site, as such all of the District is affected. Officers have questioned Natural England in relation to the geographical, topographical and hydrological factors that are likely to have a direct effect on the level of nitrates from development entering the Solent SPA and Natural England are currently reviewing their advice in this respect.

### **The City Council's position regarding the impact of development on water quality at the Solent**

Current planning applications submitted to the Council for residential housing development and accommodation which generates an overnight stay must submit a nitrogen budget to the Council as part of the application assessment. This will show that the development either avoids harm to protected sites or provides the level of mitigation required to ensure that there is no adverse effect. Existing planning consents (full or outline) are treated as 'commitments' and are not being held back, but any other sites would have to show nitrate neutrality.

The Council consider that this is a national matter and have called for a national review. There appears to be a conflict in responsibilities on this matter between Natural England, the Environment Agency and Water Authority. It is Natural England's advice to local planning authorities and applicants to be 'as precautionary as possible' when addressing uncertainty and calculating nutrient budgets. By contrast the Environment Agency have advised that no further investment is needed to treat wastewater to a tighter nitrogen limit and that Wastewater treatment works operate within permit limits.

The Cabinet Member for Built Environment and Wellbeing has written to Rt Hon Robert Jenrick MP Secretary of State for Housing, Communities and Local Government urging a national resolution on this matter.

Failing a central solution there should be a PFSH wide solution to enable development to come forward comprehensively across the Solent area.

Many Hampshire Councils have produced their own position statements. This has led to uncertainty for applicants/agents, and this concern was highlighted at the last Winchester Planning Agents Forum on 19th September 2019. However in the absence of a national or PfSH wide solution this approach has been necessary and the City Council has now found it necessary to provide a short term solution to enable development to continue to be permitted. Failure to do so will affect the delivery of housing, which is an important aim for the Council. In the longer term this could affect the Council's ability to maintain a 5-year supply of housing sites and meet the 'Housing Delivery Test', potentially leading to inappropriate and unplanned development.

### **The City Council's position regarding avoidance and mitigation measures to achieve nitrate neutrality**

It is the responsibility of the City Council as the competent authority to carry out a Habitats Regulations Assessments, including an Appropriate Assessment on any development that is considered could lead to a likely significant effect on a European site. It is the role of the applicant to submit all the information necessary to undertake the assessment including the nitrogen budget. A nitrogen budget should be submitted for all qualifying applications (i.e. residential and overnight tourist accommodation) to determine if the nitrogen load will be increased.

Where mitigation is proposed which conforms with the Habitat Regulations and the Council concludes that the mitigation is acceptable and deliverable in perpetuity we will consider this within an Appropriate Assessment to assess if adverse effects can be avoided. We will consult Natural England taking into account their advice before reaching a decision.

National legislation allows Local Planning Authorities to grant planning permission when they are satisfied that a proposal complies with national legislation and local plan policies and to secure avoidance and mitigation through planning conditions and/or S106 legal agreements.

The National Planning Policy Guidance (Paragraph: 001 Reference ID: 21a-001-20140306) explains that when used properly, conditions can enhance the quality of development and enable development to proceed where it would otherwise have been necessary to refuse planning permission, by mitigation the adverse effects or by mitigation of the adverse effects.

Paragraph 55 of the National Planning Policy Framework make it clear that planning conditions should only be used when they satisfy 6 tests, which require them to be necessary; relevant to planning; relevant to the development to be permitted; enforceable; precise and reasonable in all other respects.

Mitigation which may be required off site may involve land that is not within the control of the applicant, or requires the consent or authorisation of another person or body will usually fail the tests of reasonableness and enforceability. It is however possible to achieve a similar result using a condition worded in a negative form (Grampian condition). This could for example prohibit occupation until a specified action has taken place. Such conditions should not be used where there are no prospects at all of the action in question being performed within the time-limit imposed by the permission.

The Council has adopted the Bird Aware Solent Recreation Mitigation Partnership strategy which requires all new residential development within 5.6km of the Solent SPAs to provide

mitigation to the impact that additional housing development generates on overwintering birds. In practical terms this covers the southern part of the District. The mitigation enables an applicant to make a financial contribution towards the Strategy and officers undertake an appropriate assessment. A similar strategy could in theory be developed for nitrate mitigation measures but is considered a long term strategic solution that is unlikely to mitigate the highlighted issue in the short term.

### **Options to deliver an avoidance and mitigation package**

Policy CP21 of the Winchester District Local Plan Part 1 allows for off-site mitigation to be secured.

The Council proposes to develop an avoidance and mitigation package to assist applicants. Any scheme which would lead to a decrease in water quality will inevitably lead the City Council to conclude in its appropriate assessment that there will be adverse effects on integrity. Where a likely significant effect is identified it will be assessed in more detail in the appropriate assessment stage to determine whether the proposals, with mitigation will have an adverse effects on integrity.

In addition land owners of agricultural land may propose to take out of productive agricultural farming land they own which can be off-set as a nitrate credit, subject to a legal agreement between the parties and the Council.

On-site and off-site measures which could aid in achieving nitrate neutrality 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

When submitting planning applications, applicants will need to complete the checklist at Appendix 1, which will enable the applicant to indicate how they wish to deal with European Sites.

The Grampian condition proposed is as follows:-

The development hereby permitted shall NOT BE OCCUPIED until:

- a) A water efficiency calculation which demonstrates that no more than 110 litres of water per person per day shall be consumed within the development, and this calculation has been submitted to and approved in writing by the Local Planning Authority
- b) A mitigation package addressing the additional nutrient input arising from the development has been submitted to, and approved in writing by the Local Planning Authority. Such mitigation package shall address all of the additional nutrient load imposed on protected European sites by the development and be implemented in full prior to first

occupation and shall allow the Local Planning Authority to ascertain on the basis of the best available scientific evidence that such additional nutrient loading will not have an adverse effect on the integrity of the protected European Sites, having regard to the conservation objectives for those sites; and

c) All measures forming part of that mitigation have been secured and submitted to the Local Planning Authority.

Reason: To accord with the Conservation of Habitats and Species Regulations 2017, and Policy CP11, CP16 and CP21 of the Winchester District Local Plan Part 1.

For sites on agricultural land that are nitrogen neutral or in other circumstances alternative conditions or S106 legal agreement may be required depending on the circumstances in each case.

### **Next steps**

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.

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 (18<sup>th</sup> November 2019) which will ensure a review of existing permits.

The Council will monitor planning permissions that are granted in accordance with this position statement and the nitrogen load that they would generate to ensure that nitrogen credits are banked and can be dealt with as the first priority.

The City Council will ensure that a scheme of mitigation is available which will allow applicants to mitigate the nitrogen load of their development, most likely by an off-site financial contribution.

The City Council will continue to work with Natural England in relation to the impact of development in the District and its effect on nitrate levels in the relevant parts of the Solent SPA taking into account geographical, topographical and hydrological factors that have a direct influence on the degree of impact that development in the District may have on the Solent SPA.

The City Council has declared a Climate Emergency which is the overarching priority and will be at the heart of the Council's Plan. The Council Plan 2020-2025 has 5 key priorities:

- Tackling the climate emergency and creating a greener district
- Homes for all
- Living well
- Vibrant local economy
- Your services, Your Voice

The City Council are proactively seeking methods to achieve a Carbon neutral district by 2030, which will include policies in the new local plan and to deliver a Carbon Neutrality Action Plan.

Monitoring will also take place of schemes which are able to achieve nitrogen neutrality or a deficit on-site which will feed into nitrogen budget and inform the local plan review to 2036.

The City Council will continue towards a more definitive mitigation strategy working with partners through PfSH, Natural England, the Environment Agency, Southern Water, Homes England, Hampshire Wildlife Trust and other stake holders to continue to deal with this issue.

## Appendix 1 – European sites checklist

This checklist must be completed by the applicant for proposals for new residential or overnight accommodation. It will set out how the applicant will deal with avoidance and mitigation to remove any likely significant effects on European sites.

Application details	
Applicant name:	
Agents name:	
Site address:	

### Solent nitrogen nutrient water quality

There is evidence of high levels of nitrogen in the water environment with evidence of eutrophication at designated sites. Residential development or development which generate an overnight stay within the Winchester District are likely to have an adverse impact on the Solent Special Protection Areas.

The Council has published a position statement setting out the avoidance and mitigation measures that are needed in order for the Council to meet its legal requirements in accordance with the Conservation of Habitats and Species Regulations 2010.

The full extent of avoidance and mitigation package is not yet known, but it will take the form of a financial contribution.

If you agree to the granting of planning permission with a 'Grampian' condition which will require the provision of an avoidance and mitigation package prior to occupation. Any financial contribution would have to be paid prior to occupation. \*

**\*NB the applicant proceeds at their own risk as the precise scale of the avoidance and mitigation package is not yet known.**

Q1	I confirm that the proposed development will include an avoidance and mitigation package, in line with this position statement and I confirm that I am content that a Grampian condition is used to secure this prior to occupation.	Yes / No  If you answer no, please continue to Q2.
Q2	The proposed development would be nitrogen neutral. A nitrogen budget has been submitted with the application.	Yes / No  If you answer no, please continue to Q3
Q3	The proposed development is not nitrogen neutral and no avoidance or mitigation package is proposed.*  *NB please note that planning permission can not lawfully be granted in these circumstances.	Yes / No

**Bird Aware / Solent Recreation Mitigation Strategy**

<https://www.winchester.gov.uk/planning/solent-recreation-mitigation-partnership>

If the development is within 5.6 km of the Special Protection Areas of the Solent mitigation will need to be provided. The City Council considers that mitigation provided in line with the Solent Recreation Mitigation Strategy ([www.birdaware.org/home](http://www.birdaware.org/home)) is appropriate to relevant planning applications. This would result in a mitigation package as follows:-

- 1 bedroom property - £346
- 2 bedroom property - £500
- 3 bedroom property - £653
- 4 bedroom property - £768
- 5 bedroom property - £902

These figures are as at 1<sup>st</sup> April 2019 - updated annually on 1<sup>st</sup> April each year.

In the absence of the avoidance and mitigation package the City Council will not be able to lawfully grant planning permission.

Q1	The development is within 5.6 km of the Special Protection Area of the Solent	Yes / No If you answer no you are not required to mitigate in respect of the Solent Recreation Mitigation Partnership.
Q2	I confirm that the proposed development will include an avoidance and mitigation package to accord with the Solent Recreation Mitigation Strategy	Yes / No If you answer no, please continue to Q3
Q3	I propose an alternative approach to avoiding and mitigating the recreational impacts arising out of the development proposed (if this is the case please supply more detail in your supporting documentation).	Yes / No

Signed: Applicant / Agent *	
Print name:	
Date:	

By signing and submitting this form to Winchester City Council the applicant is committing to provide mitigation packages, usually in the form of a financial contribution. If the applicant answers yes to Q1 of the Solent nitrogen nutrient water quality they acknowledge and understand that the scale of the contribution is unknown at this time. They also accept that if a Grampian condition is used on the grant of any planning permission that the mitigation is due prior to the occupation of the accommodation permitted.