

Nitrate Mitigation

Report of the Planning Portfolio Holder

Recommended:

1. That the purchase of 100 nitrate credits from an appropriate mitigation scheme, for the sum set out at paragraph 8.1 of this report is approved.
2. That authority is delegated to the Head of Planning and Building in consultation with the Heads of Planning Policy and Economic Development, Finance and Revenues, Legal and Democratic Services and the Planning & Building and Finance & Resources Portfolio Holders to:
 - a. purchase up to an additional 400 credits from an appropriate scheme/s at appropriate times and in appropriate quantities subject to the financial limitation set out in paragraph 8.4 of this report.
 - b. enter into appropriate Agreement/s to secure the purchase of the credits and delivery of the nitrate mitigation referred to in paragraphs 1 and 2a. of this recommendation.
3. That the amounts described in paragraph 8 of this report for the purpose of purchasing nitrate credits be added to the Capital Programme as necessary.
4. That the Nutrient Neutrality – Off Site Mitigation Contributions Framework (2021) be amended to introduce a deposit scheme as outlined in paragraph 6.1.11.

SUMMARY:

- In order to satisfy the Habitat Regulations certain types of development are required to be nitrate neutral in order to have no adverse impact on nationally protected site of The Solent. The absence of mitigation is an impediment to housing delivery.
- In line with the adopted Nitrate Nutrient Neutrality – Off Site Mitigation Financial Contributions Framework it is proposed that the Council purchases further of nitrate credits for applicants to purchase direct from the Council.
- In April and September 2021 Council agreed to the purchase two tranches of 250 credits, a total of 500 credits. These credits have now been exhausted and the Council has reached the stage where it needs to consider whether to purchase additional credits.

1 Introduction

- 1.1 As Local Planning Authority, the Council has been affected by the lack of options available to applicants whose schemes are required to achieve nutrient neutrality in order to address the adverse effects on the international designated nature conservation sites (SPAs, SACs and Ramsar sites) in and around the Solent from excessive nitrates in the water environment.

- 1.2 The purpose of this report is to seek approval for the purchase of further nitrate credits, an initial purchase of 100 credits, with authority delegated to purchase up to a further 400 credits at such times, in such quantities and from such schemes as the Head of Planning and Building Services in consultation with those specified in the recommendation above deems appropriate. This would provide the Council with a mechanism to continue to actively support future planning applications in satisfying the Habitat Regulations.
- 1.3 This report outlines the current situation and wider mitigation options which inform the recommendation for credit-purchase and the mechanism for improving return on the Council's expenditure.

2 Background

- 2.1 The Solent provides one of the most important water environments for wildlife in the United Kingdom, with many parts of its estuary, shoreline and the sea being protected through legislation. The area is home to a wide variety of habitats and species that help to make it special, some of which result in international designations. A number of the habitats, such as the mudflats and saltmarshes, provide essential winter feeding and roosting grounds for tens of thousands of coastal birds that fly from as far as Arctic Siberia to spend the winter on the Solent. This includes about 10 per cent of the global population of Brent geese. The area also supports important breeding gull and tern populations. It is unique in Britain for the complexity of the marine and estuarine habitats that are found.
- 2.2 Excessive levels of nutrients (nitrogen and phosphorus) in the water environment are having an adverse effect on international designated nature conservation sites in and around the Solent. These are causing eutrophication, resulting in dense mats of green algae that impact on the internationally protected species and habitats. This must be addressed as required by the Conservation of Habitats and Species Regulations 2017 (as amended) (referred to as the Habitats Regulations). The impact of the condition of these sites is relevant in the context of their conservation objectives and achieving favourable conservation status.
- 2.3 Following the Court of Justice of the European Union judgments, Natural England advised in June 2019 that in order to comply with the Habitats Regulations, all new residential and overnight accommodation development should be nutrient neutral. In taking a precautionary approach, their advice is that it is uncertain as to whether the increase in wastewater from certain developments will have an adverse effect on the Solent's international designated sites. As such mitigation is required to be put in place in order to meet the regulations.

- 2.4 For nitrates this constraint applies to the area of the Borough which falls within the catchments of the River Test and River Itchen and their tributaries, which then flow into the Solent. Essentially this covers the whole Borough, with the exception of a small area around Shipton Bellinger and Cholderton that falls within the catchment of the River (Hampshire) Avon. This area is affected by excessive phosphates. For the Valley Park and Hocombe area of Ampfield which drains to the Chickenhall Waste Water Treatment Works (which discharges into the River Itchen) this is also affected by phosphates for wastewater only, in addition to nitrates.
- 2.5 In light of the Natural England advice since summer 2019 the Council has not permitted any planning applications (for residential and overnight accommodation) which do not achieve nutrient neutral development. In order to satisfy the Habitats Regulations, it needs to be established that planning decisions will not make the situation worse. Any increase in nutrients is deemed significant, however small, due to the in-combination impact and therefore small sites cannot be screened out from the requirements to achieve nutrient neutrality. A mitigation solution is therefore needed in order to enable such developments to proceed where they are otherwise unable to achieve nutrient neutrality but are deemed to be acceptable in all other planning respects.
- 2.6 The issue of nitrate mitigation is a controversial one from the perspective of both the development industry and interested parties objecting to development. In 2021 a challenge from local objectors led to a Judicial Review to the operation of Fareham Borough Council's nitrate mitigation schemes and the use of the Natural England's nitrate methodology to conduct appropriate assessments as part of the Habitats Regulations. These judgments have now been handed down and whilst amendments are required to Natural England's approach they do not affect the principle of off-site mitigation as an appropriate means of achieving nutrient neutral development, or nutrient credit purchase to secure this.
- 2.7 Whilst the issue affects a wide geographic area, for Test Valley achieving nutrient neutral development without the provision of off-site mitigation solutions is particularly challenging as the amount of nutrient in wastewater is assumed to be higher in the absence of wastewater treatment works (WwTW) having a permit limit for nitrogen discharge. This means that there is no nitrate stripping at the WwTW taking place resulting in an increased amount of mitigation required but, even where permits are in place, a level of mitigation is still needed. Of the WwTW which serve Test Valley only Millbrook WwTW which serves Chilworth, North Baddesley and Nursling and Rownhams currently has such a permit limit. There are also rural areas within the Borough which are not served by mains drainage and are therefore reliant on package treatment plants or septic tanks. Achieving on site nutrient neutrality is unlikely to be achieved for all but the large scale greenfield developments.

- 2.8 Other mitigation sources are coming forward however in the absence of other practical solutions being available at present, the focus is on land based off-site mitigation in the form of ‘nitrate offsetting’ solutions. This concerns taking land out of agricultural production, or significantly reducing the current level of artificial additional nitrogen added to agricultural land from fertiliser and animal waste. This source accounts for between 70-80% of excess nitrates as opposed to that arising from development or other background sources. It can take decades for nutrients in the upper reaches of river catchments to reach the sea. However, as the Habitats Regulations apply to planning decisions, there is a legal obligation on considering the impact of new development in order to avoid exacerbating an existing issue, notwithstanding that the impact of this is relatively minor overall. By taking land out of agricultural production this reduction in nitrates can then be used as a ‘credit’ to offset the increased nitrogen from new development so that neutrality is achieved. Credits can be achieved either through land acquisition and management or purchasing credits from third parties. Other types of schemes, such a wetland creation, can also produce mitigation but often take longer to deliver.
- 2.9 At its meeting on 27 January 2021 the Council approved the ‘Nutrient Neutrality Off-Site Mitigation Financial Contributions Framework’. This framework set out the options that could apply once the applicant has completed the Natural England nitrate methodology. Applicants could a) demonstrate that the development would not lead to an increase in nutrients and would therefore achieve nutrient neutrality on-site; b) provide and secure in perpetuity a bespoke off-site package; or c) provide a financial contribution of £3,000 per kg of nitrogen, plus a £100 monitoring fee to provide off-site mitigation (the nitrate credit tariff).
- 2.10 In April 2021 the Council agreed to the release of £750,000 to purchase 250 credits from Roke Manor Farm. 1 credit is equal to 1kg of total nitrogen. The purchase was completed in June 2021. A further 250 credits were purchased in September 2021. Since that time officers have been liaising with applicants and developers and allocating credits to those planning applications where a positive response has been received.
- 2.11 All credits that were purchased by the Council have now been reserved. This has resulted in the following units be made acceptable under the Habitats Regulations,

| Development type | No. of units |
|--|---------------------|
| Dwellings | 164 |
| Nursing home | 55 |
| Extra care provision | 20 close care flats |
| Other (tourist accommodation/children’s home/ gypsy & traveller etc) | 29 |

- 2.12 Payment to the Council is triggered on the occupation of the dwellings. Inevitably there is a time lag between the allocation of credits to planning applications and occupation. At the time of writing £56,789 has been received in payment.

3 Corporate Objectives and Priorities

- 3.1 The Test Valley Corporate Plan (2019-23) sets out that the Council will work with communities and partners to deliver the supply of homes which reflect current and future housing needs. The lack of nitrate mitigation can constrain the delivery of new residential development. The Corporate Plan also identifies the aim of providing high quality green infrastructure for our communities to enjoy. Mitigation schemes can deliver wider environmental benefits.

4 Consultations/Communications

- 4.1 The principle of the Council acquiring credits has previously been agreed by the Council and Natural England. The availability of credits will be the subject of communications with the local development industry and applicants.

5 Options

- 5.1 There are two options considered in the report, whether the Council purchases further credits in accordance with the recommendation set out at the beginning of this report (option one), or not (option two).

6 Option Appraisal

6.1 Option One (Recommended)

- 6.1.1 The principle of purchasing credits has previously been agreed by Council through its mitigation framework (January 2021) and the purchase of credits in April and September 2021. The option of whether to purchase additional credits is guided by the scale of demand from applicants.

Scale of demand

- 6.1.2 The challenge of achieving nitrate neutrality continues to affect a significant number of planning applications for residential and overnight accommodation. When the Council previously resolved to purchase credits this was done to help reduce the number of planning applications which were locked in the planning system. Whilst not exclusively so, the credits are aimed at supporting smaller sites from undertaking unnecessary work to locate, negotiate and secure nitrate mitigation, which is potentially hard to achieve directly for smaller scale builders and individuals developing such sites. The basis for now seeking further credits is to have a continued supply to support delivery of those future planning applications recognising that the existing credits have been reserved/allocated to planning applications/permissions.

The number of credits purchased must be guided by the level of interest. This is difficult to accurately forecast. There are now more sources of credits available to developers building in the Borough than was the case when previous decisions were made to acquire credits. To date, given the very strong level of interest demonstrated by the purchases of credits already acquired by the Council, it would be reasonable to assume that there would be on-going demand for Council credits, at least in the shorter term because the credits market is still relatively new and developing. To manage the exposure to risk, should the Council be unable to dispose of them, smaller bulk purchases are recommended.

6.1.3 Whilst the proposed approach of a smaller tranches seeks to limit the Council's level of risk, by doing so it may result in the stock of credits being exhausted quicker. Should this situation arise it is proposed that the Head of Planning & Building be given delegated authority to purchase up to a further 400 credits if and when deemed necessary at a total cost not exceeding £1.2M.

Alternative options

6.1.4 There are now a wider range of possible mitigation solutions coming forward than there were when the Council made its initial purchases. As such the Council needs to be mindful of the number of additional credits to purchase to avoid overcommitting and making it hard to sell all the credits bought at a price that covers its investment. It also needs to carefully consider the value of the credits purchased and whether they would be maintained or decreased as other schemes/ solutions come forward as the nutrient mitigation market matures resulting in an increased supply.

6.1.5 The Levelling Up and Regeneration Bill (LURB), which is currently before Parliament, sets out the Government's intention to introduce a new legal duty on water and sewerage companies in England to upgrade wastewater treatment works by 2030 in 'nutrient neutrality' areas to the highest technically available limits (TAL). This proposed duty focussing on an infrastructure led solution is to be supported. Assuming that legislation was put in place and wastewater treatment works were improved, it is probable that there will still remain a longer term need for mitigation albeit less per dwelling than is currently the case. More importantly, it is likely that there will still be a need for existing levels of mitigation prior to any changes made to wastewater treatment works.

6.1.6 The Council continues to explore other options to reduce the scale of the challenge. One approach is for the Environment Agency to undertake a Solent specific nitrogen permit review or formal 'Review of Consents'. This is particularly relevant as the Fullerton WwTW and Romsey WwTW do not have permits in place for nitrogen. Reviewing the permits which set the level of nitrates discharged in the water it could reduce the levels of nitrates currently seen. Further details and timescales for the permit review are yet to be confirmed but it is hoped that these will be considered by Southern Water, Environment Agency and OFWAT as part of the five year investment programme for the period 2025-30 as part of the TAL process under the proposed LURB duty. However, this option is currently not available to the Council and as such an alternative short term solution needs to be secured. It should also be noted that the providing permits would not eliminate the issue but would mean the size of the constraint may become more manageable as the level of mitigation per home would be significantly reduced.

- 6.1.7 There is also the emerging 'EnTrade' scheme – the Solent Nutrient Market Pilot, a nutrient trading platform supported by DEFRA and Natural England. This strategic initiative is welcomed and is designed to better identify the level of mitigation needed across the wider Solent/ Hampshire area and to bring forward mitigation solutions for developers to access in the most economically and environmentally efficient manner. However, the project is still being developed and does not yet provide mitigation options for developers. Officers are currently considering the details of this scheme.
- 6.1.8 There are currently four mitigation schemes the Council is aware of within the River Test and Itchen catchment with the ability to sell credits to support development in the Borough. These are sites owned/run by Roke Manor (from whom the Council purchased its first two sets of nitrate credits), Eastleigh Borough Council (EBC) inside their area; National Trust at Hinton Ampner; and private land owners at the Grange Estate, Abbotstone, Winchester. Further schemes are coming forward within the River Test and Itchen catchments however these are in their infancy with credits not yet available.
- 6.1.9 The current market for credits from the established sites is estimated at £3,000 -£3,500. The increase market in price for some mitigation schemes since the Council's previous purchase indicates that demand is eating into current supply i.e. more credits are being taken up than new mitigation schemes coming forward at present.
- 6.1.10 A factor considered by Council previously is the length of time in recovering the cost of purchase. The existing agreed approach is that the credits are secured by applicants through an individual S106 agreement with the trigger for payment being prior to occupation as this is the point at which the development impacts the environment. This results in a lag between the allocation of credits and the receipt of funds for those credits. It is difficult to know how long that lag would be. A conservative estimate, especially for those schemes with outline planning permission, would be 18-24 months between permission being granted and occupation. It is considered that it would be unreasonable to apply an earlier trigger (e.g. prior to commencement or payment when credits are first allocated) as the mitigation is only required once the development is first occupied. In addition the credits acquired by the Council are mainly intended to support SMEs who may not generally be as well placed to deal with up-front costs as much larger volume house builders. Payment is index-linked back to the date of Council expenditure on purchase of the credits. This will remain the case for any future purchases.
- 6.1.11 However, in order to ensure that developers are committed to delivery and the Council is receiving a financial return as quickly as possible it is proposed to introduce a deposit scheme based on the value of the total credits required. To take account of the financial outlay from smaller developments it is proposed that the deposit scheme will be stepped dependent on the number units. For example, 1-5 units a 10% deposit; 6-10 units a 15% deposit, 11+ units a 20% deposit. The introduction of this scheme will require the mitigation framework to be amended.

6.1.12 It will be necessary for both the financial contributions framework and specific credit purchase to be monitored and kept under review, especially in light of how any market may develop and the principle and scale of other available off site mitigation. Should sufficient alternative mitigation solutions become available then the Council may wish to step back from direct participation in acquiring and making credits available to applicants for planning permission and alternatively only have a signposting role to mitigation schemes administered by other parties.

6.1.13 Having balanced the considerations it is recommended that 100 credits are purchased forthwith and delegated authority is given to the Head of Planning and Building (in consultation with the others referenced in the recommendation) to enter into the purchase of up to a further 400 credits as the need presents itself, having regard to all of the factors mentioned in the preceding paragraphs.

6.2 **Option 2**

6.2.1 The alternative option is that the Council does not purchase any more credits. To not to proceed with the recommendation would mean that achieving nutrient neutrality continues to be challenging for some developers especially in the short term. This is particularly the case for brownfield sites and for those developments which discharge their wastewater to WwTW without a permit limit, or which are reliant upon non-mains drainage.

6.2.2 One of the main consequences of not purchasing the credits is the implications this has for housing delivery. If delivery of homes is not achieved in the short term, this puts pressure on the Council's housing land supply position and puts the Borough at risk of speculative planning applications which have managed to secure nitrate mitigation through some means.. In the medium and longer term the Council will need to be able to demonstrate a suite of available mitigation measures as part of delivering the next local plan and the future housing requirement. At this stage it is too early to know what mitigation approach will need to be put in place or at what scale.

6.2.3 At the time of the initial purchase it was identified that it would be difficult to try and gauge future demand for the credits. There was a risk that in purchasing the credits the Council may not be able to dispose of all of them. That risk remains. However, given the response the Council has had it is considered that the risk of not being able to dispose of the credits purchased is low. This is further mitigated by the number of credits recommended to be purchased. Should the Council find itself in the position of not having disposed of all of the purchased credits these could be 'banked' to contribute to mitigation for development in the two town centres. This would further reduce the risk.

- 6.2.4 A linked risk relates to the availability of alternative mitigation sites/ credits arising from other landowners, especially if those credits were made available at a lower price. As covered above, whilst other schemes are available the price of credits is either comparable or higher to that which the Council is currently able to secure from providers. Whilst there is a risk of 'competition' from other mitigation sources unallocated credits could be 'banked' for the Council's own development in Andover and Romsey.
- 6.2.5 A further issue is that there is a risk of non-implementation of a planning permission and therefore no nitrate tariff payment made. Whilst this could occur it is considered to be rare given the current housing market and delivery rates within Test Valley.
- 6.2.6 There is also a risk that an applicant could reserve Council credits but then decide to use alternative measures e.g. cheaper credits being sold from an alternative source/landowner. This risk could occur both prior to signing the S106 or after issuing planning permission through applying to vary the S106. Whilst possible, this situation would only occur if those alternative credits are being sold at a price significantly lower than the current value of £3,000. The likelihood of this occurring is difficult to forecast but given the procedural delays, additional costs involved with varying the S106, and the current value of credits it is unlikely that applicants would chose to swap mitigation so late in the process. This risk does highlight the need to monitor progress of schemes between allocation and permission and why it is recommended that a deposit scheme being introduced.
- 6.2.7 In April 2021, when considering the purchase of nitrate credits, the Council also approved a strategic land purchase at Bury Hill. The site's previous agricultural use would generate a nitrate benefit from its change of use. Work commissioned has calculated the principle, scale and delivery of any nitrate credits. Based on that initial calculation any credits that would arise from the Bury Hill would not be sufficient to provide mitigation for the anticipated demand or from the Council proposals within Andover and Romsey.
- 6.2.8 If the decision were to not purchase further credits, the Council could take on a role of 'sign posting' applicants to available mitigation schemes. Whilst this removes the financial risk there would be no mechanism for the Council to directly support the delivery of development and would have no ability to control the wider availability of credits, nor would smaller developers be able to participate in a simpler, quicker process that the Council's approach provides.
- 6.2.9 It is for these reasons that this option is not recommended.

7 Risk Management

- 7.1 Risks of the proposed options are set out in the narrative above. These relate to the financial outlay, the timing of repayment and whether all credits will be purchased. The report outlines the approach which officers have taken or identified in reducing the risk to an acceptable level. This includes limiting the number of credits purchased at any one time and identifying the ability to bank surplus credits to benefit development on Council land.

8 Resource Implications of the recommended Option One

- 8.1 The cost of purchase of the further 100 credits as set out at paragraph 1 of the recommendation is likely be £300,000. Stamp Duty Land Tax is not payable on this transaction.
- 8.2 The existing tariff approach of £3,000 /credit is indexed on payment to reflect inflation (at base date of purchase) and mitigate the lost investment income faced by the Council from forward purchasing the credits. Also charged is a £100 monitoring fee.
- 8.3 These purchases would be funded by internal borrowing, as permitted within the Capital Strategy to be repaid from the eventual sale of credits. Any impairment costs would be met from the unallocated balance on the New Homes Bonus Reserve.
- 8.4 It is proposed that the Head of Planning & Building in consultation with those referenced in the recommendation be given delegated authority to acquire up to a further 400 credits with a total cost of no more than £1.2M. Members will note that the Head of Finance and Resources is a named consultee and would advise on the affordability and other financial implications of subsequent purchases as the need arose.

9 Legal Implications

- 9.1 The implications relating to the Habitats Regulations and the nitrate mitigation benefits arising from the site have been outlined within the report.
- 9.2 The purchase of credits and the associated mitigation will be governed by appropriate section 106 and Allocation Agreement/s.

10 Equality Issues

- 10.1 The EQIA has not identified any potential for discrimination or adverse impact and all opportunities to promote equality have and will be taken.

11 Other Issues

- 11.1 Ward/communities affected.
 - 11.1.1 The purchase of credits has the potential to benefit the delivery of homes throughout the borough that fall within the catchment of the River Test and Itchen. Future mitigation sites could be located anywhere within the River Test and Itchen catchment. On 16 November 2022 Council approved the principle of Cross-Authority nutrient mitigation agreements within the Test and Itchen catchment areas.
- 11.2 Sustainability and addressing climate change.
 - 11.2.1 As outlined in the report there is the opportunity to deliver a number of measures which can help address climate change through the management plan.

12 Conclusion and reasons for recommendation

- 12.1 The challenge of continuing to deliver new residential development which requires nutrient mitigation is one that many Hampshire authorities are facing. Whilst there are now more options available to developers to secure mitigation, compared to when the Council first agreed to acquire nutrient credits, the market is still relatively young and developing which creates a degree of uncertainty as to how residential schemes will be able to achieve nutrient neutrality enabling planning permission to be granted and accommodation built. Hence it is recommended that the Council buys a further 100 credits with the flexibility to acquire more should the need arise. This is in line with the Council's adopted Nitrate Mitigation Framework.

Background Papers (Local Government Act 1972 Section 100D)

Borough Local Plan 2016

Nutrient Neutrality - Off Site Mitigation Financial Contributions Framework (2021)

Climate Emergency Action Plan 2020

Corporate Plan 2019-23

Green Spaces Strategy (draft) 2020

Natural England Advice and Guidance on Achieving Nutrient Neutrality (March 2022).

Confidentiality

It is considered that this report does not contain exempt information within the meaning of Schedule 12A of the Local Government Act 1972 (as amended) and can be made public.

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| No of Annexes: | 0 | File Ref: | Pp5.1.1 |
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