

Position Statement and Mitigation Plan for Nutrient Neutral Development

May 2022

1. Introduction

1. The water environment within the Solent region is one of the most important for wildlife in the United Kingdom. It is internationally important for its wildfowl and wading species and is protected under the Water Environment Regulations and the Conservation of Habitats and Species Regulations. There are existing high levels of nutrients (especially nitrogen and phosphorus) in the Solent International sites which are causing harm to the ecosystem and failure of environmental standards.
2. New development necessitates the provision of connections to the foul water drainage network and can increase surface water run-off. This could increase the amount of nutrients entering Solent European Sites, even if it is a proportionately small contribution.
3. New housing schemes and other proposals which include a net gain in overnight accommodation or development which has a high volume of water use will need to prevent any increase in nutrients into the harbour in order for them to be ‘nutrient neutral’ if they would otherwise lead to a likely significant impact on a European site.

### The Habitats Regulations

1. Under the Conservation of Habitats and Species Regulations (2017 as amended) (hereafter referred to as the Habitats Regulations), there are significant responsibilities conferred on the Council as a ‘competent authority’. Chiefly, 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.
2. A significant effect could be caused by a number of potential impacts including direct or indirect habitat loss, air pollution, water quality, increase in recreation, light pollution, tall buildings or construction activity.
3. In order to assess whether planning applications would lead to a ‘likely significant effect’ the developer will need to submit a Habitats Regulations Assessment (HRA) as part of the planning application submission. The Local Planning Authority, as competent authority, will then assess this through its HRA Screening and produce an Appropriate Assessment (AA). Natural England must be consulted on the findings of an HRA and there is a duty to consider their response.
4. A potential effect would be considered ‘likely’ if it cannot be ruled out based on the information available as opposed to it merely being probable or possible. When then moving to the appropriate assessment stage, an established principle under law is that AAs 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. It must therefore be shown that there would not be no likelihood of a significant effect in order for the Council to lawfully grant planning permission.
5. The need for Habitats Regulations Assessments has existed since 2004 when the original regulations came into force. It has been known for many years that new development does lead to an increase in recreation at the coast and that this has an impact on the birds which use the coastal mud flats to feed and roost (this is a ‘likely significant effect’).

### The Dutch Case

1. The European Court of Justice determined a case related to considering water quality in Appropriate Assessments in late 2018. This generally referred to as The Dutch Case[[1]](#footnote-1).
2. The judgement in this case refines the definition of plans and projects and effectively includes significantly more operations within the definition which have an impact on water quality, most notably runoff from agriculture.
3. As a result, the only way that a new housing scheme could prevent this likely significant effect is for there to be no increase in nutrients into the harbour, i.e. for it to be ‘nutrient neutral’.

### The purpose of this Position Statement

1. This Position Statement sets out the Council’s approach to new development which is likely to have an adverse effect on the integrity of the Solent European sites. It provides guidance on what new development is affected, means of considering the nutrient load of new development by using the Natural England calculator, and how an increase in nutrients into the harbour should be mitigated in order for development to be ‘nutrient neutral’.

### Water Quality and the European Designated Nature Conservation Sites

1. Eutrophication is increased plant growth which reduces the oxygen content in water and occurs when an excessive amount of nutrients within a water body are present. This process makes it difficult for aquatic insects or fish to survive, in turn removing a food source from the food cycle.
2. Addressing the sources of eutrophication reduces the input of nutrients into the internationally designated marine environment. However, if the issue of eutrophication is not addressed, it could have a negative impact on the marine environment and the conservation objectives of the European designated nature conservation sites.
3. Water quality can be measured by chemically testing water samples. Chemical testing can test for parameters such as nitrogen and phosphates which are indicators of poor water quality.
4. Nutrients from wastewater treatment works represent one source of excess nutrients in the marine environment. However, it is not the only source, nor is it generally the highest. Agriculture in particular typically represents a higher level of input of nutrients into the marine environment than wastewater treatment works.
5. The southern parishes in East Hampshire District Council are served by Budds Farm Wastewater Treatment Works and parts of Ropley, Medstead, Bentworth, Four Marks and Wield Parishes in the north discharge into the catchment of the River Itchen both affect the Solent International sites[[2]](#footnote-2).
6. Whether an effect would be significant depends on whether it would threaten the specific features and conditions of the protected sites concerned by the plan or project. In the case of water quality and the Solent’s European Sites, the condition varies site by site. However, none are fully favourable, and many are not recovering. As such, any further deterioration of water quality at those sites, no matter how small, can be considered likely to cause a significant effect on those sites in terms of the application of the Habitats Regulations.
7. As such, it has been confirmed that development draining to Budds Farm Wastewater Treatment Works in the East Hampshire catchment and any water body (surface or groundwater) which drain into the River Itchen catchment would be likely to lead to a significant effect on the following European Sites:

* Chichester & Langstone Harbours Special Protection Area (SPA)
* Chichester & Langstone Harbours Ramsar site
* Solent Maritime Special Area of Conservation (SAC)
* Solent and Southampton Water SPA
* Solent and Southampton Water Ramsar
* Portsmouth Harbour SPA
* Portsmouth Harbour Ramsar

1. Natural England have produced guidance for developers and mitigation providers. This can be found on the Council’s nutrient neutrality webpage: <https://www.easthants.gov.uk/nutrient-neutrality-what-developers-need-know>.
2. As well as the risk of increases of nitrogen in both the East Hampshire and Itchen catchments, there is also the potential to result in increases in phosphorus entering the Habitats sites in the Itchen catchment as a result of new development. The nutrient budget calculation in the Itchen catchment will need to consider both nitrogen and phosphorus. It should be noted that separate mitigation is required for nitrogen and for phosphorus. Further guidance is set out in Natural England’s guidance[[3]](#footnote-3).

2. Development Management Process

### Development schemes that could be affected

1. A large number of schemes are likely to result in a significant effect on the European Sites. The key test is whether there would be an increase in nitrogen/phosphorus emissions into one or more European Sites once the development is occupied compared to if it was not built.
2. The advice below is general in nature and does not remove the necessity to discuss this matter through a pre-application enquiry at an early point in the development process.
3. The Solent International sites[[4]](#footnote-4) that are relevant to the Council are those where wastewater from the southern parishes of Clanfield, Horndean and Rowlands Castle discharges via a wastewater treatment plant, and for parts of Ropley, Medstead, Bentworth, Four Marks and Wield Parishes in the north-west of the district which drain (via package treatment plants) within the catchment for the River Itchen.

**Types of applications that will be affected**

1. This matter needs to be addressed by all applications for overnight accommodation including new homes, student accommodation, care homes, tourism attractions and tourist accommodation. This includes any development permitted through the General Permitted Development Order and that gives rise to new overnight accommodation.
2. Many outline applications do not include detail regarding the scale and mix of the proposed development – this is addressed during the reserved matters stage. In such cases a legal agreement which secures the methodology to calculate the full avoidance and mitigation package will need to be secured prior to the granting of any outline planning permission. This ensures that the nutrient mitigation is calculated once the scale of development is known and prior to the commencement of the development.
3. For reserved matters planning applications, and applications for grants of prior approval for a proposed use or operation[[5]](#footnote-5) nutrient neutrality will need to be addressed. Therefore, an avoidance and mitigation package will be needed for these types of development and planning applications. However, this does not apply to Certificates of Lawfulness as these determine whether a development is lawful, or not.
4. Section 73 applications need to address nutrient neutrality as a new permission is required. This would need to be done using the most up to date methodology. Section 96 applications are non-material amendments to extant planning permission and by their very nature are not considered as a new planning permission therefore they do not need to address nutrient neutrality.
5. It is the Council’s advice to the Planning Inspectorate[[6]](#footnote-6) that any planning appeals for applicable uses should include an avoidance and mitigation package to remove any likelihood of a significant effect.
6. Any increase in residential dwellings that takes place as permitted development must undertake a separate HRA through Regulations 75 and 77 of the Habitats Regulations. Such assessments will need to consider water quality. Mitigation packages for such development will be needed on the same basis as those for dwellings that require planning permission.

**Residential (C3) dwellings**

1. Any residential development proposing a net increase in overnight accommodation (excluding self-contained householder extensions and ancillary annexes to a dwelling) would lead to an increase in nitrogen/phosphorus and thus would be likely to cause a significant effect.
2. In this context, 'dwelling' also includes net new dwellings created through the sub-division of existing dwellings, second homes, dwellings to be used as holiday accommodation, houses in multiple occupation, self-contained student accommodation, and new dwellings created as a result of approval granted under the General Permitted Development Order e.g. change of use from office to residential (including houses and flats). It includes permanent accommodation for gypsies and travellers. Temporary/transit pitches/plots will be assessed on a case-by-case basis by the local planning authority in consultation with Natural England.

**Other forms of development providing overnight accommodation**

1. There is a range of development other than C3 dwellings which provides overnight accommodation. Most commonly, this includes care homes and other forms of housing for older people (Class C2) and hotels (Class C1).
2. Such development would be considered to increase nitrogen/phosphorus and thus would be likely to cause a significant effect. This is due to such development housing people who otherwise would not have been in the catchment of a wastewater treatment works or water body which drains to a Solent European Site.

**Commercial and other non-residential development**

1. Non-residential development is unlikely to lead to a significant effect as it would not involve a net increase in population in the catchment. For the purposes of business and commercial development it is considered that anyone living in the catchment also works and uses facilities in the catchment, and therefore wastewater generated can be calculated using the population increase from new homes and other accommodation. This removes the potential for double counting of human wastewater arising from different planning uses.
2. However, in some cases commercial or non-residential development could have a significant effect due to the type of operation or facilities proposed. In particular, high-water use developments would be likely to cause a significant effect. Such schemes would be considered on a case by case basis. It is recommended that any high-water use developments engage with Natural England’s Discretionary Advice Service prior to preparing a nutrient budget for submission as part of a pre-application enquiry to the Council.

### How applications will be considered and what information is needed to assess the ‘likely significant affect’

1. Any planning application within the Solent and Itchen drainage catchments, which is likely to impact on nutrient deposition in the European sites will need to be supported by a Habitat Regulations Assessment. This is necessary for the Council, as the competent authority under The Regulations, to undertake its Habitats Regulations Screening Assessment, including Appropriate Assessment (AA), on any development that it is considered could lead to a likely significant effect on a European Site.
2. The Council has undertaken HRAs on applications for many years as there has been an acknowledged significant effect from recreation since 2014, with new development providing mitigation packages. However, this guidance is specific to likely significant effect on the Solent European Sites resulting from water quality.
3. It is incumbent on the applicant to provide all of the information necessary to enable the Local Planning Authority to undertake its assessment. When submitting planning applications, applicants will need to submit the following information to set out how any likely significant effects on Solent European Sites will be mitigated through the application:
   * A site-specific nutrient budget, using Natural England’s most up to date methodology and calculator; and
   * If the application site’s pre-development use is classified as an agricultural use within the calculator, evidence of the farm type for the past 10 years will need to be submitted to support the nutrient budget. This evidence could for example take the form of historic/aerial photographs or deeds of agreement.
4. In line with Natural England’s methodology which allows for a 10% precautionary buffer on top of the optional higher Building Regulations water use per person standard of 110 litres/person/day, a standard of 120 litres/person/day will be secured through a planning condition. The planning condition used is therefore as follows:

*The development hereby permitted shall not be occupied until: a) A water efficiency calculation in accordance with the Government's National Calculation Methodology for assessing water efficiency in new dwellings has been undertaken which demonstrates that no more than 120 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; all measures necessary to meet the agreed water efficiency calculation must be installed before first occupation and retained thereafter; 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 when fully occupied 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 package have been provided to the Local Planning Authority and shall be implemented in full in accordance with an agreed timetable.*

*Reason: There is existing evidence of high levels of nitrogen and phosphorus in the water environment with evidence of eutrophication at some European designated nature conservation sites in the Solent catchment. The PfSH Integrated Water Management Strategy has identified that there is uncertainty as to whether new housing development can be accommodated without having a detrimental impact on the designated sites within the Solent. Further detail regarding this can be found in the appropriate assessment that was carried out regarding this planning application. To ensure that the proposal may proceed as sustainable development, there is a duty upon the local planning authority to ensure that sufficient mitigation for is provided against any impacts which might arise upon the designated sites. In coming to this decision, the Council have had regard to Regulation 63 of the Conservation of Habitats and Species Regulations 2017, policies CP22 and CP27 of the East Hampshire District Local Plan: Joint Core Strategy 2014.*

### Occupancy Rate

1. Natural England’s generic methodology sets out that the occupancy figure can be derived from national data as long as it reflects local conditions. The national occupancy data which is derived from the Office of National Statistic provides a national average value for the number of residents per dwelling to be 2.4. The Local Planning Authority has agreed with Natural England that this figure should therefore be used within nutrient budget calculations.

### Calculating a nutrient budget

1. All development which results in a net-increase of overnight accommodation (excepting householder extensions and ancillary annexes) or a development which has a high-water use will be required to submit a nutrient budget as part of their application. Natural England have provided two separate Nutrient Budget Calculators, one for the Solent catchment and one for the Itchen catchment both with accompanying maps which show the areas of the district which fall within each catchment. In addition, there are links to other various documents, which can be used to access specific information needed within the calculations.

3. Options for mitigation

1. For the HRA accompanying the planning application to conclude that there is no likelihood of a significant effect on the Solent’s European Sites, the proposed development would need to be nutrient neutral.
2. Avoidance and mitigation measures to achieve nutrient neutrality should be provided on site, in line with the Habitats Regulations, wherever possible. However, for a vast majority of developments it is acknowledged that this is not possible and off-site mitigation should be provided.

### **On-site Mitigation Options**

1. Some development will be able to use on-site measures in order to achieve nutrient neutrality or reduce the scale of off-site mitigation required to achieve nutrient neutrality. Wherever possible, on- site measures should be used to avoid an impact before relying on off-site mitigation. Examples of the type of on-site measures that may be used can be found in Natural England’s methodology.
2. In some cases, on site mitigation could include taking land out of agricultural use and using the land for an alternative use, notably development and open space. It should be noted that a greenfield site is not automatically in use as agriculture. The land use classes used within Natural England’s methodology can be seen in the below table (Source: Natural England’s written calculator guidance document).
3. In the event a nutrient budget and a proposed on-site avoidance and mitigation package shows the proposed development will be nutrient neutral, there will need to be the necessary certainty that any mitigation measures will reduce the nutrient load of the land. In such circumstances the Council will secure the requisite mitigation via a legal agreement to ensure that it is maintained in perpetuity.
4. For some developments, a bespoke on-site mitigation solution will be a viable option, particularly where watercourses can be found on site. The applicant will be expected to fund the project level Habitats Regulations Assessment that will be required on such an application.

### Off-Site Mitigation Options

1. Development on non-agricultural land will not be able to provide mitigation on site. In such cases, developments will need to contribute towards an off-site scheme.
2. Third parties are progressing potential mitigation plans which could provide effective mitigation for development in East Hampshire or applicants may have their own suitable mitigation scheme. In such cases, applicants are encouraged to enter into early discussions with Natural England through the Discretionary Advice Service[[7]](#footnote-7). It will also be necessary to discuss the proposals with the Council as the competent authority. The Partnership for South Hampshire (PfSH) has a link on their website listing notably agreed providers who offer mitigation[[8]](#footnote-8).
3. In such cases, it will need to be established that there is a clear scientific link between the proposed development and the mitigation (ie. it is within the same catchment area) and that the mitigation package ensures that the development in question is nutrient neutral. Any third-party mitigation scheme would also be required to provide supporting evidence to conclude that the mitigation principles set out in Natural England’s guidance have been met. This will need to constitute robust information bespoke to the scheme in question which can be assessed as part of the HRA for the planning application in question.
4. The legal agreement put in place for third-party mitigation will likely need to be bespoke to that development and the mitigation scheme in question. It will need to be signed by the landowner of the mitigation site. In discharging the requirements of planning obligations, the Local Planning Authority would require written confirmation from an accredited mitigation scheme that sufficient credits have been purchased to mitigate the nutrient budget from the development.
5. Given the geographical nature of East Hampshire district, it is likely that some third-party mitigation schemes could be progressed outside of the district. In such cases, the planning authority of the mitigation land together with the landowner of the mitigation site would both need to be signatories to the legal agreement. In such scenarios, the planning authority for the mitigation land would either need to be willing to undertake any necessary enforcement action or be willing to delegate that authority to East Hampshire District Council.

3.12 In the areas within the Itchen Catchment, where a nutrient budget calculation confirms that mitigation for phosphorus is required, then the Local Planning Authority is not currently aware of any strategic mitigation schemes within this catchment where developers may purchase credits for phosphorus mitigation.  This matter is currently being progressed through the Partnership for South Hampshire (PfSH) and once such schemes have been identified then this guidance will be updated.

4. Review of this Position Statement

1. The Council is committed to both complying with the Habitats Regulations and also enabling sustainable new housing development. This Position Statement includes advice on enabling development management decisions to be taken on planning applications in compliance with the Habitats Regulations. This position statement has been prepared using the best and most up-to-date scientific knowledge available and has applied the precautionary principle where appropriate.
2. Moving forwards, it will be necessary for further research to be undertaken regarding the role of nitrogen and phosphorous in the water environment, the sources of nitrogen and phosphorus in the Solent’s European Sites and the effectiveness of potential measures to mitigate this. This research is already underway in collaboration with partner authorities in the Partnership for South Hampshire (PfSH).
3. The Council will continue to call for Government to take action to address this issue through a review of the consents of wastewater treatment works at the Solent. However, it is acknowledged that many operate at the currently best available technology and such a review would take time in any case.
4. The Council wishes to work towards a more definitive mitigation strategy. This should ideally be on a PfSH or wider basis. The Council will continue to positively and proactively work with its partner authorities, through PfSH, together with Government, Natural England, the Environment Agency, Southern Water and any other stakeholder in order to address this issue appropriately.

1. Full reference is Cooperatie Mobilisation for the Environment UA and College van gedeputeerde staten van Noord-Brabant (Case C-293/17 and C294/17) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62017CA0293> [↑](#footnote-ref-1)
2. Solent Maritime SAC, Solent and Southampton Water SPA and Ramsar, Portsmouth Harbour SAC and Ramsar, Chichester and Langstone Harbours SPA and Ramsar and any water body (surface or groundwater) that subsequently discharges into such a site. [↑](#footnote-ref-2)
3. https://www.easthants.gov.uk/nutrient-neutrality-what-developers-need-know [↑](#footnote-ref-3)
4. Solent Maritime SAC, Solent and Southampton Water SPA and Ramsar, Portsmouth Harbour SAC and Ramsar, Chichester and Langstone Harbours SPA and Ramsar and any water body (surface or groundwater) that subsequently discharges into such a site. [↑](#footnote-ref-4)
5. Prior Approvals have a requirement to address nutrient neutrality under regulations 75-78 of the Conservation of Habitats Regulations 2017. [↑](#footnote-ref-5)
6. In a scenario where an applicant has appealed to the Secretary of State (in practice the Planning Inspectorate) against a refusal of planning permission, the Planning Inspectorate become the Competent Authority under Regulation 63 of the Habitats Regulations. As part of this, they will need to undertake an assessment under that regulation. [↑](#footnote-ref-6)
7. <https://www.gov.uk/guidance/developers-get-environmental-advice-on-your-planning-proposals> [↑](#footnote-ref-7)
8. [list of all known nutrient mitigation schemes](https://www.push.gov.uk/work/mitigation-schemes-available-to-developers/) [↑](#footnote-ref-8)