

Agenda Item:
Communities, Housing and Planning Policy Development Panel
4 January 2023

To establish and enter into a joint venture to deliver a programme of mitigation for nutrient neutrality

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Portfolio: Communities, Housing and Planning, and Finance

Ward(s) Affected: All

Purpose of the Report:

Currently planning applications for new overnight accommodation are on hold in many parts of the district due to the nutrient neutrality constraints that were imposed by Natural England in March 2022.

The report contains details of how this constraint will be overcome through the establishment of a Joint Venture which will source the mitigation that is required to get the housing market moving and sell credits to developers to enable them to demonstrate housing schemes are nutrient neutral.

The Joint Venture would be established with the potential to provide a range of environmental credits, initially focussing on nutrient neutrality.

In order to provide seed funding for the establishment of the Joint Venture it is also proposed to use £150k from the Environmental Projects Reserve which will be repaid from the Joint Venture in due course.

Recommendations:

It is recommended that the Panel advises Cabinet to:

1. Enter a Joint Venture (a company limited by guarantee) with Anglian Water and one or more local authorities in Norfolk for the provision of environmental credits (initially focussing on addressing nutrient neutrality) as per the attached Heads of Terms.
2. To commit £30,000 revenue in 2023/24 as part of establishing the Joint Venture. The purpose of the funding being to establish the operating model in year one, after which there will be full recovery of the operating costs as part of the credit income.
3. Delegate to the Director of Place in consultation with the Leader of the Council to finalise the details of the joint venture agreement and operating arrangements and enter the Joint Venture.
4. To loan £150,000 revenue from the Environmental Projects Reserve as seed funding in 2022/23 for the Joint Venture to be repaid with interest within 2 years from the establishment of the Joint Venture.
5. Delegate to the S151 Officer in consultation with the Portfolio Holder for Finance to finalise the details of the seed funding and repayment mechanism

1. Summary

- 1.1 On the 16 March 2022 Natural England wrote to seventy-four local authorities and advised them, as the Competent Authority under the Habitats Regulations, to carefully consider the nutrients impacts of any new plans and policies (including new development proposals). In Norfolk, the two Special Areas of Conservation (SACs) that need to be protected from rising nutrient levels are the River Wensum and the Broads.
- 1.2 Consequently, planning applications for new overnight accommodation are on hold in many parts of the district awaiting developers to come forward with planning applications that demonstrate there will be no further adverse levels of nutrients (phosphorus and nitrogen) reaching the SACs because of their respective housing proposal.
- 1.3 Whilst some of the volume housebuilders will be able to provide the mitigation required (through for example constructed wetlands) this will not be possible for many of the small and medium sized developers. With small and medium sized developers making up around 40% of the homes delivered in Norfolk this creates a significant barrier.
- 1.4 There is also an impact on the Council's growth ambitions for the district alongside social and economic impacts, for example addressing housing need and future loss of income for council services.
- 1.5 The impact of the nutrient neutrality requirements has been significant for Breckland Council, Broadland District Council, Norwich City Council, North Norfolk

District Council and South Norfolk Council and therefore it is proposed that the authorities work together to identify a solution.

- 1.6 Anglian Water is also affected by nutrient neutrality and the government has indicated that the performance of wastewater treatment plants also must improve by 2030. An amendment to the Levelling Up and Regeneration Bill was proposed on the 18 November 2022, which if adopted is expected to reduce the mitigation requirement for phosphorus by 36% and nitrogen by 65% post 2030. Anglian Water has significant expertise at a strategic level in water management and treatment which the Council does not have and a direct link into all the households in Norfolk. This will be essential in providing some of the solutions within the portfolio of mitigation.
- 1.7 The report sets out the work to date and a range of options that have been considered.

2. Background

- 1.8 On the 16 March 2022 Natural England issued new guidance to local planning authorities concerning nutrient enrichment and the role it must play in preventing further adverse impacts to protected wetland habitats.
- 1.9 This guidance covered the catchment areas of the River Wensum Special Area of Conservation (SAC) and the Broads Special Area of Conservation and RAMSAR. This impacted all the local authorities in Norfolk, either through wastewater discharge or surface water flows running into the River Wensum SAC or Broads SAC. Although Kings Lynn and West Norfolk District Council and Great Yarmouth Borough Council have indicated nutrient neutrality requirements will have a minimal impact.
- 1.10 Local Planning Authorities (LPA) are required to consider the impact of nutrient enrichment before planning permission can be granted and therefore all planning applications (including new applications, reserved matters and with those with outstanding conditions), primarily involving increases to overnight stay were temporarily put on hold. Some of these applications have now been released, although most are still in abeyance.
- 1.11 The Council is the Competent Authority for planning decisions; however, the habitats legislation requires that sites that are in the catchments of the Wensum SAC and Broads SAC will only be granted planning permission when there is certainty around levels of enrichment and corresponding mitigation. If that certainty is not proven beyond reasonable the LPA is not legally allowed to grant permission and Natural England has made it clear it will also oppose any deviation to the legal framework.
- 1.12 A Written Ministerial Statement on nutrient neutrality was published on 20 July 2022 and Defra issued a Direction to Natural England on strategic mitigation schemes on 28 July 2022. The Secretary of State directed Natural England to

“take the steps that they have proposed and that are within their control to prepare, facilitate and administer the operation of strategic mitigation schemes in any or all the catchments where at the date of this direction there are restrictions on development because of concerns in relation to nutrient pollution.”

- 1.13 It is understood that Natural England will only provide a scheme and nutrient neutrality credits on nature and land-based solutions such as wetlands and woodlands, which by their nature will be medium to long term solutions. This will also not deliver sufficient capacity for the growth agenda in the catchments.
- 1.14 This is a complex and complicated scenario with a range of external factors influencing the approach alongside the immediate local challenges. Member briefings have taken place during the Autumn to share the context, challenges, and approach, these were well attended.
- 1.15 The focus of this report is to put in place an arrangement to source and deliver the required mitigation. The content covers how the arrangements will be governed, the report is not intended to cover all the aspects and details of nutrient neutrality or the provision of other environmental credits.

3. Current position/findings

- 1.16 The authorities in Norfolk all have growth aspirations which are predicated on providing housing as part of their place shaping agenda. Meeting the nutrient neutrality requirements will place further pressure on viability and developer contributions which are also supporting wider economic, environmental, and social improvements. This includes transport infrastructure, affordable housing and improving connectivity which all impact on wider economic growth. In addition, the government has targets for additional housing in these authorities which are all now under threat.
- 1.17 Without swift action to mitigate nutrient neutrality there is a risk that developers will submit predatory applications for schemes which lie outside the relevant catchment area and the plan-led approach to the growth agenda will erode. The government has previously stated that it will issue further guidance on how the 5-year land supply will be assessed in areas which are subject to nutrient neutrality, but this guidance is still awaited.
- 1.18 Many of the developers in Norfolk are small and medium sized organisations and they do not have capacity to install their own nutrient neutrality solutions. Many will have already purchased land or have options on sites. There is a significant risk that many of these small and medium sized enterprises will go out of business if the granting of new planning permissions in these catchments does not get moving soon.
- 1.19 It is estimated that between 1,750 and 2,200 homes per year are currently on hold across Norfolk due to the nutrient neutrality constraints. In addition, there is a significant backlog of applications that were halted on the 16 March 2022.

- 1.20 Natural England recently provided an update on progress with their credits-based system. However, there is no mitigation identified in Norfolk at this stage (and therefore no credits available). Natural England is still looking for potential solutions with the aim of providing credits by the end of March 2023.
- 1.21 The Norfolk planning authorities have been working together since March 2022 to look at the mitigation requirement and potential solutions. On the former Royal Haskoning has been commissioned and is working with the Norfolk councils to look at calculating the mitigation need, the locations where nutrient neutrality would apply and potential solutions.
- 1.22 The authorities have also been looking at how mitigation could be delivered on specific sites and have been discussing options and advising developers, landowners and potential providers.
- 1.23 Learning has also been taken from authorities that have been subject to nutrient neutrality for several years to look at the options and bringing forward proposals as swiftly as possible. It should be noted that many of the early authorities that were affected have taken 2 to 3 years to get their schemes operational.

4. Proposed action

- 1.24 The proposed way forward is to establish a Joint Venture company. The purpose of the Joint Venture would be to enable developers to purchase environmental credits to cover the additional enrichment load that has been calculated for their site.
- 1.25 The Joint Venture company would secure mitigation and then issue certificates confirming the credits that had been purchased. Developers would then submit the certificates with their planning applications.
- 1.26 The Joint Venture would comprise of Anglian Water and several of the local authorities. It is estimated that the offer from the company would capture 40% of the nutrient neutrality market. Noting some developers will have the capacity and space to develop their own nutrient neutrality solutions on site.
- 1.27 This solution will provide housing developers in the catchments with certainty around the delivery of the mitigation required. It is not anticipated that the Joint Venture will be a direct provider of mitigation solutions itself.
- 1.28 The operating model would sit alongside what Natural England provides on nature and land-based solutions. Recognising some landowners may prefer to work with the partnership on nature and land-based solutions rather than Natural England and vice versa.
- 1.29 It is expected that other commercial providers will also enter the nutrient neutrality market in due course.

- 1.30 There would be an informal reporting link into the Leaders through the Norfolk Strategic Planning Forum.
- 1.31 This action would enable the growth ambition across Norfolk to proceed through the delivery of additional overnight accommodation and help in addressing the demand for additional housing. Unlocking the new homes that are currently on hold by establishing an environmental credits model focussing on nutrient neutrality by March 2023.
- 1.32 The immediate level of benefit to the housing market will be determined by the level of mitigation that can be implemented, particularly in the short term. It is anticipated that it will take some time to secure the mitigation required to address all the backlog and new planning applications that come forward during 2022/23 and 2023/24.

5. Other options

- 1.33 Several other options have been considered as part of responding to the nutrient neutrality situation, these are set out in the following section.
- 1.34 Option 1 - To require Natural England to produce the whole nutrient neutrality solution for Norfolk. The government has said Natural England need to oversee the nutrient credit arrangements; Natural England has subsequently said that they will focus on the nature and land-based solutions. This option is not recommended as a way forward for the Council. A mixed economy of mitigation will need to be delivered to meet the requirements. Any nature-based solutions are also unlikely to be operational in the short term and Natural England will only be able to meet a portion of the nutrient requirement.
- 1.35 Option 2 - To pass responsibility to some other third party or investment vehicle to run a credit-based scheme for developers to access. For example, something like EnTRADE (providing online markets to help buyers and sellers (farmers) find the best value deals for environmental improvement), this would be a profit-making organisation. This is not recommended as a way forward for the Council. The preference is for the planning authorities to have some control over the nutrient credits process and allocation as part of place shaping and supporting the market (particularly small and medium sized organisations). Recognising it is likely other nutrient neutrality providers will enter the marketplace in due course.
- 1.36 Option 3 - Do nothing. Allowing the market to develop credits themselves alongside the Natural England nature and land-based offer. Developers can trade between themselves and develop their own mitigation plans. This is not recommended as a way forward for the Council. There is no indication of how long this would take to become established and many of the developers are small and medium sized enterprises that will not be able to develop their own solutions. It is likely other providers will enter the market and will be profit making, however, this will take time and reduce the funds available from each scheme for other aspects such as affordable housing.

6. Indicative timescales

- 6.1 The initial planning phase of the Programme will run through to March 2023 when, subject to agreement, the Joint Venture will be established.
- 6.2 At this stage (subject to council agreement) it is envisaged that Breckland Council, Broadland District Council, Norwich City Council, North Norfolk District Council, South Norfolk Council and Anglian Water will enter the Joint Venture. All the parties will be considering reports in December 2022 and January 2023.
- 6.3 The aim is to have the governance up and running by March 2023, alongside developing some short-term mitigation solutions.

7. Issues and risks

Both a Risk Register (things that may happen) and Issues Register (things that have or will happen) exist as part of the programme planning. The main identified risks are:

- a. Change in Government Policy towards nutrient neutrality meaning the mitigation is reduced or no longer required which would impact on the business model.
 - b. Natural England not being able to establish an effective and timely Norfolk wide P (phosphorus) credit and N (nitrogen) credit system requiring more credits from the Joint Venture to support the planned growth.
 - c. Anglian Water not meeting the government highest technically achievable limits (TAL) by 2030 at larger wastewater treatment works, requiring more credits. Noting that TAL is dependent on legislation and an update to the Levelling Up and Regeneration Bill.
 - d. Small and medium sized developers being squeezed out of the market and go out of business along with local builders if an accessible mitigation solution cannot be established.
 - e. Delay in the Government legislation and guidance including the Levelling Up and Regeneration Bill causing delay in sites coming forward for mitigation
 - f. The cost of credits cannot be established in a creditable way ahead of knowing the full cost of the mitigation scheme(s)
- 7.1 Issues (Critical ones)
- a. The need to identify a portfolio of short-term mitigation to enable planning applications to be considered and determined and new homes delivered.

- b. Clarifying the rules that apply to the accreditation of any mitigation.

7.2 Resource Implications

- 7.3 Initial revenue funding of £30,000 is required from the Council for 2023/24 to establish the Joint Venture. Annual operating costs have been estimated at £300,000, with a 50:50 split between Anglian Water and the local authorities. Therefore, with five local authorities indicating they wish to be a part of the joint venture it would be £30,000 each. Provision will need to be made in the 2023/24 budget.
- 7.4 In addition, £150,000 seed revenue funding which will help expedite the establishment of the Joint Venture is requested for 2022/23. It is proposed that this funding can be loaned from the Environmental Projects Reserve and subsequently repaid to the Reserve as the Joint Venture starts trading. This revenue is currently being sought solely from Broadland District Council and would be spent on consultants, financial advice/modelling/legal advice and the appointment of a general manager. Prior to the formal establishment of the Joint Venture the repayment of this loan would be at risk. However, even if other partners unexpectedly pulled out of the proposed company, it could still be progressed by South Norfolk and Broadland District Councils acting together to form the Joint Venture. In other words it is considered that any risk to this loan prior to the establishment of the Joint Venture is limited.
- 7.5 The terms of this loan will need to be agreed but the terms will be equivalent to the financial market at the time of agreeing the loan.
- 7.6 Once the Joint Venture is operational and credits are sold it is anticipated that the revenue costs associated with the future running costs would be met as part of the developer contributions.
- 7.7 An officer representative from the Council would become a member director of the Joint Venture and then a Board would be drawn from the member directors. Decision making on the most important matters would rest with the member directors. Board members may also be Executive directors that are appointed to oversee the day-to-day arrangements. Further details are set out in the draft Heads of Terms (See Appendix 1).
- 7.8 The Joint Venture company would employ a small team of staff, a programme lead/general manager to run the company on a day-to-day basis and a separate support role to oversee, monitor and track arrangements and agreements.
- 7.9 There are implications for local businesses as many are directly and indirectly related to the housing market. The pipeline of work is reducing for builders, electricians, plumbers etc, agents and developers will also see options on land running out, particularly on smaller and medium sized sites where local mitigation is not possible.

7.10 There are also short-term financial implications for the Council in terms of a loss in planning fees and in the longer-term council tax income. At best housing development is on hold, however, with the delays some housing development may well not come forward at all, seriously impacting on the growth aspirations for the area.

7.11 **Legal Implications**

7.12 Legal advice has been sought on several governance models through external advisors (Birketts LLP) and each of the working options was considered by officers in November 2022. The options explored were as follows:-

- A Joint Venture Company Limited by Shares
- A Joint Venture Company Limited by Guarantee
- Contractual arrangements using Council in-house powers
- A Limited Liability Partnership

7.13 Further details on each of the options are available in a background document. The preferred option was a joint venture company limited by guarantee. This was influenced by:-

- (a) a desire to show this was not about making profit out of nutrient neutrality - particularly when funding for affordable housing and other infrastructure is being squeezed
- (b) the fact that the liability on each of the parties is limited and
- (c) there is a constraint for Anglian Water (given their funding base and operational arrangements) to pursue this model rather than a profit-making vehicle

7.14 Following an initial meeting with lead officers from all the potential parties on 15 November a draft Heads of Terms document was produced by Birketts. This has been reviewed by all the parties and is set out in Appendix 1 to this report.

7.15 **Equality Implications – None**

7.16 **Environmental Impact**

7.17 The proposal will have a significant impact on the environment in establishing a Joint Venture that will provide mitigation to initially stop the nutrient enrichment arising from new overnight accommodation worsening the water quality in the Wensum SAC and Broads SAC and provide headroom for development to proceed.

7.18 In due course it is envisaged that Biodiversity Net Gain (due to become a requirement in November 2023), carbon credits and potentially water neutrality measures could be delivered through the Joint Venture.

7.19 **Crime and Disorder – None**

7.20 **Other Risks**

There is a reputational risk for the Council. A Joint Venture between Anglian Water and the councils provides a trusted brand that developers can be confident in. However, whilst the risk has been assessed as low there could be a reputational risk for the Council if the Joint Venture ran into difficulties.

8 **Conclusion**

7.21 Protecting the natural environment in our rivers and Special Areas of Conservation remains a priority. However, the nutrient neutrality constraints that have been placed on the council present a huge barrier to growth and addressing some the wider social and economic challenges.

7.22 A solution needs to be found swiftly that meets the local requirements without creating a further uncertainty across the wider region.

7.23 The proposed Joint Venture with Anglian Water and the other local authorities that have been significantly affected by nutrient neutrality will enable the hold on many planning applications to be released in the short term.

9 **Recommendations**

7.24 It is recommended that the Panel advises Cabinet to:

1. Enter a Joint Venture (a company limited by guarantee) with Anglian Water and one or more local authorities in Norfolk for the provision of environmental credits (initially focussing on addressing nutrient neutrality) as per the attached Heads of Terms.
2. To commit £30,000 revenue in 2023/24 as part of establishing the Joint Venture. The purpose of the funding being to establish the operating model in year one, after which there will be full recovery of the operating costs as part of the credit income.
3. Delegate to the Director of Place in consultation with the Leader of the Council to finalise the details and enter the joint venture arrangement.
4. To loan £150,000 revenue from the Environmental Projects Reserve as seed funding in 2022/23 for the Joint Venture to be repaid with interest within 2 years from the establishment of the Joint Venture.
5. Delegate to the S151 Officer in consultation with the Portfolio Holder for Finance to finalise the details of the seed funding and repayment mechanism

Appendices

1. Draft Heads of Terms

Background papers

Assessment of potential governance models by Birketts LLP