

**Agenda Item No:** 9

**Report To:** Cabinet

**Date of Meeting:** 29 July 2021

**Report Title:** A Nutrient Mitigation strategy for the Stour catchment in Ashford Borough

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**Portfolio Holder** Cllr. Neil Bell – Portfolio Holder for Planning & Development  
**Portfolio Holder for:**



**Summary:**

In July 2020, Natural England (NE) issued Advice to the Council requiring new housing development (and other overnight accommodation) in the Stour Catchment to demonstrate 'nutrient neutrality'.

The Advice was issued in response to recent studies of Stodmarsh Lakes (a European protected site located in Canterbury district) which showed water to be in an unfavourable condition with the potential to further deteriorate.

Recent case law, covering case examples elsewhere, was also relevant in that it tied new development to the harmful generation of nitrogen and phosphorus in the water as a contributing factor to deterioration of water quality.

The impact of the Advice has meant that, since issued, the Council have been unable to grant planning permission for new housing within the Stour Catchment, unless the proposal can show it can achieve 'nutrient neutrality' - which is then assessed by the Council through an appropriate assessment.

Experience is showing us that the ability to achieve neutrality requires significant land areas and as such many housing proposals simply cannot progress due to their small size (such as a brownfield site in the town centre or a small-scale rural housing proposal).

In practice, these proposals are not able to be permitted until a strategic solution is found that will 'unlock' them.

In response to the gravity of the situation, members asked officers to pursue a mitigation strategy as a means of finding a strategic solution within the borough boundary.

Accordingly, officers have been working with expert consultants to prepare a 'Stodmarsh Mitigation Strategy' for the Council.

The draft strategy is now entering a crucial phase. It has clearly identified that the only realistic land based strategic solution that could be utilised is the creation of new strategic wetland areas in the borough.

New wetlands would provide the opportunity to generate nitrogen and phosphorus "credits" which can then be applied to development proposals (current and future) to achieve 'nutrient neutrality'. Similar credit-based schemes are already in place in the Solent region, albeit this area is not impacted by the phosphate issue (see below).

Whilst the finer details of the strategy are still emerging, it is very clear that new strategic wetlands are the only realistic solution to the problem and therefore the Council do not need to wait for the Strategy to be finalised before acting on the emerging outcomes.

Accordingly, the purpose of this report is to get agreement from the Cabinet to actively pursue a mitigation strategy based on the delivery of a new strategic wetlands.

**Key Decision:** YES

**Significantly Affected Wards:** Wards (wholly or partially) located in the Stour Catchment: Aylesford & East Stour, Beaver, Bircholt, Bockhanger, Bybrook, Charing, Conningbrook & Little Burton Farm, Downs North, Downs West, Furley, Goat Lees, Godinton, Highfield, Kennington, Kingsnorth Village & Bridgefield, Mersham, Sevington with Finberry, Norman, Park Farm North, Park Farm South, Repton, Roman, Saxon Shore, Singleton East, Singleton West, Stanhope, Upper Weald, Victoria, Washford, Weald Central, Weald North, Weald South, Willesborough, Wye with Hinxhill

Note: see risk section below

**Recommendations:** **The Cabinet is recommended to:-**

- I. Agree the principle of acquiring land within the borough as a means of creating new strategic wetlands for the purposes of nutrient mitigation;**
- II. Agree that central Government should be approached for grant and/or loan funding to deliver the mitigation package;**
- III. In the event that (ii) above is unsuccessful, agree that a financial package be set aside by the**

- Council for the purposes of delivering the mitigation package;
- IV. Authorise officers to prepare a credits-based formula to be considered for adoption as a Supplementary Planning Document as a means of seeking proportionate developer contributions towards the delivery and maintenance of the mitigation package;
  - V. Authorise the Head of Planning & Development and Head of Corporate Property & Projects and the Solicitor to the Council in consultation with their Portfolio Holders to negotiate, enter into agreements and complete acquisitions of land and any related documents to implement the nutrient mitigation strategy and to make necessary arrangements (subject to all planning and other consents) for works to be undertaken on the land to create strategic wetlands with a view to generating nitrogen and phosphorus credits

**Policy Overview:** The Conservation of Habitats and Species Regulations 2017 (as amended) and recent case law have provided the framework for granting planning permissions on development affected by nutrient neutrality. Legal advice sought by the Council has confirmed that this issue is a significant material consideration in determining planning applications.

The Ashford Local Plan does not contain a specific policy for nutrient neutrality, as Natural England did not raise this as an issue during the Local Plan preparation. However, Policy ENV1 is relevant to the wider issue of biodiversity and conserving the environment. This reinforces the importance of protecting the environment from the impacts of development.

**Financial Implications:** There are potentially significant cost implications (depending on how any solution is funded) for the Council, highlighted in this report, with regards to pursuing new strategic wetlands.

However, there are also significant cost implications for the Council not pursuing a solution. The current hold on granting planning permissions, as a result of the Stodmarsh Advice, is preventing infrastructure and funding coming forward, which is delivered through planning applications. This includes the New Homes Bonus, future council tax receipts, S106 monies for community & Council projects, school contributions and affordable housing.

**Legal Implications:** Some of this is covered in the policy implications section above.

In accordance with The Conservation of Habitats and Species Regulations 2017 (as amended) all development proposals, which could have a likely significant effect on the integrity of the Stodmarsh Lakes, must demonstrate that the project can mitigate these impacts (demonstrated through nutrient neutrality).

European law requires that, before an Appropriate Assessment can be adopted and a related planning permission granted, the mitigation measures necessary to prevent the development impacting on Stodmarsh must be legally secured. Whether the developer is to directly deliver, or to fund others to deliver, the mitigation measures, in either case this is secured through the developer entering into a Section 106 Obligation with the Council. The Council's Legal Service has experience of securing such obligations through Section 106 Agreements, and this would be tailored to the mitigation strategy that is chosen so that sufficient security is obtained.

The Council is the "competent authority" to grant planning decisions and therefore the risk about whether a proposal can be nutrient neutral lies with the Council. This has stalled granting planning permissions. The mitigation strategy will provide the Council with a solution within our boundary and ownership to be able to legally grant planning permissions for affected development.

**Equalities Impact Assessment:**

See Attached

**Data Protection Impact Assessment:**

None

**Risk Assessment (Risk Appetite Statement):**

There are a number of risks associated with pursuing new strategic wetlands. There are also a number of risks associated with not pursuing this solution. Please see main report below.

Balancing the risks, officers have taken this report to Cabinet, ahead of completion of the strategy, to progress a solution quickly, with a view of ensuring that the eventual control or ownership and any new wetlands will sit with the Council.

Delaying land acquisition until the strategy is published could mean private sector solutions come forward instead, which raises issues relating to ownership and potential ransom scenarios. It could also lead to non-strategic solutions being

presented, making the management of future credits much more difficult.

Taking forward a land acquisition option, to deliver strategic wetlands, will ensure that the wetlands meet the legal requirements to allow planning permissions to be granted. This is the solution which can also be delivered and administered by the Council (or in partnership with another body).

**Sustainability Implications:**

Creating new strategic wetlands provides the opportunity to remove nutrients from river water, improving the water quality, before it reaches the Stodmarsh Lakes.

In doing so, it will mean that future development in the Borough will have a 'neutral' effect on the Lakes. This satisfies the legal test and would allow the granting of planning permissions, subject to sufficient security being obtained.

However, these new wetland areas, once established, also provide the opportunity to provide multi-functional benefits as well – which in turn could help contribute to wider 'greener' goals of the Council.

For example, wetland creation (depending on their location) could provide opportunities for new wildlife and plant species to thrive, create new ecological connections to the existing Green Corridor and provide biodiversity net gain opportunity areas.

Additionally, creating new strategic wetlands could contribute towards achieving some of the key actions identified in the Council's emerging Carbon Neutral Action Plan (currently out for consultation).

More work will be needed to determine the precise extent of the impact of any new wetlands on the river environment. This will be covered through the ongoing discussions and dialogue with both Natural England and the Environment Agency as the project progresses.

**Other Material Implications:**

Members need to be aware that the whole Stodmarsh Lakes issue is a significant one and not one which has been faced before. Nor was it an issue raised by Natural England as part of the Council's Local Plan formulation, meaning no plan-led solution was progressed.

As it stands, planning permissions for new housing have been on hold for almost a year in vast areas of the borough –

areas which are earmarked for significant new development up to 2030 in the Local Plan.

The significance has already been recognised in the form of acquiring expert consultants to help provide a strategy that can work within our border – at our expense.

The issue is further complicated as the Stour catchment only sits within part of our borough, meaning much of our borough is not impacted by the Advice.

Inevitably, this leads to fears that these non-impacted areas might be asked to 'compensate' in terms of new housing. Clearly this is unacceptable and unsustainable, given the nature of these areas, and will be resisted by the Council. However, that risk exists and places more emphasis on the need to find a solution within the borough.

Other areas of the country have, and are, facing similar environmental issues, with Natural England issuing similar Advice.

However, the Stour Catchment was one of the first areas which raises the issue of both phosphorus and nitrogen. By its nature, phosphorus nutrient removal is more complex than nitrogen. This means, effectively, only certain types of land-based solutions will work. It also means learning from best practice is somewhat limited.

**Exempt from  
Publication:**

**NO**

**Background  
Papers:**

Natural England Stodmarsh Nutrient Neutrality Advice  
(November 2020)  
<https://www.ashford.gov.uk/habitat-regulations-assessment>

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## Report Title: A Nutrient Mitigation strategy for the Stour catchment in Ashford Borough

### Introduction and Background

1. The Stodmarsh Lakes lie east of Canterbury and is a Special Protection Area (SPA), Ramsar site, Special area of Conservation (SAC), and a Site of Special Scientific Interest (SSSI) and parts are a National Nature Reserve (NNR). It is a site of national and international importance for a range of water dependent habitats and wildlife that relies upon them.
2. In July 2020, Natural England (NE) issued to the Council an Advice note which set out that there were excessive nitrogen and phosphorus levels in the Stodmarsh Lakes.
3. A proportion of the increased nutrients (nitrogen and phosphorus) were attributed to housing development. In light of relevant European case law and the consequence of this Advice, new developments which are located within the Stour catchment are required to prevent further deterioration of the Stodmarsh Lakes.
4. Developments providing overnight accommodation (including housing and tourism accommodation) within the affected area are required to demonstrate “nutrient neutrality”. This term describes no net increase in nutrients (nitrogen and phosphorus) entering the River Stour watercourses post-development.
5. Nutrient neutrality is confirmed through a Habitat Regulations Assessment and Appropriate Assessment (AA), in accordance with The Conservation of Habitats and Species Regulations (2017 as amended). These support the planning application process. Separate expert consultants have been appointed to assess any mitigation proposals submitted to the Council through Appropriate Assessments.
6. Case law demonstrates that the Advice issued by NE should be afforded significant weight within planning decisions. Recent QC advice confirms this position and very recent case law reaffirms the weight to be given to such NE Advice. Where applications are affected, granting planning permission is only lawful after an AA has been concluded.
7. In these circumstances, the decision maker and “competent authority” is the Council. Any decision to grant planning permissions must have an appropriate assessment adopted by the competent authority, through which it is satisfied that there is no reasonable scientific doubt that the development will not adversely impact the integrity of the Stodmarsh Lakes. Failure to do so carries a risk for the Council that it will be successfully challenged through the courts.
8. The implications of Stodmarsh Lakes have been and continue to be significant for the Council. At present, there are over 100 live applications, accounting for

at least 4,000 new homes, which are 'on hold' because nutrient neutrality is yet to be confirmed through the appropriate assessment process.

9. Of these, a significant number of proposals will not be able to achieve neutrality given that they are too small to successfully mitigate on site. For example, brownfield sites in the urban area and small sites in the rural area which do not have sufficient land to find a solution on site.
10. There are also doubts about a number of site allocations in the Local Plan 2030 which may not be able to come forward until a strategic solution is found and operating. These include some significant developments in the urban Ashford area such as the redevelopment of the KWG site in Tannery Lane and potentially, the regeneration of Elwick Road and Vicarage Lane sites. Development on allocated rural sites, in villages such as Charing, Aldington and Chilham are also affected.
11. This means a stall on benefits brought forward by housing delivery, such as the housing delivery grant/New Homes Bonus, S106 monies and future Council Tax receipts. Reduced income from S106 monies will have impacts on funding for community and Council projects, school contributions and the delivery of affordable housing within the borough. Additionally other infrastructure which would be delivered by affected planning applications will also be delayed.
12. In the meantime, the government's national requirements of the five-year housing land supply test and the housing delivery test both remain in place. Where housing development is frustrated from coming forward in the Stour catchment area, this may progressively increase the pressure for development in the remainder of the borough, where the environment is particularly sensitive and existing adopted Local Plan policy indicates only a limited scale of new residential development should be permitted. Clearly, this reinforces the need to find a solution to the 'Stodmarsh' problem.

## **Principle of the Stodmarsh Mitigation Strategy**

13. Following the release of the Natural England Advice consultants were hired to produce a Stodmarsh Mitigation Strategy to explore options for the Council to pursue with a view of finding a solution within the borough boundary.
14. The work undertaken to date:-
  - a. Identifies the broad number of houses which are impacted by the Advice, up to the end date of the Local Plan (2030). This includes houses which are being proposed as 'live' planning applications, housing site allocations identified within the Local Plan and also an assumed number of likely future windfall housing sites, likely to come forward in the catchment.
  - b. Applies a series of assumptions around this 'total' assumed number of houses in terms of how many sites might be able to mitigate their nutrient impact on site, as opposed to those proposals which are likely to need a strategic solution.
  - c. Assumes a broad total amount of land that might be needed for nutrient mitigation based on this residual housing numbers coming forward. This is the headline figure of land needed to be acquired, to mitigate



housing development up to 2030, albeit based on a series of 'strategic' assumptions.

- d. Clearly shows that the best way to achieve nutrient mitigation for the borough is through the creation and maintenance of strategic wetlands. Wetlands, if located in appropriate locations, are an effective form of nutrient mitigation, as they store and intercept nutrient-rich water from the river. This decreases the level of nutrients within the river network, improving the water quality that flows into the Stodmarsh Lakes. Wetlands also require the least land take, by far, of any alternative mitigation solution.
15. Due to the complexities of calculating nutrient loads, the requirements for land to mitigate development harm needs to be expressed in terms of kilograms of nutrients rather than per dwelling. The issue is further complicated as differing proposals will yield different nutrient loads that need mitigating. For example, a future proposal that seeks to change the use of a farm to housing development will have a different impact in terms of nutrient load than a brownfield site in the town centre on account of the existing land uses having different nitrogen and phosphorus leaching rates, as set out in the NE Advice.
16. By expressing nutrients in terms of kilograms, a credit-based system will need to be established and administered by the Council in due course. A future Supplementary Planning Document (SPD) will need to be published to guide developers as how the credit system will work in practice. This is reflected in the recommendation.
17. In simple terms, new strategic wetlands will create nutrient 'credits' (when available) that can be applied for and then 'secured' against a planning application so that nutrient neutrality can be shown (established through an Appropriate Assessment per application). There may be some complexities associated with preparing a future credit-based system, but the general principle is established in the Solent region where a similar model is currently being applied. The Council also has experience of the apportionment of credits relating to highway capacity relating to Junction 10a, so it is not a new concept.
18. The draft strategy has identified broad locations where new strategic wetlands could be located based on geological and hydrological studies. The specific details of the size, design and location of any wetland areas is currently ongoing. The availability of land, and our ability to acquire it, are also considerations.
19. There is a need to move swiftly on land acquisition to deliver the solution and that is reflected in the recommendations to this report. There is no need to wait for the Mitigation Strategy to be worked up into more detail. The emerging conclusions are very clear about the need for new strategic wetlands if the Council are to pursue a solution within their own borders and retain control.

## **Engagement with Natural England and Environment Agency**

20. As part of drafting the Mitigation Strategy, Officers have consistently engaged senior officers representing Natural England and the Environment Agency.

Discussions have been focused on the principle of strategic wetlands to form a core component of the solution that is needed.

21. At this stage, the Environment Agency (EA) have confirmed there are no significant barriers to the principle of strategic wetlands being created and or any issues with the abstraction of water from the River Stour to sustain a wetland, although any new wetland or wetland areas will need planning permission, to be determined through the planning application process.
22. Natural England have expressed their interest in the delivery of nature-based solution, in particular wetlands, assuming these solutions deliver neutrality based on design and maintenance of such wetlands.
23. It is clear, that both these important stakeholders will need to be involved in the detailed delivery of any future wetlands. As the project progresses, the views of NE and EA will need to become clearer and more refined to provide a steer on the more detailed proposals as they emerge.

## **Implications and Risk Assessment**

24. There are a number of risks, uncertainties and implications on the Council which form part of resolving the Stodmarsh issue.
25. *Not progressing a solution:* One of the largest risks to the Council is to simply do nothing. The Council have already faced almost a year of not being able to grant planning permissions for qualifying developments, within the catchment. At the micro level, this has resulted in the inability to collect S106 money to go towards needed infrastructure and has placed a hold on delivering needed affordable housing.
26. At the macro level, continuing this approach would bring into question the Council's ability to deliver sustainable development across the borough in a way envisaged by the Local Plan 2030. This clearly has potential implications on the up-to-date nature of the Local Plan 2030, but also places more pressure on the non-catchment areas of the borough – areas which are unsustainable for such levels of housing growth.
27. *The Wastewater Treatment Works:* The current and future role of the Wastewater Treatment Works (WwTWs) and potential future upgrades is uncertain at present. Clearly, the WwTWs have the potential to mitigate much, if not all, of the harm generated by current and future developments in terms of phosphorus.
28. Clearly, there is a direct correlation between any future planned upgrades, in that they could significantly impact the scale of mitigation required within the Mitigation Strategy (i.e. much less land-based wetlands would be needed).
29. At present however, the current wastewater upgrade programme is a lengthy process, set out through legislation and moderated by Ofwat. Any changes in the process are unlikely to provide short-term relief from the nutrient issue and should be considered as a long-term solution (to start from 2025 onwards, at best).

30. However, it could be that the Government intervene and require upgrades to WwTWs earlier than currently envisaged, for example through the use of emergency powers. Depending on whether (and when) that is actioned, this could mean any land acquired by the Council for strategic mitigation purposes becomes unnecessary (although the land could still be used for other purposes which may be of benefit to the wider community).
31. Regarding the WwTWs, a catchment-wide strategy has been prepared by the affected Kent Local Planning Authorities and the Kent and Medway Enterprise Partnership (KMEP). Part of the catchment-wide strategy proposes to use credits from the headroom created by WwTW improvements.
32. This strategy has been submitted to Government for confirmation of the approach. As of this point in time, no response has been received from Government about whether the strategy is acceptable or what direction they may take.
33. Whilst officers support any accelerated improvements to the WwTWs, there is no guarantee that any upgrades (except those currently planned) would occur before 2030. Hence, when considering the relative risks, officers feel there would be significant risk to rely solely on the acceleration of WwTW upgrades, rather than pursue a Mitigation Strategy in tandem with any WwTW improvements. Especially as there has been no encouragement from Government at this time.
34. Delivering, managing and maintaining new wetland areas: If new strategic wetlands are pursued, they will need to be managed and maintained in this use in perpetuity (for a minimum of 80 years). This carries a financial burden (although management and maintenance costs are part of the work currently being looked at through the draft strategy).
35. In addition, the management and maintenance of wetlands will need expert resource and land management skills which are beyond what the Council currently hold. It may well be a partnership approach is adopted, with other organisations, such as Kent Wildlife Trust (who manage wetlands elsewhere). However, the cost of any arrangements is not yet known or agreed.
36. Additionally, a credit-based system to track any credits which are generated by strategic wetlands and how these are apportioned to specific planning applications will need to be produced and maintained. Whilst officers have some experience of similar credit-based system this will have resource and cost implications moving forward.
37. Development in neighbouring districts: As members will be aware, the water quality issues at Stodmarsh Lakes affect development potential in several other districts in East Kent. To date, officers across these districts have worked collaboratively in seeking strategic solutions for the wider catchment but it also follows that wetland creation or agricultural off-setting in Ashford borough may enable other development to come forward outside the district, particularly downstream.
38. Whilst the mitigation strategy presented in this report is aimed primarily at releasing development within Ashford borough to meet the Local Plan 2030

housing targets, the potential to expand mitigation schemes in suitable locations that could release development elsewhere should not be excluded as this may offer a more attractive package for funding bodies (see the *Funding the Strategy* section below).

39. *Failure to 'own' the solution:* Clearly, the most preferable scenario is that the Council 'own' the future wetlands in terms of controlling both the credits generated and their apportionment. Failure to do so could lead to a market driven solution and the risk of 'credits' becoming traded with a premium attached.
40. It might also lead to the 'controlling' developers to only use surplus credits for their own housing proposals, either within the borough or in other boroughs within the catchment. To avoid these scenarios, swift action is required by the Council to acquire land now as set out in the recommendation.
41. *Impact of the solution on the water course:* An outcome of the solution being proposed is that it will lead to the diversion/abstraction of river water from the Stour to feed the interceptor wetland areas. There may be consequences of this on the water quality and this is something the Environment Agency will need to be involved with. The sensitive nature of the chalk-streams in the Stodmarsh area will need to be considered in this context.
42. *The Water Industry National Environment Programme (WINEP):* A minor risk to the need for a strategic wetland solution will be the outcome of the WINEP programme which concludes in March 2022. This programme is investigating the hydrological connectivity between the Stodmarsh Lakes and the Stour, as well as suggesting a number of actions to improve water quality (in accordance with the Water Framework Directive). The outcome of this study may conclude that Stodmarsh is in better quality than previously set out, which could influence the scale of mitigation required in the borough Mitigation Strategy. However, it is recommended by officers that we do not wait for the results of this study, as it is unlikely to have such an outcome and any actions proposed as part of the study are likely to be medium to long-term solutions.
43. *Changes to case law:* Any changes to case law, the Habitat Regulations or the planning system could have implications for the nutrient neutrality process. Depending on the nature of the changes, this could alter the need for a wetland solution, its scale or when it might be needed. This is simply an unknown risk and cannot be accounted for. However, it is very unlikely that any diluting of Natural England's advice will actually happen.
44. *Post-2030 housing growth:* The emerging Stodmarsh Mitigation Strategy focuses on planned housing growth for the lifetime of the Ashford Local Plan 2030. Any housing growth post-2030 has not been considered yet. Whilst this presents an unknown risk, it is anticipated, that the WwTW upgrades would be implemented early in the next Plan's timeframe. However, it is very likely that the 'Stodmarsh Issue' will need to be explored in the next iteration of the Local Plan (partly to respond in a plan-led way) and the Mitigation Strategy itself will need to be revisited at regular intervals to make sure it remains robust and up-to-date.

## **Funding the Strategy**

45. In order to achieve a swift implementation of the mitigation strategy, which is critical to the release of new housing development, a measure of pro-active forward funding is considered to be essential. As development is frustrated from coming forward and releasing potential developer contributions for mitigation, and given the scale of potential funds necessary to acquire land, deliver the mitigation and maintain and manage it over the long term, significant public sector intervention is required.
46. Given this context, and the origins of the problem not being of local authorities or developers making, it is reasonable and appropriate to seek central government funding for the delivery of the strategy. This could take the form of a grant or a loan that is repayable over time as development is released. In broad terms this was the model applied to enable the delivery of M20 Junction 10a (another example of a major infrastructure constraint to new development).
47. If this approach is unsuccessful, then alternative methods of funding need to be considered. In this scenario, the Council itself may choose to invest in the delivery of at least an initial stage of the mitigation strategy to enable the process of working towards the release of constrained development to begin. This may then enable other avenues to be explored such as the potential for external funding via, for example, the LEP, where partnerships with other districts affected by Stodmarsh could be formed to bid for funds.
48. The principle of developer funding contributing towards the repayment of forward funded solutions is sound, but needs to be caveated in the context of development viability and potentially unforeseen costs that would not have been factored into original estimates of land value, profitability, etc. Whilst taking a pro-rata approach so that applicants are only liable for the scale of nutrient mitigation they require, will help to spread the overall cost, it is likely that this might reduce the scope for other forms of developer contributions that would normally be sought.
49. If the Cabinet approves the approach recommended in this report, officers will work up guidance for subsequent adoption that sets out these issues including the scope and scale of any financial contributions that would be sought towards the refunding of the costs of delivering the mitigation strategy.

## **Proposal for Cabinet**

50. The proposal in front of Cabinet is to agree to pursue an approach that:
  - a. gives the Council the opportunity to start granting planning permissions within the Stour catchment again, as they will be able to demonstrate nutrient neutrality,
  - b. provides the Council with an element of control as the Council would own the strategic wetland areas and be responsible for their detailed planning and management,
  - c. relies on the Council being responsible for the apportioning of available nutrient credits through a future credit-based system.

51. To achieve the points above, the first step is for Cabinet to agree the recommendations highlighted in this report. This will allow officers to progress a land acquisition strategy as a means of finding suitable land for future wetlands. It will also allow the Council to request money from Government to help deliver the solution.
52. In due course, the Cabinet will be asked to endorse a detailed Action Plan for implementing the Stodmarsh Mitigation Strategy once more is known about the land available for wetland creation and the specific wetland schemes to be brought forward has been finalised. They will also be asked to recommend to Council that a future SPD is adopted which will establish how any future credit based system will work in practice.
53. It is worth noting at this point, the nature of the issue the Council has faced over the last year and continue to face. The Natural England Advice covers the issue of phosphorus in the Stour river, as well as nitrogen. This requires a different solution, as phosphorus mitigation is far more land hungry for mitigation (if new woodlands were pursued for example). It also means that whilst the broad process in the Solent provides useful best practice, there isn't a like for like translation.
54. The Council, and our neighbouring districts within the Stour Catchment are among the first to have to tackle the issue of both phosphorus and nitrogen together and this needs to be understood.
55. In addition, Ashford's circumstances are further unique in that around half of the borough is impacted by the Advice and remaining half is not. The area affected includes the town of Ashford, which the Ashford Local Plan 2030 recognises as the most sustainable location within the borough and where most development should be located. Approximately 90% of the borough's future housing growth is located within the catchment and subsequently 'caught'.
56. The complexities of the issue, and the circumstances set out above means that there are risks for the Council that must be accepted when any solution is pursued. However, there are also consequences of doing nothing – as explored in this Report and therefore that approach is not one to pursue.
57. Clearly, given the context of the Stodmarsh Lakes situation and that this a matter which was not foreseen by any of the national agencies charged with being responsible for the Lakes' water quality, including Natural England as the public body responsible for managing Stodmarsh, it is reasonable that the funding to deliver a mitigation solution should come from Government. Hence the recommendation in this report.
58. However, the Council must be prepared to take responsibility should such funding not be provided, and this principle is reflected in the recommendations. However, such an option should very much be treated as a fallback position.

## **Other Options Considered**

59. Given the complexities and specific nature of the Stodmarsh issue, there are only limited alternative options available to the Council.
60. One option would be to simply not pursue a specific solution and wait until the planned improvements to Wastewater Treatment Works happen. As set out previously in this report, there is no guarantee that any upgrades (except those currently planned) would occur before 2030. Hence, when considering the relative risks, officers feel it there would be significant risk to wait for improvements to the WwTWs, rather than progress the proposed mitigation strategy.
61. Another option is to wait for Government intervention, i.e. the Government come forward with a proposal themselves for a land-based solution (in tandem with planned upgrades to the WwTWs). However there has been no indication that this will happen.
62. Another option is to rely solely on the cross-boundary strategy being pursued with our neighbours. Although such partnership working is welcomed, and should continue, there are considerable risks to relying on this approach, including the implications if the strategy falls behind schedule, is not suitable for the borough, is not supported by Government, or if any solution takes the control/ownership out of the Council's hands. This option should remain on the table, and the Council should remain engaged with it, but as a complementary work area and not the sole solution.
63. Another option is to wait for a market-based solution to be generated. There are a number of risks associated with such an approach, as the Council would not be able to retain ownership or control, making apportioning future credits very difficult and potentially leading to premiums being attached to any credits. There is also the question whether the market could genuinely unite to deliver a truly strategic wetland option, rather than a series of wetlands based on their individual land options - which may or may not lead to supporting new housing growth in the borough.

## **Reasons for Supporting Option Recommended**

64. The option or approach outlined in this Report is the only realistic way in which a strategic solution can be found which allows the Council an element of control and allows the Council to start granting planning permissions for housing within the Stour Catchment, certainly in the short term.
65. Failure to do so simply means that finding a solution is taken out of our hands and the Council will be at the behest of other people's timescales and priorities.

## **Next Steps in Process**

66. Should Cabinet agree to the recommendations, the key steps are as follows:
  - a. Officers to explore land acquisition options as means of delivering strategic wetlands,
  - b. Officers and Members to lobby Government as a means of securing a grant to assist in the delivery of delivering strategic wetlands.

67. The next steps include:
- a. Progressing the emerging Stodmarsh Mitigation Strategy to a final version for Cabinet approval,
  - b. Submitting a detailed planning application (s) for a strategic wetland or wetlands,
  - c. Drafting a supplementary planning document and phasing strategy for the creation of the wetland areas, to be consulted on in due course. These documents would create the detailing of any future apportionment process in a credit-based system. The supplementary planning document would first pass through the Local Plan and Planning Policy Task followed by Cabinet,
  - d. Continuing to work with our neighbouring authorities to pursue a catchment wide based solution

## **Equalities Impact Assessment**

68. Members are referred to the attached Assessment.

## **Conclusion**

69. Since July 2020, housing applications have been on hold within the Stour catchment, due to the impact of development on the deteriorating water quality downstream in the Stodmarsh Lakes. In particular, the Ashford urban area and a significant portion of sustainable planned housing development set out in the Local Plan 2030 has been affected.
70. To be able to lawfully grant planning permissions, new housing development (and other overnight accommodation) in the Stour catchment must demonstrate 'nutrient neutrality'. In practice, experience is showing us that achieving neutrality requires significant land areas and as such many housing proposals simply cannot progress.
71. For many schemes, this hold on granting permissions will continue until a strategic nutrient mitigation solution can be delivered. In light of this, members asked officers to pursue a mitigation strategy as a means of finding a strategic solution within the borough. This report sets out that work on the Mitigation Strategy has identified that the only realistic land based strategic solution includes the creation of new strategic wetland areas in the borough.
72. There are a considerable amount of risks accompanying this Mitigation Strategy and any wetland creation, which have been discussed in this report. However, the largest risk is to do nothing. Therefore, it is considered on balance that these risks are outweighed by the benefits of pursuing a Mitigation Strategy to remove the current block on granting planning permissions.
73. The purpose of this report is to recommend to Cabinet that the Council actively pursues a mitigation strategy based on the creation and delivery of strategic wetlands.

## **Portfolio Holder's Views (Cllr Neil Bell)**



74. The issues at Stodmarsh Lakes were presented to the Council with little warning, but the severity of the Advice cannot be underestimated. We have faced, and continue to face, a significant impediment to the granting of planning permissions for new housing development in highly sustainable locations which have been carefully and diligently identified through our Local Plan 2030, following a rigorous independent examination process.
75. To now face uncertainty over the delivery of this housing growth, for an issue which was not known to us as the Council progressed our Local Plan 2030, is a significant challenge. There are a number of implications from not being able to grant planning consent for otherwise suitable housing proposals, ranging from the inability to collect S106 money to support much needed community infrastructure to risking the Council's ability to maintain parity with housing land supply tests and the housing delivery tests in the future. In doing so, other parts of our borough – which are far less suitable for new housing growth – are potentially at risk from speculative future housing proposals. This, in itself, carries different environmental concerns.
76. I therefore fully support the creation of the Stodmarsh Mitigation Strategy as a means of trying to find a solution to the issue within our own border. I am delighted it is progressing well, and have no hesitation in supporting the clear emerging outcome that new strategic wetland areas are needed as the most optimum, deliverable and quickest solution. Failure to act would have far more serious implications. Whilst this is a financial burden that the Council should not have to face, given the nature of the issue, I am supportive of the need to move forward with seeking to acquire land for such purposes, as a means of solving the problem. Crucially, this will also ensure that we retain control over the future creation and apportionment of credits.
77. I therefore strongly recommend that the Cabinet agree to the recommendations outlined so the Council can move forward and deliver the Local Plan aspirations that we worked so hard to achieve.

## **Contact and Email**

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# Equality Impact Assessment

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1. An Equality Impact Assessment (EIA) is a document that summarises how the council has had due regard to the public sector equality duty (Equality Act 2010) in its decision-making. Although there is no legal duty to produce an EIA, the Council must have **due regard** to the equality duty and an EIA is recognised as the best method of fulfilling that duty. It can assist the Council in making a judgment as to whether a policy or other decision will have unintended negative consequences for certain people and help maximise the positive impacts of policy change. An EIA can lead to one of four consequences:

- (a) No major change – the policy or other decision is robust with no potential for discrimination or adverse impact. Opportunities to promote equality have been taken;
- (b) Adjust the policy or decision to remove barriers or better promote equality as identified in the EIA;
- (c) Continue the policy – if the EIA identifies potential for adverse impact, set out compelling justification for continuing;
- (d) Stop and remove the policy where actual or potential unlawful discrimination is identified.

## Public sector equality duty

2. The Equality Act 2010 places a duty on the council, when exercising public functions, to have due regard to the need to:
- (a) Eliminate discrimination, harassment and victimisation;
  - (b) Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
  - (c) Foster good relations between persons who share a relevant protected characteristic and persons who do not share it (ie tackling prejudice and promoting understanding between people from different groups).

3. These are known as the three aims of the general equality duty.

## Protected characteristics

4. The Equality Act 2010 sets out nine protected characteristics for the purpose of the equality duty:

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership\*
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

\*For marriage and civil partnership, only the first aim of the duty applies in relation to employment.

## Due regard

5. Having 'due regard' is about using good equality information and analysis at the right time as part of decision-making procedures.
6. To 'have due regard' means that in making decisions and in its other day-to-day activities the council must consciously consider the need to do the things set out in the general equality duty: eliminate discrimination, advance equality of opportunity and foster good relations. This can involve:
- removing or minimising disadvantages suffered by people due to their protected characteristics.
  - taking steps to meet the needs of people with certain protected characteristics when these are different from the needs of other people.
  - encouraging people with certain protected characteristics to participate in public life or in other activities where it is disproportionately low.
7. How much regard is 'due' will depend on the circumstances. The greater the

potential impact, the higher the regard required by the duty. Examples of functions and decisions likely to engage the duty include: policy decisions, budget decisions, public appointments, service provision, statutory discretion, decisions on individuals, employing staff and procurement of goods and services.

8. In terms of timing:

- Having 'due regard' should be considered at the inception of any decision or proposed policy or service development or change.
- Due regard should be considered throughout development of a decision. Notes shall be taken and kept on file as to how due regard has been had to the equality duty in research, meetings, project teams, consultations etc.
- The completion of the EIA is a way of effectively summarising this and it should inform final decision-making.

### Armed Forces Community

9. As part of the council's commitment to the Armed Forces Community made through the signing of the Armed Forces Covenant the council's Cabinet agreed in November 2017 that potential impacts on the Armed Forces Community should be considered as part of the Equality Impact Assessment process.

10. Accordingly, due regard should also be had throughout the decision making process to potential impacts on the groups covered by the Armed Forces Covenant:

- Current serving members of the Armed Forces (both Regular and Reserve)
- Former serving members of the Armed Forces (both Regular and Reserve)
- The families of current and former Armed Forces personnel.

### Case law principles

11. A number of principles have been established by the courts in relation to the equality duty and due regard:

- Decision-makers in public authorities must be aware of their duty to have 'due regard' to the equality duty and so EIA's must be attached to any relevant committee reports.
- Due regard is fulfilled before and at the time a particular policy is under consideration as well as at the time a decision is taken. Due regard involves a conscious approach and state of mind.
- A public authority cannot satisfy the duty by justifying a decision after it has been taken.
- The duty must be exercised in substance, with rigour and with an open mind in such a way that it influences the final decision.
- The duty is a non-delegable one. The duty will always remain the responsibility of the public authority.
- The duty is a continuing one so that it needs to be considered not only when a policy, for example, is being developed and agreed but also when it is implemented.
- It is good practice for those exercising public functions to keep an accurate record showing that they have actually considered the general duty and pondered relevant questions. Proper record keeping encourages transparency and will discipline those carrying out the relevant function to undertake the duty conscientiously.
- A public authority will need to consider whether it has sufficient information to assess the effects of the policy, or the way a function is being carried out, on the aims set out in the general equality duty.
- A public authority cannot avoid complying with the duty by claiming that it does not have enough resources to do so.

The Equality and Human Rights Commission has produced helpful guidance on "Meeting the Equality Duty in Policy and Decision-Making" (October 2014). It is available on the following link and report authors should read and follow this when developing or reporting on proposals for policy or

service development or change and other decisions likely to engage the equality duty. [Equality Duty in decision-making](#)

<b>Lead officer:</b>	Simon Cole
<b>Decision maker:</b>	Cabinet
<b>Decision:</b> <ul style="list-style-type: none"> <li>• Policy, project, service, contract</li> <li>• Review, change, new, stop</li> </ul>	Agreement of principle and method for nutrient mitigation strategy for the Stour catchment in Ashford borough.
<b>Date of decision:</b> The date when the final decision is made. The EIA must be complete before this point and inform the final decision.	29 July 2021
<b>Summary of the proposed decision:</b> <ul style="list-style-type: none"> <li>• Aims and objectives</li> <li>• Key actions</li> <li>• Expected outcomes</li> <li>• Who will be affected and how?</li> <li>• How many people will be affected?</li> </ul>	<p>The aim of the nutrient mitigation strategy is to create an mechanism to enable affected development proposals which are required to demonstrate nutrient neutrality to come forward, if they cannot provide mitigation on-site.</p> <p>The nutrient mitigation strategy, and the strategic wetlands areas created as a result of the strategy, will enable development, particularly housing, to lawfully be granted planning permission within the Stour catchment.</p>
<b>Information and research:</b> <ul style="list-style-type: none"> <li>• Outline the information and research that has informed the decision.</li> <li>• Include sources and key findings.</li> </ul>	<p>Consultants have been working with the Council to identify the broad number of houses impacted by the Natural England advice, as well as the total number of houses which might be able to mitigate their nutrient on site. This has given the broad total amount of land needed for nutrient mitigation.</p> <p>The consultants are now currently working to identify the best location for strategic wetland areas.</p> <p>Discussions have also been held with the Environment Agency and Natural England about the Advice, implications and the nutrient mitigation strategy.</p>
<b>Consultation:</b> <ul style="list-style-type: none"> <li>• What specific consultation has occurred on this decision?</li> <li>• What were the results of the consultation?</li> <li>• Did the consultation analysis reveal any difference in views across the protected characteristics?</li> <li>• What conclusions can be drawn from the analysis on how the decision will affect people with different protected characteristics?</li> </ul>	<p>Discussions have been held with Environment Agency and Natural England to discuss the approach towards nutrient neutrality and the nutrient mitigation strategy for Ashford Borough.</p> <p>The future stages of the strategy will include the publication of the final version as well as the production of a Supplementary Planning Document. Consultation on the Supplementary Planning Document will be held in the future, and conclusions drawn in a separate Cabinet Report on the SPD and final Mitigation Strategy.</p>

**Assess the relevance of the decision to people with different protected characteristics and assess the impact of the decision on people with different protected characteristics.**

When assessing relevance and impact, make it clear who the assessment applies to within the protected characteristic category. For example, a decision may have high relevance for young people but low relevance for older people; it may have a positive impact on women but a neutral impact on men.

<b>Protected characteristic</b>	<b>Relevance to Decision High/Medium/Low/None</b>	<b>Impact of Decision Positive (Major/Minor) Negative (Major/Minor) Neutral</b>
<u>AGE</u> Elderly	None	Neutral
Middle age	None	Neutral
Young adult	None	Neutral
Children	None	Neutral
<u>DISABILITY</u> Physical	None	Neutral
Mental	None	Neutral
Sensory	None	Neutral
<u>GENDER RE- ASSIGNMENT</u>	None	Neutral
<u>MARRIAGE/CIVIL PARTNERSHIP</u>	None	Neutral
<u>PREGNANCY/MATERNITY</u>	None	Neutral
<u>RACE</u>	None	Neutral
<u>RELIGION OR BELIEF</u>	None	Neutral
<u>SEX</u> Men	None	Neutral
Women	None	Neutral
<u>SEXUAL ORIENTATION</u>	None	Neutral
<u>ARMED FORCES COMMUNITY</u> Regular/Reserve personnel	None	Neutral
Former service personnel	None	Neutral
Service families	None	Neutral

<b>Mitigating negative impact:</b> Where any negative impact has been identified, outline the measures taken to mitigate against it.	N/A
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<b>Is the decision relevant to the aims of the equality duty?</b>	
Guidance on the aims can be found in the EHRC's <a href="#">Essential Guide</a> , alongside fuller <a href="#">PSED Technical Guidance</a> .	
<b>Aim</b>	<b>Yes / No / N/A</b>
1) Eliminate discrimination, harassment and victimisation	N/A
2) Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it	N/A
3) Foster good relations between persons who share a relevant protected characteristic and persons who do not share it	N/A

<b>Conclusion:</b>	
<ul style="list-style-type: none"> <li>• Consider how due regard has been had to the equality duty, from start to finish.</li> <li>• There should be no unlawful discrimination arising from the decision (see guidance above ).</li> <li>• Advise on whether the proposal meets the aims of the equality duty or whether adjustments have been made or need to be made or whether any residual impacts are justified.</li> <li>• How will monitoring of the policy, procedure or decision and its implementation be undertaken and reported?</li> </ul>	<p>Officers have been working to prepare a nutrient mitigation strategy for the Stour catchment. The stage presented to Cabinet it with regards to the pursuing a nutrient mitigation strategy and to start a land acquisition process for the creation of strategic wetlands.</p> <p>The Council has considered the equalities act, however the Strategy is not specifically relevant to any of the protected characteristics. The Nutrient Mitigation Strategy seeks to remove the current hold on development, that will benefit the Stour catchment (and borough) as a whole. It is concluded that steps proposed in this report, for the nutrient mitigation strategy, do not prejudice any existing groups.</p>
<b>EIA completion date:</b>	14 July 2021