

NEWCASTLE-UNDER-LYME BOROUGH COUNCIL

EXECUTIVE MANAGEMENT TEAM'S REPORT TO CABINET

21st July 2021

Report Title: **Walleys Quarry – Odour Issues**

Submitted by: **Chief Executive**

Portfolios: **Environment & Recycling; One Council, People & Partnerships**

Ward(s) affected: **All**

Purpose of the Report

To advise Cabinet on the case for serving a Statutory Nuisance Abatement Notice to address problem odours in the Borough associated with Walleys Quarry and to address the associated financial implications.

RECOMMENDATIONS

Cabinet is recommended to:

- (1) Note that despite the further works that have taken place at Walleys Quarry landfill site, a significant level of complaints continue to be received from residents of the Borough and air monitoring data continues to show odour levels in exceedance of annoyance levels.**
- (2) Note the officer advice regarding the evidence, risks, financial implications and potential outcomes surrounding formal Statutory Nuisance action as set out in the confidential appendix to this report.**
- (3) Approve an initial reserve in the sum of £1,000,000 to meet the costs associated with taking formal action (in the event of a decision to do so) and authorise the Executive Director – Operational Services In consultation with the Leader of the Council, to call on this reserve, to meet the potential costs associated with serving and progressing any Notices served.**
- (4) Agree to update Full Council on the decision and the next steps in the legal process.**

Reasons

To ensure Cabinet are aware of the evidence, risks, financial implications and potential outcomes surrounding any decision to take formal Statutory Nuisance action and to make initial financial provision for those processes to commence in the event of a decision being taken to do so.
To note that the decision to serve an Abatement Notice is not a Cabinet decision, but a decision that is taken by the Head of Environmental Services who is the appropriately qualified Officer.

1. Background

- 1.1 Previous reports have detailed how for a number of years, parts of the Borough have suffered from problematic foul odours, widely believed to come from the Walleys Quarry Landfill Site in Silverdale operated by Walleys Quarry Ltd, part of the RED Industries group of companies. Addressing this issue has been a priority for the current administration, with a specific budget of £50,000 agreed in February to enable specialist advice to be secured and targeted work to be undertaken.**

- 1.2 The Environment Agency is the lead regulator for such sites, testing and enforcing compliance with the permit under which the site operates. The Council also has a role in influencing the operation and performance of such sites, where an operator fails to comply with actions required under an abatement notice issued by the Council in relation to any statutory nuisance caused by the site.
- 1.3 At the last meeting of the Cabinet, a number of actions were agreed including:
- (1) It be noted that a response has been received to the letter before action, served on Walleys Quarry Ltd, which was not, in the view of Officers, sufficient to address the concerns raised.
 - (2) It be noted that despite the works that had taken place at Walleys Quarry landfill site, a significant level of complaints continued to be received from residents of the Borough and air monitoring data continued to show odour levels in exceedance of annoyance levels
 - (3) A Special Cabinet Meeting be held on 21st July 2021 to carefully consider all of the evidence collated to date, and receive advice on whether or not an Abatement Notice should be served, and consider the financial implications of this.
- 1.4 Complaints associated with the site continue to be received in significant numbers, and the air quality monitoring equipment indicates that concentrations of Hydrogen Sulphide in the area remains high. This report does not provide an update on the odour issues locally, but rather addresses the situation regarding the evidence collected to date, and to provide advice regarding the servicing of an Abatement Notice.

2. Issues

Council Powers Regarding Statutory Nuisance

- 2.1 The Environmental Protection Act 1990, section 79, is the legislation concerned with statutory nuisances. This is the principal piece of legislation covering the Council's duties and responsibilities in respect of issues relating to odour nuisance. As set out below, it places a duty on a local authority to serve an Abatement Notice where a statutory nuisance is identified or considered likely to arise or recur.
- 2.2 Section 79 defines (insofar as it is relevant), is as follows:-

“79.— Statutory nuisances and inspections therefor.

(1) Subject to subsections (1A) to (6A) below, the following matters constitute “statutory nuisances” for the purposes of this Part, that is to say—

...

(c) fumes or gases emitted from premises so as to be prejudicial to health or a nuisance;

(d) any dust, steam, smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance;

...

and it shall be the duty of every local authority to cause its area to be inspected from time to time to detect any statutory nuisances which ought to be dealt with under section 80 below or sections 80 and 80A below and, where a complaint of a statutory nuisance is made to it by a person living within its area, to take such steps as are reasonably practicable to investigate the complaint.”

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80A below and, where a complaint of a statutory nuisance is made to it by a person living within its area, to take such steps as are reasonably practicable to investigate the complaint.’

- 2.3 Where a statutory nuisance is identified or considered likely to occur or recur, section 80 of the Act requires that an abatement notice is served on those responsible for the nuisance. The abatement notice can either prohibit or restrict the occurrence or reoccurrence of the nuisance and may require works (or other steps) to be undertaken within specified timescales.
- 2.4 There is a right of appeal against any notice on prescribed grounds. There is a right of appeal against any Abatement Notice issued. The requirements of an Abatement Notice are often suspended whilst any appeal is determined.

Odour Nuisance Investigations

- 2.5 Cabinet allocated a budget of £50,000 to enable officers to undertake the necessary investigations to establish whether the issues of odours from Walleys Quarry amounted to a Statutory Nuisance, requiring the Council to serve an Abatement notice. Officers have gathered and analysed a range of evidence which is summarised in this report and in its confidential appendix.
- 2.6 As the collation evidence was being progressed and analysed, officers served a letter before action on Walleys Quarry Ltd to give the company the opportunity to provide to the Council any information to satisfy it that the company has an effective action plan and acceptable timeline in place to prevent the emission of regular, persistent and offensive odours detectable beyond the site boundary. Whilst Walleys Quarry Ltd responded to this letter, it did not address the core request. The focus of the response was to suggest that the source of the odour lay elsewhere.
- 2.7 In the view of Officers, the response was insufficient to address the concerns raised. This is due to the operator’s reply failing to provide the Council with any information to confirm that it has an effective action plan and acceptable timescale in place to resolve the problem.
- 2.8 The Council’s Environmental Health Officers have been collecting and analysing a range of evidence regarding the odours experienced by residents in the Borough, and this is summarised below. A more detailed analysis is contained in the confidential appendix attached to this report as it will be necessary to treat this information as confidential in advance of potential legal proceedings.

3. Complaint data:

- 3.1 In the first 6 months of 2021 the Council has received a total of 18,227 complaints, and the Environment Agency 32,541 (including to 11th July). These are set out in the table below which also shows the complaints received by the Environment Agency.

Complaints To	Jan 2021	Feb 2021	March 2021	April 2021	May 2021	June 2021	July 2021 to 11/7	Total Year to date
Council	921	3263	4799	3316	3466	1880	628	18277
Environment Agency	2050	4098	6347	6181	8482	4444	939	32,541

- 3.2 Whilst complaint levels appear to have decreased, they continue at a level which indicates that the issue with odours escaping the site have not abated and continue to have a negative impact on residents. This incident remains, by some margin, the largest source of complaints received on any matter by the Council.

- 3.3 The complaints received by the Council have been captured in a dedicated odour complaint form, which allows each complainant to rate the odour on a scale of 0-6.
- 3.4 GIS maps of the distribution of complaints has also been collated. The trend of complaint data indicates that public concern regarding this matter is ongoing.

4. Air Quality Monitoring Stations

- 4.1 The Council, Staffordshire County Council, and the Environment Agency are jointly funding a campaign of air quality monitoring which will run until August utilising four static air monitoring stations. Data from these stations is reviewed to provide information in relation to two standards relating to Hydrogen Sulphide (H₂S) – the WHO Health threshold and the WHO annoyance threshold, with this analysis published by stakeholders.
- 4.2 Hydrogen sulphide concentrations were above the World Health Organization’s odour annoyance guideline level (7 µg/m³, 30-minute average) over the last 12 weeks for the following percentages of each week:

Location	19/4 – 25/4	26/4- 2/5	3/5 – 9/5	10/5- 16/5	17/5- 23/5	24/5 – 30/5	31/5 – 6/6	7/6 – 13/6	14/6 – 20/6	21/6 – 27/6	28/6 – 4/7	5/7 – 11/7
MMF1 - Silverdale Cemetery	18%	4%	6%	15%	1%	7%	30%	1%	11%	2%	1%	5%
MMF2 - Silverdale Road	8%	10%	21%	20%	9%	15%	1%	10%	7%	1%	8%	18%
MMF6 - NuL Fire Station	4%	13%	6%	1%	10%	16%	6%	10%	9%	4%	8%	3%
MMF9 - Galingale View	21%	35%	48%	10%	53%	47%	18%	19%	13%	12%	10%	17%

- 4.3 From this data it continues to be apparent that whilst the periods when the annoyance level has been in exceedance has reduced overall, as the last week showed an increase of up to 10% on the previous week, there remains potential for significant odour complaints to occur over these periods, with the Galingale View area remaining the most significantly impacted.
- 4.4 Although the EA has ensured the operator has undertaken significant improvements to gas capture, capping and leachate management, it is considered premature to view the reductions in gas detected at the monitoring stations as a permanent reduction in gas escaping from the land fill as there may be seasonal atmospheric factors in play that reduce the detection of H₂S gas at this time of year. Further measures such as on site gas emission testing will be necessary to determine whether there has been a significant reduction of gas escaping the landfill.

5. **Community Impact Statements:**

- 5.1 Approximately 750 individual impact statements, surveys and letters have been submitted to the Council which detail how the impact of odours impact on the daily lives and health of residents. These provide a compelling statement of the experience of living with this odour:
- 49% Reported health Issues

- 44% Could not open their windows/air vents/doors to get fresh air
- 30% Reported odours in their property (house/flat)/odours in cars
- 11% Had difficulty sleeping/disturbed sleep/lack of sleep
- 22% Cannot use garden/enjoy garden properly/put washing out
- 16% Impacted by dirty roads/debris/acidic smell/noise/visual impact of operation/feeling unclean (hair/clothes)
- 18% Said it impacted on daily outdoor exercise
- 5% Avoid/dislike visiting areas in Newcastle where smells permeate (impact on local businesses)
- 4% Taste the smell/leaves strange taste in mouth/puts off food
- 6% report Odours in Schools and College/Hospital/Work places

6. **Health and Impact Survey Report**

- 6.1 Aaron Bell MP undertook a Health Impact Survey which generated 1,426 responses, capturing the range of impacts on residents which included symptoms of health impacts as follows:

82% Headaches
71% Nausea/feeling sick
61% Eye irritation
51% Stress
45% Anxiety
38% Insomnia
27% Depression
24% Loss of appetite
23% Other Breathing difficulties
20% exacerbation of asthma/COPD
17% Nosebleeds
13% Vomiting
10% Panic attacks
14% Other

- 6.2 These health impacts are consistent with the sort term health impacts which Public Health England have advised would be consistent with exposure to Hydrogen Sulphide.

7. **Odour Tours:**

- 7.1 Environmental Health Officers have conducted “odour tours” between February and April 2021 at 6 locations, resulting in 28,164 individual odour ratings being recorded. The odour tours were completed by two officers for consistency, during the day time period, between February and April 2021 at 6 locations surrounding the landfill site. Officers rated the odour at set locations every 10 seconds for a 5 minute period in order to provide a consistent assessment of odours at locations around the Walleys Quarry site. Odours were recorded ranging from 0 - no odour to 5 – very strong odour.

8. **Environmental Health Officer visits**

- 8.1 Officers have responded to complaints in order to witness odour, these have been collated on the odour assessment sheets and/or in PACE notebooks. Night time call outs have been undertaken by EH staff during weekends and night times in April and from 3rd May to 23rd May, responding to 25 specimen properties call outs and also routine complaints. During these visits officers witnessed a range of odour levels.

9. **Jerome (Hydrogen Sulphide (H₂S) monitoring equipment):**

9.1 The Council hired and deployed Jerome H2S monitoring devices. These were used in two ways. Firstly to support officer visits in response to call outs and secondly temporarily installed inside properties. The data collected from these devices identified concentrations of H2S in residents homes at a range of levels, including instances above the WHO “annoyance guideline level” (7 µg/m³, 30-minute average).

10. **Odour Expert reports:**

10.1 The Council has engaged odour experts who has produced the following:

- Review of the findings of the Council’s olfactory testing.
- Review of the EA Air Quality monitoring data.
- Reverse modelling of emissions from Walleys Quarry Landfill site

11. **Landfill Experts reports**

11.1 The Council has engaged a landfill expert who has appraised the current landfill operations, current gas management procedures and infrastructure and also undertaken an assessment of whether Best Available Technique is being utilised in the management of the site.

12. **Complainants monitoring records:**

12.1 Work has been undertaken with 25 specimen properties. Diary records were provided by some of these properties and a number of witness statements have also been provided from the residents.

13. **Witness statements**

13.1 Formal Witness statements have been collected from the following:

- Borough Council Environmental Health Staff undertaking monitoring, collation and assessment of data.
- Some of the occupiers of the 25 specimen properties Local Businesses, institutions and organisations impacted by the odour
- Expert witnesses (Odour & Landfill)

14. **Sources of Odour**

14.1 A review of alternative possible local sources of odour has been undertaken and to date no credible alternate source has been identified. The current and ongoing focus of the Environment Agency as the principal regulator of the landfill on gas containment, capture and destruction also confirms that the site is a source of odour being experienced by residents.

15. **Implications**

15.1 The portfolio of evidence summarised above will be used by the Head of Environmental Health Services to determine whether the issues of odour from Walleys Quarry amount to Statutory Nuisance, requiring the serving of an abatement notice. In anticipation of this matter being determined, Cabinet is invited to consider whether, on the strength of the evidence summarised above and expanded upon in the confidential appendix, it is prepared to make financial provision for the matter to be progressed. In reaching this decision, Cabinet will need to be aware of other relevant matters including:

- Legal Process

- Risks
- Financial implications

An analysis of these issues is set out in the confidential appendix to this report.

16. **Proposal**

- (1) Note that despite the further works that have taken place at Walleys Quarry landfill site, a significant level of complaints continue to be received from residents of the Borough and air monitoring data continues to show odour levels in exceedance of annoyance levels.
- (2) Note the officer advice regarding the evidence, risks, financial implications and potential outcomes surrounding formal Statutory Nuisance action as set out in the confidential appendix to this report.
- (3) Approve an initial reserve in the sum of £1,000,000 to meet the costs associated with taking formal action (in the event of a decision to do so) and authorise the Executive Director – Operational Services In consultation with the Leader of the Council, to call on this reserve, to meet the potential costs associated with serving and progressing any Notices served.
- (4) Agree to update Full Council on the decision and the next steps in the legal process.

17 **Reasons for Proposed Solution**

17.1 To ensure Cabinet are aware of the evidence, risks, financial implications and potential outcomes surrounding any decision to take formal Statutory Nuisance action and to make initial financial provision for those processes to commence in the event of a decision being taken to do so.

To note that the decision to serve an Abatement Notice is not a Cabinet decision, but a decision that is taken by the Head of Environmental Services who is the appropriately qualified Officer.

18. **Options Considered**

18.1 Consideration is being given to whether or not a Statutory Nuisance exists and/or is likely to occur or recur in the area of the authority. The Head of Environmental Health Services, being the duly authorised officer to make that determination, will form a view as to whether, or not, this test has been met. If the view is formed that a Statutory Nuisance exists/or is likely to occur or recur, subject to any observations of Cabinet that may alter that view, the Council has a duty to serve an abatement notice.

19. **Legal and Statutory Implications**

19.1 The Environmental Protection Act 1990, section 79 is the legislation concerned with statutory nuisances in law. This is the principal piece of legislation covering the Council's duties and responsibilities in respect of issues relating to odour nuisance.

19.1.1 The Environmental Protection Act 1990, section 79 sets out the law in relation to statutory nuisance. This is the principal piece of legislation covering the Council's duties and responsibilities in respect of issues relating to odour nuisance.

19.1.2 The relevant part of Section 79 defines a statutory nuisance as any smell or other effluvia arising on industrial, trade or business premises which is prejudicial to health of a nuisance. The Council is responsible for undertaking inspections and responding to complaints to determine whether or not a statutory nuisance exists.

- 19.1.3 Where a statutory nuisance is identified or considered likely to occur or recur, section 80 of the Act requires that an abatement notice is served on those responsible for the nuisance. The abatement notice can either prohibit or restrict the nuisance and may require works to be undertaken by a specified date(s).
- 19.1.4 By virtue of paragraph 195 (Appendix 4, Scheme of Delegation – Specific Functions; Appendix C, Delegation of Environmental Health and Licensing Decisions) of the Constitution (pg100), the decision to serve notices pursuant to S80 of the 1990 Act is delegated to the Head of Environmental Health Services as the duly authorised and qualified officer.
- 19.1.5 There is a right of appeal against any abatement notice issued on a number of grounds, one of which is that the site operator is using “best available techniques” to prevent the odours complained of. Compliance with the Environmental Permit issued by the Environment Agency, and any actions required by the Environment Agency will often be sufficient to demonstrate that an operator is using “best available techniques” and that can result in an abatement notice being quashed on appeal.
- 19.1.6 The appeal process represents a significant resource commitment for the council in both time and expense, so it is important for the Council to be content that it stands a reasonable prospect of defending an appeal against any abatement notice that it issues.
- 19.1.7 If the council succeeds in securing an abatement notice following any appeal process, it is then a criminal offence to breach the terms of the abatement notice. Because the site is regulated by the Environment Agency under an Environmental Permit, the council would need to obtain the consent of the Secretary of State before it is able to prosecute any offence of breaching an abatement notice.
- 19.1.8 It is not possible to predict, with any certainty, the amount of a fine the court is likely to impose in respect of a breach of an abatement notice, because it will depend entirely on the circumstances in any given case. There will be a number of complex variables that the court would need to consider.
- 19.1.9 The courts will refer to the Sentencing Guidelines, which start by requiring an analysis of the degree of culpability and the level of harm caused. In addition, the courts are required to have regard to the financial means of the defendant. As a medium sized company (£10-£50m turnover) the starting point for any fine would range between £3000 and £400,000, depending on the degree of culpability and level of harm caused by the breach in question.
- 19.1.10 If a prosecution is brought in respect of a number of offences then the “totality principle” comes into play whereby the court must consider if the total sentence is just and proportionate in respect of the offending behaviour taken as a whole. The “starting point” fine would then be increased or reduced accordingly. The Guidelines indicate an “offence range”, taking all of these factors into account, of between £100 and £3m.
- 19.1.11 The magistrates' court can also make a compensation order, to compensate any person who has suffered personal injury, damage or loss as a result of the statutory nuisance offence.
- 19.1.12 Where an offence committed by a company is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of,

any director, manager, secretary or similar company officer, they may also be guilty of that offence and liable to be proceeded against.

20. Equality Impact Assessment

20.1 The work of the Council in this regard recognises that the problematic odours in the area may impact on some groups more than others. The work is focussed on removing this impact.

21. Financial and Resource Implications

21.1 There is no initial cost from the serving of an Abatement Notice, however, if an appeal is made against the notice and legal proceedings are required, there will be a significant financial and resource implications which will require funding via the proposed Reserve contained in the confidential appendix attached to this report.

21.2 It is proposed that an initial Reserve of £1m be established in order to fund any anticipated costs associated with serving the Abatement Notice. The Council has completed a review of its Financial Risk Assessment in respect of its General Fund Reserve of £3m and as a result propose to make available £1m from the General Fund Reserve to cover any potential costs associated with the issue of the Abatement Notice.

21.3 In addition to the financial impact servicing an Abatement Notice might have, there needs to be consideration given to the additional officer resource required.

21.4 It should also be noted that the Council is continuing to seek external funding to assist with this issue and updates will be provided in due course.

22. Major Risks

22.1 Risks are analysed in full in the appendix to this report.

23. Unsustainable Development Goals (UNSDG)



24. Key Decision Information

24.1 This is a Key Decision.

25. Earlier Cabinet/Committee Resolutions

25.1 This matter has been variously considered previously by Economy, Environment & Place Scrutiny Committee, Council and most recently, Cabinet on 21 April 2021, 9th June 2021 and 7th July 2021

26. List of Appendices

Walleys Quarry Odour Report – Confidential appendix.