Wealden District Council Local Plan Examination

Stage 1
Matter 1: Legal Compliance, including Duty to Co-operate.

HABITATS REGULATIONS ASSESSMENT

HEARING STATEMENT

ON BEHALF OF RESIDENTS OF BERWICK STATION

May 2019

Reference: 1012654.3.ss
1.0 INTRODUCTION

1.1 This statement updates representations submitted on behalf of Residents of Berwick Station ("Residents") in October 2018 in response to the Proposed Submission Local Plan (August 2018)("the PSWLP") relating to the Habitats Regulations Assessment ("HRA")\(^1\).

1.2 The PSWLP was informed by a Stage 1 HRA\(^2\). The Stage 1 HRA identified, on a precautionary basis, that without avoidance or mitigation measures it could not be concluded that the Local Plan would not result in a significant adverse effect on the integrity of the Ashdown Forest SAC to meet its conservation objectives, by maintaining or restoring the structure and function of its habitats\(^3\).

1.3 The Submission LP is informed, inter alia by a Stage 2 HRA (January 2019 ("the Stage 2 HRA")\(^4\), The Wealden Local Plan Interim Air Quality Mitigation Strategy (January 2019) ("AQMS")\(^5\), and an Air Quality Technical Note: Evaluation of Impact of Wealden Mitigation Strategy (January 2019)("AQTN")\(^6\).

1.4 The Stage 2 HRA confirms\(^7\) that it cannot currently be concluded with scientific certainty that the Wealden Local Plan would not result in a significant adverse effect on the integrity of the Ashdown Forest SAC. The Stage 2 HRA goes on to consider whether mitigation measures would avoid or reduce the impacts to a level where they will no longer be considered to adversely affect the integrity of the site.

1.5 The Residents challenge the assertion in the Stage 2 HRA that there are currently such measures that may be secured by Local Plan Policy AF2 that would deliver the improvements required to mitigate the growth proposed in the Local Plan. The Residents submit that there is in fact no evidence base on which it can be concluded with certainty that mitigation measures would deliver sufficient benefits to ensure that there would be no adverse impact on the Ashdown Forest SAC.

1.6 The Residents therefore further submit, that in the absence of certainty as to the benefits of the proposed mitigation measures, they should not have been taken into account as part of the Stage 2 HRA per the ruling of the Court of Justice of the European Union (Second Chamber) dated 7 November 2018 in conjoined cases C-293/17 and C-294/17 (hereinafter referred to as the “Coöperatie Mobilisation” case).

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\(^1\) Council Reference PSWLP954
\(^2\) August 2018 Submission Doc B2
\(^3\) Stage 1 HRA para 11.128
\(^4\) Submission Doc A35
\(^5\) Submission Doc A36
\(^6\) Submission Doc I41
\(^7\) para 11.141
2.0 THE COÖPERATIE MOBILISATION CASE

2.1 In summary, the CJEU held in Cooperatie Mobilisation that mitigation measures may only be taken into account as part of an Appropriate Assessment where the benefits of the mitigation measures are certain at the time of the assessment: i.e.

“126 ... according to the Court’s case-law, it is only when it is sufficiently certain that a measure will make an effective contribution to avoiding harm to the integrity of the site concerned, by guaranteeing beyond all reasonable doubt that the plan or project at issue will not adversely affect the integrity of that site, that such a measure may be taken into consideration in the ‘appropriate assessment’ within the meaning of Article 6(3) of the Habitats Directive (see, to that effect, judgments of 26 April 2017, Commission v Germany, C-142/16, EU:C:2017:301, paragraph 38, and of 25 July 2018, Grace and Sweetman, C-164/17, EU:C:2018:593, paragraph 51).

127 In the present case, the referring court notes, first, that the approach to the nitrogen problem adopted by the authors of the PAS is intended to reduce nitrogen deposition in Natura 2000 sites by means of measures in sites already affected which will take effect in the long term, it being understood that some of those measures may be taken only in the future and that others still must be regularly renewed.

128 Thus, as the Advocate General noted in point 92 of her Opinion, for some of them, those measures have not yet been taken or have not yet yielded any results, so that their effects are still uncertain.

129 Secondly, the referring court states that the PAS provides for annual monitoring of both deposition development and the implementation progress and results of measures, and also adjustment where their result is less favourable than the estimate used as a basis by the authors of the appropriate assessment.

130 The appropriate assessment of the implications of a plan or project for the sites concerned is not to take into account the future benefits of such ‘measures’ if those benefits are uncertain, inter alia because the procedures needed to accomplish them have not yet been carried out or because the level of scientific knowledge does not allow them to be identified or quantified with certainty.

131 It must be added that the ‘appropriate assessment’ within the meaning of Article 6(3) of the Habitats Directive must include not only the anticipated positive effects of those ‘measures’ but also the certain or potential adverse effects which may result from them (see, to that effect, judgment of 25 July 2018, Grace and Sweetman, C-164/17, EU:C:2018:593, paragraph 53).

132 In the light of the foregoing, the answer to the fifth to seventh questions in Case C-293/17 and the third to fifth questions in Case C-294/17 is that Article 6(3) of the Habitats Directive must be interpreted as meaning that an ‘appropriate assessment’ within the meaning of that provision may not take into account the existence of ‘conservation measures’ within the meaning of paragraph 1 of that article, ‘preventive measures’ within the meaning of paragraph 2 of that article, measures specifically adopted for a programme such as that at issue in the main proceedings or ‘autonomous’ measures, in so far as those measures are not part of that programme, if the expected benefits of those measures are not certain at the time of that assessment.”

(underlining added)
3.0 SUBMISSIONS

3.1 Paragraph 12.52 of the Stage 2 HRA asserts that the delivery of mitigation and avoidance measures in the AQMS including those known to be deliverable under the “Investigation” heading at a minimum will deliver the improvements required to mitigate the growth proposed in the Local Plan. Accordingly the Stage 2 HRA asserts that “...it can be concluded therefore with the requisite certainty that the Wealden Local Plan will not result in an adverse effect on the integrity of the Ashdown Forest SAC”

3.2 This assertion, however, is directly contrary to;

3.2.1 Paragraph 5.5 of the measures listed under the “Investigation” heading in the AQMS which are (as the heading suggests) subject to “Initial Investigations to determine delivery and individual project scope” for the measures proposed. Paragraph 5.5 cross references to a Report published at Appendix 9 of the Stage 2 HRA, which itself recommends

“...further investigation is carried out to determine the proportion of journey types through the Ashdown Forest SAC. This would assist in identifying which package of measures could be the most effective and deliverable

3.2.2 the conclusion set out in paragraph 5 of the AQMS that “a combination of” the various mitigation measures proposed (i.e. a combination of the measures proposed under each of the separate headings of “Strategy / Policy”, “Monitoring”, “Communication Plan”, “Investigation” and “Strategic Long-term”) “will be required” to deliver the necessary improvements to mitigate the growth proposed in the Local Plan;

3.2.3 the conclusions set out in Chapter 6 of the AQTN, under the heading “Can there be certainty that the Proposed Mitigation will deliver the Required Improvements?” that:

“6.1 Section 3 of this note explained that the measures being proposed by WDC have the potential to deliver benefits of the scale required on the roads close to the designated habitats. Furthermore, Section 4 of this note explained that the Mitigation Strategy can be updated over time to include other measures should this be necessary or appropriate. It is not currently possible to demonstrate whether any specific subset of measures will deliver the required benefits. Indeed, Section 4 of this note showed why absolute certainty is virtually never possible when predicting the effects of air quality mitigation.

6.2 The Mitigation Strategy provides WDC with a mechanism to deliver air quality benefits. Furthermore, the measures contained within the Interim Strategy have the potential to mitigate the effect of the WLP. This is not to suggest that achieving this level of mitigation will be easy or straightforward. Achieving the required level of improvement is likely to be challenging. Certainty that the effects of the WLP will be adequately mitigated can only, at this time, be provided by WDC’s commitment to ensuring that this is the case; which raises the question of how WDC can do this.

6.3 WDC is committed to ongoing air quality monitoring but, as explained in Section 5 of this note, the monitoring will not, on its own, demonstrate the effect of the mitigation measures. Instead, the monitoring will show the combined effect of a host of factors;

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8 Air Quality Consultants – Air Quality Mitigation Strategy: Review of Transport Options, Ashdown Forest (June 2018) para 4.3
including the mitigation measures, the WLP, in-combination developments, fleet-renewal, and meteorology. This information will be highly valuable, but it will not, on its own, allow the mitigation strategy to be ‘fine-tuned’.

6.4 A simple view might be that if air quality conditions deteriorate then additional mitigation should be implemented. However, it is quite possible that the unmitigated WLP would retard, or remove, improvements which might otherwise have occurred. Thus, such a simple approach to interpreting the air quality measurements may not be appropriate. WDC could seek to set ‘air quality indicators’ whereby certain levels of improvement need to be achieved, but it is difficult to see how this could be justifiably tied to mitigating the effects of the WLP.

6.5 It would be most sensible for mitigation delivery to make use of different strands of information. In particular, activity data should be collected and analysed, e.g. traffic flows and vehicle types. Where appropriate, the impacts of mitigation measures should be calculated using a predictive model. This modelling could then be verified against the measurements being collected by WDC. Over the longer term (five years or more), the air quality measurements will provide a clearer picture of overall air quality trends and thus allow WDC to see whether air quality is improving and, if so, the rate of improvement.


“For the competent authority to be able to decide if the mitigation measures are sufficient to remove any potential adverse effects of the plan or project on the site (and do not inadvertently cause other adverse effects on the species and habitat types in question), each mitigation measure must be described in detail, with an explanation based on scientific evidence of how it will eliminate or reduce the adverse impacts which have been identified. Information should also be provided of how, when and by whom they will be implemented, and what arrangements will be put in place to monitor their effectiveness and take corrective measures if necessary. The need for definitive data at the time of authorization is also raised in case C-142/16, paragraphs 37-45.

If the competent authority considers the mitigation measures are sufficient to avoid the adverse effects on site integrity identified in the appropriate assessment, they will become an integral part of the specification of the final plan or project or may be listed as a condition for project approval. If, however, there is still a residual adverse effect on the integrity of the site, even after the introduction of mitigation measures, then the plan or project cannot be approved (unless the conditions set out in Article 6(4) are fulfilled)".

(underlining added)

3.4 It is submitted that there is no explanation based on scientific evidence of how any of the currently proposed mitigation measures will effectively eliminate or reduce the adverse impacts which have been identified. Indeed the evidence base for the local plan appears to support the fact that there remains scientific uncertainty about the effectiveness of such measures.

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9 Submission Doc I32 – page 51
4.0 CONCLUSION

4.1 It is plainly evident that the HRA’s conclusion that the mitigation measures that could be secured under Policy AF2 would deliver the improvements required to mitigate the growth proposed in the Local Plan cannot be sustained, as the benefits of such measures (as the evidence base itself demonstrates) remain uncertain. The HRA’s reliance on such measures is contrary to the law as set out in the Cooperatie Mobilisation case on which basis it is legally flawed.