Joint Position Statement by the South Downs National Park Authority, Lewes District Council and Tunbridge Wells Borough Council

Matter 1: Legal Compliance

Joint position statement of the South Downs National Park Authority (SDNPA), Lewes District Council (LDC) and Tunbridge Wells Borough Council (TWBC) (henceforth referred to as ‘the Authorities’) prepared in response to the questions listed under Matter 1: Legal Compliance.

There are seven appendices referenced in this document:

1. Chronology of duty to cooperate events and documents
2. LDC/SDNPA first response to WDC pre-action letter
3. LDC/SDNPA second response to pre-action letter of WDC
4. Email correspondence between Wealden District Council (WDC) and Mid Sussex District Council (MSDC)
5. Map of letters of objection
6. AECOM technical note
7. Chronology of HRA preparation by the Authorities
8. Letter from TWBC to WDC on mitigation strategy
INTRODUCTION
1. The Authorities consider the Wealden Local Plan (WLP) has not been prepared in accordance with the relevant provisions of the Planning and Compulsory Purchase 2004 as amended (“PCPA”) and the Conservation of Habitats and Species Regulations 2017 (as amended) (“the Habitats Regulations”). Specifically, WDC has (a) failed to comply with its duty to co-operate (“DtC”) pursuant to section 33A PCPA and as required by paragraph 178 of the NPPF and (b) submitted a plan based on a flawed Habitats Regulation Assessment (HRA) which erroneously concludes that there is an adverse impact on the integrity of Ashdown Forest Special Area of Conservation (SAC) contrary to the views of both Natural England (NE) and neighbouring local planning authorities (LPA) and (c) in any event have failed to include appropriate mitigation measures.¹

DUTY TO COOPERATE²
2. The Authorities consider that Wealden District Council (WDC) has not cooperated with them or a number of other neighbouring LPAs on the cross boundary strategic issue³ of air quality (AQ) impacts on the Ashdown Forest SAC arising from traffic associated with new development. For the reasons set out below the Authorities do not accept the contentions and partial narrative in the WDC’s Duty to Cooperate Background paper at Section 5 and can as necessary address in further detail at the hearings.

3. The High Court has confirmed that the role of examination by a local plan inspector with regards to compliance with the DtC should involve “not a mechanistic acceptance of all documents submitted by the plan-making authority but a rigorous examination of those documents” and an assessment as to whether there has been “an active and ongoing process of co-operation” by the plan-making authority.⁴ The DtC appendices published by WDC are indeed a mechanistic replication of correspondence, which fail to demonstrate active and ongoing cooperation by WDC.

4. Paragraph 31 of the National Planning Guidance states that the DtC cannot be rectified post-submission. The Authorities consider that the duty has not been complied with and that, regrettably, the WLP examination should not proceed any further. The Authorities would be happy to engage with WDC going forward and suggest that the Ashdown Forest Working Group (AFWG) provides an appropriate forum for discussions on AQ.

5. NPPF12 paragraphs 178 – 181 emphasises the need for joint working to “be diligently undertaken for the mutual benefit of neighbouring authorities”. It also requires LPAs to work collaboratively with other bodies to ensure that strategic priorities across local boundaries are properly coordinated and clearly reflected in individual Local Plans (179). Neither of these requirements have been met by WDC.

¹ For the avoidance of doubt, this argument is without prejudice to the Joint Authorities’ position that no mitigation is required because the WLP will not have an adverse impact on the integrity of the SAC
² This section addresses the Inspector’s Questions 9 - 17
³ This matter was identified as strategic by the Authorities following the partial quashing of the Lewes Joint Core Strategy (JCS) at the High Court and WDC itself considered the issue as a strategic one in June 2015 (LDC22). The Ashdown Forest Working Group (AFWG) also identified it as a cross boundary strategic issue at its inception meeting in 2017.
⁴ St Albans District Council v SSCLG [2017] EWHC 171 (Admin) at [38]
6. WDC has breached its DtC and failed to comply with the relevant NPPF requirements in the following six key respects set out below. The Authorities have also addressed Questions 14 and 18.

7. To assist the Inspector in understanding the factual background to this issue, the Authorities have compiled a chronology with references to the key documents and events (Appendix 1). Examples from the chronology are cited where relevant in square brackets below.

(a) **WDC failed to pro-actively engage with other LPAs in addressing the strategic issue of AQ impacts on the SAC**

8. The approach of WDC throughout the plan preparation period to engagement with other Authorities on this issue has at best been passive and reactive, and at worse obstructive. At no stage has WDC taken the lead in engaging with other Authorities on this issue. This was shown by their actions following the Steel Cross judgement [2].

9. In 2017, rather than engaging with the SDNPA and LDC with any concerns it had over the Lewes JCS in advance of the submission of that Plan, WDC resorted to litigation which resulted in the partial quashing of the Plan. The pre-action correspondence sets out LDC’s concerns at that stage regarding WDC’s obligations under s.33A and regrets that WDC had failed to raise the issues it had in advance before threatening legal proceedings [4].

10. Following that litigation, it was the SDNPA that set up the AFWG in order to work collaboratively on this strategic cross-boundary issue [6]. Whilst it was reasonable for WDC to allow SDNPA to take the lead at that stage it was incumbent on WDC to engage in the AFWG pro-actively and transparently. It failed to do so: whilst ostensibly taking part in the AFWG, WDC concurrently pursued its own agenda in both the approach to data collection and in developing its own “bespoke” methodology. There was a lack of transparency in the way it pursued this agenda fundamentally at odds with WDC’s DtC.

(b) **WDC failed to co-operate constructively, actively and on an on-going collaborative basis regarding methodology for the assessment of AQ impacts on the SAC, data collection and the sharing of data.**

11. The AFWG agreed to work collaboratively on the issues, to share information and existing work, and to prepare a Statement of Common Ground (SCG) [6&7]. However, WDC has unilaterally pursued its own agenda of developing an increasing complex and “bespoke” methodology throughout the preparation of its HRA and WLP rather than properly exploring and exhausting the opportunities to carry out joint research and agree a joint methodology for assessing those impacts. This is evidenced by the publication of heavily redacted reports well after WDC had adopted its position on AQ [11 & 12].

12. The fact that WDC failed to sign the AFWG SCG by the agreed deadline is symptomatic of that unilateral approach. The AFWG sought to clarify in its SCG six key matters on HRA methodology for plan-making which the authorities either agreed, disagreed or had no position on. WDC approached that process by submitting at a very late stage in that process large tracts of technical text for inclusion, which was unhelpful and detracted from the clarity and potential utility of such a document [21].

13. The failure to co-operate has continued after the Regulation 19 stage. Following the submission of its formal representation, the Authorities offered to work with WDC to explain our
concerns. This offer was declined and WDC instead commissioned consultants to address the issues raised [36].

14. The result of this breach of the DtC is that extremely detailed and complex issues over the appropriate methodology to be employed in the HRA are now still unresolved and WDC have produced policies and a mitigation strategy, which are unjustified and inconsistent with the Habitats Regulations.

(c) **WDC formulated policies relating to AQ and a mitigation strategy unilaterally and in isolation, without the input of neighbouring authorities or statutory bodies**

15. Consistent with its bespoke and unilateral approach to the technical modelling and evidence gathering, WDC has also formulated policies and a mitigation strategy without the input of neighbouring LPAs, NE or indeed the landowners. The mitigation strategy was only published and made available to the LPAs partway through the Regulation 19 stage. This mean that the effectiveness of plan-making has not been maximised and has resulted in WDC formulating policies and mitigation strategy, which are undeliverable and thus unsound for the reasons set out in the HRA section.

(d) **WDC failed to engage effectively with neighbouring authorities on AQ and therefore cannot provide evidence of an agreed position contrary to NPPF12 paragraph 181.**

16. For the reasons set out above, WDC have therefore failed to provide evidence of effective co-operation with neighbouring LPAs as required by NPPF12 paragraph 181. There is no SCG or memorandum of understanding with the Authorities on this crucial cross-boundary strategic issue.

(e) **WDC pursued an unco-operative approach to planning applications in neighbouring LPAs**

17. Rather than engage effectively with neighbouring authorities in formulating an agreed approach to the assessment of AQ impacts, instead concurrently to preparation of its local plan WDC objected without warning to various planning applications on the ground of unacceptable impact on the SAC due to AQ issues [17 & 20]; reference should also be made to items 5, 11 and 15 of the HRA chronology (Appendix 7).

(f) **Published draft documents with confidential officer workings with the potential to prejudice future plan preparation**

18. As a further indication of the degree to which WDC has failed in its DtC, is correspondence between Mid-Sussex District Council and WDC regarding WDC’s approach to maintaining the confidentiality of draft documentation (Appendix 4).

**WDC’s objection to the SDNPA Local Plan (Question 14)**

19. WDC withdrew their objection to the South Downs Local Plan (SDLP) two weeks’ before the start of the hearings [35]. It is for WDC to explain what their thinking was behind withdrawing their objection. The SDNPA had robustly addressed all issues raised in the representation in the preparation of its Submission Plan and HRA. The withdrawal of WDC from the examination of the SDLP meant air quality was not debated at length during the examination, notwithstanding the consideration of written representations and evidence on the matter by the
Inspector. We await the Inspector’s final report and indeed requested at the hearings that he addressed air quality and HRA fully in his report.

HABITAT REGULATION ASSESSMENT

20. These questions are inter-related and so we have covered them in a composite summary of our position (footnoted where appropriate where they directly answer a specific question raised by the Inspector).

(1) HRA assumptions are flawed as a matter of law

21. The WDC HRA has not been prepared in a manner consistent with the relevant legislation. This is essentially for two reasons, as set out in more detail in the AECOM Technical Note (Appendix 6).

22. Firstly, the HRA excludes improvements in vehicle emissions factors and background concentration/deposition rates apparently on the basis of a legally flawed interpretation of the judgments of Court of Justice of the European Union’s in Cases 293/17 and C-294/17 (“the Dutch Nitrogen cases”). Those cases confirmed that improvements in nitrogen deposition forecast by the Dutch Government should not be taken into account in that case because their effects, on the facts, were held to be uncertain. They did not establish that as a matter of law all forecast improvements in principle should be excluded when carrying out an HRA. Such improvements should only be excluded where they are uncertain, i.e. where reasonable scientific doubt remained that they would be achieved. WDC instead have interpreted certainty to mean “absolute certainty”. That is wrong as a matter of law: it would mean in principle forecast improvements by definition would not be able to be taken into account. That is not what the CJEU said in the Dutch Nitrogen cases.

23. The result of excluding these forecasted improvements is that the WDC HRA has failed to assess the significant likely effects of the WLP based on what its own experts have themselves described as a worst case sensitivity test. If WDCs Scenario A had been applied to the period 2005-2014 for which we do have evidence of trends from APIS, it would have predicted deterioration in NOx concentrations and nitrogen deposition rates, which is contrary to what occurred. Going beyond a worst case scenario and applying a wholly unrealistic scenario when assessing significant likely effects for the purposes of an HRA is a legally flawed misapplication of the precautionary principle.

24. Secondly, the HRA wrongly assumes that where a site already exceeds its critical load for nitrogen, that it necessarily must follow as a matter of law that if a plan or project results in additional emissions that there will be an adverse effect on integrity. That is not what the CJEU ruled in the Dutch Nitrogen cases: the CJEU held that whilst the possibility of authorising activities where the conservation status of a natural habitat is unfavourable is “necessarily limited” (at [103]), it did not preclude such authorisation.

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5 This section addresses questions 19, 20, 24, 26, 27, 28 and 29
6 See for example paragraph 10.194 and 11.131 of the WDC HRA
7 See WDC’s expert Professor Sutton’s analysis at pages 8 – 9 of Appendix 12C of the HRA (paragraphs 16 – 19), at page 857 of the HRA
9 See the review by Professor Sutton at Appendix 12C to the HRA
(2) Underlying assumptions in the HRA are not realistic, robust, accurate, transparent or appropriate.

25. The examination of whether a given nitrogen dose will affect ‘the ecological situation of the sites concerned’ referred to by the CJEU at [103] and by NE in guidance referenced in Appendix 6 of this statement, as set out in the AECOM Technical Note should include consideration of all of the following: the expected future trend in pollutants of concern, the effect of any future ‘in combination’ dose on key vegetation parameters relevant to site integrity and the physical extent of the affected area as a proportion of that interest feature within the European site.\textsuperscript{11}

26. For the reasons set out in the AECOM Technical Note, the nitrogen dose due to traffic growth based on WDC’s advisers’ own worst case scenario is far too small to result in any retardation in vegetation recovery in respect of either the Ashdown Forest SAC or Lewes Downs SAC. As Dr Riley has explained in his conclusions to his Technical Note at para. 44 – 48 it is very unlikely that the “botanically subtle effects” over the very small parts of the SAC identified in in the WLP would prevent either site from achieving their conservation objectives, in particular:

(a) In respect of the Ashdown Forest SAC, it is very unlikely that 1kgN/ha/yr increase due to traffic growth over a very small part of the SAC (0.52 ha) would affect the site achieving its conservation objectives; i.e it would not result in any adverse effect on site integrity (AECOM Technical Note para. 44 and 48)

(b) In respect of Lewes Downs SAC, less than 0.1% of the protected grassland will be subject to a nitrogen dose that is only slightly above the “imperceptibility” threshold considered appropriate by Natural England (1% of the Critical Load) (AECOM Technical Note para. 46).

27. For the reasons set out above, the adverse impacts postulated in the HRA are fanciful in the sense that they are based on a scenario that is scientifically unreasonable.\textsuperscript{12}

28. Finally, many of the air quality monitoring locations were excluded from the redacted issue of the Ashdown Forest August 2018 monitoring and modelling report, making the replication of the work, as a minimum, difficult. This can be explained in more detail by Dr Riley at the examination itself if required.

29. In summary, the Authorities agree that there will be LSE on the European sites, but not adverse effects on integrity.\textsuperscript{13} They also agree that mitigation measures are no longer needed for the Pevensey Levels.\textsuperscript{14}

30. However, as a result of (a) the legal flaws and (b) for the technical and substantive reasons set out above, the underlying assumptions on which the WDC HRA has been formulated are not realistic, accurate, appropriate, proportionate or transparent or sufficiently replicable to allow sensitivity testing.\textsuperscript{15}

\textsuperscript{10} Natural England’s Approach to Advising Competent Authorities on Road Traffic Emissions and HRAs V1.4 Final – June 2018 (see AECOM Technical Note paragraph 40)
\textsuperscript{11} AECOM Technical Note, paragraph 43 (Appendix 6)
\textsuperscript{12} Question 28
\textsuperscript{13} Question 20
\textsuperscript{14} Question 30
\textsuperscript{15} Question 24
Effectiveness/appropriateness of proposed mitigation measures

31. This section addresses the question of the appropriateness of the proposed mitigation measures and whether they will work. The mitigation measures set out in the HRA, and the chosen measures brought through into the development requirements of Policy AF2, are not considered to be effective because, crucially, they do not constitute ‘mitigation’ for the purposes of the Habitats Regulations and do not have enough certainty to meet the requirements of the Habitats Regulations. Three examples of this are outlined as follows.

32. Firstly, it is noted that financial contribution for mitigation measures includes fees for the investigation of mitigation measures and also monitoring. Investigation and monitoring do not constitute mitigation – by definition these are not actions which directly reduce the severity of impact itself. Importantly, it is unclear how effective the proposed mitigation will be when the investigations into potential mitigation measures have not yet been undertaken. It is also noted that part of the mitigation fee is for communication, consultation and staff costs, and it is not clear how the money will be spent.

33. Secondly, measures outlined relating to electric vehicle charging infrastructure and travel plans, are simply good planning practice and should be required in any event as part of achieving the wider national air quality strategy and related goals in the reduction of background levels of pollution. They are unlikely to be sufficiently specific and direct to be considered mitigation for impacts to the Ashdown Forest SAC or Lewes Downs SAC.

34. Thirdly, the delivery mechanism, particularly with regard to the implementation for the two European sites is uncertain and unclear. It is noted that in the HRA or the Interim Mitigation Strategy Tariff Guidance (draft, September 2018), there is not a clear indication as to how the monies collected from the mitigation fee will be attributed to each European protected site and thus there is uncertainty as to the effectiveness of the strategy. With particular regard to Lewes Downs SAC it is unclear whether the landowner has been consulted and its position regarding any on-site measures. Furthermore, as set out in Part 1 under DfC, the SDNPA and LDC, as the two relevant authorities within which Lewes Downs SAC sits, have not been involved in the formulation of any measures and were first made aware of these proposed measures during the formal Regulation 19 consultation. Appendix 8 is correspondence between TWBC and WDC that exemplifies the breach of DfC in regard to mitigation.

Natural England (Question 18)

35. The position of NE throughout their attendance at the AFWG and in direct consultation with WDC has consistently been that they do not consider that there will be an effect on the integrity of Ashdown Forest SAC. The advice of NE on 16 February 2018 on the WDC AQ and Modelling for Ashdown Forest SAC was that “there is sufficient information included within the reports to undertake an AA and further ecological analysis should not be necessary” and noting the bespoke methodology suggested that a “standard methodology should also be run so that differences in output of the models can be checked”.

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16 Question 29
36. NE along with the Authorities first saw the Local Plan HRA in late June 2018 when published on the WDC website. NE were formally consulted on 10 August 2018 and concluded that “NE is satisfied that it can be ascertained that the plan or project will not adversely affect the integrity of Ashdown Forest SAC”\(^\text{18}\) and that this conclusion can be reached “without mitigation measures being needed”. Conversely NE have strongly supported the approach taken by the Authorities. WDC have gone to great lengths to challenge the advice of NE with further technical reports and have not sought to resolve matters through further mediation or more open discussions with other stakeholders.