Further information relating to Question 27

1. With specific reference to the recent CJEU Ruling on C-293/17 and C-294-17 (commonly referred to as the Dutch Nitrogen Case/s), at paragraph 10.194 of the HRA it is stated:

“In considering these uncertainties and to account for the precautionary principle put forward by the habitats legislation and associated guidance, scenario A is again likely to be the most useful scenario on the basis that it presents the worst case and can therefore account for the limitations as described. This would also be in accordance with the recent publication of the Opinion of Advocate General Kokott of the European Court of Justice, delivered on 25th July 2018 in Joined Cases C-293/17 and C-294/17. In this context, the Advocate General is clear in relation to future-year emissions projections such as these that: “it is not sufficient, for the purposes of approval of additional nitrogen deposition, if deposition declines overall, but the land in question is still overloaded with nitrogen. (in these circumstances) the expected decrease in nitrogen emissions may not be taken into account in the decision on the approval of additional nitrogen deposition”. This would also be in accordance with the Judgment in the Joined Cases dated 7 November 2018, and in particular paragraph 6 of the ruling.”

[emphasis added]

2. Further consideration as to the relevance (in its view) of these cases is given by WDC within Appendix 12 of the HRA [REF I43], where responses to Natural England’s Regulation 19 submission are set out. For ease, reference here is made to the paginated Appendix 12 contained within the Submission HRA. It is stated at pages 758 and 759 of Appendix 12 of the HRA:

“The advice provided by Natural England to use Scenario B is contrary to the Opinion provided by Advocate General Kokott in the preliminary ruling delivered to the European Court of Justice on 25th July 2018 where it was explained that:

“the autonomous decrease in nitrogen emissions can establish the compatibility of additional nitrogen deposition … only if it is already definitively established … that the total load on the site from nitrogen deposition falls below the threshold for the integrity of the site being adversely affected. On the other hand, it is not sufficient, for the purposes of approval of additional nitrogen deposition, if deposition declines overall, but the land in question is still overloaded with nitrogen. Mere forecasts regarding the future effects of those measures and the expected decrease in nitrogen emissions may not be taken into account in the decision on the approval of additional nitrogen deposition.”

Thus, in the context of assessing impacts of nitrogen deposition on designated sites, Advocate General Kokott’s position is clear. Applying that position, since the total load from nitrogen deposition does not fall below the threshold for the sites being adversely affected, the forecasts of reductions under Scenarios B
and C may not be taken into account. Basing the assessment on emissions scenarios B or C would run directly counter to the clear guidance provided by Advocate General Kokott.

[Emphasis added]

Advocate General Kokott’s Opinion informed a European Court judgment on Joined Cases C-293/17 and C294/17 handed down on 7th November 2018. This notes (in Ruling 6) that benefits associated with measures which are not a part of the proposal being determined may not be taken into account if they are not “certain” at the time of the assessment.

Scenarios B and C both include predicted benefits associated with national and international measures and trends which are not a part of the Wealden Local Plan i.e. they are autonomous. Although it is considered that some such benefits are likely, it is not possible to say that the full extent of benefits in either Scenario B or Scenario C are certain. The practical interpretation of the 7th November judgment is thus the same as that of the Advocate General’s Opinion that informed it: that the ‘uncertain’ benefits contained within scenario B or C may not be taken into account. Scenario A, which does not include these benefits, is thus the scenario which WDC and its expert advisors (AQC and CEH) consider must form the basis of decisions in relation to the assessment of atmospheric pollutant effects on Natura 2000 ecological sites.”