Wealden Local Plan Examination: Stage 1

Matter 1 (Habitats Regulations Assessment)

1. Appendix 1 contains a list of the key documents which have informed the content of this representation and additional information relating to Question 18.

Matter 1

Habitats Regulations Assessment

**Question 18**: What role has Natural England Played in the production of the HRA and how has the Council had due regard to its professional expertise and its guidance? Have other stakeholders been consulted?

2. It is noted that Natural England has been consulted in relation to the approach to be taken with regard to the HRA and also, that as part of the Wealden Local Plan Examination process, it has reviewed the content of the HRA, providing detailed comment by way of its Regulation 19 response.

**Question 19**: Has the Habitats Regulations Assessment been prepared in a manner consistent with the relevant legislation? If not, please set out clearly why not?

3. The focus of this representation is on WDC’s application of Regulation 105.

4. In the light of the legislative provisions, considered key to addressing Inspector’s Question 19 are the following:

   a) In line with Regulation 105 (1), does the Appropriate Assessment properly / robustly assess the implications of the Local Plan in view of the site’s Conservation Objectives?
   b) In line with Regulation 105 (2), has WDC consulted the appropriate nature conservation body (Natural England) and has it had regard to representations made by it?

5. Item “b” above, in relation to consultation with Natural England, has already been discussed above. To summarise briefly, consultation has taken place and Natural England has provided clear advice to WDC, however on fundamental points which go to the heart of the robustness of the HRA / Appropriate Assessment conclusions, **WDC has departed from Natural England’s advice** to the extent that, on the evidence, the conclusions of the HRA are considered flawed.
6. Matters concerning item “b”, relating to the Plan being tested against the relevant Conservation Objectives is discussed below.

7. Insofar as matters concern the application of the likely significance test, at Regulation 105(1)(a), Ecology Solutions concur with WDC and NE that such effects cannot be screened out and that, since the land use plan is not concerned with, or necessary for the management of the European site/s, it is necessary to move to undertake an Appropriate Assessment of the implications for the European site/s in view of the site’s conservation objectives.

8. For convenience, the formal Conservation Objectives for the SAC are included at Appendix 4:

9. The sole focus of the Conservation Objectives for the SAC is the maintenance or restoration of the sites integrity and ensuring that the site contributes to achieving the Favourable Conservation Status of the relevant qualifying interest features.

10. The HRA undertaken by WDC correctly identifies the relevant conservation objectives and qualifying interest features of the SAC. It is noted that in contrast to the SAC, the Ashdown Forest SPA is given scant consideration in the HRA, with the Appropriate Assessment proceeding on a precautionary basis\(^1\) in the light of an evidence base which is concluded to be uncertain in terms of effects.

11. In undertaking its Appropriate Assessment in relation to the Ashdown Forest SAC, WDC has adopted a fundamentally flawed approach to the application of the Integrity test. This means that the Wealden Local Plan cannot be regarded as being consistent with (passing the tests of) the relevant legislation and this is discussed in further detail within Appendix 4.

12. The failure of WDC to have proper and full regard to the advice of the relevant nature conservation body (Natural England) on matters which are fundamental to the Appropriate Assessment and, the inherent failures within the Appropriate Assessment relating to the test of Integrity mean that it cannot be concluded that the HRA is consistent with the relevant legislation.

**Question 20: Is the Plan, as submitted, likely to have a significant effect on European sites either alone, or in combination with other plans or projects? Have these other plans or projects been appropriately identified?**

13. With specific reference to the evidence base, it is considered that a likely significant effect on the Ashdown Forest SAC / SPA cannot be ruled out when the plan is considered in combination with other relevant plans and projects.

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\(^1\) Reference paragraphs 13.65 to 13.68 of the HRA
Question 22: Have the appropriate assessments of the implications for those sites been undertaken in a manner consistent with the sites’ conservation objectives?

14. Key issues are discussed below with additional detail provided at Appendix 5.

15. The sole focus of the Conservation Objectives for the SAC is the **maintenance or restoration** of the sites' **integrity** and ensuring that the site contributes to achieving the Favourable Conservation Status of the **relevant qualifying interest features**.

16. It is noted that the focus of the information given in Table 49 of the HRA is indeed on effects to heathland habitats, as opposed to those on woodland or other site features. However, in drawing conclusions regarding the integrity test, at paragraph 11.141 of the HRA [Ref A35] a broader remit appears to have been followed which is not backed by detailed discussion or indeed the evidence base. In concluding that it cannot be ascertained (with scientific certainty) that the Wealden Local Plan would not result in significant adverse effects on the SAC, four items are listed as being taken into consideration by WDC. These are:

   i. **Critical loads are currently exceeded across the whole of Ashdown Forest SAC**;
   
   ii. **Near-road increase in N pollution would likely cause a worsening of site condition as a sole result of the Wealden Local Plan**;
   
   iii. **Background increase in N pollution would likely cause a worsening of site condition as a result of the Wealden Local Plan in combination with other local plan developments across the UK**; and
   
   iv. **Future autonomous measures (i.e. national scale emissions reductions) cannot be considered a scientifically certain basis for the assessment, and therefore cannot be taken into account**.

17. In relation to point “i”, a broad, whole site approach to assessment is **not considered appropriate in applying the legal tests**.

18. Regarding point “ii” above, a near-road increase in nitrogen deposition and the purported adverse effects which arise is considered relevant only where such deposition affects heathland habitat. In many areas, woodland, which is less sensitive to the affects of nitrogen deposition and is not a qualifying interest features of the SAC, abuts the roads which pass through / near the SAC (the section of the A22 which passes through the northern part of Ashdown Forest and the section of the A26 at Poundgate being key examples).

19. Further, in real terms **habitats which are located immediately adjacent to a road are subject to continual anthropogenic pressures**. Such pressures include **inter alia**, verge maintenance for safety reasons, road run-off / spray (containing salt, grit and petrochemicals), litter / debris and turbulence caused by the regular passing of vehicles. Management for conservation benefit (e.g. that undertaken in accordance with statutory requirements relating to the Habitats Regulations) would not normally be undertaken in those areas which immediately border a road. As an example, grazing which is a key management technique employed to maintain / enhance heath habitats would be very unlikely to take place within a few meters of the kerb / road edge. Put simply, as a general rule it is accepted that a corridor of a few meters (e.g. 5m) exists along main roads where habitat composition / quality cannot be controlled to any significant degree. In simple terms, it is Ecology Solutions view that in this light, **adverse effects on habitat in this zone should not be considered as material when applying the tests of the Habitats Regulations**.
20. With regard to “iii” above, it is considered that this is not backed by the evidence. The evidence demonstrates that in fact the Wealden Local Plan should be tested against an improving background in relation to air quality (in particular, that related to traffic emissions).

21. In relation to point “iv”, Ecology Solutions strongly refute the claim that national scale emissions reductions cannot be taken into account on the basis that they are not scientifically certain. Euro 6/VI standards have been in place and mandatory since 2015. These standards do deliver betterment over previous technology, although it is accepted that such betterment is not in line with originally envisaged assumptions. During the Local Plan period, other technology advances are highly likely, but it is accepted that such assumptions should not inform the Appropriate Assessment as these would be untested. It is also important to have regard to the fact that the National Emissions Ceilings Directive\(^2\) (NERC) was adopted in 2016. This sets legal limits for NOx and NH\(_3\) emissions both for the UK and other member states. It is a statutory instrument and those commitments contained therein should be given due regard when undertaking the Appropriate Assessment. It is considered that in the light of adopted statutory (legally binding) ceilings for emissions and actual evidence for reductions in traffic related emissions, that certainty regarding national scale emissions reductions can be considered scientifically certain and should be taken into account in the Appropriate Assessment.

22. It is considered that WDC has not undertaken its Appropriate Assessment in a manner consistent with the sites’ conservation objectives.

**Question 23: In doing so, are the appropriate assessments capable of ascertaining that the Plan as submitted will not adversely affect the integrity of the European sites and its qualifying features, either alone, or in combination?**

23. It is considered, in view of the evidence base and the flawed approach adopted by WDC, that the Appropriate Assessment (relevant to the Ashdown Forest SAC) should in fact safely conclude no adverse effect on the integrity of the site when considered both alone and in combination.

24. As discussed elsewhere in this representation, it is considered that this conclusion can be safely reached in the absence of any requirement for mitigation to be delivered through the local plan. This is a position on which Natural England agree.

25. Sufficient evidence is available to conclude that under the **realistic scenario** (WDC’s Scenario B), where one takes account of some improvements in emissions due to technological improvements, as opposed to the **‘fanciful’ scenario** where no improvements are taken into account, an **improved situation** with regards air quality impacts arises when the Wealden Local Plan is considered against the current baseline (in combination with other relevant plans and projects).

26. Additional information relating to this question is included at Appendix 6.

Question 24: Specifically, is the evidence, methodology, and the underlying assumptions on which the HRA has been formulated, realistic, robust, accurate, transparent, appropriate, and sufficiently replicable to allow sensitivity testing, so as to justify its conclusions? Has a qualitative, proportionate approach been taken to the potential impacts on the integrity of the sites? If not, should this be the case?

27. It is Ecology Solutions clear view that the evidence does not support the conclusions reached within the HRA insofar as matters concern air quality effects on the Ashdown Forest SAC.

28. Evidence shows that currently (in the absence of the plan) nitrogen deposition is at a level where relevant thresholds in terms of Critical Loads and Levels are being breached across the designated site, but the evidence does not show that adverse effects on the qualifying features of the SAC / SPA are arising as a result of traffic related emissions.

29. There is evidence available (which Natural England has brought to WDC's attention) which demonstrates that for relevant habitats, where exceedances of the thresholds already exist the habitats can develop an effective tolerance to the effects of further deposition. This evidence shows that significant levels of additional Nitrogen deposition would be required in order to further reduce species richness within the habitat, with an additional 1.7kgN/Ha/yr required to reduce species richness by one.

30. The AA does not have due regard to the recognised trend for an improving background situation in relation to air quality impacts. Natural England has specifically advised WDC that this trend should be properly recognised in the assessment process.

31. Not only has the AA in relation to the Ashdown Forest SAC failed to properly refine its scope to matters concerning the Conservation Objectives, the approach adopted has incorrectly assessed the Local Plan against a fanciful scenario where future improvements in vehicle emissions do not materialise. The accuracy and robustness of the AA is therefore fundamentally flawed.

32. In relation to whether a “proportionate approach” has been adopted and whether such an approach should be adopted (if it has not), this matter is dealt with further below in relation to “question 26”.

Question 25: Should reference to ‘not adversely affect the integrity of the site’ be taken to mean that, as a result of the Plan, the qualifying elements of the site should not be in a worse state than the recorded baseline condition, ie no significant net deterioration? Or, does it mean, in the context of an improving situation, for example, improvements in air quality, that the potential for a theoretical quantum of improvement should not be compromised by the policies of the Plan?

33. Mindful that the integrity test is focussed upon the Conservation Objectives and the qualifying interest features, it is Ecology Solutions view that the net position regarding the site’s qualifying features is an important consideration in undertaking the HRA / Appropriate Assessment. However, it would be wrong to treat that specific consideration as the test for “not adversely affect the integrity of the site”.

34. Following from the above however, again whilst an important consideration, it would be wrong to view the integrity test in this instance as being one which relates solely to
the potential for a theoretical quantum of improvement to be compromised by the policies of the Wealden Local Plan.

35. Further consideration to this question is given at Appendix 7.

**Question 26: Is the approach to the use of evidence underpinning the HRA consistent with the ‘precautionary approach’ as described in the ‘Communication from the Commission on the precautionary principle’?**

36. As already discussed, it is considered that the AA undertaken by WDC has not had regard to an improving background trend regarding air quality effects at the site. Instead a fanciful scenario has been taken forward in the Appropriate Assessment. Neither has the assessment had due regard to the tolerance of relevant habitats to further increases in nitrogen deposition (when relevant thresholds are already exceeded). Nor has the lack of actual identified harm caused by nitrogen deposition arising from traffic emissions been given due credence.

37. It is considered by Ecology Solutions that WDC have misapplied the Precautionary Principle, adopting a disproportionate approach and one which appears, on the evidence, to aim at zero risk.

38. Further detail in relation to the application of the precautionary principle is included at Appendix 8.

**Question 27: What is the relevance of the recent CJEU Ruling on C-293/17 and C-294-17, as well as C-461/17, to the Council’s approach set out in the HRA?**

39. It is considered by Ecology Solutions that the relevance of CJEU Ruling on C-293/17 and C-294-17 only goes so far. It must be kept in mind that the Preliminary Ruling in these cases and the subsequent Judgment (7th November 2018) were considering a specific case relating to whether the direct application of fertilisers and grazing on existing farms should be the subject of limitations and in addition, whether new farms (undertaking those same activities) could be authorised. That case/s was determined on its merits.

40. Insofar as WDC purport parts of the Judgment to be relevant in guiding the Appropriate Assessment, Ecology Solutions comment as follows.

41. The first point to note is that insofar as matters concern an improving background situation, we are not dealing with “mere forecasts” regarding future effects. As previously discussed, the UK has signed up to clear, legally binding commitments in relation to reducing emissions (NECD). Further, the Clean Air Strategy, which was adopted in January 2019, but published in May 2018 for consultation purposes, includes additional measures aimed at further reducing emissions from agriculture and traffic. Additionally, the Government published its Road to Zero strategy July 2018 (updated in September 2018). That strategy outlines how the government will support a transition to zero emission road transport and reduce emissions from conventional vehicles during the transition period, aiming for between 50% and 70% of new car sales (40% new van sales) being ultra low emission vehicles by the year 2030, with a total ban on emission causing vehicles by 2040.

42. Evidence demonstrates that there is a declining trend in emissions in the UK and it also shows that Euro6/IV vehicles are cleaner than previously manufactured vehicles.
These improvements must be reflected when undertaking the Appropriate Assessment since improvements can be categorised as certain. Contrary to the position of WDC, Ecology Solutions consider it entirely (indeed, only) appropriate to proceed to address matters concerning effects on integrity by way of reference to emissions scenario B, which is precautionary in its approach but reflective of a realistic position.

43. Whilst, in line with the Holohan Judgement it is necessary and appropriate to identify and examine implications for habitats and species which are both qualifying interest features and those which are not, it is Ecology Solutions understanding, in the light of the Judgment that the relevant legal test remains one which is focussed upon the Conservation Objectives for the site. This is of course reflected in the final part of paragraph 70(1) of the judgment where, in relation to implications for features outside of the protected site, such implications need only be considered where they “are liable to affect the conservation objectives of the site”. Following from this, in undertaking a robust Appropriate Assessment, implications for all relevant features (qualifying interest features and other features) should be identified and assessed, however it may be simple to conclude that implications for some features will not result in an adverse effect on integrity in view of the sites conservation objectives. The act of documenting this within the Appropriate Assessment will give rise to robustness and certainty in relation to the assessment findings, as required by the legislation and case law.

Question 28: On what basis has the threshold for development and its distribution been considered to be acceptable? Are the adverse impacts considered to be ‘real’, not ‘fanciful’?

44. It should be noted that Ecology Solutions clear position, as described previously within this representation, is that the adverse effects considered to arise by WDC are not real but are instead fanciful. The evidence does not support the conclusion that the plan will give rise to an adverse effect on the integrity of the SAC in the absence of mitigation delivered through the plan.

Question 29: Assuming that the mitigation measures set out in the HRA are required, what evidence is there that these will work?

45. As an overarching observation, Ecology Solutions position is that a proportion of the proposed measures, as discussed in the HRA [Ref A35] and also detailed at Policy AF2 of the Wealden Local Plan, cannot be considered mitigation or avoidance measures. Additional information is given at Appendix 9.