1. This note addresses the legal assumptions underlying the approach Wealden District Council (“WDC”) has adopted when carrying out its Habitats Regulation Assessment (“HRA”). Specifically, it addresses (1) the correct legal test as to when “autonomous measures” (in this case, predicted improvements in background levels of NO and resulting rates of nitrogen deposition) can be taken into account when assessing whether there will be an adverse effect on the integrity of the Ashdown Forest Special Area of Conservation (“the SAC”) due to the development growth envisaged in the local plan; and (2) the correct legal test as to when mitigation measures can be taken into account when carrying out that assessment.

(1) Autonomous measures

2. WDC have excluded taking into account predicted improvements in NOx in principle. WDC’s position is articulated in various parts of the evidence base supporting its HRA but is most recently encapsulated at paragraph 12.24 of its position statement where (in response to Question 25) it states the following:

   “the Council considers that improvements may only be taken into account if:
   • The predicted improvements are deemed certain at the time of the assessment;
   and
   • The European site in question is considered to be in favourable status / within its ecological limitations at the time of the assessment (for example, for air quality, that the site is below its critical load for nitrogen deposition or below its critical level for atmospheric pollutants)”

3. WDC’s position is based on a flawed reading of the Dutch Nitrogen cases (Cases C-293 and C-294/17).

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1 This Speaking Note has been prepared in advance of Day 3 of the EiP (23 May 2019). It specifically relates to Questions 24, 26, 27 and 29.
4. Those cases concerned authorisation schemes for agricultural activities in the Netherlands which caused nitrogen deposition in sites protected by the Habitats Directive. A programmatic approach was adopted in 2015 by the Dutch government in order to address this issue.

5. The programme, referred to as the “PAS”, was based on the premise that nitrogen deposition was going to be reduced (at [30]).

6. The PAS allowed for authorisations to be granted (without further, specific appropriate assessments being carried out) for agricultural activities which either did not cause an increase in nitrogen deposition or which caused an increase but only at a level for which allowance had already been made in the PAS at [42 – [43], i.e. which did not exceed a limit value determined in the PAS.

7. One of the issues was the extent to which the appropriate assessment undertaken for the purposes of the PAS could take into account “the positive effects of the autonomous decrease of nitrogen dioxide which might have become apparent” in the PAS period (see Question 4 of the preliminary reference request in C-294/17 at [49], and a similar question in C-293/17 at [57(6)]). The autonomous measures are described at [33] as “external measures adopted outside of the PAS and enabling autonomous reduction”. What precisely those measures were is unclear.

8. That question was answered by the CJEU at [132] as follows (emphasis added):

   “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.”

9. There is nothing in paragraph 132 above that precludes reliance on autonomous measures except where a site is in favourable status at the time of the assessment (i.e. WDC’s proposition at paragraph 25.12 of WDC’s Position Statement 1).

10. The CJEU was merely determining that autonomous measures (and indeed other measures such as preventive measures or conservation measures) can only be taken into account as
part of an appropriate assessment if the expected benefits are certain at the date of the assessment. That is a fact specific question that has to be considered on a case by case basis.

11. In so far as the Dutch Nitrogen cases merely support the general and well-established principle at EU law level that a competent authority can only approve a plan or project if it is certain that the plan or project will not adversely affect the integrity of the protected site, as the AECOM Technical Note sets out, there is no real uncertainty regarding the level of improvement in air quality emission factors and background NOx levels forecast at a national level. The position of WDC in its HRA\(^3\) is contrary to predictions within government, as denoted by Defra projections and also within the air quality community, where the only area of some uncertainty is over the rate of improvement.\(^4\) It is also inconsistent with WDC’s own adviser’s analysis of the DEFRA Emission Factor Toolkit which sets out those projections. AQC have stated in terms: “there is no strong basis for doubting the assumptions made” in that toolkit and that “there are in fact many reasons to be optimistic about the performance” of the vehicles considered in that toolkit.\(^5\)

12. Those uncertainties (such as they are) can be factored into the model used to assess the air quality impacts of any given plan or project, to produce a more scientifically sound worst case scenario forecast (i.e. Scenario B as set out in the AECOM Note). To discount altogether the range of government strategies and regulatory measures (including at an EU level), all of which will contribute to the reduction in background NO2 levels, as WDC has done (see WDC Position Statement 1, paragraph 27.6 – 27.7) is a clear misapplication of CJEU case law.

**(2) Mitigation Measures (Matter 1, Question 29).**

13. WDC’s conclusion that the WLP will not have an adverse effect on the integrity of the SAC is premised on the effectiveness of its mitigation strategy. However, nowhere in its Position Statement has it referenced the correct legal test that determines whether a competent

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\(^2\) AECOM Technical Note, 3 May 2019, paragraph 4 (Appendix 6 to Joint Authorities Position Statement on Matter 1).

\(^3\) HRA (Doc No. A35) para. 11.133, page 206: “It is considered at this time that since we are not able to rely upon the effectiveness of future national and international programs with the degree of certainty required under the Habitats Directive (Article 6(3)), it is therefore not possible in practice to trade-off a proposed local increase in NOx and NH3 emissions against an anticipated national reduction”

\(^4\) Ibid.

\(^5\) See para.7.2 AQC’s Report entitled “Development of the CURED V3A Emissions Model” dated January 2018 (this can be found at Appendix A to the AECOM Technical Note dated 3 May 2019, at Appendix 6 to the Joint Authorities Position Statement on Matter No.1 dated 8 May 2019.
authority can take into account proposed mitigation measures for the purposes of an appropriate assessment under Article 6(3) of the Directive.

14. The HRA states at 4.62 that “to meet the requirements of the Habitats Regulations it is important to ensure that any mitigation measures proposed are sufficient, are in place before any adverse effect can occur and are effective for as long as there is expected to be a risk.” The only authority cited to support this proposition in the HRA is Case C-142/16 Commission v Germany and the HRA merely states that there is a need for definitive data at the time of authorisation.

15. The HRA fails:

(1) to acknowledge the standard of certainty required before a mitigation measure can be taken into account; and

(2) in any event, has only provided a partial quotation from Commission v Germany, which established that if monitoring is required to ascertain the effectiveness of a mitigation measure, then that mitigation measure is not sufficiently certain to be taken into account in the Article 6(3) assessment.

16. Addressing each point in turn.

(1) The standard of proof required for a mitigation measure to be sufficiently certain

17. It is surprising, given the importance attached by WDC to the need for certainty when taking into account forecast levels of improvement in background NO2 levels, that WDC fail to acknowledge anywhere in either their position statements or HRA that the same degree of certainty also applies to the effectiveness of its proposed mitigation measures.

18. The correct legal test is that set out by the CJEU more recently in C-164/17 Grace v An Bord Pleanala, which states [51] that a mitigation measure can only be taken into account when it is sufficiently certain (in the sense of beyond all reasonable doubt) that it will be effective in avoiding harm:

“It is only when it is sufficiently certain that a measure will make an effective contribution to avoiding harm, guaranteeing beyond all reasonable doubt that the project will not adversely affect the integrity of the area, that such a measure may be taken into consideration when the appropriate assessment is carried out (see, to that effect, judgment of 26 April 2017, Commission v Germany, C-142/16, EU:C:2017:301, paragraph 38).
19. This is endorsed in the Dutch Nitrogen cases at [126]. The test of “beyond all reasonable doubt” means beyond all reasonable scientific doubt (Grace at [39]):

“The assessment carried out under that provision may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected area concerned (see, to that effect, judgment of 12 April 2018, People Over Wind and Sweetman, C-323/17, EU:C:2018:244, paragraph 38 and the case-law cited).

(2) Mitigation requiring monitoring to establish effectiveness cannot be taken into account for the purposes of an appropriate assessment under Article 6(3) of the Habitats Directive.

20. Commission v Germany provides clear authority that if monitoring is required to establish the effectiveness of a mitigation measure it renders that measure insufficiently certain for the purposes of being taken into account under Article 6(3).

21. Commission v Germany concerned the assessment of the impact of a coal-fired power station on migratory fish species in the River Elbe, and in particular on the Natura 2000 site located upstream of the power station. One of the proposed mitigation measures was the installation of a fish ladder to assist as many in fish to reach the SAC as were killed by the water intakes to the power station. The specific issue was whether it was an appropriate mitigation measure or in fact a compensation measure. The effectiveness of the fish ladder as a mitigation measure (as contended by the Federal Republic of Germany) was based on a two-stage forecasting model, namely, estimates from the project planning and final approval stage, and data from monitoring.6

22. The CJEU firmly rejected the proposition that the proposed fish ladder could be a sufficient mitigation measure, on the basis that it was not established beyond all reasonable scientific doubt that the plant would not adversely affect the integrity of the protected site in question [38].

23. The basis for that conclusion was that it was clear that the impact assessment itself did not contain “definitive data regarding the effectiveness of the fish ladder, and merely stated that its effectiveness could only be confirmed following several years of monitoring” [37].

24. The mitigation measures proposed in the HRA by WDC are uncertain in precisely the same way as the mitigation measures relied on in Commission v Germany. Worse still, the HRA

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6 See paragraph 27 of the Judgment.
expressly includes monitoring itself as a mitigation measure (indeed it states it is an “integral part of the mitigation strategy” (12.40)).

25. One example is sufficient to show the flawed approach to mitigation. WDC include in the HRA (as summarised at 12.27) a number of measures under the heading “investigation and delivery of mitigation measures”. The HRA states expressly that “further work that may be required for certain measures under the investigation heading is likely to include traffic modelling to assess the effectiveness of the measures” (12.36) and that “certain measures will require further investigation to determine deliverability and effectiveness” (12.34). It fails to explain which measures require further investigation. But on any analysis their inclusion as mitigation measures that have been taken into account in the overall conclusion that the WLP would not have an adverse effect is legally flawed.

26. That lack of certainty is confirmed by WDC’s consultants. They state at paragraph 6.1 of Appendix 11 of the HRA (the technical study Air Quality Consultants undertook to determine whether or not the benefit of the mitigation measures could be quantified) baldly (and correctly) that:-

“It is not currently possible to demonstrate whether any specific subset of measures will deliver the required benefits”.

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22 May 2019