INTRODUCTION

1. On 22 May 2019 the Joint Authorities\(^2\) submitted a Speaking Note addressing the legal assumptions underlying the approach of Wealden District Council (“the Council”) in its Habitats Regulations Assessment (“HRA”) of the emerging Wealden Local Plan (“the Local Plan”), asserting that the Council had erred in law in respect of two matters:
   a. The correct legal test as to when “autonomous measures” 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
   b. The correct legal test as to when mitigation measures can be taken into account when carrying out that assessment.

2. The Council’s position on the correct legal approach is set out in detail in its HRA for the Local Plan and in its Matter 1 Statement, and the Council is keen to avoid proliferation of submissions outside Matters Statements. However, since the Speaking Note has been accepted as an examination document, the Council hopes that this brief Response will assist the Inspector in understanding the Council’s position on the matters raised in the Speaking Note.

\(^1\) Document Y1 – Legal Submissions on HRA
\(^2\) South Downs National Park Authority, Lewes District Council and Tunbridge Wells Borough Council
AUTONOMOUS MEASURES

3. At paragraphs 2 to 10 of their Speaking Note, the Joint Authorities assert that the Council’s position on autonomous measures is based on a “flawed reading” of the Dutch Nitrogen cases (Cases C-293/17 and C-294/17). Their criticism is directed at a single proposition, set out in the second bullet of paragraph 25.12 of the Council’s Matter 1 Statement, and it is notable that the Joint Authorities (rightly):

   a. Take no issue with the first bullet in paragraph 25.12, which accurately summarised the principle set out in paragraph 132 of the CJEU’s Judgment (that an appropriate assessment may only take account of autonomous measures if the expected benefits of those measures are certain at the time of the assessment); and

   b. Do not maintain the assertion in paragraph 22 of their Matter 1 Statement that the Council has interpreted “certainty” to mean “absolute certainty” (the standard of certainty applied by the Council has, correctly, been certainty beyond a “reasonable scientific doubt” and it has not adopted an “absolute” or “zero risk” approach - see paragraphs 23.1, 26.5 and 28.10 of its Matter 1 Statement).

4. The allegation in the Joint Authorities’ Speaking Note is that the proposition in the second bullet of paragraph 25.12 of the Council’s Matter 1 Statement is unsupported by the Dutch Nitrogen cases, and in particular paragraph 132 of the CJEU’s Judgment. But that assertion fails to read paragraph 132 in context. The paragraph 132 principle is an important one, but as the Council noted in paragraph 25.9 of its Matter 1 Statement, if (on application of that principle) the expected benefits of an autonomous measure are certain at the time of an assessment, a further consideration is the ecological status or condition of the European Site.

5. The Advocate General considered that further issue in detail in her Opinion in the Dutch Nitrogen cases, culminating in the passage quoted at paragraph 25.10 of the

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3 Paragraph 2 of the Speaking Note wrongly refers to this as paragraph 12.24
4 The paragraph 132 principle is also set out in paragraph 6 of the CJEU’s Ruling, which is quoted in full in paragraph 25.6 of the Council’s Matter 1 Statement.
Council’s Matter 1 Statement. The CJEU also addressed that issue in paragraph 103 of its Judgment, as set out in paragraph 25.11 of the Council’s Matter 1 Statement. Those passages amply support the second bullet in paragraph 25.12 of the Council’s Matter 1 Statement and the Council’s position generally.  

6. The Joint Authorities are, therefore, wrong to assert that the Council has misinterpreted or misapplied the Judgment in the Dutch Nitrogen cases. It has interpreted the Judgment correctly; and has applied it to the particular circumstances before it, circumstances in which (notably) the Ashdown Forest SAC is in unfavourable condition and will remain in a state of exceedance for nitrogen, not only under Scenario A but under Scenarios B and C also - see paragraph 27.3 of the Council’s Matter 1 Statement.

7. The Joint Authorities may disagree with the judgements made by the Council in these regards, but those judgements are matters for the Council as competent authority, and are challengeable only on Wednesbury grounds: R (Mynydd y Gwynt Ltd) v Secretary of State for Business, Energy and Industrial Strategy [2018] PTSR 1274 at paragraph 8(9). There is no basis for such a challenge in this case. The Council’s reliance on Scenario A and its other judgements are both rational and sensible, as set out extensively in the HRA and the Council’s Matter 1 Statement.

MITIGATION MEASURES

8. Section 2 of the Speaking Note asserts, at paragraph 13, that the Council’s conclusion that the Local Plan will not have an adverse effect on the integrity of the Ashdown

5 For completeness, the Council notes that the Speaking Note does not maintain the allegation in paragraph 24 of the Joint Authorities’ Matter 1 Statement that the HRA has wrongly assumed that, where a site already exceeds its critical load for nitrogen, it necessarily must follow as a matter of law that, if a plan or project results in additional emissions, there will be an adverse effect on integrity. The Council does not contend that this follows inevitably as a matter of law (i.e. without exception), and accepts that there may be cases in which (in the particular circumstances) the evidence shows that an exceedance will not risk harm to maintenance or restoration conservation objectives and an adverse effect on integrity. In this case, however, its judgement as competent authority is that the development under the Local Plan will require air quality mitigation to avoid risking harm to the integrity of the Ashdown Forest and Lewes Downs SACs.
Forest SAC is premised on the effectiveness of its mitigation strategy; and then raises two points on mitigation measures against the backdrop of that assertion:

a. First, that the Council has failed to acknowledge the standard of certainty required before a mitigation measure can be taken into account (see paragraphs 13-15 and 17-19 of the Speaking Note); and

b. Second, that the Council’s approach to mitigation is contrary to the approach of the CJEU in the *Commission v Germany* case (Case C-142/16).

9. We address both the prior assertion and the two subsequent points in turn below.

**Suggestion that the conclusion on integrity is premised on the effectiveness of the mitigation strategy**

10. Whilst it is true that the Council considers that an effective mitigation strategy is necessary to allow development under the Local Plan to come forward without risking an adverse effect on the integrity of the Ashdown Forest SAC, Policies AF1 and AF2 are deliberately drafted so as to ensure that any development that would risk an adverse effect on the integrity of the Ashdown Forest SAC (and Lewes Downs SAC) cannot come forward, since development is contingent on a delivery mechanism being in place, under Policy AF2, designed to ensure that there is no adverse impact on integrity. This policy lock ensures no risk to integrity whether or not the Council’s position that the current air quality mitigation strategy will be effective is accepted. Hence, the issue is merely one of deliverability: if the view were to be taken that the air quality mitigation strategy is not currently sufficiently certain, this would give rise to an element of risk to deliverability of the Plan, but this risk would be limited and would not give rise to any soundness concerns.

**Alleged failure to acknowledge the standard of certainty required for mitigation to be taken into account**

11. The Speaking Note alleges that the Council has failed to apply the “certainty” standard (i.e. certainty beyond a reasonable scientific doubt) to mitigation. This is a surprising

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6 Full detail of the Council’s position on these issues is provided in answer to Matter 1 Question 29, Matter 2 Question 35, and the Council’s Opening Statement.
and unmeritorious allegation. The certainty standard is applied throughout the HRA, including expressly in connection with mitigation (see, for example, paragraph 12.52). The certainty standard is also very clearly set out in the Council’s Matter 1 Statement both in general terms (see, for example, paragraphs 23.1, 23.12, and 26.5) and in the specific context of mitigation (see, for example, paragraph 29.5). There is no basis for suggesting that the Council has applied a lower standard when considering mitigation than when considering other elements of the integrity test.

Alleged inconsistency with the CJEU approach in Commission v Germany

12. At paragraphs 20 to 26 of their Speaking Note, the Joint Authorities allege that the Council’s approach to mitigation is contrary to the approach of the CJEU in the Commission v Germany case (Case C-142/16) in respect of monitoring of mitigation measures. That is incorrect.

13. The Commission v Germany case concerned a fish ladder 30km from a power plant, which was designed to compensate for fish killed during the operation of the plant, and which was combined with multi-phase monitoring in order to verify its effectiveness.

14. The CJEU found (at paragraph 38) that, at the time the authorisation for the power plant was granted, the fish ladder could not guarantee beyond all reasonable doubt, together with the other measures relied upon, that the plant would not adversely affect the integrity of the European site at issue. In reaching this view, the CJEU found 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” (see paragraph 37). It went on to address the multi-phase monitoring as follows:

“As regards multi-phase monitoring, such monitoring cannot be considered as sufficient to ensure performance of the obligation laid down in Article 6(3) of the Habitats Directive.

44 First, as the Commission argued at the hearing, without being challenged in that respect by the defendant Member State, the results of that monitoring may be irrelevant if the data was collected at times when the Moorburg plant was not using the continuous cooling mechanism. Secondly, the monitoring
measures only the number of fish that manage to bypass the Geesthacht weir via the fish ladder. Accordingly, that monitoring is not capable of ensuring that the fish ladder will avoid any adverse effects on the integrity of the protected sites.”

15. As can be seen, the Commission v Germany case is simply an application of the general principle that a finding of no adverse effect on integrity requires certainty beyond a reasonable scientific doubt as to the absence of adverse effects at the date of adoption.

16. However, and contrary to the position of the Joint Authorities, the Commission v Germany case is not authority for the further proposition that monitoring may not form part of a mitigation strategy, so long as the requisite certainty exists at the date of adoption; and for the Joint Authorities to suggest otherwise not only ignores paragraph 44 of the Judgment, but is surprising since adaptive monitoring is a core part of strategic mitigation for many European Sites (including, for example, as a core part of Strategic Access Management and Monitoring (“SAMM”) for Special Protection Areas, which includes monitoring and adjustment to ensure effectiveness).

17. In this case, although the Council recognises some uncertainty in relation to particular elements of the air quality mitigation strategy (which will, of course be supplemental to the autonomous measures, upon which the Joint Authorities do rely), and applying the appropriate test (certainty beyond a reasonable scientific doubt), its judgement as competent authority is that the overall mitigation strategy secured by Policies AF1 and AF2 is sufficient to ensure that there will be no adverse effects on the Ashdown Forest and Lewes Downs SACs. Adaptive monitoring is part of the strategy in the same way as it is part of ordinary SAMM strategies. There is nothing in this which is inconsistent with the CJEU’s approach in the Commission v Germany case, or which is in any way controversial. On the contrary, it is a sensible strategic approach to mitigation.

7 Given its reliance on Scenario A, the Council’s air quality mitigation strategy has been devised to be able to mitigate the entirety of the Plan in the absence of any reductions from autonomous measures, though its task may be easier if autonomous reductions do eventuate such that loads/levels falls below critical loads/critical levels, as explained in paragraph 29.3 of the Council’s Matter 1 Statement.
CONCLUSIONS

18. For the reasons set out above, the Joint Authorities’ allegations in their Speaking Note that the Council has erred in law when approaching autonomous measures and mitigation issues are misconceived. The Council has applied caselaw correctly and its judgements in the HRA are both rationally open to it as the competent authority and sensible.

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