



## POSITION STATEMENT of the South Downs National Park Authority

### Duty to Cooperate and Legal Compliance

DATE: October 2018

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#### **Duty to Co-operate**

Has the Plan been prepared in accordance with the Duty to Co-operate (DtC) with prescribed bodies, with reference to the DtC Statement [SDLP.11] and the several Statements of Common Ground (SOCGs) with neighbouring and partner authorities and other bodies [SCG series] and with respect in particular to:

- a. The supply of housing land to accommodate unmet housing need within the SDNP
- b. The need for and supply of accommodation for gypsies and travelers
- c. Any other relevant strategic cross-boundary issues?

#### **Other Considerations of Legal Compliance**

##### ***Habitats Regulations Assessment***

Has the plan been prepared in accordance with the Habitats Regulations, with reference to the Habitats Regulation Assessment as updated [SDLP 05 series] and now subject to further revision taking into account all relevant legislation and case law and with respect in particular to:

- a. Air quality as affecting European designated wildlife sites
- b. Any other relevant considerations

##### ***Sustainability Appraisal***

Has the Plan been subject to adequate Sustainability Appraisal (SA), duly updated [SDLP 04 series], taking account of reasonable alternative development strategies?

##### ***Statement of Community Involvement***

Has the Plan been prepared in accordance with the Statement of Community Involvement [SDLP.08], with respect in particular to:

- a. The degree and effectiveness of public consultations
- b. Any other relevant considerations?

**Public Sector Equality Duty**

Has the Plan been prepared having regard to the aims expressed in section 149(1) of the Equality Act 2010, with reference to:

- a. The Equalities Impact Assessment [SDLP 06]
- b. The aims of elimination of discrimination, advancing equality of opportunity and fostering good relations
- c. The relevant protected characteristics defined in Section 149(7) of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation?

**KEY DOCUMENTS for cross-reference:****General Legal Compliance**

- Legal Compliance Checklist (SDNPA, 2018) (SDLP 10)

**Duty to Cooperate**

- Duty to cooperate statement (SDNPA, 2018) (SDLP 11)
- Various Statements of Common Ground (Various, 2018) (SoCG 1 - 15)

**Habitats Regulations Assessment**

- Habitats Regulations Assessment (AECOM 2018) (SDLP 05 series)
  - HRA Report (AECOM, 2018) (SDLP 05)
  - HRA Air Quality Addendum (AECOM 2018) (SDLP 05.4)
  - Tunbridge Wells Borough Council – Report to Full Council on Ashdown Forest (Tunbridge Wells, 2018) (SDLP 05.5)
- Biodiversity Background Paper (SDNPA, 2018) (TLL 11)
- Conservation of Habitats and Species Regulations (HM Gov 2017) (TLL 13)
- Ashdown Forest Statement of Common Ground (Various, 2018) (SoCG 01)
- Advising Competent Authorities on Road Traffic and HRA (Natural England, 2018) (TLL 25)
- Representation on the Pre-Submission South Downs Local Plan by Wealden District Council (Comment ID 1586)
- Representation on the Pre-Submission South Downs Local Plan by Natural England (Comment ID 2353)

**Sustainability Appraisal**

- Sustainability Appraisal (SD04 series)

**Statement of Community Involvement**

- Statement of Community Involvement (SDNPA, 2018) (SDLP 08)

**Public Sector Equality Duty**

- Equalities Impact Assessment (SDNPA, 2018) (SDLP 06)

## 1. Introduction

- 1.1 This position statement has been prepared by the South Downs National Park Authority (SDNPA) and responds to the Inspector's invitation to submit a statement in relation to matters to be discussed at the hearings sessions (INSP.4). In the case of the duty to cooperate and legal compliance, reliance is chiefly placed on the Background Papers, and core documents of which the key ones are listed above. However further detail is provided on the Habitats Regulations Assessment (HRA) in response to questions set out in INSP.4 and duplicated below.

## 2. Duty to Cooperate

- 2.1 Please refer to the Duty to Cooperate Statement and also the Statements of Common Ground (SoCG 1 – 15).

## 3. Habitats Regulations Assessment

- 3.1 A background paper was prepared that discusses the HRA. However, some matters have progressed, and this position statement therefore provides both a summary of the Authority's position and an update on those matters that have progressed.
- 3.2 The sections below address the question in three parts: firstly, broad legal compliance with the Conservation of Habitats and Species Regulations 2017; secondly the matter of air quality as affecting European designated wildlife sites; and thirdly, any other relevant considerations.

Has the plan been prepared in accordance with the Habitats Regulations, with reference to the Habitats Regulation Assessment as updated [SDLP 05 series] and now subject to further revision taking into account all relevant legislation and case law?

- 3.3 The HRA (SDLP 05 series) is legally compliant and has been prepared in accordance with the requirements of the Conservation of Species and Habitats Regulations 2017<sup>1</sup>. Part 6 of these regulations sets out the requirements for the assessment of land use plans such as Local Plans. In accordance with the regulations, the authority has:
- Undertaken a screening of the Local Plan to determine if there may be likely significant effects whether alone or in combination with other plans and projects;
  - Undertaken an appropriate assessment in those instances where likely significant effects could not be ruled out through screening to conclude whether effects on site integrity from the SDLP (whether alone or in combination with other plans and projects) could be excluded on the basis of objective information;
  - Consulted with the appropriate nature conservation body, Natural England;
  - Consulted the public; and
  - Taken the responses into account.

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<sup>1</sup> The Conservation of Species and Habitats Regulations 2017 (Core Document Library Reference: TLL 13) <http://www.legislation.gov.uk/ukxi/2017/1012/contents/made>

Issue a. – air quality as affecting European designated wildlife sites

- 3.4 In March 2017 a legal challenge from Wealden District Council (WDC) was upheld by the High Court on the Lewes District Joint Core Strategy (Lewes JCS)<sup>2</sup> on the grounds that the HRA was flawed because the assessment of air quality impact on the Ashdown Forest SAC was not undertaken ‘in combination’ with other plans or projects (such as other Local Plans). This was because it relied on examining the flows arising from the JCS in isolation to determine if the 1000 Annual Average Daily Trip (AADT) threshold was exceeded, and did not take into account the potential accumulation of growth from multiple authorities all affecting vehicle flows through the SAC, and the role (or not) of the JCS in any cumulative effect.
- 3.5 The HRA Report (SDLP 05 and SDLP 05.4) for the South Downs Local Plan has fully addressed the findings of the Wealden Judgement:
- In combination assessment undertaken through Appropriate Assessment.
    - Forecast vehicle flows on roads are compared with baseline flows on the same roads in order to ascertain the air quality effect. The forecast includes the growth proposed in the South Downs Local Plan and growth arising from other plans, and therefore “in combination” effects have been assessed.
    - The relative contribution of the growth in the South Downs Local Plan is then separated out from the growth of other authorities to establish the relative contribution of the South Downs Local Plan. This step is necessary to determine whether the contribution made by the South Downs Local Plan is ecologically material, and whether mitigation of that contribution is required.
  - The methodology, consisting of traffic modelling, air quality calculations, and ecological interpretation, follows the industry standard approach and is consistent with the approach taken by other authorities, save for Wealden District Council.
  - The methodology accords with the precautionary principle. The housing numbers modelled for a number of authorities in and around Ashdown Forest (e.g. Wealden, Mid Sussex) are increased. Background improvements in vehicle emissions are assumed to occur, but not to the extent identified in the Design Manual for Roads and Bridges<sup>3</sup> as being a suitable precautionary approach.
  - The conclusion was that adverse effects on site integrity arising from the SDLP could be excluded on the basis of objective information. This determination was made without consideration of, or need for, mitigation measures.
  - Natural England, the appropriate conservation body, concurs with the conclusions of the air quality work undertaken<sup>4</sup>. Natural England does not raise objections to the methodology undertaken for the appropriate assessment of air quality as affecting European designated wildlife sites.

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<sup>2</sup> Wealden District Council vs Secretary of State for Communities and Local Government, Lewes District Council and South Downs National Park Authority, and Natural England. [2017] EWHC 351 (Admin) <http://www.bailii.org/ew/cases/EWHC/Admin/2017/351.html>

<sup>3</sup> Design Manual for Roads and Bridges, Highways Agency

<sup>4</sup> As stated in their Pre-Submission Representation (Comment ID 2353)

- 3.6 Wealden District Council submitted a representation to the Regulation 19 Consultation of the Pre-Submission South Downs Local Plan<sup>5</sup> which raised a number of matters regarding the methodology chosen. The Authority has explored these points and addressed them where necessary, and the conclusions of this are set out in Appendix E of the Air Quality Addendum to the HRA Report (SDLP 05.4).
- 3.7 SDNPA's approach to air quality impacts on European sites is consistent with the approach adopted in neighbouring authorities, with the exception of Wealden DC. This is demonstrated through the Ashdown Forest Statement of Common Ground (SoCG 01) signed by Lewes District Council, Tunbridge Wells Borough Council, Rother District Council, Mid Sussex District Council, Tandridge District Council, Sevenoaks District Council, Crawley Borough Council, East Sussex County Council, West Sussex County Council, and Natural England. Wealden District Council did not sign the Ashdown Forest Statement of Common Ground.
- 3.8 The consistency between the authorities (with the exception of Wealden DC) is also demonstrated through the joint work undertaken with Lewes District Council on the Air Quality Addendum (SDLP 05.4) and by the Report to Full Council on Ashdown Forest by Tunbridge Wells Borough Council (SDLP 05.5). These authorities consider that Wealden District Council's approach to air quality impacts on the Ashdown Forest SAC is fundamentally flawed.
- 3.9 Further detail on the Authority's approach regarding 'Issue a. air quality as affecting European designated wildlife sites' are set out in the Biodiversity Background Paper (TLL 11), the HRA Report (SDLP 05) the Air Quality Addendum (SDLP 05.4), and the Ashdown Forest Statement of Common Ground (SoCG 01).

Issue b. – any other relevant considerations

*The People Over Wind, Peter Sweetman v Coillte Teoranta judgement*

- 3.10 This judgement, commonly referred to as the 'People Over Wind' or 'Sweetman II' judgement<sup>6</sup> was issued in April 2018 by the Court of Justice of the European Union (CJEU) and provides important new case law for the treatment of mitigation measures when undertaking Habitats Regulations Assessment (HRA). The Court ruled that Article 6(3) of the Habitats Directive<sup>7</sup> must be interpreted as meaning that mitigation measures (referred to in the judgment as measures which are intended to avoid or reduce effects) should be assessed within the framework of an appropriate assessment (AA) and that it is not permissible to take account of mitigation measures for the plan or project on a European site at the screening stage. The Planning Inspectorate has issued guidance<sup>8</sup> to planning inspectors regarding the People Over Wind/Sweetman II case.

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<sup>5</sup> Comment ID 1586

<sup>6</sup> Case C- 323/17 People Over Wind, Peter Sweetman v Coillte Teoranta  
<http://curia.europa.eu/juris/document/document.jsf?docid=200970&doclang=EN>

<sup>7</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora

<sup>8</sup> Planning Inspectorate (PINS), Note 05/2018 'Consideration of avoidance and reduction measures in Habitats Regulations: People over Wind, Peter Sweetman v Coillte Teoranta', May 2018

3.11 Prior to this judgment, case law<sup>9</sup> in England and Wales had established that mitigation measures that form part of a proposal could be taken into account when considering whether the plan or project would be likely to have a significant effect on a European site. If the risk of a significant effect could be excluded on the basis of objective information, there was no need to undertake an AA.

3.12 The Authority commissioned its HRA consultants AECOM to undertake a review of the HRA in light of the new judgement. The review determined that the HRA Report and its appendices contain all the necessary information but would benefit from restructuring to clearly set out the distinction between the likely significant effects screening and appropriate assessment stages of the HRA. The restructured HRA Report has been made available for consultation with Natural England as the appropriate nature conservation body.

#### **4. Sustainability Appraisal**

4.1 Please refer to the Sustainability Appraisal (SD04 series)

#### **5. Statement of Community Involvement**

5.1 Please refer to the Statement of Community Involvement (SDNPA, 2018) (SDLP 08)

#### **6. Public Sector Equality Duty**

6.1 Please refer to the Equalities Impact Assessment (SDNPA, 2018) (SDLP 06)

#### **7. Summary**

7.1 In summary, the Background Papers and core documents together with the above updates demonstrates that the South Downs Local Plan has been prepared in accordance with the Duty to Cooperate, legal and procedural requirements and is sound.

7.2 With regard to the Habitats Regulations Assessment, the above response provides clarification of the Authority's position with respect to the issues raised in INSP.4 Duty to Cooperate and Legal Compliance, in addition to evidence previously published. This demonstrates that the HRA for the South Downs Local Plan has been prepared in accordance with the Conservation of Habitats and Species Regulations 2017 and relevant case law as follows:

- Air quality: The methodology used is compliant with the requirements of the Conservation of Habitats and Species Regulations 2017 and addresses the relevant case law to consider whether the an adverse effect on the integrity of the European site will result either alone, or in combination with other plans or projects. Following this methodology, the HRA concludes that there are not expected to be adverse effects on site integrity arising from the SDLP and this determination was made without consideration of, or need for, mitigation measures.

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<sup>9</sup> Hart DC v SCLG, Luckmore Limited & Barratt Homes Limited [2008] EWHC 1204 (Admin)

- The People Over Wind, Peter Sweetman v Coillte Teoranta judgement: The HRA Report was considered in light of the judgement and was found to contain the necessary information. The HRA report has been restructured to more clearly show the likely significant effects screening and appropriate assessment stages.

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