IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

In the matter of an application made pursuant to s.288 Town & Country Planning Act 1990

BETWEEN:

CREST NICHOLSON OPERATIONS LIMITED

Claimant

-and-

(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

(2) HORSHAM DISTRICT COUNCIL

Defendants

CORE CLAIM BUNDLE

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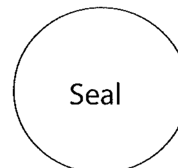
N208PC

Planning Statutory Review

Part 8 Claim Form (CPR8.1(6) and Practice Direction 8C)

In the High Court of Justice
Planning Court in the Administrative Court

For Court use only	
Planning Court Reference No.	
Date filed	



SECTION 1 Details of the claimant(s) and defendant(s)

Claimant(s) name(s) and address(es)

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1st Defendant

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SECTION 2 Details of other interested parties as set out in paragraph 4 of PD 8C

Include name and address and, if appropriate, details of DX, telephone or fax numbers and e-mail

name

address

Telephone no.

Fax no.

E-mail address

name

address

Telephone no.

Fax no.

E-mail address

SECTION 3 Details of the decision to be statutorily reviewed

Decision:
Decision of 25 October 2024 made by the Minister of State for Housing and Planning, Matthew Pennycook MP, on behalf of the Secretary of State (ref: APP/Z3825/W/23/3333968) granting a reserved matters approval pursuant to an application reference DC/23/0856, dated 28 April 2023.

This claim for statutory review is being made under the following section as set out in CPR PD 8C 1.1:-

- ☐ section 287 of the Town and Country Planning Act 1990
- ☑ section 288 of the Town and Country Planning Act 1990
- ☐ section 63 of the Planning (Listed Buildings and Conservation Areas) Act 1990
- ☐ section 22 of the Planning (Hazardous Substances) Act 1990
- ☐ section 113 of the Planning and Compulsory Purchase Act 2004
- ☐ other, please state

Date of decision:
25 October 2024

Name and address of the authority, tribunal or minister of the Crown who made the decision to be reviewed.

name
Secretary of State for Housing, Communities and Local Government

address
2 Marsham Street
London
SW1P 4DF
United Kingdom

SECTION 4 Permission to proceed with a claim for a planning statutory review

I am seeking permission to proceed with my claim for a planning statutory review.

Are you making any other applications? If Yes, complete Section 8.	☐ Yes	☑ No
Is the claimant in receipt of a Civil Legal Aid Certificate?	☐ Yes	☑ No
Are you claiming exceptional urgency, or do you need this application determined within a certain time scale? If Yes, complete Section 8.	☐ Yes	☑ No
Have you issued this claim in the region with which you have the closest connection? (Give any additional reasons for wanting it to be dealt with in this region in the box below). If No, give reasons in the box below.	☐ Yes	☑ No

Does the claim include any issues arising from the Human Rights Act 1998?
If Yes, state the articles which you contend have been breached in the box below. ☐ Yes ☑ No

SECTION 5 Detailed statement of grounds

☐ set out below ☑ attached

SECTION 6 Aarhus Convention Claim

If you have indicated that the claim is an Aarhus claim set out the grounds below, including (if relevant) reasons why you want to vary the limit on costs recoverable from a party.

SECTION 7 Details of remedy (including any interim remedy) being sought

☑ set out below ☐ attached

(1) a quashing order quashing the decision of the Secretary of State for Housing, Communities & Local Government under reference APP/Z3825/W/23/3333968 of 25 October 2024 to grant conditional planning permission on 25 October 2024 and for the decision to be remade on a lawful basis.

(2) costs.

SECTION 8 Other applications

☐ set out below ☐ attached

I wish to make an application for:-

SECTION 9 Statement of facts relied on

☐ set out below ☑ attached

SECTION 10 Supporting documents

If you intend to use a document to support your claim but do not presently have that document, identify it, give the date when you expect it to be available and give reasons why it is not presently available in the box below.

Please also tick the following boxes in relation to the papers you are filing with this claim form and any you will be filing later.

☑	Detailed statement of grounds	☐ set out in Section 5	☑ attached
☐	Application for directions	☐ set out in Section 8	☐ attached
☑	Statement of the facts relied on	☐ set out in Section 9	☑ attached
☑	Written evidence in support of the claim		☑ attached
☐	Where the claim for a planning statutory review relates to a decision of a court or tribunal, an approved copy of the reasons for reaching that decision		☐ attached
☑	Copies of any documents on which the claimant proposes to rely		☑ attached
☐	A copy of the legal aid or Civil Legal Aid Certificate *(if legally represented)*		☐ attached
☑	Copies of any relevant statutory material		☑ attached
☑	A list of essential documents for advance reading by the court *(with page references to the passages relied upon)*		☑ attached

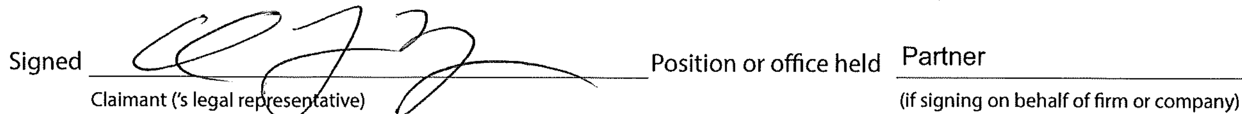
Reasons why you have not supplied a document and date when you expect it to be available:-

Statement of Truth

I believe ~~(The claimant believes)~~ that the facts stated in this claim form are true.

Full name Andrew Morgan

Name of claimant's legal representative's firm DAC Beachcroft LLP

Signed  Position or office held Partner

Claimant ('s legal representative) (if signing on behalf of firm or company)

IN THE HIGH COURT OF JUSTICE **[INSERT CASE REF…]**

KING'S BENCH DIVISION

PLANNING COURT

IN THE MATTER OF THE TOWN AND COUNTRY PLANNING ACT 1990

AND IN THE MATTER OF THE CONSERVATION OF HABITATS AND SPECIES REGULATIONS 2017

BETWEEN:

CREST NICHOLSON OPERATIONS LIMITED

Claimant

and

(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT
(2) HORSHAM DISTRICT COUNCIL

Defendants

STATEMENT OF FACTS AND GROUNDS

Introduction

1. This Claim is brought under s.288(1)(a)(i) of the Town and Country Planning Act 1990 ("the T&CPA").

2. The Claimant challenges the decision of the First Defendant on its appeal under s.78 of the T&CPA against the non-determination by the Second Defendant of the Claimant's application for approval of reserved matters ("RM")("the Approval") in respect of

development of 280 dwellings and associated landscaping, access and parking on land at Kilnwood Vale, Crawley Road, Faygate, Horsham RG12 0DB ("the Proposal").

3. Specifically, the Claimant challenges the decision of the First Defendant to grant the Approval subject to a condition (Condition 6; "the Condition") preventing occupation of the approved dwellings until demonstration of 'water neutrality'

4. The First Defendant imposed the Condition in a Decision Letter dated 25 October 2024 ("the DL"), in which the First Defendant agreed with the recommendations contained in the accompanying Inspector's Report ("the IR"), following a planning inquiry in March 2024.

5. The First Defendant decided that the imposition of the Condition was necessary on the basis that without requiring the Proposal to be 'water neutral' he could not conclude a favourable 'appropriate assessment' under Reg 63 of the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations") in respect of the Approval. This was by reference to potential harm to certain protected sites potentially adversely affected by groundwater abstraction from Hardham in the Sussex North Water Resource Zone ("the WRZ"). Hence, absent the Condition, the Approval could not be granted as a result of Reg 63(5).

6. The Claimant says that the imposition of the Condition was unlawful for two reasons:

GROUND 1:

a. The First Defendant proceeded on the basis that, although the Southern Water's ("SW's") Water Resources Management Plan 2024 ("WRMP24") for the supply of potable water in the WRZ is itself subject to Reg 63 of the Habitats Regulations, the WRMP24 might none-the-less continue groundwater abstraction at Hardham at a level that could not be excluded from resulting in harm to protected habitats, by reliance on Reg 64(1) (colloquially, "the IROPI test"). That finding was erroneous in law and/or irrational, given (a) the nature of the IROPI test, itself, and (b) the nature of the evidence before the inquiry, including alternatives to abstraction, timing and the role of the Environment Agency's abstraction licence regime (see below); and

GROUND 2:

b. The First Defendant proceeded on the basis that insufficient certainty of avoiding potential adverse effects could be derived from the Environment Agency's ("the EA") operation of the regulatory regime for groundwater abstraction licences under s.52 of the Water Resources Act 1991 ("the WRA") in that it was subject to a 'less rigorous' test than that imposed by Reg. 63, a conclusion which is legally erroneous given relationship between Regs 9 and 63 of the Habitats Regulations and the fact that, in any event, the exercise of the EA's function under s.52 is itself subject to Reg.63.

Potable water – the regulatory context

7. The First Defendant's decision arose in a context which involves multiple layers of regulatory activity and control.

8. In the context of the application of the Habitats Regulations to secure the protection of the relevant protected sites, three elements of regulatory activity are referred to in the IR.

9. The **first** is the requirement, under the T&CPA regime, for development to receive planning permission. Reg 63 of the Habitats Regulations applies to the various stages of the authorisation of a planning application, including (for present purposes) the approval of reserved matters arising under a condition on an outline planning permission. The First Defendant's impugned decision in this Claim was such a decision.

10. The **second** is the process, under the Water Industry Act 1991 regime, by which statutory undertakers concerned with the supply of potable water (in this case, SW) are required to prepare Water Resource Management Plans[1]. Such plans are required by statute to be prepared every five years and reviewed annually, and must set out how the undertaker will achieve a secure supply of water for its customer, and a protected and enhanced environment: ss 37A-37D of the WIA. Statutory undertakers are under a statutory duty to

[1] For a summary of the process in this case, see the evidence of Mr Aitken, Section 4

supply potable water to the level demanded of them: s. 37 of the WIA. In the discharge of their statutory functions, water companies like SW are subject to the duty in reg 9(3) of the Habitats Regulations to have regard to the requirements of the Habitats Directive (see further below). WRMPs are specifically subject to Reg.63.

11. The preparation of WRMPs is informed by the Water Resources Planning Guideline ("WRPG"), which is prepared jointly by the EA and (for England) OffWat. The WRPG provides a detailed explanation of the process and content of WRMPs.

12. For present purposes, it is sufficient to note that:

    a. The overarching objective of a WRMP is to "*efficiently deliver resilient, sustainable water resources for your customers and the environment, both now and in the long term. This objective should be at the centre of all your planning methods and decisions.*" (1.1.1);

    b. The property and population forecasts which inform the levels of supply required by a WRMP must be forecast so as "*not to constrain planned growth*" (6.3). That includes planned growth via strategic housing developments (6.3, first bullet); and

    c. Statutory undertakers are required to ensure that their WRMPs comply with the Habitats Regulations, and are required to conduct reg 63 assessments of their WRMPs (9.4.3). Natural England is a statutory consultee for draft WRMPs, as part of the facilitation of the Habitats Regulations assessment process.

13. The **third** regulatory activity, under the WRA regime, whereby the EA is responsible for the grant/modification/revocation of water abstraction licences, without which groundwater cannot be lawfully abstracted by water companies. By virtue of s. 52 of the WRA, EA may amend or revoke such licences at its own initiative, where it appears to it that it ought to do so. As a public body, the EA's exercise of its functions is subject to the reg 9(3) duty in the Habitats Regulations and decisions in respect of abstraction licences under s.52 are, themselves, subject to reg 63 of the Habitats Regulations.

14. The decision challenged in this Claim (which the First Defendant took in imposing the Condition) arose under the first of those regulatory regimes. However, as the First Defendant (correctly) recognised, in accordance with the general principles of administrative decision-making, as endorsed by caselaw (e.g. *R (An Taisce) v SSECC* [2015] PTSR 189 and *R (Together against Sizewell C Ltd) v SSESNZ* [2023] Env LR 29[2]), a planning decision-maker may properly proceed on the basis that the other specialist regulatory will operate effectively according to their statutory duties.

15. It should be noted that neither the EA as regulator, nor SW as undertaker and author or the WRMP objected to grant of the RM approval, on the basis that water neutrality was required (or at all).

Factual background

The proposal:

16. The Proposal comprises a phase (specifically, phase 3DEFG) of a multi-phase development at the Kilnwood Vale site, outline permission for which was first granted in 2011 (the outline was varied in 2016, but nothing turns on this).

17. The Proposal forms part of a significant strategic development to create a new neighbourhood of about 2,500 dwellings and associated infrastructure to the west of Crawley, and is in accordance with the specific site allocation policy in the adopted development plan for Horsham. For WRMP purposes, it is, therefore, 'planned development'.

18. At the inquiry, it was common ground between the parties that the Claimant's application was in substantial compliance with the parameter plans attached to the outline permission, and that all material matters were acceptable in planning terms [IR/4.1].

19. As such, the only impediment to the approval of the RM application was the Habitats Regulations issue.

[2] See Holgate J (as he then was), who noted that "without this there would be sclerosis" (para 91).

20. The specific issue was whether or not, in order to be able to conclude a favourable 'appropriate assessment' under Reg. 63 of the Habitats Regulations, it was necessary to impose on the RM approval a condition restricting occupation of housing in the Proposal in such a way as to ensure that the Proposal was "water neutral".

"Water neutrality"

21. In September 2021, Natural England ("NE"), issued an 'advice note' relating specifically to the development Sussex North WRZ ("the Position Statement"). The concern that led to that Position Statement was the potential effect of groundwater abstraction at Hardham (interchangeably known as the "Hardham" or "Pulborough" site in the inquiry papers) on protected sites located in the WRZ. It stated that one way of ensuring protection was to require that that new development was 'water neutral' – i.e. (in net terms) that it would not increase water usage in the WRZ.

22. 'Water neutrality' can be characterised as an interim measure because:

    a. as the inspector explained [IR/6.4], the long-term solution to water abstraction pressure is through strategic provision of water resources, through the WRMP process, rather than development control decisions under the Town and Country Planning Act 1990 regime; WRMP24 is due to be published and take effect in 2025 and will establish water supplies to meet need from 2025 from sources consistent with the Habitats Regulations; and

    b. The specific issue of the acceptable level of groundwater abstraction at Hardham (if any) is currently the subject of a Sustainability Study required by the EA, which is due to report by April 2025 (see below).

23. Given that the NE Position Statement is founded on concerns in respect of impacts on habitats sites from groundwater abstraction a Hardham, the relevant aim of water neutrality for planning applications would be to ensure that any new development does not increase the level of water abstraction at Hardham within the WRZ.

Potable water supply in the Sussex North WRZ

24. At the time of the inquiry, a number of matters were under consideration in respect of the future management and protection of water supply the WRZ.

25. By way of background, the supply of potable water to consumers in the WRZ arises from a number of sources, including groundwater abstraction at Hardham, but also including surface water abstraction, a nearby reservoir known as Weir Wood, bulk transfer (by pipe) from Portsmouth Water and other water undertakers[3].

26. In September 2021, following the publication of the Position Statement, the EA commissioned a sustainability review into the relationship (if any) between the groundwater abstraction from the Hardham aquifer and the protected features of the relevant Habitats Regulations sites ("the Sustainability Study"). The Sustainability Study is expected to be published in April 2025.

27. The result of the Sustainability Study will inform the EA's decision-making process under s.52 of the WRA in respect of the Hardham abstraction licence, which is subject to a Reg 63 assessment in its own right.

28. The supply of water to the WRZ is managed and controlled by Southern Water ("SW"), a private company and statutory undertaker. As at the time of the inquiry, SW had reduced its rate of groundwater abstraction in the WRZ voluntarily, to a rate of 5Ml/day, from a previous average of about 12Ml/day and a maximum permissible level of 36Ml/day under its abstraction licence from the EA. That commitment extends to at least the conclusion of the Sustainability Study.

29. Under its WIA duties, SW is in the process of preparing the WRMP24, to replace its current (2019) WRMP. The authorising of WRMP24 is subject to consultation not only with the EA but also NE and overseen by DEFRA; it is subject to a Reg 63 assessment in its own right.

[3] See the evidence of Mr Aitken, Section 5

The Inspector's approach

30. The inspector's conclusions, which the First Defendant adopted without material modifications, are found at section 10 of the IR.

31. The inspector began by setting out the (undisputed) legal framework governing the basic operation of the Habitats Regulations [IR/10.3-8]. In IR/10.9, the inspector described (*inter alia*) the IROPI principle, which he referred to (correctly) as a "*question of law*". In IR/10.10, the inspector set out the (again, uncontroversial) tests which are required to be met for IROPI to be made out; those include (relevantly for these purposes) the requirement that there are no alternative solutions which would either avoid damage to the protected site or else be less damaging to it than what is proposed. It is notable here that if alternatives exist, then there is no question of IROPI being established or relied upon (see 'Law', below).

32. Having concluded that the Proposal should be "screened into" the Reg. 63 Habitats Regulations regime, the inspector turned to the 'appropriate assessment' stage and whether or not the Secretary of State ("the SoS") could have the requisite degree of certainty that the Proposal, if permitted, would not harm the integrity of the relevant sites via increased groundwater abstraction from Hardham.

33. That analysis begins at IR/10.40.

34. The first sub-issue the inspector considered related to "*other regulatory regimes*". The inspector's findings were as follows:

    a. The SoS could properly assume that other regulatory regimes, including those arising from the statutory duties of the EA and SW, will operate effectively, so that there is no need to duplicate them [IR/10.42];

    b. The PPG proceeds on the basis that water supply should not generally be a consideration in development control decisions [IR/10.43];

c. While the SoS was entitled to proceed on the basis that other aspects of the regulatory regime would operate effectively, that did not of itself absolve the SoS of conducting an appropriate assessment, and it was not sufficient to assume that the problem would be dealt with by others. Absent certainty, such an approach risked leaving gaps in coverage of the protection for the relevant sites [IR/10.45];

d. Until the Sustainability Study reports, there is no certainty about the safe level of abstraction which can occur at Hardham.

e. SW's voluntary agreement to keep abstraction levels at 5Ml/day "*allows parties to say, at least until the Sustainability [Study] reports, that the likely adverse effects on the [protected sites] are unlikely to worsen. It does not … discharge the [EA's] duties under the Habitats Regulations. That would, instead, follow by making any necessary changes to the abstraction licence*" [IR/10.48, emphasis added]. The SoS could, the inspector found, have confidence that the EA will appropriately monitor the voluntary agreement with SW, and consider taking more formal action if necessary [IR/10.54]. It was on that basis that the voluntary minimisation agreement of SW could not be discounted;

f. Once the Sustainability Study reports, the EA will be under a duty to secure compliance with the Habitats Regulations, and therefore to consider the effects on the protected sites [IR/10.51];

g. In a key (and erroneous) finding, the inspector identified a difference between the EA's duties under reg 9 of the Habitats Regulations, and the reg 63 duty in respect of appropriate assessment;

h. After the Sustainability Study reports, there is a range of things that the EA and/or SW could do in respect of the Hardham abstraction licence, under their respective legal regimes. Given the "*unspecified future action*", however, he concluded there was insufficient certainty of no harm for him to conclude a favourable appropriate assessment in respect of the Proposal [IR/10.56];

i. It was that absence of future certainty that led to this aspect of the issue being resolved against the Claimant [IR/10.57].

35. On the WRMP24, the inspector's approach was as follows:

a. The current version of the WRMP, and its associated HRA assessment, are in draft form, and the likelihood of changes being made to them calls into question the validity of relying on the draft documents as a basis of present decision-making. Their specific provisions do not therefore provide a basis for concluding a reasonable certainty as to an absence of impact [IR/10.59];

b. The measures in a WRMP are capable in principle of providing sufficient certainty to enable an appropriate assessment to be passed, though the draft nature of the WRMP 2024 meant that there was no reasonable certainty here [IR/10.61];

c. At a general level, the final version of the WRMP will itself be subject to an appropriate assessment, and the SoS was entitled to expect that the relevant bodies would carry out their duties in this regard [IR/10.62];

d. The possible circumstances in which the WRMP might proceed on a "*zero Hardham*" basis (i.e. a basis which assumes no further abstraction from Hardham) include: (i) the revocation of the SW abstraction licence for the Hardham aquifer; or (ii) the WRMP appropriate assessment would otherwise be failed, and there is no scope for IROPI in respect of this element of the WRMP [IR/10.63];

e. In a key (and erroneous) finding, the inspector held that the IROPI mechanism contained in Reg 64 of the Habitats Regulations provided a route to the publication of a version of the WRMP which had failed an appropriate assessment [IR/10.64];

f. On that basis, together with the lack of reasonable certainty as to how or when the WRMP will operate, the inspector concluded that there was no reasonable

certainty that the WRMP would prevent adverse effects on the protected habitats in question [IR/10.66].

36. Mr Aitken gave evidence for the Appellant on alternative solutions to continued groundwater abstraction at Hardham[4]. Specifically, on the question of alternative sources of potable water in the event that abstraction from Hardham were to cease, the inspector's conclusion was as follows [IR/10.89]:

> *"The question of availability of alternative sources of supply is a complex one, due primarily to fluid nature of contractual arrangements between water companies and the lack of public transparency on the terms of such arrangements. The evidence does not allow a specific source of alternative supply to be identified, nor is there a need for there to be one. However it does, in general, point towards some capacity in supply that the Secretary of State can take confidence in should groundwater abstraction at Hardham need to cease in the future."*

37. It was in that context that the inspector recommended the imposition of the Condition – the Condition enabled the inspector to recommend that the appropriate assessment for the Proposal would be passed, and the First Defendant agreed [DL/20].

The Law

The Habitats Regulations

38. The Habitats Regulations transpose into domestic law the requirements of the Habitats Directive. Parliament opted to retain those requirements in domestic law post-Brexit, with no modification to the underlying policy imperatives.

39. For present purposes, the central provision of the Habitats Regulations, and the provision which transposes the core requirements of Art 6(3) of the Directive, is Reg 63(1):

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[4] See the evidence of Mr Aitken, Section 6.

"A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which— (a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and (b) is not directly connected with or necessary to the management of that site, must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives"

40. Reg 63(5) provides that:

"In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be)."

41. The legal principles governing the application of reg 63 were not in dispute at the inquiry, and for present purposes are largely uncontroversial. They were summarised by the Court of Appeal in *R (Wyatt) v Fareham BC* [2023] PTSR 1952 at para 8, which is not, therefore, repeated here.

42. Reg 64 provides the only exception to the need for relevant development to receive a favourable appropriate assessment before it can be authorised. Reg 64(1) provides:

"If the competent authority is satisfied that, <u>there being no alternative solutions</u>, the plan or project must be carried out for imperative reasons of overriding public interest (which, subject to paragraph (2), may be of a social or economic nature), it may agree to the plan or project notwithstanding a negative assessment of the implications for the European site or the European offshore marine site (as the case may be)." (emphasis added)

43. The Reg 64(1) test is known as the "IROPI" test. Care must be taken with that acronym, however – the existence of imperative reasons of overriding public interest is not itself sufficient to engage Reg 64. There must also be an absence of alternative solutions. It is

notable that Reg 64 does not require an absence of reasonable alternatives, but an absence of <u>any</u> alternatives.

44. In addition to the Reg 63 duty, which is engaged when competent authorities consider whether or not to authorise a 'plan or project', the Habitats Regulations also contain general duties on public authorities operating in ways which might affect nature conservation. Reg 9 provides:

> *"(1) The appropriate authority, the nature conservation bodies and, in relation to the marine area, a competent authority must exercise their functions which are relevant to nature conservation, including marine conservation, so as to secure compliance with the requirements of the Directives.*
>
> …
>
> *(3) Without prejudice to the preceding provisions, a competent authority, in exercising any of its functions, must have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions."*

45. The "appropriate authority" in England is 'the SoS' (in respect of both planning and water supply regimes: respectively DHCLG and Defra), and the nature conservation body in England is Natural England (Reg 3). A "competent authority" includes "*any Minister of the Crown ... government department, statutory undertaker, public body of any description or person holding a public office*" (Reg 7).

46. For present purposes, the EA is a competent authority. It is thus subject to the reg 9(3) duty to have regard to the requirements of the Directive when exercising its functions, including in relation to its decisions regarding the approach it adopts to the abstraction of water from the Hardham aquifer following the report of the Sustainability Study. Reg 63 would then be engaged in the EA's consideration, under s 52 of the WRA, of whether to revoke or vary the abstraction licence in the light of the result of the Sustainability Study.

47. Similarly, SW, as a statutory water undertaker, is a competent authority in respect of its own decisions as to potable water supply. Its operation and the formulation of the WRMP are subject to Re.9(3) and its publication is subject to Reg. 63.

48. One of the requirements of the Habitats Directive which is of some significance in the present context is that contained in art 6(2):

> *"Member states shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive."*

49. The nature of the Reg 9(3) duty, and its interaction with art 6(2) of the Directive, was explored by the High Court in *Harris v Environment Agency* [2022] PTSR 1751, in the specific context of the EA's duties concerning water abstraction licences.

50. The Court noted that the language of Reg 9(3) gave, on its face, a broader discretion to a competent authority than did Reg 9(1): the former is a "have regard to" duty, whereas the latter requires compliance to be secured.

51. Importantly, however, the particular function of the EA in the context in which its duty arose meant that, in reality, its discretion to decide not to comply with the requirements of the Directive was extremely limited. The Court noted, first, that (para 83):

> *"the object of the "have regard" duty is "requirements", rather than advice or guidance. Advice or guidance is not, ordinarily, mandatory. "Requirements" more usually are mandatory. The "requirements" are set out, in mandatory terms, in a Directive which the Regulations themselves transposed. In this context, there is not the same broad scope for taking something into account, but then deciding for good reason to depart from it, as there is in the case of non-binding guidance."*

52. The Reg 9(3) duty, the Court held, was (para 84):

> *"concerned with a "competent authority". That has a broad meaning (including every public body). In some contexts different competent authorities may have overlapping roles that are relevant to the discharge of the requirements of the Habitats Directive. In such cases, it would not be meaningful or appropriate to impose on one single competent authority (or on every competent authority) an obligation to secure*

compliance with the Habitats Directive. Instead, what is required is that all competent authorities have regard to the Habitats Directive, so as to ensure that, in the result, compliance with the Directive is achieved."

53. The implication of that position was explained (para 85):

"the duty to "have regard" here does not implicitly permit the Environment Agency to act in a way which is inconsistent with the Habitats Directive (in other words to have regard to the requirements of the Directive but then deliberately decide to act in a way that is inconsistent with those requirements). Rather, it recognises that the Environment Agency is one part of a complex regulatory structure and, depending on the issue, it may have a greater or lesser role to play."

54. Critically, the Court went on to explain the nature of the duty imposed on the EA in respect of its decisions around abstraction licences for water (emphasis added):

86. In the present context the Environment Agency is, effectively, the sole (and certainly the principal) public body which is responsible for determining whether abstraction licences should be granted, varied, or revoked. If it does not secure the requirements of article 6(2) in respect of those decisions then no other public body is capable of filling the gap.
87. For these reasons, in this context, the duty on the Environment Agency to have regard to the requirements of the Habitats Directive means that the Environment Agency must take those requirements into account, and, in so far as it is (in a particular context) the relevant public body with responsibility for fulfilling those requirements, then it must discharge those requirements. In other words, the scope for departure that is ordinarily inherent in the words "have regard to" is considerably narrowed.

55. The EA was thus required, as a matter of domestic law, to discharge the requirements of Art 6(2). As to how those requirements manifested in the water abstraction context, the Court analysed the authorities, and concluded (para 50):

"This means that where it becomes apparent that there may be a risk to a protected habitat or species as a result of the licensed abstraction of water, article 6(2) imposes

an obligation to review the applicable licences: Grüne Liga, para 44. The review must be sufficiently robust to guarantee that the abstraction of water will not cause significant damage to ecosystems that are protected under the Habitats Directive"

56. Thus, a review to which Art 6(2) applies involves the application of materially the same high standard of precautionary protection as applies when an appropriate assessment is carried out for a plan or project.

The grounds of challenge

57. In the light of the law, and the inspector's recommendations (which the SoS accepted), the Claimant challenges the imposition of the Condition on two grounds.

Ground One: IROPI in respect of the WRMP 2024

58. The First Defendant concluded that it was possible that the WRMP2024, in its final form, might not secure the protection of the protected sites. The basis for that conclusion was that the IROPI principle enables the WRMP2024 to be adopted in a form which fails to preserve the integrity of the sites.

59. The First Defendant's conclusion misunderstands and misapplies the IROPI principle.

60. The critical point is that, as the First Defendant recognised, IROPI is available if, and only if, there is no feasible alternative to proceeding with the harmful development.

61. In this regard, any finding that IROPI applied to the WRMP2024, so as to prevent it from securing the protection of the protected sites via the control of the abstraction rate from the Hardham aquifer, would have to be accompanied by a finding that there was no feasible alternative to the abstraction of water from the aquifer.

62. By contrast, the inspector recommended, and the First Defendant concluded, however, that while there were complexities around alternative sources of supply, there was "*some capacity in supply that the Secretary of State can take confidence in should groundwater abstraction at Hardham need to cease in the future*" (emphasis added) [IR/10.89]. The existence of that capacity is, in and of itself, sufficient to rule out any prospect of IROPI

in respect of the eventual content of the WRMP2024. This is before considering 'demand-side' solutions to not rely on groundwater abstraction in drought years.

63. It must be stressed that the inspector's finding of a lack of certainty as to which and when these solutions may be deployed does not save the First Defendant's conclusion on IROPI in respect of continued reliance on groundwater abstraction at Hardham. The First Defendant would have had to make a finding that there was *no* alternative to relying on groundwater abstraction from Harden. He made no such finding.

64. Further, the level (if any) of groundwater abstraction at Hardham that may lawfully be abstracted is governed by the abstraction licence under s.52 of the WRA, not the WRMP24. Thus, whatever the WRMP24 might state as expected groundwater abstraction from Hardham, SW's actual operation will be bound by the outcome of the EA Sustainability Study (whether some, none, or the same abstraction as currently) and there is no scope for the WRMP to rely upon IROPI to depart from that.

65. IROPI is therefore not available to allow the publication of a WRMP that provides for continued groundwater abstraction of Hardham pending the Sustainability Study, or in excess of what that Study finds to be an acceptable level.

66. Put another way, there was no material before the First Defendant on which he could rationally conclude that no alternatives to the cessation of groundwater abstraction at Hardham existed, in the event that the Sustainability Study concludes that such a cessation is required for the protection of the relevant sites. Absent such material, it was not open to the inspector to approach the WRMP on the basis that IROPI was a possibility.

67. The First Defendant was thus wrong in law to conclude that the WRMP might be adopted on a basis that relies on IROPI to fail to protect the relevant sites, so that there was insufficient certainty to enable the appropriate assessment for the Proposal to be passed.

Ground Two: the duties of the EA

68. The inspector and the First Defendant recognised that, in principle, the First Defendant's decision could be made on the basis that other aspects of the regulatory regime would work effectively. They also recognised that the abstraction levels in respect of the Hardham aquifer were adequately controlled by the SW voluntary reduction in usage combined with

the EA's enforcement powers. The First Defendant's concern about the lack of certainty for the control of abstraction levels related to the EA's response to the findings of the Sustainability Study.

69. In particular, the First Defendant was concerned about (a) the 'less rigorous' nature of the EA's Reg 9 duty as compared with the Reg 63 duty, and (b) the lack of certainty as to what measures exactly would be taken in response to the Sustainability Study's findings.

70. The First Defendant's approach to both of these issues was legally flawed.

<u>The nature of the EA's reg 9(3) duty</u>

71. Beginning with the EA's position, it is true that, in general, the reg 9(3) duty, which requires all competent authorities to "have regard to" the requirements of the protection of habitats, is more general than the procedural decision-making process enshrined in reg 63, which requires a step-wise chain of findings to ensure that the requisite level of protection actually occurs.

72. Critically, however, the EA is the principal, indeed the sole, body responsible for deciding whether or not the Hardham abstraction licence should be withdrawn, varied, modified, or left in place in the light of the findings of the Sustainability Study.

73. In those circumstances, as *Harris* makes clear, the reg 9(3) requirement is not a mere "have regard to" duty; it has substance in that it requires the EA to <u>ensure</u> that the requirements of the Habitats Directive are complied with. In this context, that means that the EA is <u>required</u> by reg 9(3) to ensure that its response to the Sustainability Study ensures the protection of the integrity of the protected sites.

74. The substance of the EA's reg 9(3) duty is thus, in the circumstances, equivalent in substance of its the reg 63 duty. The First Defendant erred in law, therefore, in proceeding on the basis that there was scope for the EA to treat the requirements of the Habitats Directive as simply one consideration amongst several – such approach would be contrary to *Harris*.

75. Put another way, the inspector and First Defendant erred in treating outcome of the reg 9(3) duty as materially different to outcome the reg 63 duty: in the particular context of this case, they are materially the same (as in *Harris*).

76. In those circumstances, the alleged lack of certainty as to how or when exactly the EA would respond to the Sustainability Study is nothing to the point. Whatever the EA chooses to do, it must act, under the Habitats Regulations, so as to ensure the protection of the relevant sites. Thus there is the necessary degree of certainty as to the protection of the sites, even if the exact mechanism by which that protection arises is not yet known.

The protected sites

77. The First Defendant's error as to the nature of the reg 9(3) duty led to an erroneous conclusion that there was uncertainty as to the protection of the integrity of the protected sites. No such uncertainty exists, however, because the EA cannot lawfully choose an option that does not preserve the integrity of those sites.

78. That appears to have been the acknowledged position of the EA itself: in response to a query raised by the Claimant's agents, specifically in respect of the *Harris* judgment, the EA noted that "*the Harris judgment does not mean we must immediately revoke the Hardham licence but rather, so long as we are addressing the issues of effects on the [protected site] and have a plan to act once the extent of the effects is known, then we are taking appropriate steps as per the Harris judgment*", and that "*the [Sustainability Study] will determine whether the licence should be revoked or not but we cannot prejudge the outcome of that review before we know the extent of effects of abstraction and whether revocation is the only action available to ensure no adverse effects on the SAC*" (para 7.12 of Mr Aitken's proof of evidence; emphases added).

79. As set out above, the Sustainability Study was commissioned by the EA to inform the exercise of its powers under s. 52 of the WRA to maintain, amend or revoke the abstraction licence at Hardham. This was done under reg 9(3), but the exercise of the EA's powers under s. 52 will in due course engage reg 63 directly. The only circumstance in which the EA will not exercise its revocation/modification duty will be if the Sustainability Study establishes beyond reasonable scientific doubt (see *Wyatt* at para 9(2) for authority as to

the standard of proof) that the abstraction of water at Hardham will not harm the integrity of the protected sites: any other approach would be contrary to reg 9(3) (as well as to the EA's own stated intentions – see above).

80. The EA was thus of the view that, in the light of *Harris*, it was required to have a plan to act once the result of the Sustainability Study was known; that plan would have to ensure that no adverse effects arose to the protected sites; and that plan would, if required to achieve that level of protection, involve the revocation of the Hardham abstraction licence (which would itself be a decision engaging reg 63 and the need for an appropriate assessment).

81. Critically, the excerpts from the EA's letter contained in Mr Aitken's proof of evidence show its position in the light of the *Harris* judgment. By contrast, the comments of the EA which are quoted by the inspector in the IR, and which suggest a less stringent approach to reg 9(3), are excerpts from a letter dated 26 April 2022 [IR/10.52], some six months before the judgment in *Harris* was handed down on 6 September 2022. The inspector's conclusion on the ambit of the reg 9(3) duty was thus based on a statement which had been overtaken by the jurisprudence, and which was inconsistent with the EA's position as expressed in response to the development in the jurisprudence.

82. There are consequently two errors of law arising under this ground:

    a. the First Defendant was wrong to say that, for the EA regulating abstraction licences, reg 9(3) involves a lower protection than reg 63; and

    b. In any event, when s. 52 of the WRA becomes engaged by the publication of the outcome of the Sustainability Study, reg 63 will apply anyway.

    Either way, the regulatory regime governing groundwater abstraction will operate to prevent harm to the protected sites.

83. As such, the First Defendant was wrong to conclude that he had an insufficient degree of certainty. The above errors are themselves sufficient to vitiate the imposition of the Condition.

Conclusion

84. For the reasons set out above, the Appellant asks the Court:

    a. To quash the Decision and remit it to the First Defendant to be remade on a lawful basis; and

    b. For its costs.

CHRISTOPHER BOYLE KC
LUKE WILCOX

4 DECEMBER 2024

Landmark Chambers,
180 Fleet Street,
London,
EC4A 2HG.

For: Claimant
Witness: SARAH BEUDEN
Witness statement - First
Exhibit – SB1
Made: 4 December 2024

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

In the matter of an application made pursuant to s.288 Town & Country Planning Act 1990

BETWEEN:

CREST NICHOLSON OPERATIONS LIMITED

Claimant

-and-

(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

(2) HORSHAM DISTRICT COUNCIL

Defendants

WITNESS STATEMENT OF SARAH BEUDEN

I, **SARAH BEUDEN**, Head of Southampton Planning at Savills UK Limited of c/o Savills, Mountbatten House, 1 Grosvenor Square, Southampton, SO15 2BZ, do say as follows:

1. I am Head of Southampton Planning at Savills UK Limited (“**Savills**”). I am authorised by Savills to make this witness statement on its behalf.

2. I make this witness statement to exhibit the relevant documents in this matter, namely the documents in the exhibit marked "**SB1**".

3. The facts and matters set out in this statement are within my own knowledge unless otherwise stated and I believe them to be true. Where I refer to information supplied by others, the source of the information is identified; facts and matters derived from other sources are true to the best of my knowledge and belief.

Statement of Truth

I believe that the facts in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed:…… ……………………………………

SARAH BEUDEN

4 December 2024

For: Claimant Witness:
SARAH BEUDEN Witness
statement - First
Exhibit – SB1 Made: 4
December 2024

IN THE HIGH COURT OF JUSTICE
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Claimant

-and-

(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

(2) HORSHAM DISTRICT COUNCIL

Defendants

EXHIBIT SB1 TO THE FIRST WITNESS STATEMENT OF SARAH BEUDEN

This exhibit marked "**SB1**" is the exhibit referred to in the first witness statement of Sarah Beuden made on 4 December 2024

Tab No.	Document	Date	Page(s)
1.	Decision Letter of the Secretary of State for Housing, Communities and Local Government enclosing Darren McCreery's Report to the Secretary of State for Housing, Communities and Local Government	Decision Letter - 25 October 2024 Report - 30 July 2024	2 – 93
2.	Closing Submissions of Christopher Boyle KC	18 March 2024	94 – 134
3.	Proof of Evidence of Alistair Aiken	12 February 2024	135 – 233
4.	Water resources planning guideline	14 April 2023	234 – 338
5.	Natural England Position Statement	September 2021	339 – 340

Ministry of Housing, Communities & Local Government

Our ref: APP/Z3825/W/23/3333968

Your ref: DC/23/0856

Mr Peter Warren
Savills
Mountbatten House
1 Grosvenor Square
Southampton
SQ15 2BZ

25 October 2024

Dear Peter Warren,

TOWN AND COUNTRY PLANNING ACT 1990 – SECTION 78
APPEAL MADE BY CREST NICHOLSON OPERATIONS LIMITED
KILNWOOD VALE SUB-PHASE 3DEFG, KILNWOOD VALE, CRAWLEY ROAD, FAYGATE, HORSHAM, WEST SUSSEX, RH12 0DB
APPLICATION REF: DC/23/0856

This decision was made by the Minister of State for Housing and Planning, Matthew Pennycook MP, on behalf of the Secretary of State

1. I am directed by the Secretary of State to say that consideration has been given to the report of Darren McCreery MA BA (Hons) MRTPI, who held a public local inquiry on 11-14 March 2024 and 18 March 2024 into your client's appeal against the failure of Horsham District Council to determine your client's application for reserved matters approval for layout, appearance, landscaping, and scale (in accordance with DC/15/2813) for Phase 3DEFG of the Kilnwood Vale development, comprising 280 dwellings with associated landscaping, access and parking, in accordance with application Ref. DC/23/0856, dated 28 April 2023.

2. On 8 April 2024, this appeal was recovered for the Secretary of State's determination, in pursuance of section 79 of, and paragraph 3 of Schedule 6 to, the Town and Country Planning Act (TCPA) 1990.

Inspector's recommendation and summary of the decision

3. The Inspector recommended that the reserved matters should be approved.

4. For the reasons given below, the Secretary of State agrees with the Inspector's conclusions, and agrees with his recommendation. She has decided to approve the reserved matters. The Inspector's Report (IR) is attached. All references to paragraph numbers, unless otherwise stated, are to that report.

Ministry of Housing Communities & Local Government
Laura Webster, Decision Officer
Planning Casework Unit
3rd Floor Fry Building
2 Marsham Street
London SW1P 4DF

Email: PCC@communities.gov.uk

Environmental Statement

5. An Environmental Statement (ES) was submitted with the outline application (DC/10/1612) under the Town and Country Planning (Environmental Impact Assessment) Regulations 1999, and an addendum to the ES was submitted in support of the S73 application (DC/15/2813) under the Town and Country Planning (Environmental Impact Assessment) Regulations 2011(as amended). The Secretary of State is satisfied that the environmental information already before her is adequate to assess the significant effects of the development on the environment. In reaching her decision the Secretary of State has taken this information into consideration.

Matters arising since the close of the inquiry

6. A list of representations which have been received since the inquiry is at Annex A. The Secretary of State is satisfied that the issues raised do not affect her decision, and no other new issues were raised in this correspondence to warrant further investigation or necessitate additional referrals back to parties. Copies of these letters may be obtained on request to the email address at the foot of the first page of this letter.

7. On 30 July 2024, the Written Ministerial Statement (WMS) 'Building the Homes we Need' (UIN HCWS48) was published. On that same date, the government launched a consultation to reform the National Planning Policy Framework (the Framework). The Secretary of State does not consider that publication of the WMS and the consultation on the existing Framework raise any matters that would require her to refer back to the parties for further representations prior to reaching her decision on this appeal, and she is satisfied that no interests have thereby been prejudiced.

Policy and statutory considerations

8. In reaching her decision, the Secretary of State has considered this proposal within the context of the Outline Planning Permission that these reserved matters are pursuant to.

9. In this case a hybrid planning application, including a masterplan for the site, was approved in 2011 (DC/10/1612) for "Outline approval for the development of approximately 2500 dwellings, new access from A264 and a secondary access from A264, neighbourhood centre, comprising retail, community building with library facility, public house, primary care centre and care home, main pumping station, land for primary school and nursery, land for employment uses, new rail station, energy centre and associated amenity space. Full planning permission for engineering operations associated with landfill remediation and associated infrastructure including pumping station. Full permission for the development of Phase 1 of 291 dwellings, internal roads, garages, driveways, 756 parking spaces, pathways, sub-station, flood attenuation ponds and associated amenity space. Full permission for the construction of a 3 to 6 metre high (above ground level) noise attenuation landform for approximately 700 metres, associated landscaping, pedestrian/cycleway and service provision (land known as Kilnwood Vale)". The permission was varied in 2016 by application reference DC/15/2813 for the "Variation of conditions 3, 4, 7, 8, 9, and 10 of hybrid planning application DC/10/1612 to enable the reconfiguration of the neighbourhood centre, community facilities and open space".

10. The Secretary of State has had regard to the relevant policies within the development plan. In this case the development plan consists of Horsham District Planning Framework (HDPF) (27 November 2015), Horsham District Council Site Specific Allocations of Land

(November 2007) and Horsham District and Crawley Borough Local Development Frameworks West of Bewbush Joint Area Action Plan (JAAP) (July 2009).
The Secretary of State considers that relevant development plan policies include those set out at IR5.5-IR5.14.

11. Other material considerations which the Secretary of State has taken into account include the Framework and associated planning guidance ('the Guidance'), as well as the matters set out in IR5.25-IR5.26.

Emerging plan

12. The Horsham District Local Plan 2023-2040 was published for consultation under regulation 19 of the Town and Country Planning (Local Planning) (England) Regulations 2012 on 19 January 2024 and was formally submitted to the Planning Inspectorate on Friday 26 July 2024 after the close of the Inquiry. The Secretary of State notes the Inspector's comment at IR5.4 that the draft plan continues to rely on delivery at Kilnwood Vale as a source of housing supply.

13. Paragraph 48 of the Framework states that decision makers may give weight to relevant policies in emerging plans according to: (1) the stage of preparation of the emerging plan; (2) the extent to which there are unresolved objections to relevant policies in the emerging plan; and (3) the degree of consistency of relevant policies to the policies in the Framework. The Secretary of State notes that the Local Plan has been submitted for examination since the close of the Inquiry. The Inspector concludes at IR5.4 that the emerging Local Plan does not attract weight, however, having regard to the stage of preparation she considers that the emerging Local Plan should be given limited weight.

Main issues

Whether a Habitats Regulations compliant appropriate assessment can be concluded and, if so, on what basis.

14. The Secretary of State has taken into account the legal principles underpinning appropriate assessment summarised by the Inspector at IR10.3-IR10.10, the Inspector's conclusion in respect of Imperative Reasons of Overriding Public Benefit (IROPI) set out at IR10.11 and his consideration of proportionality in applying the precautionary principle set out at IR10.12-IR10.19 and agrees with the Inspector's approach.

15. For the reasons set out at IR10.20-IR10.90 the Secretary of State agrees with the Inspector's conclusions at IR10.85-IR10.90 that it cannot be ascertained (with reasonable certainty) that the proposal will not adversely affect the integrity of the Arun Valley Sites.

16. In relation to likely significant effects, she agrees that as the Water Supply Zone includes supplies from groundwater abstraction it cannot, with certainty, be concluded that there will be no adverse impact on the Arun Valley Sites for the reasons set out at IR10.24-IR10.27. For the reasons set out at IR10.28-IR10.32 she agrees that the concept of Water Neutrality is not of central relevance to the question of whether a favourable appropriate assessment can be concluded.

17. In relation to the effects on the site's nature conservation objectives, the Secretary of State agrees with the Inspector at IR10.37 that the qualifying interest affected by the issue in the NE Position Statement cannot be narrowed to the Lesser Ramshorn Whirlpool Snail, for the reasons set out at IR10.33-IR10.39.

18. The Secretary of State has considered matters arising in relation to reliance of other regulatory regimes (IR10.41-IR10.45); Southern Water Voluntary Minimisation and Environment Agency action following the Sustainability Review (IR10.46-IR10.57); The WRMP 2024 (IR10.58-IR10.69); Alternative Sources of Supply (IR10.70-IR10.75); and Demand Management Savings (IR10.76-IR10.84). For the reasons set out at IR10.40-IR10.91, she agrees with the Inspector's conclusions at IR10.85-IR10.91, and agrees that based on the Appellant's evidence of avoidance/mitigation it cannot be ascertained (with reasonable certainty) that the proposal will not adversely affect the integrity of the Arun Valley Sites (IR10.90).

19. In considering whether compliance with conditions or other restrictions enable it to be ascertained that the proposal would not adversely affect the integrity of the site, for the reasons set out at IR10.92-IR10.112 the Secretary of State agrees with the Inspector's proposed amendments to the Council's suggested Sussex North Offsetting Water Scheme (SNOWS) condition set out at IR10.111 and his conclusion at IR10.112 that compliance with conditions enables her to ascertain that the proposal would not adversely affect the integrity of the Arun Valley sites.

20. The Secretary of State agrees with the Inspector's conclusion at IR10.113 that subject to compliance with conditions, she is able to ascertain with reasonable certainty that the proposal would not adversely affect the integrity of the Arun Valley Sites. She further agrees that she is able to conclude a favourable appropriate assessment and discharge her duty under Regulation 63(5) of the Habitat Regulations. The Secretary of State adopts IR10.3-IR10.114 as the necessary Appropriate Assessment in her role as the Competent Authority on this matter.

21. Like the Inspector at IR10.114 in fulfilling her duty, the Secretary of State has had regard to the representations made by Natural England, as the appropriate nature conservation body for the purposes of Regulation 63(3) of the Conservation of Habitats and Species Regulations 2017.

Whether the evidence otherwise indicates that the reserved matters should be approved

22. For the reasons set out at IR10.115, the Secretary of State agrees that the proposal accords with the parameter plans, the s.106 under the Outline Permission, and accords with the relevant policies identified in paragraph 10 of this decision letter.

23. For the reasons set out at IR 10.115-IR10.119, the Secretary of State agrees with the Inspector's conclusion at IR10.120 and agrees with the assessment of matters unrelated to habitat effects provided by the Council. She further agrees with the Inspector at IR10.127 that the benefits listed in the appellant's statement of case (housing, affordable housing, employment, economic benefits, provision of open space, remediation of landfill and biodiversity benefits), are collectively significant material considerations and she gives these benefits significant weight.

Planning conditions

24. The Secretary of State had regard to the Inspector's analysis at IR10.90-IR10.112 and IR11.1-IR11.4, the recommended conditions set out at the end of the IR and the reasons for them, and to national policy in paragraph 56 of the Framework and the relevant Guidance. She is satisfied that the conditions recommended by the Inspector, including Condition 6, comply with the policy test set out at paragraph 56 of the Framework and that the conditions set out at Annex B should form part of her decision.

Planning balance and overall conclusion

25. For the reasons given above, the Secretary of State considers that the appeal scheme is in accordance with the Outline Permission and the relevant policies of the HDPF and of the JAAP and is in accordance with the development plan as it relates to the reserved matters under consideration. She has gone on to consider whether there are material considerations which indicate that the proposal should be determined other than in line with the relevant development plan policies.

26. Weighing in favour of the proposal are housing, affordable housing, employment, economic benefits, provision of open space, remediation of landfill and biodiversity benefits. The Secretary of State gives these benefits significant weight.

27. Overall, the Secretary of State considers that the accordance with the outline planning permission and relevant development plan policies, and the material considerations in this case indicate that the reserved matters should be approved.

28. The Secretary of State therefore concludes that the reserved matters should be approved subject to the conditions set out in Annex B.

Formal decision

29. Accordingly, for the reasons given above, the Secretary of State agrees with the Inspector's recommendation. She hereby allows your client's appeal and approves the reserved matters subject to the conditions set out in Annex B of this decision letter for reserved matters approval for layout, appearance, landscaping, and scale (in accordance with DC/15/2813) for Phase 3DEFG of the Kilnwood Vale development, comprising 280 dwellings with associated landscaping, access and parking, in accordance with application Ref. DC/23/0856, dated 28 April 2023.

30. This letter does not convey any approval or consent which may be required under any enactment, bye-law, order or regulation other than the approval of reserved matters subsequent to outline planning permission granted under section 57 of the TCPA 1990.

Right to challenge the decision

31. A separate note is attached setting out the circumstances in which the validity of the Secretary of State's decision may be challenged. This must be done by making an application to the High Court within 6 weeks from the day after the date of this letter for leave to bring a statutory review under section 288 of the TCPA 1990.

32. A copy of this letter has been sent to Horsham District Council and notification has been sent to others who asked to be informed of the decision.

Yours faithfully,

Laura Webster

Laura Webster
Decision officer

This decision was made by the Minister of State for Housing and Planning, Matthew Pennycook MP, on behalf of the Secretary of State, and signed on his behalf

Annex A Schedule of representations

General representations

Party	**Date**
Kevin Curd	3 September 2024

Annex B List of conditions

1. The development hereby permitted shall be carried out in accordance with the approved plans listed in Appendix 1 of the Statement of Common Ground between Horsham District Council and Crest Nicholson Operations Limited dated 18 March 2024.

2. No development above ground floor-slab level shall commence until a schedule of materials, finishes and colours to be utilised for the external walls, windows and roofs of the approved buildings, has been submitted to and approved by the Local Planning Authority in writing. All materials to be utilised in the construction of the approved buildings shall, thereafter, conform to those approved.

3. No development shall commence above ground floor-slab level, until full details of underground services, including locations, dimensions and depths of all service facilities and required ground excavations, have been submitted to and approved by the Local Planning Authority in writing. The development shall be carried out as per the approved details and coordinated with the approved Residential Landscape Masterplan (ref: 30125-5 DR-5000 S4-P12), Softworks Proposals (3015-5-DR-5001-P9, 3015-5-DR-5002-P9, 3015-5-DR-5003-P6, 3015-5-DR-5004-P6, 3015-5-DR-5005-P6, 3015-5-DR-5006-P10, 3015-5-DR-5007-P10, 3015-5-DR-5007-P10 and 3015-5-DR-5008-P9) and Preliminary Surface and Foul Water Drainage Strategy (refs: 2107120-002 G and 2107120-003 G).

4. No development shall commence above ground floor-slab level, until full details of any street-furniture to be installed, which can include any lighting columns, public cycle stands and bollards have been submitted to and approved by the Local Planning Authority in writing. The development shall be implemented in accordance with the approved details.

5. No development above ground floor slab level shall commence until full details of the water efficiency measures required to achieve a maximum of 91.4 l/p/d have been submitted to and approved in writing by the Local Planning Authority. The submitted details shall include the specification of all fixtures and fittings to be included in all dwellings, and a completed Part G calculator confirming the targeted water consumption is achieved.

    i) No dwelling hereby permitted shall be occupied until the approved water efficiency measures to serve that dwelling have been installed and made available for use in accordance with approved details, with evidence of installation submitted to an approved in the writing by the Local Planning Authority.
    ii) The installed water efficiency measures, or any subsequent replacement of measures over the lifetime of the development, shall achieve equivalent or higher standards of water efficiency to those approved unless otherwise agreed in writing with the Local Planning Authority.

6. No dwelling hereby permitted shall be first occupied until written agreement from the Local Planning Authority has been provided that either:
    i) A water neutrality mitigation scheme has been secured via Horsham District Council's adopted Offsetting Scheme (in line with the recommendations of

the Sussex North Water Neutrality Study: Part C – Mitigation Strategy, Final Report, December 2022). OR

ii) A site-specific water neutrality mitigation scheme has been (a) agreed in writing with the Local Planning Authority as being equivalent to Horsham District Council's adopted Offsetting Scheme AND (b) implemented in full.

7. All approved soft/ hard landscaping and boundary treatments within the curtilage of an approved building shall be implemented prior to the first occupation of that dwelling, in accordance with the approved soft/hard landscaping drawings, unless alternative hard and soft landscaping details and/or boundary treatments are submitted to and been approved in writing by the Local Planning Authority prior to the commencement of development above ground-floor slab level.

8. All soft landscaping outside of the curtilage of an approved dwelling shall be carried out in the first planting and seeding season, following the first occupation of the relevant buildings or the completion of the development, whichever is the sooner. Any trees or plants detailed on the approved landscaping strategy which die, are removed, become seriously damaged or diseased, within a period of five years following the completion of the development shall be replaced with new planting of a similar size and species.

9. Prior to the first occupation of any part of the development, a landscape management responsibilities plan (delineating areas of ownership and maintenance responsibility) for all communal landscape areas shall be submitted to and approved in writing by the Local Planning Authority. The landscape areas shall be managed and maintained in accordance with the approved details.

10. No dwelling hereby permitted shall be occupied until secure covered cycle parking facilities to serve that dwelling have been constructed and made available for use in accordance with approved drawings. The cycle parking facilities shall thereafter be retained as such for their designated use.

11. No dwelling hereby permitted shall be occupied until the car parking spaces serving the respective dwellings have been constructed and made available for use in perpetuity. All unallocated (visitor) parking spaces shall be completed and made available for use prior to the completion of the development and shall, thereafter, remain available only for use as visitor parking.

12. No part of the development shall be occupied until details of the proposed solar PV apparatus, including locations and amounts, have been submitted to and approved in writing by the Local Planning Authority. The equipment shall, be installed prior to the first occupation of each respective dwelling in accordance with the approved details.

13. No dwelling shall be first occupied until secure covered provision for the storage of refuse and recycling has been made for that dwelling in accordance with the submitted plans. The refuse and facilities shall thereafter be retained for use at all times.

14. No dwelling shall be first occupied until confirmation has been provided to the Local Planning Authority that either:- 1. All foul water network upgrades required to accommodate the additional flows from the development have been completed; or- 2. A development and infrastructure phasing plan has been agreed with the Local Authority in consultation with Thames Water to allow development to be occupied. Where a

development and infrastructure phasing plan is agreed, no occupation shall take place other than in accordance with the agreed development and infrastructure phasing plan.

15. No dwelling shall be first occupied until details showing the location of fire hydrants and method of installation and maintenance in perpetuity have been submitted to and approved in writing by the Local Planning Authority, in consultation with West Sussex County Council's Fire and Rescue Service. The development shall be carried out in accordance with the approved details and retained as such, unless a variation is agreed with the Local Planning Authority.

16. Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (and/or any Order revoking, amending and/or re-enacting that Order), no roof extensions falling within Class B, Part 1, Schedule 2 of the Order shall be erected, constructed and/or installed to any dwelling hereby approved without express planning permission from the Local Planning Authority first being obtained.

17. Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (and/or any Order revoking, amending and/or re-enacting that Order), all garages hereby permitted shall be used only as private domestic garages for the parking of vehicles incidental to the use of the properties as dwellings and for no other purpose.

The Planning Inspectorate

Report to the Secretary of State for Housing, Communities and Local Government

by Darren McCreery MA BA (Hons) MRTPI

an Inspector appointed by the Secretary of State for Housing, Communities and Local Government

Date 30 July 2024

TOWN AND COUNTRY PLANNING ACT

Horsham District Council

APPEAL BY

Crest Nicholson Operations Limited

Inquiry opened on 11 March 2024

Kilnwood Vale Sub-Phase 3DEFG, Kilnwood Vale, Crawley Road, Faygate, Horsham, West Sussex, RH12 0DB

File Ref: APP/Z3825/W/23/3333968

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Abbreviations

1990 Act	Town and Country Planning Act 1990 (as amended)
LLFA	Lead Local Flood Authority
The Habitats Regulations	The Conservation of Habitats and Species Regulations 2017
HDPF	Horsham District Planning Framework (2015)
HRA	Habitats Regulations Assessment
JAAP	West of Bewbush Joint Area Action Plan (2009)
l/p/d	Litres per person per day
ml/d	Millions of litres per day
NE Advice Note	Natural England's Advice Note dated February 2022
NE Position Statement	Natural England's Position Statement dated September 2021
The Outline Permission	Permission reference DC/10/1612, as varied by DC/15/2813
SAC	Special Areas of Conservation
SOCG	Statement of Common Ground
SPA	Special Protection Areas
SSSI	Sites of Special Scientific Interest
WSZ	Southern Water's Sussex North Water Resource/ Supply Zones
WRMP	Southern Water's Water Resource Management Plan

File Ref: APP/Z3825/W/23/3333968
Kilnwood Vale Sub-Phase 3DEFG, Kilnwood Vale, Crawley Road, Faygate, Horsham, West Sussex, RH12 0DB

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for reserved matters attached to an outline planning permission.
- The appeal is made by Crest Nicholson Operations Limited against Horsham District Council.
- The application Ref DC/23/0856, dated 28 April 2023, sought approval pursuant to condition No 5 of permission Ref DC/15/2813 granted on 28 April 2016 (related to original outline planning permission Ref DC/10/1612 granted on 17 October 2011).
- The development proposed is reserved matters approval sought for layout, appearance, landscaping, and scale (in accordance with DC/15/2813) for Phase 3DEFG of the Kilnwood Vale development, comprising 280 dwellings with associated landscaping, access and parking.

Summary of recommendation: the reserved matters should be APPROVED.

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1 Preliminary matters

1.1 I held a case management conference virtually on 30 January 2024 with the Appellant and the Council. No other party joined the conference. An agreed note was published shortly after[1] which at paragraph 3.1.1 included what the parties felt was the main issue of the appeal, which has not changed, namely:

'The effect of the proposed development on the integrity of the Arun Valley Special Conservation Area, Special Protection Area and Ramsar sites, with particular reference to water abstraction.'

1.2 The inquiry webpage[2] includes the Core Documents [prefix **CD**], agreed between the parties ahead of opening, and Inquiry Documents [prefix **ID**] added after opening. The list of documents is at Annex 2 and Annex 3 and I use the referencing throughout (i.e. [**CDXX**] or [**IDXX**]).

1.3 With the agreement of the Appellant, the description of development has been amended from what was on the application form to remove reference to access. This reflects the position that access was approved as part of earlier consents and corrects what appears to be an error in the interests of clarity. [**ID12**] explains the position.

1.4 The Inquiry opened on 11 March 2024 and sat in person for 4 days, before adjourning. We resumed virtually on 18 March 2024 to hear closing submissions and closed the same day. I carried out an unaccompanied site visit on 14 March 2024. Other than the Appellant and the Council, no party gave oral evidence during the Inquiry. No applications for costs were made.

[1] https://docs.google.com/document/d/1sJSJgW2T2KHb69bhM3XSXWqYAiVCNdvw/edit
[2] https://drive.google.com/drive/folders/1zhZRfzTYH0MgSjv2mkThvgWKibRmBx0t?usp=sharing

1.5 The Statement of Common Ground (SOCG) between the Appellant and the Council was signed on 18 March 2024 [**ID11**]. It was updated prior to the close of the Inquiry to reflect an agreed position on drainage and conditions.

1.6 On 28 March 2024, following the close of the Inquiry, I wrote to Natural England. The need to do so was agreed by all parties at the Inquiry in light of the relevant legal duties[3]. Natural England's response dated 19 April 2024 [**ID13**] is summarised in section 9 of this report. The Appellant's comments on the Natural England response are dated 3 May 2024 [**ID14**].

1.7 By notification dated 8 April 2024, the direction under section 79 and paragraph 3 of Schedule 6 of the Town and Country Planning Act 1990 (1990 Act) recovers the appeal for the Secretary of State's own determination. The reason given is that the appeal involves proposals for residential development of over 150 units or on sites of over 5 hectares, which would significantly impact on the Government's objective to secure a better balance between housing demand and supply and create high quality, sustainable, mixed and inclusive communities.

2 The site and planning history

2.1 The site, surroundings, and detailed planning history are at sections 2 and 3 of the SOCG [**ID11**]. In summary, Kilnwood Vale is a strategic development located on the western edge of Crawley to the north of the A264, west of Bewbush and east of Faygate. It is identified in the West of Bewbush Joint Area Action Plan (2009)[4] (JAAP) to create a new neighbourhood of around 2500 homes with associated social, environmental, and transport infrastructure. It was subsequently taken forward in the Horsham District Planning Framework (HDPF), adopted in 2015 [**CD4 1.01**].

2.2 A hybrid planning application, including a masterplan for the site, was approved in 2011 (DC/10/1612) and varied in 2016 (DC/15/2813), resulting in an amended parameter plan. I refer to these consent's collectively as the Outline Permission. Of the four parts in the Outline Permission, Parts C and D are complete (which included 291 homes). For Parts A and B, 1318 homes have detailed consent and are either occupied/complete or under construction. This sits alongside infrastructure investment, including a new primary school which opened in 2019.

2.3 Sub phase 3DEFG, the subject of this appeal, is located towards the eastern section of Kilnwood Vale. It sits within the wider development context described above and within Part A of the Outline Permission. It includes an area of land identified for a leisure park (secured separately through S106 agreement attached to the Outline Permission) and is to the northeast of the new primary school.

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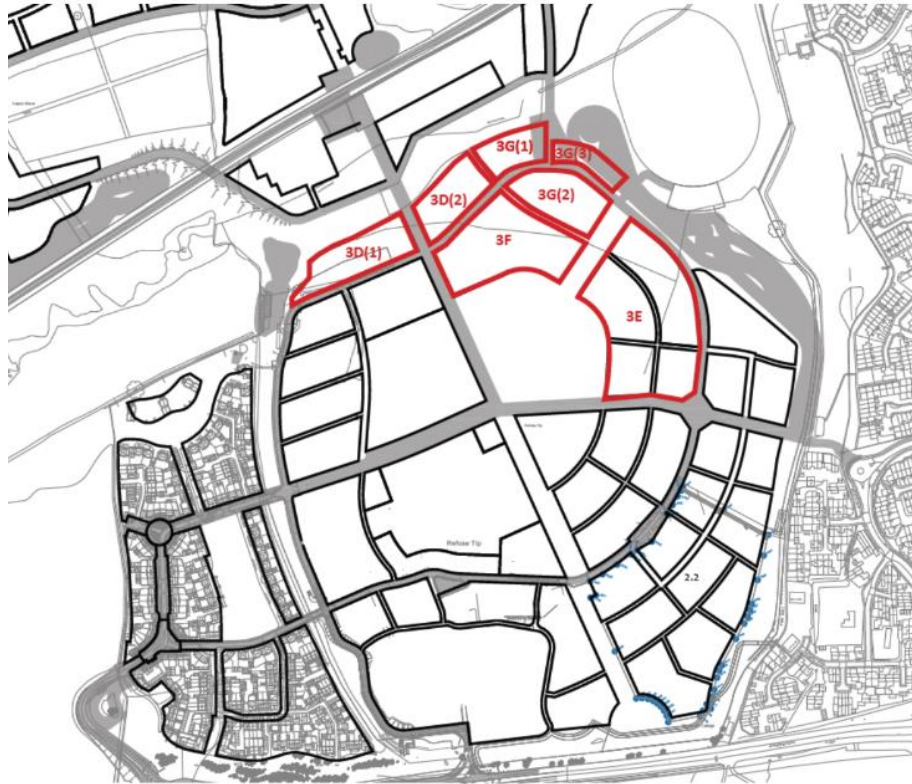
[3] Regulation 63(3), The Conservation of Habitats and Species Regulations 2017 (Habitats Regulations)

[4] https://www.horsham.gov.uk/__data/assets/pdf_file/0010/69526/West-of-Bewbush-Joint-Area-Action-Plan.pdf

2.4 The drawing below is from the Council's Statement of Case [**CD7 1.02a**]. It shows the site in context. Sub phase 3DEFG can be seen in red alongside the wider strategic site in bold black. The A264 is in the bottom right corner and the railway line is towards the top. On the right of the drawing is the residential area of Bewbush, which is at the edge of Crawley.



3 <u>The proposal</u>

3.1 The application is for reserved matters approval, described as:

'Reserved matters approval sought for Layout, Appearance, Landscaping, and Scale (in accordance with DC/15/2813) for Phase 3 D, E, F and G of the Kilnwood Vale development, comprising 280 dwellings with associated landscaping, access and parking'.

3.2 Section 5 of the Appellant's Statement of Case [**CD7 1.01**] sets out the appeal proposals in detail. Condition 3 of the Outline Permission (specifically DC/15/2813) requires the reserved matters to be in substantial compliance with the parameter plans specified in the condition. Namely the:

a. Land use plan

b. Residential density plan

c. Buildings height plan

d. Pedestrian and cycle movement plan

e. Vehicular movement plan

f. Landscape and open space plan

3.3 The parameter plans can be seen at Appendix 2 of the Council's Statement of Case [**CD7 1.02a**].

3.4 There is a Section 106 agreement governing the wider development that was not before the Inquiry. Section 5 of the Appellant's Statement of Case [**CD7 1.01**] explains how the proposal is said to accord with both the Section 106 agreement and the parameter plans.

3.5 The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) (1990 Act) as the Council did not give notice of their decision on the application within the prescribed period.

4 Agreed matters and extent of dispute

4.1 The SOCG [**ID11**] agrees between the Appellant and the Council that:

a. the information before the Council was sufficient to enable each of the reserved matters to be determined, in accordance with validation requirements and the relevant conditions of the Outline Permission.

b. the reserved matters are in substantial accordance with the parameter plans agreed in the Outline Permission (as required by condition 3 of DC/15/2813).

c. the other matters agreed as being material to the reserved matters detailed at paragraphs 6.11-6.26 of the SOCG are acceptable.

d. the issue of drainage capacity that led to a holding objection from the Lead Local Flood Authority (LLFA) has been addressed.

4.2 The extent of dispute is on a single matter relating to water neutrality. It is set out at paragraph 7.1 of the SOCG:

'Whether a further condition is necessary to restrict development to ensure compliance with Regulations 63(5) and 70(3) of the Conservation of Habitats and Species Regulations 2017 (The Habitats Regulations) and, if so, whether it is necessary for the condition to restrict development until such time that access into the Council's Water Offsetting Scheme (SNOWS) has been secured'.

5 Planning policy and guidance

5.1 The agreed development plan position is at Section 4 of the SOCG [**ID11**]. It comprises:

a. Horsham District Planning Framework (HDPF) (27 November 2015)

b. Horsham District Council Site Specific Allocations of Land (November 2007)

c. Horsham District and Crawley Borough Local Development Frameworks West of Bewbush Joint Area Action Plan (JAAP) (July 2009)

5.2 The Outline Permission was decided against the now superseded Horsham District Council Core Strategy (2 February 2007) and General Development Control Policies (21 December 2007). They identified Kilnwood Vale as a key strategic site and a major contributor to Horsham's planned housing delivery.

5.3 The JAAP remains extant and relevant.

5.4 The Horsham District Local Plan 2023-2040 was published for Regulation 19 consultation on 19 January 2024. It does not attract weight in planning decisions due to its infancy. However, it is noteworthy that the draft plan continues to rely on delivery at Kilnwood Vale as a source of housing supply.

Horsham District Planning Framework (HDPF) [CD4 1.01]

5.5 Policy 31 (Green Infrastructure and Biodiversity) says that development proposals will be required to contribute to the enhancement of existing biodiversity and should create and manage new habitats where appropriate (Policy 31(2)). Under 31(4)(a) and (b), particular consideration will be given to the hierarchy of sites and habitats in the district as follows:

a. Special Protection Areas (SPA) and Special Areas of Conservation (SAC)

b. Sites of Special Scientific Interest (SSSIs) and National Nature Reserves

c. Sites of Nature Conservation Importance, Local Nature Reserves and any areas of ancient woodland, local geodiversity

5.6 Policy 31(4) goes on to say that development anticipated to have a direct or indirect adverse impact on sites or features will be refused unless it can be demonstrated that the reason for the development clearly outweighs the need to protect the value of the site and appropriate mitigation and compensation measures are provided. Policy 31(5) says that any development with the potential to impact the Arun Valley SPA will be subject to a Habitats Regulations Assessment to determine the need for an appropriate assessment.

5.7 Policies 32 (Quality of New Development) and 33 (Development Principles) require development to be of a high standard of design and layout. They must be locally distinctive in character and respect the surroundings. Where relevant, the scale, massing and appearance of development is required to relate sympathetically with its built-surroundings, landscape, open spaces and to consider any impact on the skyline and important views.

5.8 Policy 37 (Sustainable Construction) requires proposals to seek to improve the sustainability of development and incorporate measures that includes limiting water use to 110 l/p/d.

5.9 Policy 40 (Sustainable Transport) says that proposals promoting an improved and integrated transport network, with a re-balancing in favour of non-car modes as a means of access to jobs, homes, services, and facilities, will be encouraged and supported. Policy 40 (1-10) sets out the detailed policy criteria for achieving this, including being integrated with the wider network of routes, including public rights of way and cycle paths, and minimising the distance people need to travel and conflicts between traffic, cyclists and pedestrians.

5.10 Policy 41 (Parking) says that adequate parking and facilities must be provided within developments to meet the needs of anticipated users. Consideration should be given to the needs of cycle parking, motorcycle parking, charging plug-in or other low emission vehicles and the mobility impaired.

West of Bewbush Joint Area Action Plan (JAAP)[5]

5.11 The separate adopted core strategies for Horsham and Crawley in force at the time set out the key principles for the development of 2,500 homes and other uses to the west and north-west of Crawley. The JAAP allocates the land (under Policy WB1) and expands on the principles to provide a detailed policy framework for the development that would become known as Kilnwood Vale.

5.12 Policy WB4 (Design) establishes the design principles. It says that design and layout should reflect design principles for the new neighbourhood detailed within a design and access statement, achieve high-quality, inclusive, and safe design. It says that development should address the street, create streetscape variety and interest with natural surveillance of open-spaces, paths, and communal areas.

5.13 In relation to market housing, Policy WB10 (Dwelling Mix) says that there should be a mix of dwelling sizes and types within each core phase of the development and that, for each core phase, it should be demonstrated how a mix is to be delivered.

5.14 For affordable housing, Policy WB10 (Affordable Housing) sets a target of 40% for the whole neighbourhood. Each phase should contain between 30% and 50% affordable housing, with the precise proportion determining individually. A tenure split of 70% social rented and 30% intermediate tenure should be provided across the whole neighbourhood.

The National Planning Policy Framework, December 2023 (the Framework)

5.15 The Framework aims to achieve locally prepared plans that provide for sufficient housing and other development in a sustainable manner. It outlines a presumption in favour of sustainable development. It also identifies that achieving sustainable development means that the planning system has three overarching objectives – economic, social, and environmental.

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[5] https://www.horsham.gov.uk/__data/assets/pdf_file/0010/69526/West-of-Bewbush-Joint-Area-Action-Plan.pdf

5.16 At Paragraph 11, the Framework sets out how the presumption is to be applied. It indicates that development proposals that accord with an up-to-date development plan should be approved without delay. It goes on to say that where no relevant development plan policies, or the policies which are most important for determining the application are out-of-date, permission should be granted unless the application of policies in the Framework that protect areas or assets of particular importance, (including those relating to habitats sites and/or designated as Sites of Special Scientific Interest) provides a clear reason for refusing the development proposed or any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole.

5.17 The Framework indicates that, for applications which involve the provision of housing where the local planning authority cannot demonstrate a five-year supply of deliverable housing sites, as is the case in this instance, the policies which are most important for determining the application are out-of-date for Para 11 purposes. In this case it is common ground that the Council cannot demonstrate a five-year supply, with the latest Authority Monitoring Report data equating to a 2.9 year supply of new homes [**CD4 1.04a**].

5.18 In relation to delivering a sufficient supply of homes (Framework, Section 5) Paragraph 60 says that it is important that a sufficient amount and variety of land can come forward where it is needed. This is to support the Government's objective of significantly boosting the supply of homes. Paragraph 74 highlights that a supply of large numbers of new homes can often be best achieved through planning for larger scale development, such as significant extensions to existing villages and towns. At Paragraph 74(c) it supports setting clear expectations for the quality of places.

5.19 Turning to conserving and enhancing the natural environment (Framework, Section 15), Paragraph 180 says that planning policies and decisions should contribute to and enhance the natural and local environment by protecting and enhancing sites of biodiversity or geological value and soils (in a manner commensurate with their statutory status or identified quality in the development plan).

5.20 The Framework defines a habitats site as any site which would be included within the definition at Regulation 8 of the Habitats Regulations for the purpose of those regulations. Paragraph 187 says that listed Ramsar sites should be given the same protection as habitats sites. Paragraph 188 says that the presumption in favour of sustainable development does not apply where project is likely to have a significant effect on a habitats site (either alone or in combination) unless an appropriate assessment has concluded that the project will not adversely affect the integrity of the habitats site.

5.21 Whilst not falling within the definition of habitats sites (or the extension provided by Paragraph 187), Paragraph 186 includes separate policy for development on land within or outside a Site of Special Scientific Interest, and which is likely to have an adverse effect on it (either individually or in combination).

5.22 Such development should not normally be permitted. The only exception being where the benefits of the development in the location proposed clearly outweigh both its likely impact on the features of the site that make it of special scientific interest, and any broader impacts on the national network.

5.23 Although I have considered the Framework in its entirety, the following sections are also relevant to this case:

- 4 - Decision-making
- 8 – Promoting healthy and safe communities
- 9 – Promoting sustainable transport
- 11 - Making effective use of land
- 12 - Achieving well-designed and beautiful places
- 14 – Meeting the challenge of climate change, flooding, and coastal change.

5.24 Although a weighty material consideration, the Framework does not change the statutory status of the development plan. Nor does it override other legal duties, including those imposed by the Habitats Regulations.

National Planning Guidance and other guidance

5.25 National Planning Guidance on appropriate assessment[6] provides advice for those required to undertake Habitats Regulations Assessment (HRA) in accordance with the Habitats Regulations. Defra's guidance[7] (Habitats Regulations Assessments: Protecting a European Site) gives more information on carrying out an HRA.

5.26 The main source of evidence relating to the HRA originates from the Appellant's Shadow HRA **[CD1 1.01]** and HRA Addendum **[CD1 1.02].** In addition to the guidance set out above, at paragraph 2.2.1 the Shadow HRA refers to ODPM/DEFRA Circular (ODPM 06/2005, DEFRA 01/2005)[8]. Whilst of some vintage, this document appears to be extant and includes a helpful flowchart that summarises the HRA process that is also included at Appendix 5 of the Appellant's Shadow HRA.

6 Background to water neutrality

Water neutrality

6.1 Horsham is within Southern Water's Sussex North Water Resource Zone and includes supply from groundwater abstraction on the river Arun, close to Pulborough (referred interchangeably throughout the evidence as 'Hardham' or 'Pulborough').

6.2 The abstraction site is located close to a group of nature conservation sites known as the Arun Valley Sites, that are nationally or internationally designated for their rare and protected habitats. The sites are The Arun Valley SPA, SAC, and Ramsar site. Overlapping is the Pulborough Brooks and Amberley Wild Brooks SSSI.

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[6] https://www.gov.uk/guidance/appropriate-assessment
[7] https://www.gov.uk/guidance/habitats-regulations-assessments-protecting-a-european-site
[8] https://www.gov.uk/government/publications/biodiversity-and-geological-conservation-circular-06-2005

6.3 In September 2021, Natural England published a Position Statement giving advice for all applications falling within the Water Supply Zone (WSZ[9]) [**CD8 1.15]** (NE Position Statement). It advises that that as the WSZ includes supplies from groundwater abstraction which cannot, with certainty, conclude no adverse effect on the integrity of the Arun Valley Sites. As existing abstraction cannot be concluded as not having an impact on the sites, they advise that developments within the WSZ must not add to it. One way of achieving this is to demonstrate water neutrality.

6.4 The NE Position Statement advises resolving the matter through a strategic approach delivered through the Local Plans of the relevant Local Planning Authorities (including Horsham) with engagement from Natural England. Ahead of the strategic approach it is advised that any application needs to demonstrate water neutrality in line with the interim approach set out.

6.5 Natural England published an Advice Note in February 2022 (NE Advice Note) [**CD8 1.16]** to expand on the NE Position Statement. The note continues to refer to the strategic approach as being a longer-term strategy to integrate water neutrality into the relevant Local Plans, working closely with the relevant local authorities, the Environment Agency and Southern Water. While the strategic approach remains in development, Natural England propose integrating the concept of water neutrality into individual planning decisions to ensure that future development can proceed and not further adversely affect the Arun Valley Sites.

6.6 The strategic approach of relevance to Horsham includes the mitigation strategy described in detail in the Sussex North Water Neutrality Study: Part C – Mitigation Strategy (Part C report) [**CD8 1.14c**]. It is endorsed by Natural England [**CD8 1.22]**. The proposals in the mitigation strategy are threefold; (1) reducing water demand through defined water efficiency requirements for new development, (2) water company demand management delivery, and (3) a Local Planning Authority led offsetting scheme. The offsetting scheme known as SNOWS will, according to the Council, become operational later in 2024.

[9] the evidence refers to both the Water Resource Zone (WRZ) and the Water Supply Zone (WSZ). They are technically different things but may be the same, or similar, areas. In this report I have consistently used WSZ for ease of reference and as distinguishing between them makes no difference to my findings.

7. <u>The case for the Appellant (Crest Nicholson Operations Limited)</u>

7.1 The case for the Appellant is set out in the evidence before the Inquiry[10]. It is important that the evidence, together with the application and supplementary material, is considered in full to gain a proper understanding of the case. To assist, what follows is a summary based on the case presented in closing [**ID10**].

Introduction

7.2 The site comprises part of the land benefiting from the Outline Permission, originally granted in 2011, that will deliver the Kilnwood Vale strategic allocation. To date, some 1318 dwellings have been consented under earlier phases, which are now either occupied or under construction. The appeal proposal is a sub phase of 280 dwellings as part of the balance of 1182 dwellings, with the local centre awaiting separate determination to complete the strategic development as planned.

7.3 The SOCG [**ID11**] records that there are no matters in dispute on the planning merits of the application, it accords with the Outline Permission and the development plan. The only issue relates to the outstanding concern by Natural England in respect of the impact on a protected site. Had the Council been able to undertake a favourable appropriate assessment under Regulation 63 of the Habitats Regulations it would have granted approval. This is evidenced by the SOCG and was confirmed by Mr Smith for the Council under cross examination at the Inquiry.

7.4 The Appellant characterises the Council's position as being that acceptable determination of the appeal rests on the imposition of a Grampian condition to ensure that the proposal is water neutral. This is necessary to reach a favourable appropriate assessment under Regulation 63 of the Habitats Regulations.

7.5 The Appellants position, by contrast, is that such a condition would fail the test of necessity as there is no need for the development to demonstrate water neutrality to conclude a favourable appropriate assessment.

Background to water neutrality

7.6 The NE Position Statement [**CD8 1.15**] says it is Natural England's view that it cannot be concluded with sufficient certainty that groundwater abstraction in the WSZ is not having an adverse effect on the integrity of the Arun Valley sites. The Appellant highlights that the statement says that new development 'must not add to this impact' and that 'one way' of doing so is to show water neutrality. Water neutrality is defined in the NE Position Statement as '*the <u>use</u> of water in the supply area before the development is the same or lower after the development is in place'*. The Appellant places emphasis on the word 'use'.

[10] Including CD7 1.01, CD10 1.01-4, ID1, ID10

7.7 Although the statement expressly states that demonstrating water neutrality is 'one way' of not adding to the potential impact, it then focuses only on what Council's need to do to secure water neutrality, i.e. joint working at a strategic level and integrating water neutrality in to Local Plans. It also expressly states that '*Natural England advises that any application needs to demonstrate water neutrality'.*

7.8 Turning to the NE Advice Note [**CD8 1.16**], the Appellant highlights the following paragraphs (with their emphasis underlined):

'Natural England is also concerned that the Sussex North Water Supply Zone is likely to be subject to significant future development pressures. These will <u>necessitate increased abstraction</u> within the region and are likely to further exacerbate any existing impacts on the Habitats Sites'.

'…. if further development were to be consented in this region (<u>with the requirement for additional abstraction</u>) such development [would be] likely to have an adverse effect on the Habitats Sites.'

Natural England is closely involved with the relevant local authorities, the Environment Agency and Southern Water in developing a longer-term strategy <u>to integrate Water Neutrality into the relevant Local Plans</u>. However, while this broader strategy remains in development, Natural England are seeking to propose mechanisms whereby the concept of Water Neutrality can be integrated into individual planning decisions to ensure that future development can proceed in a manner that does not further adversely affect the Habitats Sites, notwithstanding these pressures'.

7.9 It is the Appellant's view that, as groundwater abstraction at Hardham cannot be excluded from harm, development not adding to it is an uncontroversial stance for the NE Position Statement to take. However, page 2 of the statement and NE Advice Note focuses on demonstrating water neutrality in the sense of not increasing water usage in the WSZ. No increase in use is a mischaracterisation of the issue. The crucial matter is, instead, about not increasing ground water abstraction at Hardham. The mischaracterisation seems to be unrecognised by Natural England.

7.10 The Council's response to the NE Position Statement, encouraged by Natural England, has been to develop a water neutrality mitigation strategy accompanied by policies requiring compliance with it (or an equivalent scheme) in their emerging Local Plans (i.e. SNOWS). In the meantime, the Council's approach has been to refuse (or, in this case fail to determine) permission unless the development can demonstrate water neutrality either through application of the still emerging SNOWS or bespoke means.

7.11 SNOWS is being developed in the context of the jointly commissioned Part C Report [**CD8 1.14c**]. The report is expressly concerned with informing the evidence base in emerging Local Plans[11] and establishing a strategy to achieve water neutrality. It uses a definition of water neutrality consistent with the one utilised by Natural England, (i.e. concerning total water use in the WSZ)[12].

7.12 The Appellant notes the responsibilities and action of other bodies in the wider process beyond planning. The Environment Agency is the regulator for potable water supply and the licencing of water abstraction. Southern Water is the statutory undertaker for potable water supply in the WSZ and the licence holder for Hardham.

7.13 The Environment Agency and Southern Water are subject to their own Habitats Regulations duties, both under Regulation 9 when exercising their statutory functions and under Regulation 63 as competent authorities when approving plans or projects. There is no allegation from any party that either body is in breach of their statutory obligations.

7.14 In response to Natural England's concerns about potential effects of groundwater abstraction at Hardham, the Appellant notes that the Environment Agency is undertaking a Sustainability Review of the licence. The aim of this is to establish what, if any, groundwater abstraction can be excluded from a likelihood of adverse effects on the integrity of the sites. The Sustainability Review will report in 2025 and inform what, if any, exercise of powers under s.52 of the Water Resources Act 1991 is required in relation to the abstraction licence at Hardham. Possible outcomes are revocation of the licence, amendment of it, of that it will remain unamended.

7.15 Until the outcome of the Sustainability Review is known, the Environment Agency and Southern Water accept that there is currently no known level of groundwater abstraction at Hardham that can be excluded from having an effect. This is evidenced by the Environment Agency and Southern Water correspondence at Appendix B and C of Mr Aitkins proof for the Appellant [**CD10.1 02a].** Consequently, at least until the review reports, the Environment Agency has secured a voluntary commitment from Southern Water to reduce the groundwater abstraction at Hardham from around 12 ml/d (millions of litres per day) average to 5M l/d, extending to at least the completion of the Sustainability Review in 2025[13].

Law and policy

7.16 It is the Appellant's view that the correct application of the law and policy is not materially in dispute. A summary of the key legislation is at Section 2 of the Shadow HRA Addendum [**CD1 1.03]** and at Section 4 of their witness, Mr Aitkins's proof [**CD10.1 02].**

[11] page v, Part C Report
[12] page iv, Ibid
[13] see Southern Water's letter of 7 July 2023, at Appendix C of [CD10 1.02a]

7.17 In relation to Regulation 63 of the Habitats Regulations, where an appropriate assessment is required, it must be undertaken in respect of the development's impacts both alone and in combination with other plans and projects. For the assessment to be favourable, adverse impacts on the integrity of the protected site must be able to be excluded on a test of certainty 'beyond reasonable scientific doubt'. A competent authority can only approve a plan or project where that test is met. This is in the absence of an overriding public interest argument (IROPI), which the Appellant says is not applicable here as it only applies in the absence of alternatives.

7.18 In relation to supply of potable water, s.37 of the Water Industry Act 1991 places Southern Water under a duty to supply water to the level demanded, regulated by bodies that include the Environment Agency. Sections 37A-37D of the same Act requires Southern Water to prepare and maintain a Water Resource Management Plan (WRMP) on a rolling 5 year basis to show how supply will be maintained. The current WRMP is from 2019 and the next will be in 2024.

7.19 Paragraph 6.3 of the Water Resources Planning Guidance [**CD8 1.08**] says that WRMP must not constrain planned growth. The Council's witness, Mr Kleiman, agreed in cross examination that the proposal constitutes planned growth.

7.20 Regulation 9 of the Habitats Regulations places Southern Water under a duty not to harm protected sites in the exercise of its statutory functions and the WRMP is itself subject to appropriate assessment under Regulation 63. Southern Water would be the competent authority for the WRMP 2024. It is the Appellant's case that this means that the supply of water identified to maintain projected supply must be from sources that can be excluded as having an adverse effect on protected sites.

7.21 In addition to being a regulator of the WRMP, the Environment Agency also grants abstraction licences under the Water Resources Act 1991. It may amend or revoke such licences under s.52 of that Act and such decisions are in themselves plans or projects and therefore subject to Reg 63 of the Habitats Regulations.

7.22 To summarise the position regarding the relevant 'competent authority' in different Regulation 63, Habitats Regulations situations. It is the Secretary of State in relation to the determination of this appeal, Southern Water for the consideration of the WRMP 2024, and the Environment Agency when deciding whether to grant, amend, or revoke the abstraction licence at Hardham.

7.23 Accordance with the development plan is an agreed matter in the SOCG [**ID11]** and the proposal benefits from the statutory presumption at S38(6) of the 1990 Act. Additionally, the proposal would promote water efficiency at 91 or 92 l/p/d. This could be secured by condition and accord with Policy 37 of the HDPF, which is 110 l/p/d. Emerging Local Plan policy does not attract material weight due to its early stage of preparation.

7.24 Subject to a favourable 'appropriate assessment', paragraph 188 of the Framework does not apply and the presumption in para. 11(c) would indicate that permission should be granted without delay.

7.25 Paragraph 20(b) of the Framework states that strategic policies should make sufficient provision for water supply. Paragraph 016 of the PPG[14] states that planning for the necessary water supply would normally be addressed through the authorities' strategic policies, which can be reflected in water companies' WRMPs and that water supply is therefore unlikely to be a consideration for most planning applications. It goes on to say that exceptions to this include large developments not identified in plans that are likely to require a large amount of water. Kilnwood Vale has been identified in the development plan since 2009 and assumed in the WRMP 2019. So it would not be an exception and water supply should not be a general consideration in this appeal.

7.26 Para 194 of the Framework reflects a well established principle that decision makers are entitled to assume that other regulatory regimes are operated appropriately in accordance with the statutory duties. *R (An Taisce)* [**CD5 1.01**] is advanced as authority for this point. The observation at paragraph 91 of *Sizewell C* [**CD5 1.02**] is said to provide back up for the proposition that, without doing so, the planning system would be reduced to a state of sclerosis.

7.27 In the Appellant's view, it is material in this case that the Environment Agency are under an obligation to consider Amendment or revocation of abstraction licences under Regulation 63 of the Habitats Regulations. It is also material that Southern Water are under an obligation to produce a WRMP which 'must not constrain growth' and be from sources that must be able to be excluded from causing harm in order to favourably conclude an appropriate assessment under Regulation 63. At all times both the Environment Agency and Southern Water must exercise their powers in accordance with the general duty under Regulation 9 of the Habitats Regulations.

7.28 The Secretary of State, in conducting an appropriate assessment on this case, both can and should assume the separate regulatory regimes are operated in accordance with their statutory duties.

7.29 The Appellant also advances that the precautionary principle incorporates the principle of proportionality. The EU guidance on the application of the precautionary principle in decision-making is relevant here, stating that '*Proportionality means tailoring measures to the chosen level of protection. Risk can rarely be reduced to zero'.* Further, *'Measures based on the precautionary principle must not be disproportionate to the desired level of protection and must not aim at zero risk, something which rarely exists.'*[15]

[14] PPG - Water supply, wastewater and water quality - Paragraph: 016 Reference ID: 34-016-20140306
[15] see paragraphs 2.4.2-2.4.5 of [CD1 1.01]

The need for water neutrality

7.30 The Appellants position, which they say is agreed with the Council at the Inquiry and apparent from the correspondence with the Environment Agency and Southern Water, is that the pathway for potential harm to the Arun Valley site from a given development (alone or in combination) is an increase in groundwater abstraction at Hardham. Paragraph 11 of the Council's opening confirms this point [**ID2**] which says, *'Unless it can be demonstrated, with certainty, that occupations in 2025 (or at an earlier point in time) will not increase groundwater abstraction at Hardham, approval may not lawfully be granted.'*

7.31 Without this, there is no pathway and therefore no risk of development adding to the adverse impacts on the protected site. Natural England's insistence on demonstrating water neutrality (defined as no increase in water use) is a mischaracterisation of the issue. Instead, it should be sufficient to show that the development (alone and in combination) will not require an increase in groundwater abstraction from Hardham.

7.32 However, Natural England continue to base their position on an assumption that new development (this proposal included) with additional demand for potable water will lead to an increase in groundwater abstraction at Hardham. This assumption would only be correct if there were no alternative to serving new development other than from additional groundwater abstraction from Hardham. This is not the case in this appeal.

7.33 Consideration of the need for water neutrality can be divided into five sections.

- Whether demanding 'water neutrality' for all new development in the WSZ is a proportionate response to the risk identified to the qualifying interest.
- Whether groundwater abstraction at Hardham has increased since September 2021 in response to additional development.
- The extent of demand management savings programmed by Southern Water to reduce demand.
- Whether supply sources in the WRMP 2024 include groundwater abstraction at Hardham, at levels that cannot be excluded from the potential of harm to the integrity of the protected site.
- Whether there is evidence of adequate alternative sources which do not rely on increased groundwater abstraction at Hardham.

Whether demanding 'water neutrality' for all new development in the WSZ is a proportionate response to the risk identified to the qualifying interest.

7.34 The Appellant's answer to this is 'No'.

7.35 In support, they draw principally on evidence from their ecological expert, Mr Baxter. In the Appellant's view, the qualifying interest in the protected site is the Lesser Ramshorn Whirlpool Snail. This is a view that was not challenged by

anyone with any ecological expertise at the Inquiry.

7.36 The evidence supporting this is summarised from paragraph 3.2.5 in Mr Baxter's proof [**CD10 1.04b**], with a series of FAQs from Natural England from 2022 being a key document[16]. Specifically, the answer to question 4 "What evidence is there that wildlife in the Arun Valley is declining". The answer to this question in the FAQs is:

The SAC feature (Anisus vorticulus) has been reduced to a small population around a single ditch (in Oct 2021 survey) in Amberley Wild Brooks having been moderately widespread previously and has gone entirely from south of Pulborough Brooks where it was present, if uncommon, previously. This is a loss of up to three quarters of its former range within the SAC. This former range was a quarter of the species UK population. The SAC is therefore failing its conservation objectives for range and distribution and the species is at risk of going extinct on the site.

7.37 Mr Baxter's evidence sets out that the snail is dependent on ditches with good water quality and at Amberly Wild Brooks distribution of the snail is limited to one ditch on the eastern side of the site. Reporting work undertaken by Natural England from 2023[17] indicates that there are a range of other factors that might affect the snail and its distribution.

7.38 The conclusion the Appellant draws from the reporting work is that the overwhelming issues are ones of site management, water level management and the maintenance of sluice features, and water quality, including salinity, disturbance, and combined sewer overflow. These issues are all within the control either the landowner (the RSPB) or the Environment Agency.

7.39 Considering the issues at hand and given the costs of requiring water neutrality through SNOWS, in the view of the Appellant, a range of more proportionate responses may have been open to Natural England.

7.40 Firstly, they could have pressed for or even assisted the landowner and the Environment Agency to improve site management for the snails at Amberley Wild Brooks. The costs to developers associated with SNOWS cannot be said to be a proportionate response to mending the sluices.

7.41 Secondly, as the outflow of the sewerage treatment works is an issue for water quality, they could have pressed the Environment Agency to resolve that issue through the means of the discharge licence.

7.42 Finally, Natural England could have pressed the Environment Agency to order the temporary cessation of groundwater abstraction until a query over transmissibility rates had been resolved (i.e. March 2025).

[16] included at Appendix 9 of the Shadow HRA [CD1 1.01]
[17] extracts included in Appendix 2 of [CD10 1.04c] and referred to in paragraph 69- 74 of Appellant's closing [ID10]

7.43 The action that Natural England has taken on any of these perceived proportionate responses is unclear. In the Appellant's view, what is clearly not a proportionate response is what Natural England have done. The direct effect of the NE Position Statement has been to halt the grant of planning permission for new development across the whole WSZ, affecting three local authority areas. The consequences been devastating for the delivery of housing in an area of growth.

7.44 The Council can now only demonstrate a 2.9 year housing land supply, based on figures in their latest Authority Monitoring Report [**CD4 1.04].** Mr Smith for the Council gave evidence at the Inquiry that some 2,400 dwellings are currently held up by this issue in Horsham alone. Kilnwood Vale is expected to continue to make an important contribution to housing supply in Horsham between 2023 and 2028, equating to 396 dwellings or 15% of housing land supply.

7.45 Based on current best knowledge using the assumptions in the Part C Report, the estimated cost of SNOWS is likely to be in the region of £2000 per dwelling, as set out by Mr Kleiman for the Council at the Inquiry in cross examination. The Appellant says that is a cost to affected developers in Horsham equating to circa £17 million to 2030. This figure will grow if Southern Water's demand management measures are not as effective as anticipated, and a greater deficit needs to be made up through offsetting.

7.46 Natural England's assumption is that increased development will necessitate increased groundwater abstraction at Hardham and that, until the sustainability review concludes in 2025, adverse impacts of groundwater abstraction at Hardham cannot be excluded. The Environment Agency considers that a proportionate response is to minimise groundwater abstraction at Hardham. Natural England's action is not proportionate, given what the Environment Agency has done and the alternative sources of water supply available.

<u>Whether groundwater abstraction at Hardham has increased since September 2021 in response to additional development.</u>

7.47 The Appellant's answer to this is 'No'.

7.48 In response to the concerns raised by Natural England, the Environment Agency commissioned the Sustainability Review of the Hardham licence that will report in March 2025. It also secured a commitment from Southern Water to minimise abstraction under the existing licence. This voluntary reduction has resulted in abstraction at Hardham falling to 40% of its September 2021 levels (i.e. circa 5 ml/d compared with circa 12 ml/d).

7.49 Correspondence from both the Environment Agency and Southern Water indicates that both parties are alive to possibility of the Sustainability Review concluding that the groundwater abstraction for Hardham needs to be revoked. The evidence for this can be found in the Environment Agency's letter of 13 January 2023 in Appendix B of Mr Aitken's proof for the Appellant [**CD10 1.02a**].

7.50 So there is currently, and will be, no link between increased development demand and increased groundwater abstraction at Hardham. It has already been reduced voluntarily and, it will be reduced further if necessary (potentially to zero). This is the case regardless of demand from development.

7.51 As such, there is no causal relationship between increased development and increased groundwater abstraction at Hardham. There is, therefore, no need for water neutrality across the WSZ.

7.52 Natural England's response to the Appeal is to decline to recognise Southern Water's minimisation commitment as mitigation as it is voluntary and not, therefore, secured **[CD8 1.18]**. The Council have adopted the same argument.

7.53 The Appellant's argument is that, if the voluntary undertaking were to be breached, the Environment Agency can use powers under s52 of the Water Resources Act 1991 to vary the abstraction licence at Hardham. Southern Water's letter of 7 July 2023[18] clearly recognising this by committing to minimise ground water abstraction at Hardham until at least the Sustainability Review of the licence.

7.54 As a result of the above, there is no need for water neutrality in addition.

<u>The extent of demand management savings programmed by Southern Water to reduce demand</u>

7.55 The Part C Report [**CD8 1.14c]** established water savings from demand management measures in the Southern Water WRMP 2019 (*referred to variably in the evidence as 'the Southern Water contribution')*. As a result, water demand of between around 6,000 and 8,000 dwellings could be offset by the measures to 2030. The basis for this calculation is summarised in the following paragraphs.

7.56 The Part C Report takes total projected growth across the WSZ to 2039[19] and translates that into additional water demand based on either a 110 litres per person per day (l/p/d) or 85 l/p/d assumption on water efficiency. It then represents that, over time, as a trajectory of predicted demand arising from projected new growth. This is represented graphically by the green and dotted red lines in Figure 5.1 (page 27) of the Part C Report (reproduced below).

[18] included at Appendix C of Mr Aiken's proof [CD10 1.02a]
[19] table 3.1, Part C Report

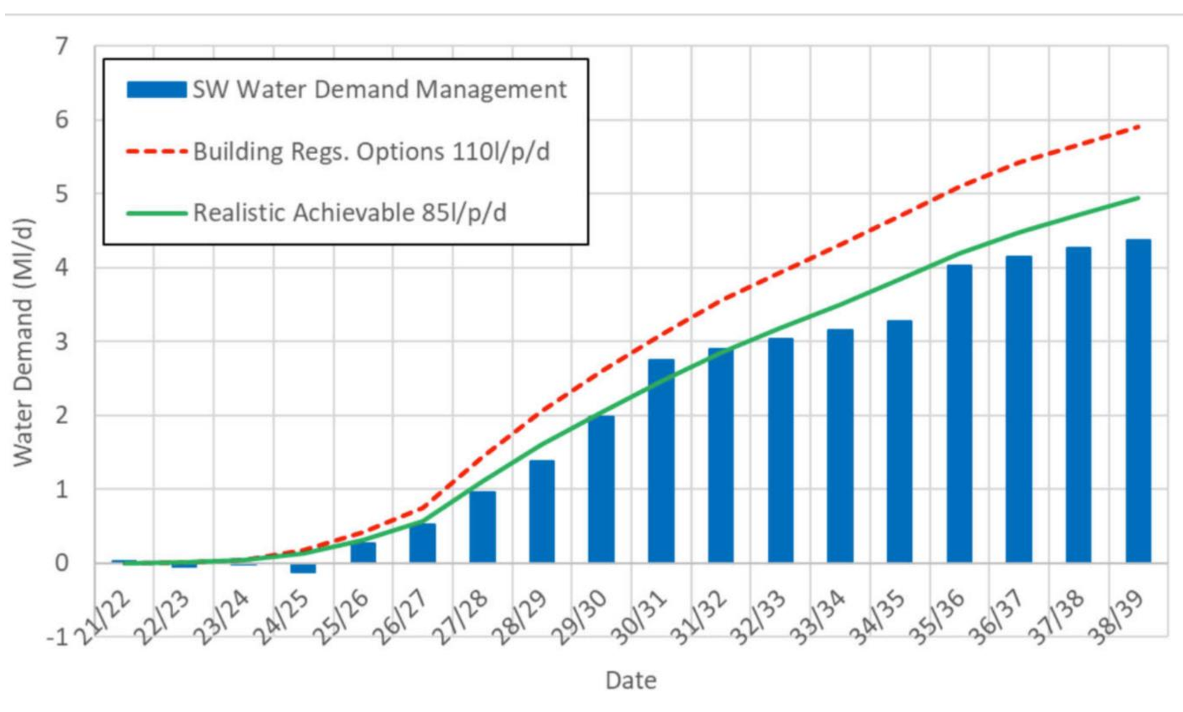

Figure 5.1 Balance of new demand vs SW's contribution from water demand management

7.57 The Part C Report then calculates savings in water demand that are derived from demand management measures set out in the WRMP 2019. This contribution is represented by the blue bars in Table 5.1. It produces an estimate that savings from demand management measures are equivalent to some 6,345-8,335 additional (i.e. not consented pre September 2021) dwellings capable of being delivered to 2030 before there is a need for off-setting[20].

7.58 Paragraph 180 of the Part C Report[21] is said to identify a 0.25 ml/d deficit between the demand arising in 2021-2030 and the projected savings from Southern Water's demand management measures.

7.59 As the 6,000 to 8,000 dwellings were additional to those with full planning permission prior to September 2021, the Appellant says that balance of the savings from the Southern Water contribution could be directed to need arising from as yet unconsented development (i.e. without full planning permission) in current local plans. The appeal scheme is one such development. Growth in emerging local plans would be additional to the Southern Water contribution and a matter for those plans and the emerging WRMP 2024.

7.60 The points above led the Appellant to make what they call a conceptual division of development needs into three categories, namely, (1) dwellings consented prior to September 2021; (2) dwellings planned for in the adopted local plans but without consent, which are planned for in the WRMP 2019; (3) additional emerging local plan allocations, to be planned for in the WRMP

[20] page viii, Ibid
[21] paragraph 180, Ibid

2024.

7.61 The Appellant's position is that the proposal firmly falls within the second category. As such, it can fairly utilise part of the 6,000-8,000 dwelling headroom identified in the Part C Report.

7.62 The Appellant notes that the Council sought to cast doubt in the Inquiry over the reliability of the predicted figures attributed to Southern Water's demand management measures in the Part C Report, and hence the 6,345-8,335 additional dwellings they would offset. They did so without bringing forward any alternative figures. Paying regard to the letter from the Environment Agency/Ofwat/Defra to Southern Water dated 20 October 2023[22], the Appellant accepts that it is not unreasonable to reduce the amount of savings assumed from demand management measures, although by how much is evidentially unclear.

7.63 Even if the 0.25 ml/d shortfall in the Part C Report turns out to be unrealistic, the total demand from new development without any savings from Southern Water savings is 0.42 ml/d at 2025 and 2.59 ml/d at 2030. These are figures that can be accommodated through alternative available sources of water supply, without having to resort to offsetting through water neutrality.

Whether supply sources in the WRMP 2024 include groundwater abstraction at Hardham, at levels that cannot be excluded from the potential of harm to the integrity of the protected site.

7.64 The Appellant's answer to this question is 'No'.

7.65 Groundwater abstraction currently accounts for some 14%[23] of total water supply in the WSZ, of which groundwater abstraction at Hardham is only a part. So around 86% of supply comes from sources other than groundwater abstraction.

7.66 Additional demand can, therefore, be met by demand management measures (including improving leakage rates) and/or greater utilisation of other sources, rather than increasing groundwater abstraction from Hardham. New development does not increase groundwater abstraction at Hardham.

7.67 The supply of potable water is a statutory undertaking, conducted by Southern Water and regulated by the Environment Agency. Southern Water is under a duty to supply the development needs projected by the local authorities and show how it will do that through its WRMP. The WRMP process is repeated on a five-yearly basis, with annual review, and an expectation that it 'must not constrain growth'.

[22] Appendix A of [CD10 1.02a]

7.68 Each WRMP must be accompanied by an HRA demonstrating that it would not harm protected sites. Only a favourable appropriate assessment establishing this would allow a WRMP to be published. So the forthcoming WRMP 2024 could not be published if it included supply from groundwater abstraction from Hardham that had not been subject to a favourable appropriate assessment.

7.69 The WRMP 2024, and accompanying HRA, is likely to be published ahead of the reporting of the Sustainability Review commissioned by the Environment Agency into the Hardham abstraction licence. The WRMP 2024 will need to account for a range of possibilities in relation Hardham. This includes how projected development needs can be accommodated if there is no groundwater abstraction from Hardham, as it the Sustainability Review has led to the abstraction licence being revoked.

7.70 The Appellant says that, as the outcome of the Sustainability Review will not be known until 2025, and adverse impacts cannot be excluded, the WRMP 2024 HRA would be unable to support a favourable outcome based on reliance on any groundwater abstraction from Hardham. Indeed, there is evidence within drafts of the WRMP 2024 confirming that alternative scenarios excluding Hardham abstraction are being looked at[24].

7.71 For these reasons, the presumed link between increased demand from development and increased groundwater abstraction at Hardham is a false one. Water neutrality is not required.

Whether there is evidence of adequate alternative sources which do not rely on increased groundwater abstraction at Hardham.

7.72 It is not necessary for the Appellants to provide evidence as to water supply sources which do not lead to risk to protected sites. The WRMP legislation is set up to prevent that and the Secretary of State is both entitled to assume that that statutory regime will operate appropriately.

7.73 Notwithstanding this, there are alternative sources available to Southern Water to meet all projected development needs without reliance on any demand management measures. This is the case even if groundwater abstraction at Hardham were to cease, which the Appellant accepts must be the working assumption until the Sustainability Review reports in 2025.

7.74 The Part C Report focuses on the period to 2030 as showing a potential deficit between projected demand and expected Southern Water savings, after which Southern Water's supply infrastructure is expected to be in place.

7.75 The Appellant's evidence to the Inquiry on alternative sources of supply that do not rely on Hardham focuses on three sources; 1. Weir Wood reservoir, 2. SES (Sutton and East Surrey) Water import, 3. Portsmouth Water import.

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[24] see references at paragraph 114 of the Appellant's closing [ID10]

7.76 Weir Wood reservoir is required to be back in service by 31st March 2025 by statutory notice served on Southern Water by the Drinking Water Inspectorate under Reg 28(4) of the Water Supply Regulations 2016 [**ID6**]. Failure to comply with the notice engages enforcement action. So the Secretary of State can have comfort that Wier Wood will be operational by March 2025. The reservoir will have a peak deployable output of 13 ml/d.

7.77 The Appellant's assumptions are that projected development needs at 2025 are 0.42 ml/d, without any allowance for Southern Water demand management savings. If revocation of the Hardham licence is assumed, a further 5 ml/d would need to be found to make up for the loss in existing supply. This produces a worst case scenario deficit of 5.42 ml/d, rising to 7.59 ml/d at 2030.

7.78 In light of the above, Weir Wood alone obviates the need for any reliance by Southern Water on Hardham groundwater abstraction. This source will be available no later than 31 March 2025. The development will not be occupied until 2025. The Appellant is content for a condition to be imposed preventing occupations of the proposal until 31 March 2025, although they do not believe this to be necessary due principally to the low likelihood of drought occurring between January and March 2025 triggering a need for abstraction from Hardham.

7.79 The two other sources of alternative supply (SES and/or Portsmouth) import are available to Southern Water now. In the case of SES, 2.7 ml/d is available for bulk import. For Portsmouth Water a full usage of 15 ml/d is available, adding a resource of 9 ml/d on top of current usage. Taken together the two available bulk import sources make an additional 11.7 ml/d available to Southern Water. Adding in the 13 ml/d from Weir Wood, which gives a total available supply of 24.7 ml/d. This exceeds the Appellant's worst case scenario deficit of 5.42 ml/d.

7.80 These alternative sources show that there is more than ample supply that would be an alternative water supply to increasing, or relying on, groundwater abstraction at Hardham. The adequacy of alternative sources was tested during the 2022 drought where groundwater abstraction at Hardham was not increased. Since then, use of groundwater at Hardham has been taken out of drought orders. So future severe droughts will not lead to an increase in groundwater abstraction from Hardham.

7.81 Consequently, the Natural England position that increased development, unless water neutral, would increase groundwater abstraction at Hardham is false. Natural England have not considered these supply side factors at all and neither does the strategic approach in the Part C report, which is concerned with establishing levels of offsetting in order to achieve no increase in water use.

Cogent and compelling reasons not to follow Natural England's advice

7.82 The Appellant acknowledges that Natural England is the Government's statutory advisor on nature conservation matters and, ordinarily, a decision-maker will give substantial weight to its advice. However, a decision maker is not bound by that advice and the Courts have been careful to preserve the discretion of the decision maker. The standard of reasoning needed to depart from advice is discussed in two legal authorities, *Wyatt*[25] ('cogent reasons') and *Shadwell*[26] ('cogent and compelling reasons').

7.83 In addition to the five sections on the need for water neutrality set out above, the Appellant provides two further reasons that are also said to be cogent and compelling.

7.84 Firstly, that neither the Environment Agency, as the regulator for potable water, nor Southern Water, as the statutory undertaker with the duty to supply water to development without causing harm to protected sites, have objected to the application on the grounds that it is necessary to demonstrate water neutrality. If either body felt that, without water neutrality, potable water could not be supplied to the development (alone or in combination) without increasing groundwater abstraction at Hardham they would say so.

7.85 Secondly, that Natural England did not appear at the Inquiry to defend their position and be questioned on it. This, in the Appellant's view, left the Council seeking to defend a position on a topic that, on the evidence of their own witness, lies outside of their knowledge and expertise. In the Appellant's view, Natural England's position is based on a mischaracterisation of the issue and should be given limited weight.

7.86 In overall terms, it is submitted that Natural England has got the position on the need for water neutrality badly wrong. It is accepted that, pending the outcome of the Environment Agency's Sustainability Review, there is no known safe level of groundwater abstraction at Hardham. However, it is illogical to jump from that proposition to one that, for new development to be acceptable in Habitats Regulations terms, it must be able to demonstrate that it is water neutral in the sense of not increasing water usage. Natural England have therefore mischaracterised the issue and the weight of their advice is therefore reduced.

7.87 More widely, Natural England's position has been accepted uncritically by Local Planning Authorities. It has given rise to SNOWS, an offsetting scheme that is not necessary, and has had devastating effect on housing delivery in a time of a national and regional housing crisis.

7.88 There is no need for the proposal to demonstrate water neutrality and consent should be granted in accordance with Paragraph 11 (c) of the Framework.

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[25] para. 9(4) of [CD5 1.05]
[26] mentioned at para 2.3.1 of [CD1 1.02]

8. The case for the Council

8.1 The case for the Council is set out in full in the evidence before the Inquiry[27]. It is important that the evidence, together with the application and supplementary material, is considered in full to gain a proper understanding of the case. To assist, what follows is a summary based on the case presented in closing [**ID9**].

Introduction

8.2 The Council believes that the fundamental question for the Secretary of State is whether the use of water in the WSZ after the development is in place, will be the same or lower than before. An answer of anything less than certainty beyond reasonable scientific doubt that water use at the point of occupation will be the same or lower than before, leads to a conclusion that permission must be refused. To comply with Regulation 63(5) of the Habitats Regulations, the Secretary of State must be able to ascertain that the proposal will not add to the existing adverse effect identified in the NE Position Statement. Unless this test is met, approval cannot lawfully be granted.

8.3 No distinction can be made between groundwater abstraction at Hardham and water use in the WSZ as the two are inextricably combined. The Appellant's stance that the Position Statement and Part C Report are wrong because they fail to deal with the issue at hand - which is groundwater abstraction from Hardham, rather than water use in the supply zone - goes nowhere because groundwater from Hardham is included in the WSZ. The NE Position Statement confirms this, and is not disputed by the Appellant:

The [WSZ] includes supplies from a groundwater abstraction which cannot, with certainty, conclude no adverse effect on the integrity of [the Arun Valley Sites]. [underlined is the Council's emphasis]

8.4 So, if water use in the supply zone increases, so can ground water abstraction from Hardham.

8.5 What matters for the purposes of carrying out an appropriate assessment is the effect of the development on the protected sites, in reality. Unless and until the Environment Agency revokes Southern Water's Hardham abstraction licence, there is no way of telling if water used in the supply zone comes from Hardham (so contributing to the existing adverse effect) or some other source. There is, equally, no mechanism to ensure new development only takes water from non-groundwater sources. There is no separate tap labelled 'Hardham'.

8.6 The Part C Report is designed to resolve the existing significant adverse effects (the drying out of the Arun Valley sites) which may be caused by groundwater abstraction at Hardham. It provides the basis for a solution to that problem, by outlining a way development can avoid increasing water use in the WSZ.

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[27] including [CD7 1.02a-i], [CD10 1.05a-e], [ID2], [ID9]

8.7 The only way of making sure water use in the WSZ isn't increased, is by not increasing use of water. This exactly as advised by Natural England, as the Part C Report aims to facilitate, and as SNOWS will operate to achieve.

8.8 If the Appellant is right on either of the two following points, a positive appropriate assessment can be concluded:

a) it is certain that the Environment Agency will have revoked the Hardham groundwater abstraction licence (or amended the license to an agreed sustainable level of abstraction) by the time the development occupies, or

b) it is certain that the development will not increase water use in the WSZ when it occupies (on its own or in combination with other developments).

8.9 If the Appellant is wrong a condition must be imposed which prevents additional water use in the WSZ until mitigation is in place. In this case, the only certain mitigation is via payment into SNOWS because the Appellant has not sought to mitigate via a bespoke solution.

Legal principles

8.10 The legal principles governing the appropriate assessment process are well known and summarised at Paragraph 9 of *Wyatt [2023]* [**CD5 1.05**].

8.11 The Appellant's argument that the Secretary of State can conclude a positive appropriate assessment because they are entitled to assume that other regulatory regimes will work, is wrong in law for three reasons.

8.12 Firstly, Paragraph 194 of the Framework does not apply as the proposal does not concern ground conditions or pollution. Even if it did apply, it would not displace the legal requirement to carry out an appropriate assessment under the Habitats Regulations or in any way alter the relevant legal tests.

8.13 Secondly, Paragraph 20(b) of the Framework and Paragraph 016 of the PPG[28] cannot be relied upon as water supply is not a "general consideration" in this appeal. The appeal is not about whether Southern Water can supply sufficient water to the development, the question is whether the development will increase the use of water in the WSZ and thereby add to an existing adverse effect at the Arun Valley sites.

8.14 Finally, the Environment Agency and Southern Water's non-objection to the proposal cannot be relied upon. The nature conservation impacts of the proposal are outside of their remit. If there were a problem with the supply of water to the development, then no doubt they would object.

8.15 The Appellant contends that the Environment Agency, by allowing Southern Water to continue abstracting ground water from Hardham at a minimised rate pending the outcome of the Sustainability Review, is fulfilling its duties under the Habitats Regulations. In the Council's view, this fails to grapple with the

[28] PPG - Water supply, wastewater and water quality - Paragraph: 016 Reference ID: 34-016-20140306

point that those bodies (*Southern Water and Environment Agency)* have two different duties under the Habitats Regulations of reliance to this appeal, depending on which function they are carrying out.

8.16 There is the general duty under Regulation 9(3) to have regard to the Habitats Directives. This is discussed at Paragraph 85-87 of *Harris [2023]* [**ID7**] and applies to the exercise of all their functions. Then there is the duty under Regulation 63(5), which applies only when they are acting as the competent authority deciding whether or not to grant consent for a plan or project. The duties are not interchangeable.

8.17 By allowing Southern Water to continue groundwater abstraction at a minimised rate pending the Sustainability Review, the Environment Agency is fulfilling its general duty under Regulation 9(3). This is not the same as discharging its duties to secure protection of the sites.

8.18 The Environment Agency's letter to the Appellant[29] makes this clear when it says:

'As we stated in our letter dated 6 June 2022 and confirmed in our letter dated 13 January 2023, Southern Water's voluntary reduction in abstraction does not discharge the Environment Agency's duties under the Habitats Regulations'…'We would discharge our duties securing the protection of the SAC by making any necessary changes to the abstraction licence. This would be done following the outcome of the investigation'. (Underlined is the Council's emphasis).

8.19 So the Environment Agency's compliance with its duty under Regulation 9(3) of the Habitats Regulations does not provide the requisite certainty for the Secretary of State's appropriate assessment under Regulation 63(5).

8.20 Southern Water has a statutory responsibility to supply water, but it is not an absolute duty. Section 54 Water Industry Act 1991 allows consumers to claim compensation if the supply fails. But, under Section 54(2) *"it shall be a defence for the undertaker to show that it took all reasonable steps and exercised all due diligence to avoid the breach".*

8.21 More importantly, the Water Industry Act 1991 does not oblige the undertaker to provide sustainable water. That is achieved at water resource planning level by a Habitats Regulations Assessment/appropriate assessment of the WRMP, with project level assessments where required.

8.22 It does not follow that a positive appropriate assessment at the WRMP level means that it can simply be assumed none of the projects under that plan will result in a significant adverse effect. The Council's draws attention of Paragraph 008 of the PPG on the relationship between strategic level appropriate assessments and projects[30].

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[29] dated 11 July 2023 - Appendix B [CD10 1.02]

[30] PPG – Appropriate assessment - 008 Reference ID: 65-008-20190722

8.23 It is also relevant that the competent authority (which for the WRMP will be Southern Water) may nevertheless approve a plan which fails the appropriate assessment. The process allows for exceptions, if three legal tests are met that are abbreviated to IROPI[31]. That is another reason why the legal basis of the Appellant's contention that WRMP 2024 must necessarily be 'zero Hardham' is wrong.

8.24 The Appellant's evidence that the NE Position Statement and the consequent moratorium on new development is a massively disproportionate response is said by the Council to be wrong in law. The Councils refers to Paragraph 2.2.7 of Mr Baxter's proof for the Appellant [**CD10 1.04b]** which says *'In the absence of reasonable certainty, the assessment should proceed in line with the precautionary principle. In this regard guidance advises that "measures based on the precautionary principle must not be disproportionate to the desired level of protection and must not aim at zero risk, something which rarely exists.'*

8.25 The guidance supporting this statement[32] is a general communication from the European Commission on the precautionary principle covering every area in which it might apply. It does not concern appropriate assessment.

8.26 It is the Council's case that the correct approach to proportionality is set out in the judgment of the Court of Appeal at Paragraph 9(7) of *Wyatt [2023]* [**CD5 1.05**]. This makes clear that, in the appropriate assessment context, proportionality applies to the test of certainty in the appropriate assessment, rather than to the measures taken. The measure in this case is the requirement that new development in the WSZ be water neutral. If an appropriate assessment cannot conclude beyond reasonable scientific and practical doubt (short of absolute certainty) that the development will not increase water use in the WSZ, then the competent authority's view on the proportionality or otherwise of the measure is legally irrelevant.

Essential matters in dispute

8.27 The Council sets out five matters that, in their view, are the essential ones in dispute:

- Current use of Hardham ground water extraction
- Drought and the draft WRMP 2024
- What the draft WRMP 2024 fully accommodates
- Other sources of supply (extra water)
- Revocation of the Hardham licence

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[31] (1)There are no feasible alternative solutions that would be less damaging or avoid damage to the site, (2)The proposal needs to be carried out for imperative reasons of overriding public interest, and (3)The necessary compensatory measures can be secured. (See guidance on derogations at https://www.gov.uk/guidance/habitats-regulations-assessments-protecting-a-european-site)

[32] Commission of the European Communities (2.2.200) 'Communication from the Commission on the precautionary principle'(Document not before the Inquiry).

Current use of Hardham ground water extraction

8.28 Ground water abstraction at Hardham continues, albeit at a voluntarily minimised abstraction rate of 5 ml/d, which operates as a rolling average rather than a cap. Southern Water have explicitly stated that they are unable to commit either to the cessation or minimisation of Hardham ground water use. The reasons for this relate to drought conditions, as explained in Southern Water's letter to the Appellant[33]:

"Our position is that in most water resource conditions Southern Water has a sufficient supply available to meet demand in the Sussex North WSZ and that we have some flexibility in where water is sourced from, thereby enabling the commitment to reduced abstraction from the Hardham groundwater source while the sustainability study is ongoing.

However, when dry periods are experienced and these become more severe, the output of several other sources in Sussex North WSZ become constrained by water availability, placing more reliance on the Hardham groundwater source. In the scenario of a severe drought or major operational supply outage we would potentially need to increase our groundwater abstraction to a higher rolling average, including potentially up to the full licensed abstraction limit for short periods, to ensure the expected supply to our existing customers in the Sussex North WSZ. For this reason, we would not be in a position to commit to a cessation of abstraction from Hardham or to a fixed limit of 5 ml/d [..]as quoted in your letter of June 5."

8.29 The Council point to figures from the summer 2022 Hardham groundwater abstraction volumes[34] as showing why Southern Water cannot make this commitment. They are on page 172 of the Appellant's Shadow HRA Addendum [**CD1 1.02]** and show that, in July and August 2022, abstraction at Hardham reached volumes in excess of the voluntary 5 ml/d. The Appellant's argument that Southern Water's voluntary minimisation was stress tested during the 2022 drought is proved wrong by this data and Southern Water's letter to the Appellant quoted above.

8.30 It may be that over the whole period from 6 June 2022 to 31 August 2022 the daily average abstraction rate was 5.45 ml/d, but this average is meaningless. The data shows that over the peak drought period (the four weeks from 14 July to 14 August) abstraction increased above the minimised rate, nearly every day, and often by significant volumes to more than double the 5 ml/d minimised rate. During oral evidence at the Inquiry, Mr Aitken for the Appellant said that the spikes in abstraction at Hardham shown in the data could be signal tests. The Council describes this as pure supposition.

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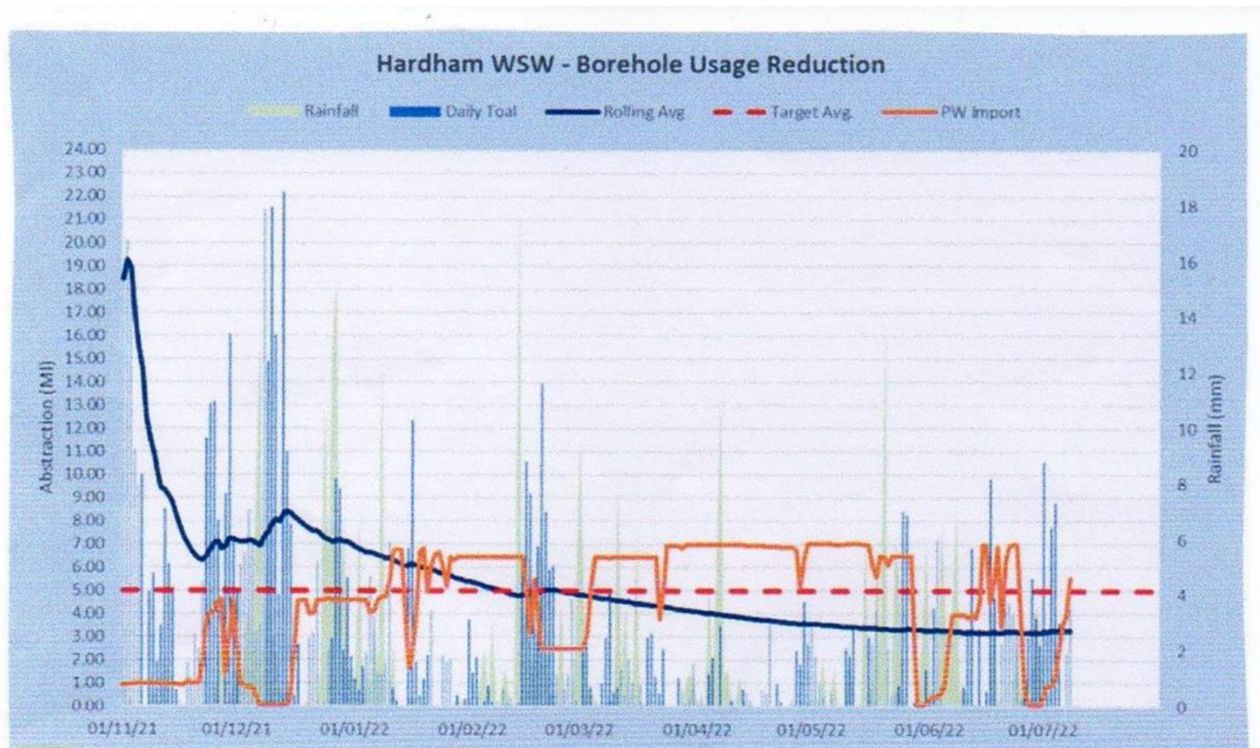
[33] letter dated 7 July 2023, at Appendix C of [CD10 1.02a]

8.31 Figure 5.1 at page 19 of Appellant's Shadow HRA Addendum is reproduced below. It shows the 5 ml/d voluntary minimised rate (red dotted line), daily totals at Hardham (blue bar), the rolling average (black line), and the level of Portsmouth Water import drawn upon (orange line). It is the Council's case that this chart precedes the peak drought period by stopping at 1 July 2022. So there is no data about the availability of import from Portsmouth Water during the 2022 drought period to substantiate the Appellant's claim that plenty of alternative supply is available, even in drought conditions.



Drought and the draft WRMP 2024

8.32 The Council accepts that the evidence demonstrates that, under normal conditions, Southern Water can commit to reduced groundwater abstraction from Hardham while the Sustainability Review is ongoing. However, in periods of drought, it cannot. Drought is important because it exacerbates the drying out of the protected sites. The evidence for this point can be found in the Amberley Wild Brooks SSSI adaptation report at Appendix AB2 of Mr Baxter's proof for the Appellant [**CD10 1.04c**[35]].

8.33 This undermines the Appellant's assertion that the WRMP 2024 must assume a 'zero Hardham' baseline to comply with the Habitats Regulations, and so the Secretary of State can rely on the eventual appropriate assessment for the WRMP 2024. The Statement of Responses for the draft WRMP 2024[36] also does not evidence that the Environment Agency, Natural England or OfWat are

[35] page 14
[36] [CD8 1.04]

asking for the WRMP 2024 to be zero Hardham from day 1 to conclude a positive HRA. The Appellant's have not pointed to any other evidence on this matter.

8.34 Further, the Appellant's points on this are wrong when the Water Resources Planning Guidance [**CD8 1.08**] is considered. Section 5 of the guidance says that, in developing their supply forecasts, companies in England must ensure their baseline supplies are available in a 0.2% annual chance of failure caused by drought (described as a '1 in 500 year' drought). Section 9.5.1 of the guidance entitled 'lessons from 2022 drought' also states:

'Your plan should clearly include an appendix to demonstrate how experiences from 2022 have been considered. You should set out any lessons you have identified through the 2022 prolonged dry weather and drought event and actions you are taking. This should include changes you have made to your plan as a result and further work you are planning to undertake.'

8.35 The summer of 2022 Hardham abstraction data[37] shows that one of the lessons of that summer, which Southern Water will have to account for in WRMP 2024, is that ground water abstraction from Hardham was needed to maintain supply.

8.36 If Southern Water's demand reduction measures are not taken into account in estimating the volume of water required by new development WSZ (shown by removing the blue columns from the graph at paragraph 7.55 of this report), the required volume ranges from around 0.25 ml/d in 2025 and 2.0 to 2.75 ml/d in 2029-2030. To show that the WRMP 2024 will be zero Hardham, the Appellant needs to show that additional alternative available supply of between 17.58 ml/d and 20.28 ml/d will certainly be available[38]. For the reasons set out in response to the 'other sources of supply' argument (below), the Council says that the Appellant cannot.

8.37 The Council accepts that, if Southern Water's demand reduction measures are accounted for, the required volume of water to supply new development reduces. However, given Southern Water's poor leakage reduction record so far, as evidenced by the letter to them from the Environment Agency/OfWat/Defra of 20 October 2023 [**CD10 1.02[39]]**, there is no certainty that the required volume would be reduced, and if so by how much.

8.38 The Council asserts that the question for the Secretary of State is when will the WRMP 2024 be 'zero Hardham'. This cannot be answered with any confidence, let alone certainty.

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[37] page 172 of [CD1 1.02]
[38] the Council calculates these figures by taking the maximum abstraction from Hardham figure of 17.53 ml/d from the 2022 drought data[38] and adding in the 0.25 and 2.75 ml/d respectively.
[39] Appendix C

What the draft WRMP 2024 fully accommodates

8.39 It is the Council's case that the Appellant is wrong to say that the draft WRMP 2024 has 'identified the planned sustainability reductions and included measures to fully accommodate these whilst still meeting its duty to supply consumers'[40]. It has not. It has simply considered a range of potential futures, and:

*'[looked at] a potential scenario where Pulborough groundwater source is no longer available, in order to assess alternative options that could be used to maintain the supply-demand balance. It is possible the water neutrality strategy will be required throughout the time frame covered by affected Local Plans, up to 2037.....We are planning to address the supply-demand balance in SNZ as quickly as possible. Our WRMP 2019 included the Littlehampton water recycling scheme to provide benefit from 2027– 28. This **could create** sufficient supply demand headroom to stop any reliance on the Pulborough groundwater source.' (Underline is the Council's emphasis)[41].*

8.40 'Could create' is not the same as 'will create', let alone 'has already created' to satisfy the appropriate assessment for this proposal now.

8.41 It is clear from the draft HRA for the draft WRMP 2024 [**CD8 1.21[42]**] that the only required licence amendments are:

'factored in to the supply-deficit calculations [..] and the EA will have confirmed that these are valid for the planning period when the WRMP modelling is undertaken. The existing consents regime (taking into account any required sustainability reductions) is therefore the baseline and, by extension, the HRA of the WRMP necessarily focuses ono the additional effects introduced by the WRMP options and does not (and cannot) reassess or reconfirm the existing consents regime'.

8.42 This is crucial as there is presently no required licence amendment at Hardham. There is a voluntary minimisation, but the Environment Agency does not enforce it and there is no legal mechanism for them to do so. If a licence amendment is required this will only be known after the sustainability review concludes, which is expected sometime in 2025. Only after that, and only if the Environment Agency amends the licence, will a zero or reduced Hardham scenario become part of the draft WRMP 2024 baseline.

[40] paragraph 6.11 of CD10 1.02a,
[41] paragraph 6.13, Ibid
[42] page 38 of Annex 20

8.43 So, required reductions to zero are not allowed for within draft WRMP 2024. Reductions, and the means to achieve them, are under consideration but they are not part of the draft WRMP 2024 baseline. There is significant uncertainty about both the date and the achievability of a zero Hardham scenario, as reflected in the Environment Agency's comment on 'Pulborough Groundwater licence reductions' dated August 2023[43]:

'In Southern Water's dWRMP24, the company has included a 'worst case' scenario where they consider the groundwater licence may be lost beyond 2040. However it has not clearly shown that it has considered the range of possible outcomes that could result from the sustainability investigation, when these might happen, or what actions would need to be taken to enable these to be implemented.' (Underline is the Council's emphasis).

8.44 The Environment Agency's position following this comment is there is a *'lack of appropriate options to manage potential outcomes of the licence review'*. There has been no update on the Environment Agency's position since.

8.45 Southern Water's response from the same document, which again is the latest position, is that they:

'will consider additional environmental destination sensitivity scenarios to explore the potential risk of earlier licence changes [i.e. prior to 2040] and are "testing different potential outcomes from the Pulborough licence sustainability investigation through some additional sensitivity testing [...] which would include the risk of earlier reductions or revocation of the Pulborough groundwater abstraction licence'.

8.46 The Council's position on this is that it cannot rationally be concluded that Southern Water is doing anything more than considering and investigating solutions to the potential future impact of a zero or reduced Hardham ground water scenario. Nor is there any evidence to support the Appellant's position that Southern Water consider there is 'plenty of water in the system' already, so a zero or reduced Hardham scenario can easily be accommodated.

Other sources of supply (extra water)

8.47 The 'extra water' the Appellant relies on is principally bulk supply import from Portsmouth Water and SES Water, and Weir Wood Reservoir coming back in to service.

8.48 The draft WRMP 2024 technical report [**CD8 1.02**] evidences the uncertainty around when these supply sources will be available. Table 7.3[44] (Supply side options – Central Area) shows the "earliest utilisation" of Portsmouth Water import at 15 ml/d to be 2026, and import from SES (volume unspecified) to be 2031.

[43] page 15, question response R2.1 [CD8 1.04]
[44] pages 152-153

8.49 In the Council's view, the Appellant did not address this evidence during the Inquiry. In re-examination, the Council say that Mr Aitken for the Appellant asserted that SW are 'already using' these supplies. Even if that is the case, the technical report addresses the supply assumptions which feed into the draft WRMP 2024 baseline. For the Appellant to argue successfully that the bulk supplies will offset the additional water from its development (in combination with other developments) once the WRMP 2024 is finalised, they must deal with the point that the technical report shows they won't be utilised until after the Appellant wants to occupy.

8.50 There is also uncertainty about what volume of water will be available via bulk supply. Portsmouth Water is under a contract with Southern Water to supply a minimum 'sweetening flow'[45] of 1 ml/d. If Southern Water wants more than that it has to ask for it in line with a commercial contract with Portsmouth Water that is not in the public domain. The Statement of Responses to the draft WRMP 2024 [**CD8 1.04[46]]** says:

'We have discussed this with Portsmouth Water and agreed that the bulk supply to Pulborough will remain at 15 ml/d for WRMP24 and have agreed with Portsmouth Water that we should both assume a volume of 15 ml/d. Whilst there are risks that the water may not be fully available in extreme droughts, it is the intention of the bulk supply agreement to provide this volume in droughts up to 1-in-200 year drought severity'.

8.51 There is uncertainty in the position and, in the absence of the contract, the Secretary of State cannot be certain that Portsmouth Water will transfer 15 ml/d to Southern Water, or when. Further uncertainty arises from the fact that neither the Council, nor Natural England, nor the Environment Agency, can enforce its terms. Contracts can be cancelled – the Council asserts that the bulk supply contract from Hampshire Water was cancelled.

8.52 As to bulk supply from SES water, Southern Water say in the Statement of Responses[47] that:

'We have agreed in principle with SES Water to extend the current arrangement we have with them in Sussex North WSZ to 2031 and increase DO benefit from the current 1.3 ml/d to 4 ml/d. This has now been incorporated in our revised dWRMP24.'

8.53 According to the Councill, there is no indication that the SES bulk supply 'cancels out' the potential reduction or loss of the Hardham abstraction licence, and there is uncertainty about the start date. If it did, there would be no need for Southern Water to 'test different potential outcomes' to resolve the problem.

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[45] clarified in the Inquiry as an amount of water passed through pipes at low volume to keep them in good working order when not in full use.
[46] page 9
[47] page 8

8.54 The Council does not agree that Weir Wood will necessarily supply 13 ml/d in 2025. The predicted supply volumes in the Statement of Responses[48] are as follows:

'[Weir Wood] is scheduled to provide the following PDO benefit over the next five years:

2023-24: 0 ml/d
2024-25: TBC
2025-26: 13 ml/d
2026-27: 13 ml/d
2027-28: 13 ml/d'

8.55 If the development occupies in March 2025, there is no way of telling whether the volume is TBC, or 13 ml/d, or somewhere in between.

8.56 It also appears that not all of Weir Wood's water will remain available in the WSZ. Table 4.1 of the draft WRMP Technical report [**CD 8 1.02**[49]] shows that Southern Water are contracted to supply South East Water with 5.4 ml/d of potable water from Weir Wood until 2031.

8.57 The delay in delivering the Littlehampton Water Treatment Works recycling scheme adds further uncertainty. In the Statement of Responses[50], Southern Water say:

'We will need to further consider the potential timing of any licence reductions arising from the Pulborough sustainability study as it is likely that, owing to the delay in delivery of Littlehampton WTW recycling option, we will not be able to accommodate loss of groundwater licence without incurring a supply-demand deficit. We will discuss this further with the EA in the development of our Environmental Ambition for our revised dWRMP24'

and

'We will consider additional environmental destination sensitivity scenarios to explore the potential risk of earlier licence changes. However, the delay to our Littlehampton WTW recycling scheme is likely to impact the extent to which we can accommodate earlier licence reductions (before 2030) in Sussex North WSZ'.

8.58 This indicates that, at August 2023, the Littlehampton delay problem had not been resolved and there is no evidence that it has been resolved since. Further information will not be available until the revised draft WRMP 2024, which is not yet published.

[48] page 7
[49] pdf page 497 (Document page 35)
[50] pdf pages 14 and 15 [CD8 1.04]

8.59 Contrary to the Appellant's case, the draft WRMP 2024 has not accounted for a 'zero Hardham' scenario. If that were true, then Southern Water would not identify the delay of Littlehampton Water Treatment Works as impacting on the extent to which it can accommodate licence reductions before 2030.[51]

8.60 The WRMP 2024 has not accounted for anything as the plan does not exist yet. Even on the most optimistic forecasts from Southern Water it will not do so until May 2025. At this stage, options are being considered and Southern Water will have to make decisions prior to finalising the WRMP 2024.

8.61 At the last drought event in 2022, groundwater abstraction from Hardham increased so that Southern Water could supply customers. As this proposal is being determined now, based on the available information, no decision maker could be confident that water would not be drawn from Hardham ground water for new development.

8.62 In summary, none of the appellant's evidence answers with confidence, let alone certainty, the essential question of when a zero Hardham scenario will exist. The only way of ensuring that the proposal will not increase the use of water within the supply zone is via SNOWS, or a bespoke water neutrality scheme.

Revocation of Hardham licence

8.63 The Environment Agency's Sustainability Review into the Hardham licence is scheduled to conclude in 2025. If the outcome is that that ground water abstraction at Hardham must cease, there is no certainty as to when the licence will be revoked. It will not necessarily be immediate.

8.64 The Council notes that the Appellant has agreed to a Grampian condition preventing occupation until March 2025. The licence may or may not be revoked by that date, it is impossible to be certain. In the draft WRMP 2024, Southern Water do not commit to a date earlier than 2030, with a worst case identified by the Environment Agency being 2040.

8.65 The Environment Agency's letter of 11 July 2023 [**CD8 1.19[52]**] says that a licence revocation need not be immediate *'so long as we are addressing the issues of effects on the SAC and have a plan to act once the extent of the effects is known'.*

The Council's case

8.66 The Council's case can be summarised in six points.

8.67 First, there are no cogent reasons justifying a departure from the advice in the NE Position Statement that this development must demonstrate, with certainty, that it will not add to the existing adverse impact of groundwater abstraction from Hardham. The statement is aimed at the correct problem

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[51] pdf pages 14 and 15 [CD8 1.04]
[52] page 3

(significant adverse effects associated with Hardham ground water abstraction), as is the Part C Report and SNOWS. The Appellant's opinion that the ecological interests these measures protect are not worthy of protection, or perhaps not this much protection, is irrelevant.

8.68 Second, the statutory duties of Southern Water and the Environment Agency do not obviate the requirement for an appropriate assessment of this proposal. Nor do they determine the outcome of that assessment. The Appellant's 'parallel regimes' argument is misconceived as (1) The Environment Agency's compliance with its Regulation 9(3) duty is not secured mitigation of this proposal, (2) Southern Water's voluntary minimisation is not enforceable, and therefore also not secured mitigation, and (3) the WRMP 2024 does not exist yet, there is no completed HRA for that plan and a plan level HRA/AA is not the same as a project level appropriate assessment. The Appellant's case that a HRA of the draft WRMP 2024 is 'zero Hardham' from day 1 is wrong.

8.69 Third, the development is not already water neutral by virtue of being 'accounted for' within Southern Water's WRMP 2019. The fact that the development was included in the housing trajectory which formed the basis of WRMP 2019 is irrelevant. The Position Statement and the Part C Report are concerned with new development, whenever it was permitted. The exception to this is development with full permission prior to the NE Position Statement (September 2021). In any event, the estimates in the Part C Report for how much water will be required by planned new development are out of date.

8.70 Fourth, the appellant is unable to demonstrate, with certainty, when the future actions by the Environment Agency and Southern Water which aim to resolve the issues in the Arun Valley will be delivered to ensure this development, and all other similarly qualifying development, avoids adverse effects. The Appellant's evidence does not engage with this issue and reliance on other bodies complying with their statutory duties does not provide the answer. There is a difference between the general duty under Regulation 9(3) of the Habitats Regulations and the appropriate assessment requirement under Regulation 63(5) which is relevant here.

8.71 Firth, the Part C Report is not appropriate for use as a development management tool. The figures in it represent a snapshot in time and are already out of date. There is no certain 'headroom' as contended by the Appellant.

8.72 Sixth, absent an offsite water neutrality scheme (which the Appellant is not offering) the only way in which the development can demonstrate certainty of mitigation is via the Council's proposed condition which prevents development commencing until water neutrality mitigation has been secured via SNOWS.

9. Summary of written representations

9.1 The Environment Agency did not respond directly to the Council's consultation on the application or the appeal. Southern Water responded only in relation wastewater. The Appellant wrote to both and received responses to questions that they put to them. The responses can be found at Appendix B (Environment Agency) and Appendix C (Southern Water) of Mr Aitkin's proof of evidence [**CD10 1.02a**]. Both parties rely on the responses as part of their cases and I address them as necessary in this report.

9.2 Only Natural England responded to the appeal notification on time. As such, unless otherwise stated, what follows is a summary of the issues raised by parties external to the Council at the application stage.

Natural England

9.3 Natural England formally commented on the proposal three times:

- 12 September 2023 [**CD6 1.01**]. Responding to the planning application.
- 11 January 2024 [**CD8 1.18].** In response to the appeal, ahead of the Inquiry
- 19 April 2024 [**ID13**]. Following the close of the Inquiry.

Letter of 12 September 2023 [**CD6 1.01**]

9.4 Natural England believe the proposal could have potentially significant effects on the Arun Valley sites, as per the NE Position Statement. They ask for further information, namely reconsideration of water neutrality with appropriate mitigation and relevant water budget calculations.

9.5 They note the Appellant's Shadow HRA and Addendum [**CD1 1.01, 1.02]** concludes that it can be ascertained that the proposal will not result in adverse effects on the integrity of the sites. Having considered the measures set out in the HRA to mitigate adverse effects, Natural England disagree. They advise that further consideration of mitigation is needed to ensure the proposal can demonstrate water neutrality.

9.6 They do not agree that impacts can be ruled out on the basis that its water demand is already accounted for in the pre-September 2021 existing/baseline water demand, against which water neutrality for all development thereafter is calculated. This is because the lawful water demand of the proposed dwellings did not exist prior to September 2021 and the proposal did not have full planning permission.

9.7 In response to Southern Water's 5 ml/d voluntary minimisation of groundwater abstraction at Hardham, they note there is no known acceptable level of groundwater abstraction which would be able to rule out having an adverse effect on the Arun Valley sites. In any event, the minimisation is unsecured and voluntary and not, therefore, appropriate mitigation. For these reasons, it is not appropriate to rely on Southern Water's abstraction minimisation as a mitigation measure to offset the increased water demand from the proposal.

9.8 In Natural England's view, water savings from Southern Water's planned demand reduction measures are to be utilised in the developing SNOWS to support the delivery of water neutral local plans across the WSZ. As such, relying on these measures to offset the proposal, without contributing to the strategy, would be double counting. They add that, while an appropriate contribution to such a strategy may be sufficient to rule out this proposal's impacts, no strategy has yet been agreed or implemented. As such, it is not appropriate to rely on the strategy at the time of their letter.

9.9 Natural England advise that any offsetting measures required to achieve water neutrality will need to have their maintenance and management appropriately secured with the competent authority, in perpetuity.

Letter of 11 January 2024 [**CD8 1.18]**

9.10 Natural England notes the appellants arguments as to why the proposal does not need to demonstrate water neutrality to rule out the adverse effects on the Arun Valley sites. They consider the arguments most relevant to Natural England's remit to be:

- That the proposal's water demand is already accounted for, and
- That Southern Water's voluntary abstraction minimisation or demand reduction measures can be relied upon as offsetting mitigation measures.

9.11 They draw attention to the NE Position Statement and NE Advice Note. They say that achieving water neutrality can be defined as, 'ensuring that for every new development, total water use in the region after the development is equal to or less than the total water-use in the region before the new development' (*underline is their emphasis)*. Natural England's view is that water use before the new development should be calculated in line with actual lawful existing water usage.

9.12 In their view, an appropriate assessment should not take into account mitigation measures which are uncertain at the time of the assessment. This includes voluntary measures not secured by an appropriate legislative or regulatory framework. A competent authority's decisions regarding the certainty of any given measure should consider both scientific certainty and practical certainty. Whereas scientific certainty is concerned with how likely a measure is to be effective, practical certainty is concerned with how likely a measure is to be delivered and secured in the long term.

9.13 They acknowledge that it is for the competent authority to satisfy itself on the certainty of any given measure. However, their view is that voluntarily adopted measures are not secured by an appropriate legislative or regulatory framework at the time of the permission. As such Southern Water's abstraction minimisation is not likely to have sufficient practical certainly to be relied upon as mitigation. Similarly, measures which have not been agreed or implemented are also unlikely to have sufficient practical certainty.

9.14 Natural England note the outcome of the Sustainability Review into groundwater abstraction at Hardham is due to report in March 2025. The findings of that investigation will determine what level of abstraction at Hardham can continue, while ensuring adverse effects on the Arun Valley sites are ruled out. As such, it is not appropriate to rule out adverse effects on the basis that ground water abstraction has been voluntarily reduced to 5 ml/day.

Letter of 19 April 2024 [**ID13]**

9.15 This letter was received following close of the Inquiry. It responds to specific questions that I put to Natural England aimed at informing an appropriate assessment. My letter also shared new documents that had been put before the Inquiry, as agreed with the parties.

*Do you agree with the conclusion in the Shadow Habitats Regulations Assessment **[CD1.1 01]** in relation to Stage 1: Screening that only the Arun Valley Sites should be taken forward for appropriate assessment? If not, why? Which other sites should be taken forward and what are the reasons?*

9.16 Natural England is satisfied that only the Arun Valley sites should be taken forward for appropriate assessment.

*Do you agree with the proposition that the key concern in this case can be narrowed to the designated interest feature, namely the Lesser Whirlpool Ramshorn Snail? (See reference at paragraph 3.2.5 of Mr Baxter's Proof **[CD10.1 04b]** and paragraph 9 of the Appellant's closing **[ID10].** If not, why?*

9.17 They do not agree. As outlined in the NE Advice Note, the ongoing abstraction is having a detrimental impact on a number of sites, including the Arun Valley SAC, SPA and Ramsar site. A number of designated features associated with the SPA and Ramsar site (as well as their supporting habitats) are water dependent and are therefore potentially impacted as a result of the ongoing abstraction as well.

Do you agree that the evidence provided enables it to be ascertained that the proposal would not adversely affect the integrity of the Arun Valley Sites without the need for the development to demonstrate water neutrality?

9.18 They do not believe that the evidence provided by the Appellant is sufficient to conclude that the proposal would not adversely affect the integrity of the sites without the need to demonstrate water neutrality.

9.19 Natural England refer to the Sustainability Review reporting in March 2025. The findings of that investigation will determine what level of abstraction at Hardham can continue, while ensuring adverse effects on the sites can also be ruled out. Until the investigation has been completed, what is an acceptable level of groundwater abstraction is remains unknown.

9.20 Given the current uncertainty as to the potential impacts of additional abstraction, it is Natural England's advice that "for every new development, total water use in the Sussex North Water Supply Zone after the development must be equal to or less than the total water-use in the region before the new development" (as per the NE Advice Note) in order to ensure that future development does not contribute to increased levels of abstraction.

9.21 Minimisation of abstraction at Hardham does not consider, nor evidence, the fundamental question of how much water can be abstracted without having an adverse effect on the Arun Valley sites. Given the current situation, it is Natural England's advice that the current minimisation does not provide sufficient certainty.

9.22 In the absence of evidence to conclude how much water can be abstracted without having an adverse effect, it remains Natural England's opinion that future development should demonstrate how water neutrality will be achieved to ensure it does not result in additional abstraction beyond appropriate levels.

Do you agree that an alternative method that would protect the Arun Valley Sites has been put forward (paying regard to page 3 of the NE Advice Note)?

9.23 As outlined in the NE Advice Note, it is their view that the delivery of an alternative water supply may be required until the sites are restored to favourable conservation status.

*Does the imposition of the condition at page 28 the SOCG [**ID11**] change your response to the previous two questions? Do you agree that the imposition of the two conditions set out on page 27 of the SOCG enable it to be ascertained that the proposal would not adversely affect the integrity of the Arun Valley sites? If not, please specify your reasons and provide details of any specific measures you consider are necessary.*

9.24 They say that the wording and suitability of conditions is outside of their remit and expertise. However, any conditions that seek to ensure that there is not an adverse effect on the integrity on the sites should be suitably worded to ensure that adverse effects can be ruled out and be based upon robust evidence. Any mitigation that a condition seeks to secure should consider both scientific certainty and practical delivery.

Colgate Parish Council

9.25 No comments but notes that the Parish Council and residents are concerned there has been no application submitted for the community hall, shops and other infrastructure.

Comments from neighbours

9.26 One letter of objection was received, raising concern and objection to the proposal on the grounds that further housing being proposed prior to the neighbourhood centre being complete. This is alleged to be in breach of the Section 106 agreement for Kilnwood Vale. Resolving the issue of demonstrating water neutrality is also cited as a reason for delay. It is said

that the objector has been without any amenities for the entirety of the development's existence, and that the developer is actively avoiding building the essentials that were both promised and legally agreed. This is said to also put a strain on the amenities in surrounding areas which has resulted in oversubscription at doctors' surgeries, queues in local shops and lack of medicines at nearby pharmacies.

Southern Water

9.27 They note the development site is not located within Southern Water's statutory area for wastewater drainage services.

Thames Water

9.28 No objection on wastewater grounds subject to a condition aimed at ensuring confirmation of a suitable foul water connection for the development.

West Sussex County Council

Lead Local Flood Authority (LLFA)

9.29 The LLFA wrote to the Council on 18 October 2023 maintaining their initial objections to the proposal on the grounds that an acceptable drainage strategy hadn't been put forward. At the heart of their concerns were the Appellant's calculations relating to rainfall, the margin for flood risk, and the CV value used in the micro-drainage calculations.

Highways

9.30 They give advice relating to the potential adoptability of the proposal's roads, and make a number of comments relevant to that, noting that matters of adoption will be determined as part of any application for an agreement under Section 38 of the Highways Act 1980.

Fire and rescue

9.31 They are concerned that unavailability of additional water supply to fire hydrants in an emergency could increase the risk of being unable to control a fire. A condition is therefore thought to be necessary.

Essex County Council – place services team

Ecology

9.32 They have no ecological objections. Nevertheless, as the proposal does not demonstrate water neutrality, they issued a holding objection. This is subject to Natural England's formal comments on the conclusion of an appropriate assessment.

Archaeology

9.33 No historic environment objections.

London Gatwick

9.34 They have no objection, having examined the proposal from an aerodrome safeguarding perspective.

10. Inspector's conclusions

10.1 The numbers in superscript square brackets [xx] in this section are references to previous paragraphs in the report of relevance to the point under discussion. They are for cross referencing purposes only. My conclusions are based on consideration of all the evidence put before the Inquiry that is now also available to the Secretary of State.

10.2 Having regard to the matters on which the Secretary of State particularly wishes to be informed about [1.7], the matters in dispute between the parties, and the evidence to the Inquiry, the main considerations where my conclusions may assist are:

- Whether a Habitats Regulations compliant appropriate assessment can be concluded and, if so, on what basis.
- Whether the evidence otherwise indicates that the reserved matters should be approved.
- How the first two considerations relate to any planning balance necessary.

Appropriate assessment

10.3 The Applicant's shadow HRA [**CD1 1.01**] includes a summary of the main legislative principles, repeated at various points across the evidence by both parties. Beyond differing emphasis, the applicable law is not materially in dispute [7.16, 8.10]. The main principles are worth repeating for clarity and to set the context for the appropriate assessment.

10.4 By Regulation 63(1) of the Habitats Regulations a competent authority (which includes the Secretary of State exercising planning decision making powers) before deciding to give any consent, permission or other authorisation for a project which is likely to have a significant effect on a European site (either alone or in combination with other plans or projects) must make an appropriate assessment of the implications of the project for that site in view of that site's conservation objectives.

10.5 Under Regulation 63(2) an applicant (the Appellant in this case) must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable it to determine whether an appropriate assessment is required. Regulation 63(3) says that the competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specifies. The appropriate nature conservation body is Natural England.

10.6 Regulation 63(5) specifies that, in the light of the conclusions of the appropriate assessment, a competent authority may agree to the project only after having ascertained that it will not adversely affect the integrity of the European site.

10.7 In considering whether a project will adversely affect the integrity of the site, under Regulation 63(6), the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that it should be given subject to.

10.8 Beyond Regulation 63, Regulation 9 of the Habitats Regulations includes general duties on bodies relating to European sites and exercising functions so as to secure compliance with the requirements of the Habitats Directives (Regulation 9(1)). In exercising any of its functions, bodies must have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions (Regulation 9(3)).

10.9 Two overarching legal points of relevance to the Secretary State's decision making relate to imperative reasons of overriding public interest (IROPI) and the precautionary principle and the question of proportionality. As both are questions of law, my view is based on the submissions made by the parties.

10.10 The duty under Regulation 63(5) of the Habitats Regulations is subject to Regulation 64, which makes provision for a project to be agreed notwithstanding a negative assessment of the implications for the European Site if the competent authority is satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest. The legal tests relating to this is referred to as 'IROPI' and are as follows:

- There are no feasible alternative solutions that would be less damaging or avoid damage to the site,
- The proposal needs to be carried out for imperative reasons of overriding public interest, and
- The necessary compensatory measures can be secured.[53]

10.11 The Appellant's position on IROPI is that it is not applicable as it only applies in the absence of alternatives [7.16]. Paying regard to the reasons given by the Secretary of State for calling in the appeal[1.7] it is relevant that IROPI offers a route within the Habitats Regulations to balance a negative assessment of effects on the Arun Valley Sites against other factors, which may in principle include housing demand and supply**.** However, as the substantive evidence does not make the case and there appears to be feasible alternative solutions if conditions are used as suggested below, I would not recommend that the Secretary of State reaches a decision on the basis that IROPI applies.

[53] see guidance on derogations at https://www.gov.uk/guidance/habitats-regulations-assessments-protecting-a-european-site

10.12 Turning to proportionality, to accord with Regulation 63(5) of the Habitats Regulations, a decision maker may only grant approval having ascertained that there is no reasonable scientific doubt as to the absence of adverse effects on the integrity of the protected sites (the test of certainty). Wyatt[54], at paragraph 9, summarises some of the relevant points that emerge from applicable domestic and European caselaw. This includes that the duty under Regulation 63(5) embodies the precautionary principle, requiring a high standard of investigation.

10.13 In relation to proportionality in applying the precautionary principle, *Waddenzee*[55] assists in confirming that 'no reasonable scientific doubt' is not a requirement for absolute certainty as no such thing exists and that would be disproportionate. Nevertheless, the bar is a high one. This is reflected in *Sweetman*[56] in the context of compliance with the Habitats Directives, a compliant appropriate assessment *'cannot have lacunae and must contain complete, precise and definitive findings and conclusions'*.

10.14 The Council makes a fair distinction between (1) proportionality in complying with the test of certainty and (2) proportionality of any avoidance or mitigation measures necessary to conclude favourably on whether adverse effects on the Arun Valley sites are likely [8.26]. The former is uncontested between the parties, the test of certainty is not one requiring absolute certainty.

10.15 For the second proposition, the Appellant primarily relies on European Commission guidance [7.28]. This document was not put before the Inquiry in full and is instead quoted within the Shadow HRA [**CD1 1.02**[57]]. The guidance appears to relate to general application of the precautionary principle across a range of functions, rather than being specific to the duties under Regulation 63 of the Habitats Regulations or anything comparable. As such, although it would wrong to dismiss the guidance out of hand, it is safer to base findings mainly on an examination of the legislation itself.

10.16 Regulation 63(5) is clear that the Secretary of State can grant approval in this case only after having ascertained that it will not adversely affect the integrity of the Arun Valley sites, considering the conclusions of an appropriate assessment. The scope of the consideration is limited to effects on integrity. Beyond IROPI, there is no mechanism for balancing the Regulation 63(5) duty, and any necessary avoidance or mitigation measures, against impacts that are unrelated to effects on integrity.

10.17 The Appellant's case includes the encouragement of such a balance, by narrowing down on the Lesser Ramshorn Whirlpool Snail (which isn't legitimate anyway, for the reasons set out below), commenting on the limits of its distribution and other things they think could have been done to address the issue, and the impact of what they see as a requirement for water neutrality and the NE Position Statement more broadly has on the delivery of

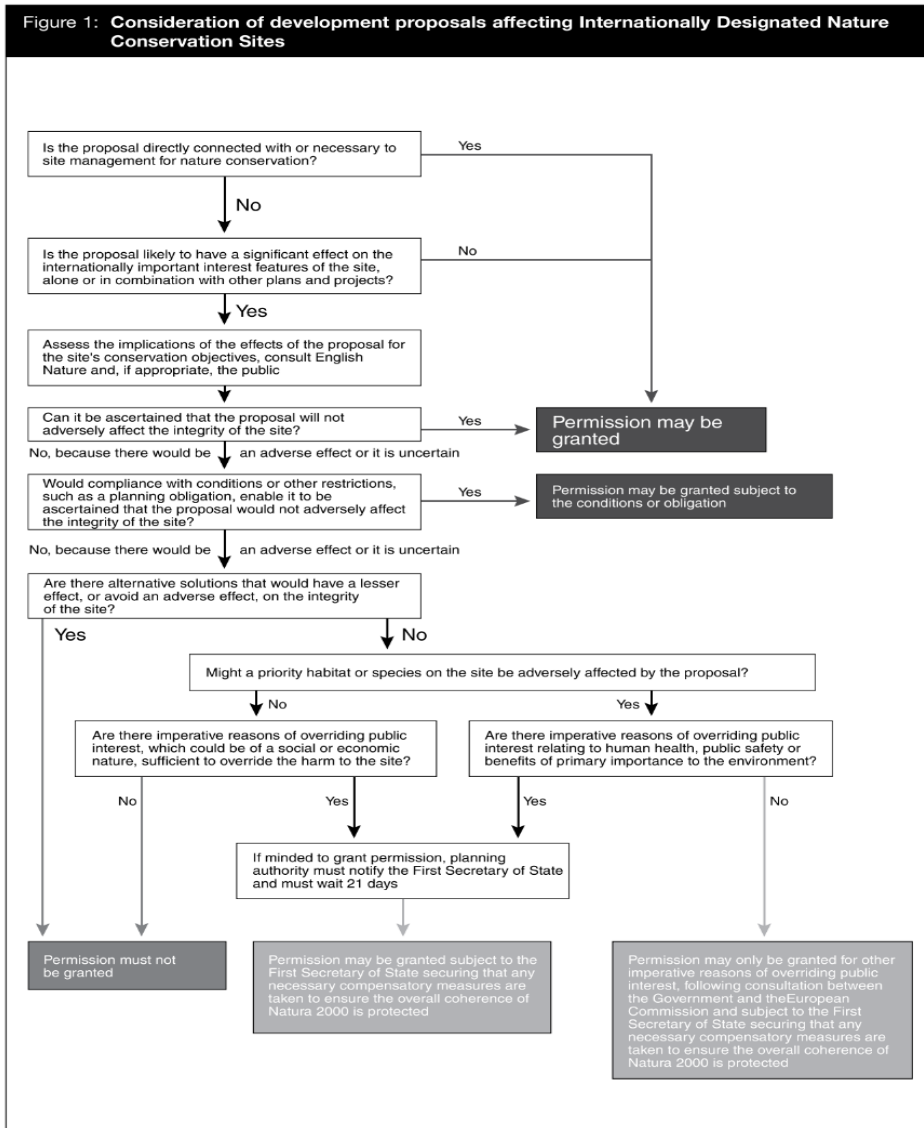
[54] [CD5 1.05]
[55] referred to at para 9(7) of Wyatt [CD5 1.05]
[56] referred to at para 9(10) of Wyatt
[57] paragraphs 2.4.2-2.4.5

development and cost [7.33-7.45]. This internal balance is outside the scope of the Regulation 63(5) duty and, therefore, taking account of the impact on delivery of development and costs would be to take account of legally irrelevant factors.

10.18 For similar reasons, taking account of the Appellant's view on more proportionate things that they think other bodies could have done as an alternative to issuing the NE Position Statement would be to introduce legally irrelevant considerations that, in any event, are highly speculative [7.38-7.42].

10.19 For these reasons, I recommend that the Secretary of State does not agree with the Appellant's arguments relating to 'whether demanding water neutrality for all new development in the WSZ is a proportionate response to the risk identified to the qualifying interest' [7.33-7.45].

10.20 What follows is an assessment of the main further points raised by the Appellant. This is to assist the Secretary of State with seeing the conclusions relevant to deciding an appropriate assessment, I have structured addressing them to generally align with the flow chart of the HRA process at Appendix 5 of the Appellant's shadow HRA [6.1]. It is reproduced below:



10.21 Looking the first step on the flowchart, there is no suggestion that the proposal is directly connected with or necessary to site management for nature conservation. The next relevant steps providing a pathway through the flowchart are considered below in detail are as follows:

- Is the proposal likely to have significant effects (either alone or in combination)?
- What are the implications of the effects for the site's nature conservation objectives?
- Can it be ascertained (with reasonable certainty) that the proposal will not adversely affect the integrity of the site?
- Would compliance with conditions or other restrictions enable it to be ascertained that it the proposal would not adversely affect the integrity of the site?

10.22 There is some overlap between the Appellant's arguments and where they may, arguably, fit within the structure.

10.23 In addition to addressing the key arguments in the appeal, what follows is also intended to give the Secretary of State the necessary information to conclude and adopt this part of the report, with the references to evidence within it, as appropriate assessment of the proposal.

Is the proposal likely to have significant effects (either alone or in combination)?

10.24 Section 3 of the Shadow HRA goes through the process of screening for likely significant effects[58], concluding that effects are unlikely in relation to the Ashdown Forest SAC, Lewes Downs SAC, and Pevensey Levels SAC. This is based on the assessment in the HRA produced to support the Outline Permission as circumstances are said to be unchanged.

10.25 In relation to the Arun Valley Sites, the NE Position Statement is an obvious change in circumstances. The Shadow HRA concludes that, as likely significant effects on the sites are possible, it is necessary to take the Arun Valley Sites forward for appropriate assessment.

10.26 Natural England agree with the approach taken to screening in the HRA [9.16] and I have no reason to recommend a different conclusion. As such, the scope of the appropriate assessment is limited to effects on the Arun Valley Sites.

10.27 The basic tenet of the NE Position Statement is not seriously contested by any party. As the WSZ includes supplies from ground water abstraction (Hardham) it cannot, with certainty, be concluded that there will be no adverse effects on the integrity of the Arun Valley Sites. Fundamentally, as this is 'the problem' and there is no evidential basis to say otherwise, this should be adopted as a starting point.

[58] section 3

10.28 This being the case, projects such as the proposal[59] need to show with reasonable certainty that they will not add to the impact. One way to achieve that, according to the NE Position Statement, is to demonstrate water neutrality using the definition which relates to water use in the WSZ [7.6].

10.29 The statement specifically relates to planning and is aimed at 'all applications which fall within the supply zone'. It being focused on what action can be taken within the system to conclude favourably under the Habitats Regulations is therefore unsurprising. Water neutrality being specifically identified as 'one way' of showing that development will not add to the impact is an action within the control of Local Planning Authorities and developers is also understandable. This doesn't hint at a lack of understanding on Natural England's part of the role of other actors in what is a complex and multifaceted problem.

10.30 Water neutrality is a demand side intervention and is therefore concerned with water use. Development obviously has the potential to put pressure on water use. There is no requirement for new development, including this proposal, to facilitate a reduction in groundwater abstraction from Hardham. However, it must not increase its use, either alone or in combination, and make the problem worse. Authorising projects that contribute to the problem in these circumstances, without suitable avoidance/mitigation, would not accord with Regulation 63.

10.31 It is not the purpose of this appeal to examine the rationality of the NE Position Statement or the wider policy response to the problem. I do not accept the Appellant's arguments that the NE Position Statement and the related documents mischaracterise the issues, in so far as they relate to this appeal. Although water neutrality is clearly a focus of both the Council and Natural England, as demonstrated by the Part C Report and SNOWS, there is nothing to seriously suggest that the intention is to do anything other than bring forward a planning related solution to an uncontested problem in the Arun Valley Sites.

10.32 For these reasons, I recommend that the Secretary of State finds the Appellant's arguments criticising the NE Position Statement and the concept of water neutrality to be not of central relevance to question of whether a favourable appropriate assessment can be concluded [7.6-7.11].

What are the implications of the effects for the site's nature conservation objectives?

10.33 The designation information relating to the Arun Valley Sites, including conservation objectives and qualifying features, is summarised at paragraph 3.8 of the Shadow HRA. In relation to the SAC and the SPA the conservation objectives include ensuring the integrity of the sites is maintained or restored and contributing towards the achievement of a favourable conservation status of its qualifying interest features.

[59] without full planning permission prior to September 2021 when the NE Position Statement was published.

10.34 The qualifying interest features are identified as the Lesser Ramshorn Whirlpool Snail (for the SAC) and the Bewick Swan (for the SPA). For the Ramsar, the site is designated for its international importance under Criterion 1[60] for its representative, rare or unique wetland types. Specifically showing a greater range of habitats than any other chalk river in Britain, including fen, mire, lowland wet grassland and small areas of woodland. It is also designated under Criterion 2 for supporting a diverse range of wetland flora and fauna, including several nationally rare species. Under Criterion 6 the site is designated for regularly supporting a sizable population of species of waterbird.

10.35 Natural England do not agree with the Appellant seeking to narrow the relevant qualifying interest feature to the Lesser Ramshorn Whirlpool Snail [7.35-7.36, 9.17]. The Council did not contest this point significantly during the Inquiry. However, by their own admission, they had limited supporting ecological expertise to do so.

10.36 The Appellant's response to Natural England's letter after close of the Inquiry [**ID14]** describes the snail as a 'key receptor' indeed 'arguably the most sensitive receptor and the focus of much of the discussion'. It also correctly says that the Appellant's Shadow HRA acknowledges the relevance of overlapping designations of the SPA (for birds) and Ramsar (for aquatic flora and invertebrates).

10.37 Even accepting that the snail is a key focus, based on the evidence presented, it cannot be said with reasonable certainty to be the only qualifying feature affected in the Arun Valley Sites. Adopting a precautionary approach, I would not recommend accepting the Appellant's evidence that the qualifying interest affected by the issue in the NE Position Statement can be narrowed to the Lesser Ramshorn Whirlpool Snail.

10.38 Regardless, narrowing the focus loses much of its utility if the Secretary of State agrees that the Appellant's arguments relating to 'whether demanding water neutrality for all new development in the WSZ is a proportionate response to the risk identified to the qualifying interest' should be rejected [7.33-7.45], which I recommend [10.20].

10.39 If the Secretary of State does not reject that argument, I would recommend that any question of proportionality is considered based on there being the potential for effects on all qualifying interests in the Arun Valley Sites, rather than narrowing the issue to the snail.

[60] Although not before the inquiry, to assist with understanding, general information about the Ramsar Criterion can be found at - https://www.ramsar.org/sites/default/files/documents/library/ramsarsites_criteria_eng.pdf

Can it be ascertained (with reasonable certainty) that the proposal will not adversely affect the integrity of the site?

10.40 The adoption of water neutrality is described in the NE Advice Note as a tool to help ensure compliance with the Habitats Regulations. It does not preclude the consideration of alternative methods to protect the sites and enable development, provided the requirements of the Habitats Regulations are met and is not intended to pre-judge the outcome of individual applications[61]. It is for the Appellant to bring forward any alternative methods in the form of avoidance/mitigation measures that meet the test of certainty. What follows is an assessment of the main elements of the Appellant's case that, taken together, are said to allow a favourable appropriate assessment to be concluded without the need for water neutrality.

Reliance of other regulatory regimes [7.12-7.13, 7.17-7.21]

10.41 The Appellant's case rellies at least partially on performance of action by the Environment Agency, Southern Water, and others under regulatory regimes and functions beyond planning. This raises a question about the degree to which such regimes/functions can be relied upon as mitigation/avoidance measures to conclude that the proposal will not adversely affect the integrity of the Arun Valley Sites. The main regimes/functions in this case can be summarised as –

- Powers of the Environment Agency to grant, revoke, and amend water abstraction licences under the Water Resources Act 1991.
- Duties on Southern Water to supply potable water and prepare and maintain a WRMP under the Water Industries Act 1991.

10.42 In line with the well-established principle in planning decision making, the Secretary of State can assume that other regulatory regimes will operate effectively and, therefore, it is not necessary to duplicate them. The subject matter of Paragraph 194 of the Framework (ground conditions and pollution) is not relevant to this case. However, the policy principle aligns with long understood general practice across the planning system. The caselaw referred to by the Appellant supports this approach[62] [7.25, 8.11].

10.43 Planning Practice Guidance[63] says that planning for the necessary water supply would normally be addressed through strategic policies. Water supply resulting from planned growth can then be reflected in the WRMPs produced by water companies. This points towards a co-dependence between the town and water planning regimes, with local plans identifying planned growth and water companies planning for supply based on it. It also reflects the principle that water supply should not normally be a general consideration in development management decision making.

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[61] See page 3 of [CD8 1.16]
[62] R(An Taisce) [CD 1.01] and Sizewell C [CD5 1.02]
[63] Paragraph: 016 Reference ID: 34-016-20140306

10.44 In Horsham there is no dispute that Kilnwood Vale is 'planned growth' and that the WRMP 2019 was published in full knowledge of it [7.18], albeit ahead of the NE Position Statement. In this case, water supply is being considered only in the very specific legislative context of the Habitats Regulations. It cannot, therefore, fairly be described as a general consideration that may conflict with the principles set out in Planning Practice Guidance [7.24, 8.13]. In any event, the guidance does not overrule the legislative requirement.

10.45 In my view, in assessing the appropriateness of mitigation/avoidance measures, the Secretary of State is entitled to assume that other regulatory regimes will operate effectively. This does not, however, disapply the need to satisfy the test of certainty to accord with the duty under Regulation 63(5) of the Habitats Regulations. It is not sufficient to simply assume that the problem will be dealt with by others without a proper examination of practical and scientific certainty, including adopting the precautionary approach where necessary. Doing otherwise risks delegating responsibility to others and leaving gaps in coverage of protection for the Arun Valley Sites, contrary to the wider purpose of the Regulations (and, by extension, the Habitats Directives).

Southern Water voluntary minimisation and Environment Agency action following the Sustainability Review [7.46-7.53, 8.28-8.31]

10.46 Until the Sustainability Review concludes in 2025, and subsequently reports on its findings, there is no known 'safe' level of groundwater abstraction from Hardham that can be excluded from having a significant effect on the Arun Valley Sites. The review will inform the Environment Agency's decision making about whether to take action to impose changes on the existing Hardham licence using powers in S.52 of the Water Resources Act 1990[64].

10.47 Southern Water's voluntary minimisation of a target rolling average of 5 ml/d is a temporary measure they have committed to keeping in place at least until the Sustainability Review concludes[65]. Minimisation in this context means Southern Water using their best endeavours to keep abstraction as low as possible whilst also meeting customer demand[66]. It is taken as a rolling average and has been exceeded, notably in the 2022 drought [8.30].

10.48 Voluntary minimisation was agreed between the Environment Agency and Southern Water in the short term as appropriate action for keeping ground water abstraction at Hardham from increasing appreciably above September 2021 levels. This timing is significant as it relates to the point at which the NE Position Statement was issued. It allows parties to say, at least until the Sustainability Review reports, that the likely adverse effects on the Arun Valley Sites are unlikely to worsen. It does not, as made clear by their letter of 11 July 2023[67], discharge the Environment Agency's duties under the Habitats Regulations. That would, instead, follow by making any necessary changes to the abstraction licence.

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[64] the existing licence is a Licence of Right granted in 1966 and is, therefore, not time limited. (see Environment Agency letter 28 April 2022 in Appendix B of CD10 1.02a)
[65] see page 2 of Southern Water letter dated 7 July 2023 at Appendix 2 of [CD1 1.02a]
[66] see Environment Agency letter dated 6 June 2022 at Appendix 2 of [CD1 1.02a]
[67] Appendix 2 of [CD1 1.02a]

10.49 It logically follows that reasonable certainty of the appropriateness of the existing level of voluntary minimisation only exists until the Sustainability Review concludes. The purpose of the review is to collect hydrological and ecological data to support future decision making. As the Environment Agency puts it in their letter of 13 January 2023;

'The protection of the [Arun Valley Site] will be secured by making any necessary changes to the abstraction licence. A voluntary commitment to reduce abstraction does not secure the necessary protection, although it is a welcome step to reducing the risk of deterioration of, and risk of adverse effects to, the site whilst detailed investigations are being carried out in relation to the abstraction'.

10.50 The current temporary minimisation measures, that were only ever intended to be short term, cannot be relied upon as avoidance/mitigation that confirms reasonable certainty of no adverse effects on the Arun Valley Sites.

10.51 Natural England and the Council's concerns that voluntary minimisation is not secured is secondary to the fact that it is only a short-term measure. Whether a licence change at Hardham is necessary will only be known once the Sustainability Review concludes. At that time, the Environment Agency would have a range of options that includes amendment or revocation of the licence. As part of that decision making, they are under a duty under Regulation 9(3) of the Habitats Regulations to secure compliance with the Habitats Directives, and therefore to consider the effects on the Arun Valley Sites.

10.52 I agree with the Council that the Regulation 9(3) duty is more general than the Regulation 63(5) obligation to only authorise a project having ascertained that no likely adverse effects on integrity will result. The Environment Agency's response to the Appellant of 26 April 2022 at Appendix 2 of [**CD10 1.02a]** gives a sense of how they see their obligations *'in exercising our powers, we have to take account of our legal obligations when undertaking this action – these include our duties and obligations to protect the environment as well as any legal duties regarding the impact of our action on the licence holder and any duties they may have to provide public water supply'.*

10.53 The response indicates a perceived greater freedom on the Environment Agency's part to balance a wider range of factors and still accord with their obligations under the Habitats Regulations. Notwithstanding this and the more general nature of the duty under Regulation 9(3) of the Habitats Regulations, it would be wrong to discount evidence of the Environment Agency's role out of hand.

10.54 The Secretary of State can have confidence that the Environment Agency will appropriately monitor and review a voluntary minimisation agreement with a water company and consider taking formal action if breach of it leads them to think that is necessary. Their letter of 6 June 2022[68] provides evidence of the monitoring process they have in place, as well as confirming that they do not formally enforce voluntary action. So, while voluntary minimisation is not legally secured, discounting it purely on this basis fails to pay regard to the Environment Agency's powers and obligations, which the Secretary of State

[68] Appendix 2 of [CD1 1.02a]

can assume will be operated judiciously.

10.55 Looking forward, beyond the Sustainability Review, there are a range of unknown actions that the Environment Agency could take in relation to the ground water abstraction licence at Hardham in the exercise of their powers under S52 of the Water Resources Act 1991. There are also things that Southern Water may volunteer to do or, indeed, they may formally apply to change in the licence under S51 of the 1991 Act.

10.56 The unspecified future action of these parties does not provide the necessary reasonable certainty to conclude that no adverse effects on the integrity of the Arun Valley Sites will result from the proposal. While they can be expected fulfil their legal obligations under the Habitats Regulations, the question of 'how' and 'when' lacks reasonable certainty.

10.57 In summary, I recommend that the Secretary of State does not discount voluntary minimisation out of hand on the basis that it is not secured. However, it is only a short-term measure and reasonable certainty of its appropriateness cannot be judged until the Sustainability Review reports. Further, while they can be expected to comply with their legal obligations, the unspecified future action by the Environment Agency and/or Southern Water in response to the Sustainability Review does not provide evidence of reasonable certainty that the Secretary of State can rely upon to confirm that no adverse effects on the integrity of the Arun Valley Sites will result from the proposal.

The WRMP 2024 [*7.63-7.70, 8.32-8.46*]

10.58 For information, an uncontested description of the preparation and function of WRMPs is described in the proof of evidence of the Appellant's water supply witness[69]. The overarching objective of the WRMP is to look ahead over 25 years and describe how the water company aims to secure a sustainable supply/demand balance. The Government's Water Resources Planning Guideline **[CD8 1.08]** assists companies with preparing WRMPs and, at paragraph 6.3, says that water demand growth projections should be based on those in local plans and the resulting supply must not constrain planned growth [7.17,7.18].

10.59 When the final version is published, the WRMP 2024 would be a statutory plan[70] and must, therefore, be accompanied by its own HRA. As things presently stand the WRMP 2024 and it's HRA are in draft form. The Statement of Responses [**CD8 1.04**] indicates a range of relevant information and new material that would need to be considered ahead of finalising either document. The likelihood of changes being made brings into question the validity of the draft WRMP 2024 and it's HRA as a basis for present decision making. The specific details of the documents themselves do not, therefore, provide a credible basis on which to reach a conclusion about reasonable certainty.

[69] paragraphs 4.19- 4.41 of [CD10 1.02a]

10.60 A reasonable planning system parallel to this situation would an HRA prepared for a Local Plan being used to support a development management decision. Paragraph 008 of the PPG provides some relevant advice [8.22] including reminding decision makers that the HRA would still need to contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt on the impact of the project. This is a high standard to meet and will need to be assessed on a case by case basis.

10.61 Although not a direct comparison, the guidance helps to support a view that measures in a WRMP are capable in principle of being avoidance/mitigation measures that confirm an absence of likely adverse effects on a European Site. However, the draft stage at which the WMRP 2024 has reached in this case leads me to conclude there is an absence of reasonable certainty. In this respect, I agree with the Council's view that a positive appropriate assessment at the WRMP level does not mean that projects under that plan can be assumed to have no significant adverse effects.

10.62 In a more general sense, the Secretary of State can expect that the relevant bodies will comply with their duties under the Habitats Regulations when the WRMP 2024 is finally published. This includes carrying out any appropriate assessment of likely adverse effects on the Arun Valley Sites necessary to meet the Regulation 63(5) duty.

10.63 The Appellant's working assumption that the WRMP 2024 is likely to be published ahead of the Sustainability Review reporting is a fair one, in the absence of evidence to the contrary [7.68]. The Council questions the degree to which the draft WRMP 2024 plans for a 'zero Hardham' baseline [8.39-8.46]. While the evidence doesn't support a firm view that the current draft of the WRMP 2024 does, there is reasonable evidence that water supply scenarios informing the WRMP will need to contemplate excluding ground water extraction from Hardham [7.69]. However, concluding on the specifics would be speculation. Possible reasons for the WRMP 2024 needing to adopt zero Hardham include (1) that the Environment Agency revokes the abstraction licence in response to the Sustainability Review or (2) a favourable appropriate assessment of the WRMP 2024 cannot otherwise be conclude and an IROPI argument is not, or cannot, be made.

10.64 The Appellant is incorrect to say that the WRMP 2024 could not be published if it included an unfavourable appropriate assessment [7.67, 7.69]. Regulation 64 of the Habitats Regulations and the associated IROPI tests provide a legislative route to do just that and whether any such decision would be made in response to evidence that, is at present, is unknown [8.23].

10.65 The Council's questioning of whether the WRMP 2024 could, in practice, adopt a zero Hardham baseline based primarily on Southern Water's available water supply in times of drought does not particularly assist [8.32-8.36]. It comes largely from a disagreement between the parties around how ably water supply coped in response to the 2022 drought [7.79, 8.32-8.36]. For reasons that include the lack of certainty about demand management measures and the availability of alternative sources (discussed below) there isn't the evidence to conclude on this point one way or another.

10.66 Overall, there is not the certainty in the draft WRMP 2024 or its accompanying HRA to conclude that any of the specific measures within it provide reasonable certainty of no adverse effects on the integrity of the Arun Valley Sites will result from the proposal. Other bodies can be expected fulfil their legal obligations under the Habitats Regulations. This includes Southern Water concluding any necessary favourable appropriate assessment, unless IRPOI applies. However, as the question of 'how' and 'when' lacks reasonable certainty.

10.67 The Appellant answers a firm 'no' to their own question of '*whether supply sources in the WRMP 2024 include groundwater abstraction at Hardham, at levels that cannot be excluded from the potential of harm to the integrity of the protected site'* [7.63]. For the reasons set out above a response of 'we don't know' is a more accurate answer. I recommend that the Secretary of State takes the same view based on the available evidence.

10.68 In these circumstances the Secretary of State is being asked to do little more than rely on the unspecified future action of parties fulfilling responsibilities under the Habitats Regulations under other regulatory regimes, including the assumption that any necessary favourable HRA must come forward. The Secretary of State is entitled to assume that other regimes will operative effectively. However, without more detail of what will happen and when, in this case it does not provide evidence of reasonable certainty that can be relied upon to confirm that no adverse effects on the integrity of the Arun Valley Sites will result from the proposal.

10.69 It is the Appellant's case that addition water demand (including form the proposal) can be met by a combination of greater utilisation of other sources of supply and/or demand management measures [7.65]. Neither of these are secured mitigation measures for the proposal. Instead, they support the Appellant's case that the Secretary of State can rely on other regulatory regimes to avoid/mitigate the likely adverse effects on the Arun Valley Sites and have confidence that supply side options for doing so can be utilised without the need for water neutrality. The merits of both are discussed below.

Alternative sources of supply *[7.71-7.80, 8.47-8.62]*

10.70 Evidence on alternative sources of supply supports the Appellant's argument that a resulting loss of supply from groundwater extraction Hadham ceasing to 2030[71] can be made up elsewhere [7.64]. As there is no detailed evidence before the Inquiry to contradict the Appellant's worst case scenario deficit assumptions, and they otherwise appear fair, is it reasonable to adopt them as a starting point [7.76].

10.71 In relation to Weir Wood, the statutory notice under regulation 28(4) of the Water Supply (Water Quality) Regulations 2016 was available to the Inquiry [**ID6**]. There is no detailed evidence about progress towards completing the measures in the statutory notice and the likelihood of it becoming operational by 31 March 2025. On the other hand, there is no evidence to suggest the statutory notice will not be complied with. The Secretary of State is also entitled to assume that the regime under the Water Supply Regulations will

[71] see para 7.73 of this report on the relevance of 2030

operate effectively [7.75]. The Council's information from the Statement of Responses does not cast serious doubt over the timings, as they are driven by the statutory notice [8.54-8.55]. Unlike the Environment Agency's consideration of the Hardham licence, which is dependent on the Sustainability Review reporting, there is reasonable certainty of outcome on the timing of Weir Wood becoming operational.

10.72 How the additional supply from Weir Wood would be used is a different matter. The Statement of Responses[72] references Southern Water's 'current pressures from the treatment works outage at Weir Wood', which is also acknowledged by the Appellant's witness on Water Supply[73]. There is also evidence of ongoing issues with the Littlehampton Water Treatment Works [8.56-8.58]. As such, the degree to which additional supply from Weir Wood is needed to address existing pressures, rather than serve new growth, is unclear. As is the nature of any contractual agreement with other water companies to export water elsewhere [8.56]. For these reasons, although on the face of it Wier Wood is capable of making up for a loss of supply resulting from cessation of groundwater extraction at Hardham, there is not reasonable certainty in the evidence provided that would be the outcome.

10.73 In these circumstances, a condition preventing occupation of the development until at least 31 March 2025 would serve no planning purpose and would not, therefore, pass the test of necessity in the Framework [7.77].

10.74 The bulk supply agreements between Southern Water and Portsmouth Water and SES Water respectively are subject to commercial contracts that are not before the Inquiry or otherwise in the public domain. The Council takes issue with the availability of the supplies [8.48-8.53]. In my view the lack of reasonable certainty comes more fundamentally from the absence of transparency around the terms of the contracts. As such, while they may in theory provide supply capable of making up for a cessation of groundwater extraction at Hardham, reasonable certainty of supply in practice cannot be concluded upon.

10.75 In summary, there are alternatives to serving new development other than from additional groundwater abstraction at Hardham. The Secretary of State should give some weight to the options as potentially available alternatives if a decision is taken in the future to cease groundwater abstraction at Hardham. However, the need for them being theoretical and questionable evidence that their availability is secured, places limits on the weight that can be attached.

Demand management savings [7.54-7.62, 8.69, 8.71]

10.76 The Appellant's arguments on demand management savings are enabled principally by their consideration of the measures in the WRMP 2019 and how they are treated in the Part C Report to generate what is referred to as the Southern Water contribution [7.54-7.57]. It is by utilising the contribution that the Appellant claims that the proposal is already water neutral as it is 'accounted for' in Southern Water's WRM2019. More generally, demand management savings provide further evidence that addition water demand for development

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[72] page 7 [CD8 1.04]
[73] paragraph 6.27 [CD10 1.02a]

can be met from other sources without the need for water neutrality [7.58-7.59][74].

10.77 Taking a step back, the purpose of the Part C Report is to set out a strategy for achieving water neutrality in the WSZ and provide part of the evidence base to support the adoption of Local Plans in Horsham and the other affected Local Planning Authorities. The strategy has three components, (1) reducing water demand through new build efficiency targets modelled on 110 or 85 l/p/d[75], (2) offsetting through the Southern Water contribution, and (3) offsetting the remaining demand by other means using the planning system (through the strategic approach that has become SNOWS or a bespoke solution)[76]. The three components are intended to work together to provide the coverage necessary to say that water neutrality in the WSZ is achieved, delivering reasonable scientific and practical certainty of no likely adverse effects on the Arun Valley Sites. The success or failure of one component has an impact on the other two.

10.78 The Southern Water contribution is drawn from the WRMP 2019 and the demand management measures within it aimed at reducing household water consumption and leakage. The Part C Report makes an allowance to account for these measures to determine an assumed Southern Water contribution. It is therefore an estimate intended to inform the strategy in the Part C Report based on the evidence available on that time.

10.79 The Environment Agency/Ofwat/Defra letter to Southern Water of 20 October 2023 refers to concerns that the company has reported a supply-demand balance significantly below what is forecast in the WRMP 2019, driven in large part by leakage[77]. No updates to the Part C Report have been made since its publication assessing the continuing appropriateness of the assumed Southern Water contribution. The evidence available to the Inquiry suggests that, as the underlying figures are open to question, it cannot be relied upon to create the 6345 to 8335 dwelling headroom claimed by the Appellant.

10.80 The Appellant appears to accept that the figures may lack realism and the Council is under no specific duty to bring forward alternative figures in circumstances where the October 2023 letter to Southern Water is enough to cast serious doubt. As such, the extent of assumed reductions from demand management measures is evidentially unclear and the lack of clarity does not support the Appellant's case that the proposal is 'accounted for' in the WRMP 2019. The question of whether water supply from alternative sources can be assumed, even in the absence of savings from demand management measures, is addressed elsewhere in this report [7.61-7.62].

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[74] the Appellant's detailed reasoning explaining how the proposal is accounted for in the WRMP 2019 can be found in paragraphs 8.15-8.45 of their Statement of Case [CD7 1.01]

[75] for information, it is the difference between these two modelled scenarios that creates the 6345–8335 dwelling margin, depending on whether a 100 or 85 l/p/d efficiency target is utilised/achieved.

[76] a summary can be found in the Executive Summary to the Part C Report on page iv + [CD8. 1.14c]

[77] pages 1 and 2 and accompanying table heading 'leakage', Appendix 1 of [CD10 1.02a]

10.81 The 'conceptual division' of development needs is a tool of the Appellant's invention [7.59]. It appears to come from discussion around the remaining demand to be offset explained in section 5.2.4 of the Part C Report. However, categorisation of development 'needs' was never the purpose of the Part C Report, nor was it intended to be used directly to support development management decisions or in the manner utilised by the Appellant.

10.82 As a strategic development allocated in the HDLP, Kilnwood Vale quite clearly formed part of the baseline informing the WRMP 2019. In this respect, the proposal is 'planned for'. However, this is irrelevant when viewed in the context of the NE Position Statement that distinguishes development in only two ways (1) development with full planning permission prior to September 2021 that is exempt from the statement as it cannot act retrospectively, and (2) other development. The Appellant's claim that there is another category in the middle that the proposal falls into is fictitious and, in any event, is based on figures that (for reasons explained above) are open to question. In this respect, there is no evidentially clear 'headroom' to utilise. Even if there were, there is no evidence on how such headroom would be apportioned to support the insistence that this proposal must be entitled to use it.

10.83 It does not appear to be in dispute that the proposal can achieve water efficiency that would meet the target of 110 l/p/d. Indeed, the open market dwellings are calculated as 91.40 l/p/d. Achievement of this could be secured by conditions. However, for the reasons above, that does not assist with confirming that the proposal would fall within any perceived headroom alluded to in the Part C Report.

10.84 In summary, I recommend that the Secretary of State does not agree that the extent of demand management savings programmed by Southern Water provides reasonably certain further evidence that additional water demand for development can be met from other sources without the need for water neutrality. Further, I recommend the Appellant's arguments that the proposal can fairly utilise 'headroom' they believe the Part C Report confirms as available are rejected. Neither of these provide evidence of reasonable certainty that the Secretary of State can rely upon to confirm that no adverse effects on the integrity of the Arun Valley Sites will result from the proposal.

Conclusions

10.85 To summarise, in my view the Secretary of State is entitled to assume that other regulatory regimes will operate effectively. In principle, this can provide reasonable certainty of mitigation/avoidance of likely significant effects on a European site and a positive appropriate assessment to be concluded to discharge of the duty under Regulation 63(5) of the Habitats Regulations.

10.86 However, the evidence in this case does not allow such a conclusion to be reached. Existing voluntary minimisation of groundwater extraction at Hardham by Southern Water is only designed to be a short term measure in advance of the Sustainability Review reporting. It is not of itself an appropriate mitigation measure for the proposal. While they be expected to fulfil their legal objections, the unspecified future action of the Environment Agency and/or Southern Water in response to the Sustainability Review does not provide reasonable certainty of no adverse effects on integrity due to the lack of detail about what action will be taken and when.

10.87 The draft WRMP 2024 and the accompanying HRA are subject to change and do not, of themselves provide reasonable certainty of avoidance/mitigation measures. This leaves the Secretary of State relying on the generality of the WRMP process itself and the fact that the WRMP 2024 would either need to conclude a favourable appropriate assessment or make an IROPI case. There is little certainty here, nor about whether the detail, coverage, and spatial scale of the WRMP 2024 could be used as an appropriate basis for decision making on the proposal.

10.88 The evidence does not, with reasonable certainty, support the Appellant's case that Southern Water's WRMP 2019 demand management savings provide reliable evidence that additional water demand arising from development can be appropriately met from this source and the claim that the Part C Report confirms the existence of headroom that the proposal can fairly utilise is without merit.

10.89 The question of availability of alternative sources of supply is a complex one, due primarily to fluid nature of contractual arrangements between water companies and the lack of public transparency on the terms of such arrangements. The evidence does not allow a specific source of alternative supply to be identified, nor is there a need for there to be one. However it does, in general, point towards some capacity in supply that the Secretary of State can take confidence in should groundwater abstraction at Hardham need to cease in the future.

10.90 In conclusion, based on the evidence provided, taken separately or as a whole the Appellant's evidence of avoidance/mitigation does not lead me conclude that it can be ascertained (with reasonable certainty) that the proposal will not adversely affect the integrity of the Arun Valley Sites.

10.91 If the Secretary of the State is of the view that the Appellant's evidence of avoidance/mitigation result in a favourable conclusion on adverse effects, they are entitled to conclude a positive appropriate assessment on this basis. There would be no need to go on to consider conditions or other restrictions in the section below.

<u>Would compliance with conditions or other restrictions enable it to be ascertained that it the proposal would not adversely affect the integrity of the site?</u>

10.92 In the absence of being able to otherwise ascertain that it the proposal would not adversely affect the integrity of the Arun Valley Sites, it falls to consider whether use the Council's suggested pre-commencement condition on page 27 of **[ID11]** requiring water neutrality mitigation to be secured via SNOWS would allow a favourable appropriate assessment to be concluded. The suggested condition is as follows:

> *No development shall commence until water neutrality mitigation has been secured via Horsham District Council's adopted Offsetting Scheme (in line with the recommendations of the Sussex North Water Neutrality Study: Part C – Mitigation Strategy, Final Report, December 2022) and this has been confirmed in writing by Horsham District Council.*

10.93 Although Natural England have not commented on the wording or suitability of the condition, as they see that as being beyond their expertise, they advise that any such condition should lead to scientific and practical certainty of ensuring no adverse effects [9.24]. In my view, it is appropriate to clarify that the standard should be 'reasonable certainty' to be consistent with the caselaw principles discussed elsewhere in this report.

10.94 SNOWS is part of the strategic approach to achieving water naturality that is designed to provide one way of addressing the issues raised by the NE Position Statement and it is endorsed by Natural England[78]. The overall mitigation strategy in the Part C Report is only effective when all three of its elements[79] work together. SNOWS is designed to 'make up' for any deficit left over from the other 2 elements through Local Authority offsetting and, taking a step back to look at the Part C Report as a whole, is capable of responding with reasonable flexibility to adjust to the best available evidence at particular times.

10.95 In these circumstances, a negatively worded/Grampian condition requiring accordance with SNOWS, and therefore water neutrality, can in principle provide reasonable certainty of no adverse effects on the integrity of the Arun Valley Sites. This is subject to an accompanying condition relating to on-site water efficiency that would achieve levels within the targets contemplated by the Part C Report, and therefore be consistent with the wider mitigation strategy. Section 4 of the Appellant's Water Neutrality Statement provides evidence that this would be achievable [**CD10 1.03a]**[80]**.** This condition is recommended in Annex 4 of this report at Condition 5.

10.96 Turning to national policy and guidance on the use of conditions. The points above lead me to conclude that a SNOWS condition would be necessity to secure accordance with the Habitats Regulations. As such, one of the Framework tests at paragraph 56 would be met. I would also not take issue that the condition would be relevant, enforceable, capable of precision.

10.97 The only remaining question on the paragraph 56 tests worthy of detailed examination is whether such a condition would be reasonable. As it specifically addresses the use of Grampian conditions, the following PPG principle should also be considered in more detail '*such conditions should not be used where there are no prospects at all of the action in question being performed within the time-limit imposed by the permission*'[81].

10.98 SNOWS is not currently operational which, according to the Council, will not happen until later in 2024. The Proof of Evidence from one of the Council's witnesses provides details of progress on SNOWS [**CD10 1.05d]**[82]**.** Its introduction is subject to matters that include agreement between the relevant Local Planning Authorities around prioritisation of access, the tariff that

[78] [CD8 1.22]
[79] (1) reducing water demand through defined water efficiency requirements for new development, (2) water company demand management delivery, and (3) SNOWS
[80] Appendix A
[81] reference ID: 21a-009-20140306
[82] paragraph 3.6- 3.15

developers looking to use SNOWS will be asked to pay, and (related to this) an update to capacity and costs calculations to reflect the latest figures on water demand forecasts and the WRMP 2024.

10.99 These matters are substantially outside the Council's control and have the potential to impact on the introduction date for SNOWS. They will also affect when a developer can be expected to have access to SNOWS post introduction and the tariff they would be asked to pay.

10.100 In these circumstances, notwithstanding the Appellant's willingness to accept the condition in the absence of anything else short of an unfavourable appropriate assessment, in my view the Council's suggested condition as drafted stretches the test of reasonableness. Nevertheless, there are two appeal[83] decisions before the Inquiry where residential development in Horsham was allowed and a similar condition was used.

10.101 Lower Broadbridge Farm was for development on unallocated land, with a Grampian condition and unilateral undertaking providing restrictions that would prevent implementation until either a water neutrality scheme had been approved and implemented or, alternatively, use of SNOWS when available. In this case, neither the mitigation land nor landowner for the water neutrality scheme were identified at the point the decision was made.

10.102 In the case of Storrington, the land was allocated in a neighbourhood plan with a Grampian condition restricting development until a site-specific water neutrality mitigation scheme had been agreed and implemented or, alternatively, use of SNOWS when available. In this case, more detail of the site-specific mitigation scheme and land were known at the decision date than was the case in Lower Broadbridge Farm.

10.103 Both decisions consider their respective conditions against the tests in the Framework and conclude that they were necessary to confirm no adverse effects on the integrity of the Arun Valley Sites[84]. Both acknowledge the uncertainty related to SNOWS and prioritisation of access to it for their proposals but do not identify these issues as a barrier to linking conditions to it.

10.104 For this proposal, while the Council cast some doubt over prioritisation of access in oral evidence at the Inquiry, their acceptance that the proposal may well score highly in the prioritisation system when it is finalised in the Proof of Evidence from one their witnesses is a fair reflection of the position[85]. This does not appear to be a materially different situation to the one presented to the Inspectors in the two appeal cases, where a favourable conclusion was reached. There is no evidence in this case leading me to recommend a contrary view. As such, I consider that there is some prospect that the proposal would be able to access the SNOWS scheme within the permission

[83] Lower Broadbridge Farm (APP/Z3825/W/23/3321658) [ID3] and Storrington (APP/Z3825/W/22/3308455 & APP/Y9507/W/22/3308461) [CD5 1.03]

[84] see analysis at paragraphs 13 to 56 and condition 12 (in the Lower Broadbridge Farm decision) and paragraphs 67 to 109 and condition 13 (in the Storrington decision)

[85] see paragraph 4.10 of [CD10 1.05d]

time limit and a condition securing this would accord with the principle in the PPG.

10.105 On the more general question of reasonableness, it is notable that in both the Lower Broadbridge Farm and Storrington cases accessing SNOWS is specified in the absence of a bespoke water neutrality solution being implemented. This is essentially using SNOWS as a fallback and differs from the present proposal where, as currently drafted, offsetting via SNOWS would be the only option available to the developer.

10.106 Considering the points above, to ensure a SNOWs condition for this proposal is reasonable, and therefore in full accordance with the paragraph 56 Framework tests, there needs to be an option within it for a bespoke specific water neutrality scheme to be brought forward. Otherwise, the developer would be tied to the use of SNOWS regardless of prioritisation or the tariff. Provided such a scheme were approved by the Local Planning Authority, adopting this approach would not introduce uncertainty into the process in a way that may offend the Habitats Regulations.

10.107 Accommodating the possibility of a bespoke specific water neutrality scheme within the condition for the proposal would not be dissimilar to the circumstances in Lower Broadbridge Farm, where neither the mitigation land nor landowner for the water neutrality scheme were identified at the point the decision was made. As such, this approach would be consistent with other appeal decisions.

10.108 The option of amending the Council's suggested condition in this way was discussed with the parties at the Inquiry, with the Appellant supporting the approach and the Council being prepared to accept it if necessary to resolve any concerns I might have around reasonableness. The Council's position is reflected in paragraph 81 of their Closing [**ID9**].

10.109 Turning to the trigger for the condition, the need for water neutrality arises because of the occupation of the dwellings. This is because it is the use of water by the end users that gives rise to likely adverse effects on the Arun Valley sites. As there is no evidence of risks from construction, the Council's suggested pre-commencement trigger arguably lacks clear justification as the condition could be linked to occupation and still fulfil its intended purpose. This brings into question whether it would accord with the final sentence of paragraph 56 of the Framework.

10.110 In oral evidence at the Inquiry, the Council argued that an occupation trigger would make administration and enforcement of the conditions difficult, as rectifying potential breaches becomes harder when people are living in the homes. This is an understandable but generic argument with no specific evidence before the Inquiry of risk. It does not amount to clear justification. As such, a prior to occupation trigger would be a more pragmatic approach in this case as it would give the developer an option to construct the dwellings ahead of SNOWS becoming operational if they wished to do so, whilst at the same time not authorising the action that gives rise to likely adverse effects until the condition is discharged. I recommend this approach.

10.111 Considering the above, Condition 6 of Annex 4 in this report recommends the adopting the Council's suggested SNOWs condition, subject to the following main amendments:

- Use of a prior to occupation trigger in preference to pre-commencement.
- The addition of an option to agree and subsequently implement a site-specific water neutrality scheme.

10.112 For these reasons, I recommend that compliance with conditions enables the Secretary of State to ascertain that the proposal would not adversely affect the integrity of the Arun Valley sites.

Conclusion of appropriate assessment

10.113 Considering the assessment and conclusions carried out above, and subject to compliance with conditions, the Secretary of State is able to ascertain with reasonable certainty that the proposal would not adversely affect the integrity of the Arun Valley Sites. The Secretary of State is therefore able to conclude a favourable appropriate assessment and discharge their duty under Regulation 63(5) of the Habitats Regulations. I recommend that the Secretary of State adopts this section of the report, and the references included, as their appropriate assessment of the proposal.

10.114 In fulfilling this duty, regard has been paid to representations for Natural England, as the appropriate nature conservation body for the purposes of Regulation 63(3) of the Habitats Regulations. Natural England not appearing at the Inquiry has not lessened the regard paid to their representations [7.84].

Approval of the reserved matters

10.115 Sections 4 and 5 of the Appellant's Statement of Case [**CD7 1.01**] presents their view on the detail of the reserved matters. The Council have provided their assessment in section 3 of their Statement of Case [**CD7 1.02a**]. Section 6 of the SOCG [**ID11**] agrees the matters as common ground. Together, they provide adequate reasoning for why the proposal accords with the parameter plans, the Section 106 under the Outline Permission, and accords with relevant policies in the current development plan, including the policies described in Section 5 of this report.

10.116 Prior to the Inquiry, there was an unresolved issue related to flood risk and drainage [9.29]. There was disagreement about the proposed sustainable drainage system, specifically the appropriate figure (CV value) that should be used within the surface water calculations. The issue drew a holding objection from the LLFA and motivated them to submit a proof of evidence to the inquiry [**CD10 1.06**].

10.117 Ultimately, following discussion between the parties ahead of the Inquiry, the LLFA withdrew their objection and didn't appear. Two updated drawings [**ID4** and **ID5**] arise from the discussions that took place and alter the surface water systems serving sub phase 3DEFG to increase pipe sizes and ensure there will be no increase in flood risk on or off the site.

10.118 Considering the technical nature of the updated drawings, no fairness or other issues resulted from allowing them to be added as inquiry documents. Subject to the updated drawings being specified in an approved details condition, I recommend agreeing that the proposal would be acceptable in flood risk and drainage terms.

10.119 Colgate Parish Council and a letter from a neighbour both question whether the wider development at Kilnwood Vale accords with the governing S106 agreement, particularly in terms of provision of community facilities. The Council has not raised any concerns in this regard and, while the S106 was not before the Inquiry, the Council's appraisal supports a view that sub phase 3DEFG accords with it. Any enforcement of the wider S106 provisions is beyond the remit of this appeal.

10.120 Beyond this, there is little I can add to the assessment of matters unrelated to habitats effects provided by the Council, supported by the SOCG, other than to say that I agree with it and recommend adopting the reasoning. For these reasons, the reserved matters can be approved subject to the conditions discussed below.

Planning balance

10.121 The planning balance presents three options for the Secretary of State. My recommendation is that the Option 1 is adopted. Although they are alternative courses of action, I do not recommend adopting either Option 2 or Option 3 for the reasons provided.

Option 1 (recommended)

10.122 Firstly, if it is agreed that Condition 6 at Annex 4 of this report requiring water neutrality is necessary and appropriate, for the reasons discussed above[10.90-10.110], the proposal accords with the development plan for the area as a whole and therefore benefits from the statutory presumption in S38(6) of the 2004 Act. As appropriate mitigation measures would be provided by the condition securing water neutrality, which is the basis for concluding a favourable appropriate assessment[10.111-10.112], there is no conflict with Policy 31(4) of the HDPF [5.6] and the development plan taken as whole. Paragraph 11(c) of the Framework indicates that the proposal should be approved without delay. As such, my recommendation is that the reserved matters should be approved.

Option 2

10.123 Secondly, if the Secretary of State thinks that the Appellant's evidence of avoidance/mitigation allows a favourable appropriate assessment to be concluded, the water neutrality condition is likely to be become unnecessary and reserved matters can be approved using the same pathway explained in the paragraph above.

Option 3

10.124 As a final option, if the Secretary of State does not think that the Appellant's evidence of avoidance/mitigation allows a favourable appropriate assessment to be concluded and disagrees with the use of the water neutrality condition, the proposal would not, in my view, accord with Policy 31(4) of the HDPF due to an absence of appropriate mitigation and compensation measures. It would also conflict with the environmental objective in the Framework of protecting the natural environment [5.19]. Approval of the proposal in these circumstances would also be in breach of the Secretary of State's duty under Regulation 63(5) of the Habitats Regulations. This would be a very significant material consideration to be weighed against other considerations.

10.125 The Council's housing land supply position is uncontested and poor [7.43]. There is no dispute that Kilnwood Vale is an important contributor to delivery. It is a long-standing allocation that has been part of Council's spatial strategy for circa 15 years. It has outline planning permission and substantial parts that have been implemented through other phases.

10.126 The Appellant's frustration at the delay to Sub Phase 3DEFG is understandable, although there is no evidence that they seriously explored a site-specific solution that may have assisted with managing a delay. Regardless, implementation of Sub Phase 3DEFG accords with Framework on delivering a sufficient supply of homes and is a significant material consideration [5.18].

10.127 The statement of case of the Appellant's planning witness [**CD10 1.101a]**[86] sets out a full range of planning benefits associated with the proposal. I would not take issue with any of them. Collectively the benefits are significant material considerations.

10.128 It is also important to highlight that there are currently occupied homes at Kilnwood Vale with people living day to day with an incomplete development and an absence of local services that are related, directly or indirectly, to the delivery of Sub Phase 3DEFG. Delay in completion effects the establishment of the community and the lives of those currently living there. As an ongoing construction project, delay would likely get to a point where the continuing employment of site staff would be put at risk.

[86] Paragraphs 9.10-9.36

10.129 Neither of these points are substantially evidenced but are natural and immediate consequences that should not be lost sight of.

10.130 The balance of benefits is tempered by the fact that the length of actual delay in any of the scenarios considered in this report is not extensively evidenced. Nevertheless, the benefits are significant material considerations.

10.131 Weighing these matters up, notwithstanding the significance of the benefits, they do not outweigh the conflict with legal obligations in the Habitats Regulations that would, in the absence of a favourable appropriate assessment, put the Secretary of State in breach of the duty under Regulation 63(5). As such, my recommended decision under this third option would be a dismissal of the appeal.

10.132 For completeness, the presumption at Paragraph 11(d) of the Framework is not relevant in this scenario as the application of Framework policies that protect areas particular importance[87] provides a clear reason for refusing the proposal.

Conclusion on planning balance

10.133 To directly address the reason for recovery [1.7], for the reasons discussed above, Regulation 63 of the Habitats Regulations does not allow for a balancing of different planning objectives beyond affects on the integrity of the Arun Valley Sites [10.13-10.20]. While an ordinary consideration of the planning balance under S38(6) of the 2004 Act allows for a wider balance, breach of the legal obligations under the Habitats Regulations weighs overwhelmingly in the balance, even in the face of other very important policy objectives.

10.134 In opening, the Appellant said that the intention of the appeal is expressly to test the validity of the NE Position Statement and the Council's response to it [**ID1**][88]. With due respect, the wider public policy questions this encompasses includes elements that are outside the scope of the decision that is before the Secretary of State. At this project level the question is fundamentally about whether, on a proper application of the law as it stands, accordance with the Habitats Regulations can be secured to allow agreement of the reserved matters for Sub Phase 3DEFG.

10.135 When considered on this basis, I recommend that reserved matters should be approved in line with the first option discussed above[10.120].

[87] Which, under footnote 7, includes Habitats sites and/or SSSIs
[88] paragraph 7

11. Conditions

11.1 Should the appeal be allowed, recommended conditions and the reasons for them, are attached at Annex 4. Unless otherwise stated they are as per the list at Appendix 2 of the SOCG [**ID11],** except for any minor drafting changes/amalgamation needed for clarity. The list was updated following the Inquiry and discussion about their accordance with Paragraph 56 of the Framework.

11.2 The water neutrality conditions are discussed in paragraphs 10.90 to 10.110 of this report.

11.3 Although suggested by the LLFA, I do not recommend a separate condition requiring accordance with drainage plans (see Condition 14, SOCG, Appendix 2). This would be unnecessary as it would replicate the plans condition at Condition 1, which contains the drainage plans.

11.4 Conditions 14 and 15 relating to foul water and fire and rescue were not discussed at the Inquiry and come at the suggestion of the relevant consultees. This appears simply to have been an oversight, as the Appellant will have had the opportunity to review the consultation responses. Examining the contents, I recommend including them for the reasons set out.

12. Inspector's recommendation

12.1 For the reasons set out above, I recommend that the application for reserved matters approval be granted subject to the conditions in Annex 4.

Annex 1: Appearances

FOR THE APPELLANT:

Counsel for the Appellant - Christopher Boyle KC (Landmark Chambers)

Witnesses:

Alistair Baxter CEcol CEnv MCIEEM (Aspect Ecology)
Alistair Aitken C Eng MICE MCIWEM C.WEM (Fortridge Consulting Limited)
Dan Smyth BSc, MSc, DIC (Savills)
Sarah Beuden BSc MSc MRTPI (Savills)

FOR THE LOCAL PLANNING AUTHORITY:

Counsel for the Local Planning Authority – Noemi Byrd (6 Pump Court)

Witnesses:

Tal Kleiman (Horsham District Council)
Adrian Smith (Horsham District Council)

Annex 2: Core Documents

Agreed between the parties as core documents ahead of the inquiry. Full documents can be accessed here.

CD1: Planning Application Documents and Plans

Reference	Content
CD1 1.01	Shadow Habitats Regulations Assessment (October 2022)
CD1 1.02	Shadow Habitats Regulations Assessment Addendum (Drawing: August 2023, Ref N/A)
CD1 1.03	Water Neutrality Statement (Drawing: August 2023, Ref N/A)
CD1 1.04	Preliminary Surface and Foul Water Drainage Strategy (Sheet 1 of 2) (Drawing: 2107120-002, Ref D)
CD1 1.05	Preliminary Surface and Foul Water Drainage Strategy (Sheet 2 of 2) (Drawing: 2107120-003, Ref D)
CD1 1.06	Preliminary Surface and Foul Water Drainage Strategy (Sheet 1 of 2) (Drawing: 2107120-002, Ref E)
CD1 1.07	Preliminary Surface and Foul Water Drainage Strategy (Sheet 2 of 2) (Drawing: 2107120-003, Ref E)
CD1 1.08	PPS25 Flood Risk Assessment (Drawing: July 2010, Ref N/A)
CD1 1.09	Site Wide Drainage Strategy Report (Drawing: December 2016, Ref D5)
CD1 1.10	Applicant Response to LLFA Holding Objection (Drawing: 07.08.2023, Ref N/A)
CD1 1.11	Drainage Strategy Briefing Note (Drawing: 04.08.2023, Ref A)
CD1 1.12	Drainage Strategy Briefing Note (Drawing: 29.09.23, Ref B)
CD1 1.13	Phase 2 and 3 Remaining Infrastructure Drainage Report (Drawing: October 2023, Ref N/A)
CD1 1.14	Site Location Plan

CD2: Original Application Relevant Documents

Reference	Content
CD2 1.01	Kilnwood Vale Outline Consent Decision Notice (October 2011)
CD2 1.02	Kilnwood Vale Section 73 DC/15/2813 Decision Notice (April 2016)
CD2 1.03	DAS Addendum (December 2015)

CD2 1.04	Phasing Plan (Drawing: 321, Rev ADD02)
CD2 1.05	Building Heights Plan (Drawing: 361, Rev ADD03)
CD2 1.06	Density Plan (Drawing: 322, Rev ADD05)
CD2 1.07	Land Use Plan (Drawing: 321, Rev ADD04)
CD2 1.08	Movement Plan (Drawing: 351, Rev ADD03)
CD2 1.09	Open Space Plan (Drawing: 322, Rev ADD01)
CD2 1.10	Pedestrian and Cycle Plan (Drawing: 351, Rev ADD02)
CD2 1.11	Illustrative Masterplan Phasing Plan

CD3: Documents not part of original application

Reference	Content
CD3 1.01	Applicant's response to the Lead Local Flood Authority's Holding Objection (7 December 2023
CD3 1.02	Drainage Strategy Briefing Note (Ref: 2107120-01C)

CD4: The Development Plan and Evidence Base

Reference	Content
CD4 1.01	Horsham District Planning Framework (November 2015)
CD4 1.02	Horsham District Local Plan 2023-2040 Regulation 19 (January 2024)
CD4 1.03	Horsham District Local Plan: Habitats Regulations Assessment (November 2023)
CD4 1.04	Annual Monitoring Report 2022/23 (18 January 2024)
CD4 1.05	Local Plan Viability Study (Aspinal Verdi, November 2023)
CD4 1.06	Joint Topic Paper: Water Neutrality (HDC & others, May 2023)
CD4 1.07	Water Neutrality Statement of Common Ground (HDC & Others, July 2023)

CD5: Relevant Planning Appeal Decisions and High Court Judgements

Reference	Content
CD5 1.01	Judgement: R (An Taisce) v SSECC - [2014] EWCA Civ 1111 1 August 2014
CD5 1.02	Judgement: R (Together Against Sizewell C) v SoS for Energy Security and Net Zero [2023] EWHC 1526 22 June 2023
CD5 1.03	Appeal A Ref: APP/Z3825/W/22/3308455 Land west of Ravenscroft, Storrington, West Sussex RH20 4HE Appeal B Ref: APP/Y9507/W/22/3308461 Land west of Ravenscroft, Storrington, West Sussex RH20 4EH
CD5 1.04	Appeal ref. APP/Z3825/W/22/3308627 Copsale Road Appeal on 3rd October 2023
CD5 1.05	Wyatt v Fareham BC [2023] Env. L.R. 14
CD5 1.06	Appeal Ref : APP/Z3825/W/23/3324144 Land North of The Rise, Partridge Green – 8 February 2024
CD5 1.07	Appeal Ref: APP/Z3825/W/23/3321658 - Lower Broadbridge Farm
CD5 1.08	Judgement - Harris v Environment Agency [2022] EWHC 2263 (Admin)

CD6: Statutory Consultee Responses

Reference	Content
CD6 1.01	Natural England (12 September 2023)
CD6 1.02	Lead Local Flood Authority (22 May 2023)
CD6 1.03	Lead Local Flood Authority (18 October 2023)

CD7: Appeal Documents

Reference	Content
CD7 1.01	Appellant Full Statement of Case (January 2024)
CD7 1.02	HDC Statement of Case (January 2024)

CD8: Other

Reference	Content
CD8 1.01	Southern Water Water Resources Management Plan (December 2019)
CD8 1.02	Southern Water Draft Water Resources Management Plan (2024)
CD8 1.03	Southern Water: Draft Water Resources Management Plan 2024 Statement of Response August 2023
CD8 1.04	Southern Water : Water Resources Management Plan 2024 Statement of Response Annex 5.2: Responses to non questionnaire respondents by organisations August 2023 Version 1
CD8 1.05	Southern Water: Water Resources Management Plan 2019 Annex 10: Strategy for the Central area December 2019 Version 1
CD8 1.06	Southern Water: Draft Water Resources Management Plan 2024 Annex 17: Leakage Strategy October 2022 Version 1.0
CD8 1.08	Gov.Uk : Guidance Water resources planning guideline Updated 14 April 2023 https://www.gov.uk/government/publications/water-resources-planningguideline/water-resources-planning-guideline
CD8 1.09	Biodiversity and Geological Conservation: Circular 06/2005
CD8 1.10	National Planning Policy Framework
CD8 1.11	National Planning Practice Guidance
CD8 1.12	Water Neutrality and Planning Applications prepared by Horsham District Council (June 2023)
CD8 1.13	Water Neutrality and Planning Policy prepared by Horsham District Council (June 2023) https://www.horsham.gov.uk/planning/water-neutrality-in-horshamdistrict/water-neutrality-and-planning-policy
CD8 1.14a	JBA Consulting - Sussex North Water Neutrality Study: Parts A: Individual Local Authority Areas (July 2021)
CD8 1.14b	JBA Consulting - Sussex North Water Neutrality Study: Part B – In-combination (April 2022)
CD8 1.14c	JBA Consulting - Sussex North Water Neutrality Study: Part C - Mitigation Strategy (December 2022)
CD8 1.15	Natural England’s Water Neutrality: Position Statement and Response (2021)
CD8 1.16	Natural England’s Advice Note regarding Water Neutrality within the Sussex North Water Supply Zone prepared by Natural England (February 2022)
CD8 1.18	Natural England Correspondence (11 January 2024)
CD8 1.19	Correspondence from the Environment Agency (11 July 2023)
CD8 1.20	Correspondence from Southern Water (7 July 2023)

CD8 1.21	Southern Water Draft WRMP 2024 Annex 20 – Habitats Regulations Assessment
CD8 1.22	Natural England endorsement of Part C Position Statement (November 2022)
CD8 1.23	SN Authorities Water Neutrality Statement of Common Ground (July 2023)
CD8.1.24	Horsham Local Plan Water Technical Note (Aecom, March 2021)
CD8.1.25	HDC Rebuttal Land at Lower Broadbridge Farm. (Appeal ref. APP/Z3825/W/23/3321658
CD8.1.26	The Wallingford Procedure, Volume 1 Principles, Methods and Practice 1981
CD8.1.27	The Wallingford Procedure, Volume 4 Modified Rational Method, 1981
CD8.1.28	CIRIA X108 - Drainage of Development Sites - A Guide
CD8.1.29	CIRIA C753 The SuDS Manual
CD8 1.30	Water-stressed areas - final classification 2021
CD8 1.31	Glossary Combined (4.3.2024)

CD9: Statements of Common Ground

Reference	Content
CD9 1.01	Main Statement of Common Ground (February 2024)

CD10: Proofs of Evidence

Reference	Content
CD10 1.01	Appellant Planning – Miss Sarah Beuden
CD10 1.02	Appellant Water Supply, Demand and Resources – Mr Alistair Aitken
CD10 1.03	Appellant Water Calculations – Mr Daniel Smyth
CD10 1.04	Appellant HRA – Mr Alistair Baxter
CD10 1.05a	HDC HRA/Planning/Water – Mr Adrian Smith - Main
CD10 1.05b	HDC HRA/Planning/Water – Mr Adrian Smith - Summary
CD10 1.05c	HDC HRA/Planning/Water – Mr Adrian Smith – Appendix 1
CD10 1.05d	HDC Water Supply – Mr Tal Kleiman

CD10 1.05e	HDC Water Supply - Summary – Mr Tal Kleiman
CD10 1.06	Lead Local Flood Authority – Katherine Waters
CD10 1.07	Appellant Flood Risk – Mr Brian Cafferkey

Annex 3: Inquiry documents

Documents submitted during or after the Inquiry

Accepted on the basis that I was satisfied the material was directly relevant to, and necessary for, my decision and that no prejudice arose from accepting them. Documents can be accessed here.

- ID.1 Mr Boyle's (Appellant) opening statement
- ID.2 Ms Byrd's (Council) opening statement
- ID.3 3321658 Land at Broadbridge Heath Appeal Decision, 7 March 2024
- ID.4 Preliminary Surface and Foul Water Drainage Strategy (Sheet 1 of 2) (Drawing: 2107120-002, Ref G)
- ID.5 Preliminary Surface and Foul Water Drainage Strategy (Sheet 2 of 2) (Drawing: 2107120-003, Ref G)
- ID.6 Southern Water Services Limited – Weir Wood New Build Notice under regulation 28(4) of the Water Supply (Water Quality) Regulations 2016
- ID.7 Judgment – Harris v Environment Agency [2022] EWHC 2263 (Admin)
- ID.8 Source of Shadow HRA, Figure 5.1. SW 11 July 2022
- ID.9 Ms Byrd's (Council) Closing statement
- ID.10 Mr Boyle's (Appellant) Closing statement
- ID11 Final statement of common ground
- ID12 Clarification note in respect of access
- ID13 Natural England letter dated 19 April 2024
- ID14 Appellant's response to Natural England letter dated 19 April 2024

Annex 4 :Recommended conditions

1) The development hereby permitted shall be carried out in accordance with the approved plans listed in Appendix 1 of the Statement of Common Ground between Horsham District Council and Crest Nicholson Operations Limited dated 18 March 2024

   Reason: In the interests of certainty.

Pre-Commencement (Slab Level)

2) No development above ground floor-slab level shall commence until a schedule of materials, finishes and colours to be utilised for the external walls, windows and roofs of the approved buildings, has been submitted to and approved by the Local Planning Authority in writing. All materials to be utilised in the construction of the approved buildings shall, thereafter, conform to those approved.

   Reason: To ensure that the approved development is of a high quality of design and appearance and in accordance with Policy 33 of the Horsham District Planning Framework (2015).

3) No development shall commence above ground floor-slab level, until full details of underground services, including locations, dimensions and depths of all service facilities and required ground excavations, have been submitted to and approved by the Local Planning Authority in writing. The development shall be carried out as per the approved details and coordinated with the approved Residential Landscape Masterplan (ref: 30125-5 DR-5000 S4-P12), Softworks Proposals (3015-5-DR-5001-P9, 3015-5-DR-5002-P9, 3015-5-DR-5003-P6, 3015-5-DR-5004-P6, 3015-5-DR-5005-P6, 3015-5-DR-5006-P10, 3015-5-DR-5007-P10, 3015-5-DR-5007-P10 and 3015-5-DR-5008-P9) and Preliminary Surface and Foul Water Drainage Strategy (refs: 2107120-002 G and 2107120-003 G).

   Reason: To ensure the successful delivery of necessary underground services without conflict with the approved landscaping and drainage strategy, in accordance with Policies 33 and 38 of the Horsham District Planning Framework (2015).

4) No development shall commence above ground floor-slab level, until full details of any street-furniture to be installed, which can include any lighting columns, public cycle stands and bollards have been submitted to and approved by the Local Planning Authority in writing. The development shall be implemented in accordance with the approved details.

   Reason: To ensure that the approved development is of a high quality of design and appearance and in accordance with Policy 33 of the Horsham District Planning Framework (2015).

5) No development above ground floor slab level shall commence until full details of the water efficiency measures required to achieve a maximum of 91.4 l/p/d have been submitted to and approved in writing by the Local Planning Authority. The submitted details shall include the specification of all fixtures and fittings to be included in all dwellings, and a completed Part G calculator confirming the targeted water consumption is achieved.

   i. No dwelling hereby permitted shall be occupied until the approved water efficiency measures to serve that dwelling have been installed and made available for use in accordance with approved details, with evidence of installation submitted to an approved in the writing by the Local Planning Authority.
   ii. The installed water efficiency measures, or any subsequent replacement of measures over the lifetime of the development, shall achieve equivalent or higher standards of water efficiency to those approved unless otherwise agreed in writing with the Local Planning Authority.

   Reason: To ensure the development uses measures which promote the conservation of water in accordance with policies 35 and 37 of the Horsham District Planning Framework and to ensure the development is water neutral to avoid an adverse impact on the Arun Valley SAC, SPA and Ramsar sites.

Pre-Occupation

6) No dwelling hereby permitted shall be first occupied until written agreement from the Local Planning Authority has been provided that either:

   i. A water neutrality mitigation scheme has been secured via Horsham District Council's adopted Offsetting Scheme (in line with the recommendations of the Sussex North Water Neutrality Study: Part C – Mitigation Strategy, Final Report, December 2022). OR
   ii. A site-specific water neutrality mitigation scheme has been (a) agreed in writing with the Local Planning Authority as being equivalent to Horsham District Council's adopted Offsetting Scheme AND (b) implemented in full.

   Reason: To ensure the development is water neutral to avoid an adverse impact on the Arun Valley SAC, SPA and Ramsar sites in accordance with Policy 31 of the Horsham District Planning Framework (2015), Paragraphs 185 and 186 of the National Planning Policy Framework (2023), and duties under the Conservation of Habitats and Species Regulations 2017 (as amended).

7) All approved soft/ hard landscaping and boundary treatments within the curtilage of an approved building shall be implemented prior to the first occupation of that dwelling, in accordance with the approved soft/hard landscaping drawings, unless alternative hard and soft landscaping details and/or boundary treatments are submitted to and been approved in writing by the Local Planning Authority prior to the commencement of development above ground-floor slab level.

Reason: To ensure that the approved development is of a high quality of design and appearance and in accordance with Policy 33 of the Horsham District Planning Framework (2015).

8) All soft landscaping outside of the curtilage of an approved dwelling shall be carried out in the first planting and seeding season, following the first occupation of the relevant buildings or the completion of the development, whichever is the sooner. Any trees or plants detailed on the approved landscaping strategy which die, are removed, become seriously damaged or diseased, within a period of five years following the completion of the development shall be replaced with new planting of a similar size and species.

Reason: To ensure that the approved development is of a high quality of design and appearance and in accordance with Policy 33 of the Horsham District Planning Framework (2015).

9) Prior to the first occupation of any part of the development, a landscape management responsibilities plan (delineating areas of ownership and maintenance responsibility) for all communal landscape areas shall be submitted to and approved in writing by the Local Planning Authority. The landscape areas shall be managed and maintained in accordance with the approved details.

Reason: To ensure a satisfactory development and in the interests of visual amenity and nature conservation in accordance with Policy 33 of the Horsham District Planning Framework (2015).

10) No dwelling hereby permitted shall be occupied until secure covered cycle parking facilities to serve that dwelling have been constructed and made available for use in accordance with approved drawings. The cycle parking facilities shall thereafter be retained as such for their designated use.

Reason: To provide alternative travel options to the use of the car in accordance with Policy 40 of the Horsham District Planning Framework (2015).

11) No dwelling hereby permitted shall be occupied until the car parking spaces serving the respective dwellings have been constructed and made available for use in perpetuity. All unallocated (visitor) parking spaces shall be completed and made available for use prior to the completion of the development and shall, thereafter, remain available only for use as visitor parking.

    Reason: To ensure future occupiers benefit from sufficient access to parking facilities and in accordance with Policy 41 of the Horsham District Planning Framework (2015).

12) No part of the development shall be occupied until details of the proposed solar PV apparatus, including locations and amounts, have been submitted to and approved in writing by the Local Planning Authority. The equipment shall, be installed prior to the first occupation of each respective dwelling in accordance with the approved details.

    Reason: To provide certainty to the Local Planning Authority as to the extent of solar PV provision within the approved development, the extent of benefit to be derived in respect of the mitigation and minimisation of impacts of climate change and visual impacts of solar PV provision in accordance with the provisions of Policies 33, 35, 36 and 37 of the Horsham District Planning Framework (2015).

13) No dwelling shall be first occupied until secure covered provision for the storage of refuse and recycling has been made for that dwelling in accordance with the submitted plans. The refuse and facilities shall thereafter be retained for use at all times.

    Reason: To ensure that future occupiers benefit from sufficient facilities for the storage of refuse/ recycling bins and in the interests of visual amenity in accordance with Policies 32 and 33 of the Horsham District Planning Framework (2015).

14) No dwelling shall be first occupied until confirmation has been provided to the Local Planning Authority that either:- 1. All foul water network upgrades required to accommodate the additional flows from the development have been completed; or- 2. A development and infrastructure phasing plan has been agreed with the Local Authority in consultation with Thames Water to allow development to be occupied. Where a development and infrastructure phasing plan is agreed, no occupation shall take place other than in accordance with the agreed development and infrastructure phasing plan.

    Reason: To ensure that any necessary improvements to the foul water network are made ahead of occupation.

15) No dwelling shall be first occupied until details showing the location of fire hydrants and method of installation and maintenance in perpetuity have been submitted to and approved in writing by the Local Planning Authority, in consultation with West Sussex County Council's Fire and Rescue Service. The development shall be carried out in accordance with the approved details and retained as such, unless a variation is agreed with the Local Planning Authority.

    Reason: In the interests of emergency planning and in accordance with policy CP13 of the Horsham District Local Development Framework; Core Strategy and DC40 of the Horsham District Local Development Framework: General Development Control Policies (2007) and policy CP3 of the Horsham District Local Development Framework Core Strategy (2007), HDPF Policies 33 and 39.

Regulatory and monitoring

16) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (and/or any Order revoking, amending and/or re-enacting that Order), no roof extensions falling within Class B, Part 1, Schedule 2 of the Order shall be erected, constructed and/or installed to any dwelling hereby approved without express planning permission from the Local Planning Authority first being obtained.

    Reason: To ensure that the Local Planning Authority can fully consider whether prospective roof extensions adequately preserve the visual amenity of the area and privacy and living conditions of nearby occupiers in accordance with Policy 33 of the Horsham District Planning Framework (2015).

17) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (and/or any Order revoking, amending and/or re-enacting that Order), all garages hereby permitted shall be used only as private domestic garages for the parking of vehicles incidental to the use of the properties as dwellings and for no other purpose.

    Reason: To ensure adequate off-street provision of parking in the interests of amenity and highway safety, and in accordance with Policies 40 and 41 of the Horsham District Planning Framework.

Ministry of Housing,
Communities &
Local Government

www.gov.uk/mhclg

RIGHT TO CHALLENGE THE DECISION IN THE HIGH COURT

These notes are provided for guidance only and apply only to challenges under the legislation specified. If you require further advice on making any High Court challenge, or making an application for Judicial Review, you should consult a solicitor or other advisor or contact the Crown Office at the Royal Courts of Justice, King's Bench Division, Strand, London, WC2 2LL (0207 947 6000).

The attached decision is final unless it is successfully challenged in the Courts. The Secretary of State cannot amend or interpret the decision. It may be redetermined by the Secretary of State only if the decision is quashed by the Courts. However, if it is redetermined, it does not necessarily follow that the original decision will be reversed.

SECTION 1: PLANNING APPEALS AND CALLED-IN PLANNING APPLICATIONS

The decision may be challenged by making an application for permission to the High Court under section 288 of the Town and Country Planning Act 1990 (the TCP Act).

Challenges under Section 288 of the TCP Act

With the permission of the High Court under section 288 of the TCP Act, decisions on called-in applications under section 77 of the TCP Act (planning), appeals under section 78 (planning) may be challenged. Any person aggrieved by the decision may question the validity of the decision on the grounds that it is not within the powers of the Act or that any of the relevant requirements have not been complied with in relation to the decision. An application for leave under this section must be made within six weeks from the day after the date of the decision.

SECTION 2: ENFORCEMENT APPEALS

Challenges under Section 289 of the TCP Act

Decisions on recovered enforcement appeals under all grounds can be challenged under section 289 of the TCP Act. To challenge the enforcement decision, permission must first be obtained from the Court. If the Court does not consider that there is an arguable case, it may refuse permission. Application for leave to make a challenge must be received by the Administrative Court within 28 days of the decision, unless the Court extends this period.

SECTION 3: AWARDS OF COSTS

A challenge to the decision on an application for an award of costs which is connected with a decision under section 77 or 78 of the TCP Act can be made under section 288 of the TCP Act if permission of the High Court is granted.

SECTION 4: INSPECTION OF DOCUMENTS

Where an inquiry or hearing has been held any person who is entitled to be notified of the decision has a statutory right to view the documents, photographs and plans listed in the appendix to the Inspector's report of the inquiry or hearing within 6 weeks of the day after the date of the decision. If you are such a person and you wish to view the documents you should get in touch with the office at the address from which the decision was issued, as shown on the letterhead on the decision letter, quoting the reference number and stating the day and time you wish to visit. At least 3 days notice should be given, if possible.

IN THE MATTER OF

THE TOWN AND COUNTRY PLANNING ACT 1990

AND IN THE MATTER OF

KILNWOOD VALE SUB-PHASE 3DEFG,

CRAWLEY ROAD, FAYGATE,

WEST SUSSEX.

CLOSING SUBMISSIONS

ON BEHALF OF

THE APPELLANTS

Introduction:

1. These Closing Submissions are made on behalf of Crest Nicholson Operations Limited ['the Appellants'] in respect of an appeal against the failure of Horsham District Council ['the Council'] to determine an application for approval of reserved matters for Sub-Phase 3DEFG ['the application'] to develop 280 dwellings and associated infrastructure on land at Kilnwood Vale, Crawley Road, Faygate, West Sussex ['the site'].

2. The site lies within the Kilnwood Vale Strategic Allocation in the West of Bewbush Joint Area Action Plan (adopted 2009) for a neighbourhood of approximately 2,500 dwellings and associated uses, including retail and employment uses, a primary school, community uses, a new rail station and open space. The allocation remains part of the

adopted Horsham District Planning Framework (adopted 2015)[1]. It is one of two Strategic Allocations that form the basis of the Council's adopted spatial strategy.

3. The site itself comprises part of the land benefiting from outline consent[2], granted in October 2011, as a hybrid permission to deliver the Kilnwood Vale Strategic Allocation. Part A of that permission comprises outline consent for approximately 2,500 dwellings, neighbourhood centre, new rail station, pumping station, energy centre with land for employment, schools, access and amenity space[3].

4. To date, some 1,318 dwellings have been consented under earlier phases, which are now either occupied or under construction. This application comprises a sub-phase of 280 dwellings as part of the balance of 1,182 dwellings and the local centre awaiting determination to complete the strategic development as planned[4].

5. The agreed Statement of Common Ground[5] records that there are no matters of dispute on the planning merits of the application[6]; it accords with the outline consent and with the development plan. A summary of the matters agreed is set out in Miss Beuden's proof[7], with fuller detail in the Appellant's Statement of Case[8].

6. It is agreed, therefore, that the only issue in this appeal relates to the outstanding concern by Natural England ['NE'] in respect of the application's impact on a Habitats Regulations-protected site[9]. Had the Council considered itself able to undertake a favourable 'appropriate assessment' under Reg 63 the Habitats Regulations, it would have granted approval[10].

7. In the event, the Council did not undertake an appropriate assessment and the Appellants appealed the failure to make a determination under s.73 of the T&CPA1990 in order to break the paralysis in the planning system created by the *impasse* caused by

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[1] CD4 1.01
[2] CD2 1.01, amended under s.73 in April 2016, CD2 1.02
[3] App SoC [CD7 1.01], para's 2.1 and 2.2
[4] See ibid, Section 3
[5] CD9 1.01
[6] The LLFA objection now having been resolved – see ID.4 and ID.5
[7] Cd10 1.01 at Sections 5 and 9
[8] CD7 1.01, at Sections 4 and 5
[9] Most recently articulated in its letter of 11th January 2024, appended to the Council's SoC [CD7 1.02]
[10] See SoCG [CD9 1.01] and Smith xx CBKC, Day 2

NE’s stance on ‘water neutrality’ and bring the matter before a Planning Inspector/Secretary of State.

Main Issue:

8. At the CMC, and confirmed subsequently, the Inspector identified the single Main Issue as being:

> *‘The effect of the proposed development on the integrity of the Arun Valley Special Conservation Area, Special Protection Area and Ramsar sites, with particular reference to water abstraction.’*

9. That issue is, in turn, is agreed[11] between the parties to be narrowed on the evidence of this case to:

   (a) relating only to the Amberley Wild Brooks and its qualifying interest, being the Lesser Ramshorn Whirlpool Smail (*Anisus vorticulus)*; and
   (b) relating only to the potential for adverse impact from groundwater abstraction from a Southern Water groundwater abstraction licence at Hardham (also referred to in the documents as ‘Pulbrough’).

10. The determination of this issue is suggested by the Council to rest on the imposition of a Grampian condition to ensure that the appeal proposals are ‘water neutral’. The case put by the Council is that in order to reach a favourable ‘appropriate assessment’ under Reg 63 of the Habitats Regulations, the Inspector must impose such a condition. With that done, the Council urge the Inspector to grant consent[12].

11. The Appellants, by contrast, consider that the imposition of such a condition fails the test of ‘necessity’ as there is no need for the development to demonstrate ‘water neutrality’ in order for a favourable ‘appropriate assessment’ to be concluded.

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[11] See EA and SW correspondence at Mr Aitken’s appendices [CD10 1.02]; confirmed by all witnesses, both advocates
[12] Confirmed Smith xx CBKC, Day 2

12. It is worth noting at this relatively early stage in these submissions that neither the regulator responsible for potable water supply, the Environment Agency [‘EA’], nor the statutory undertaker with the duty to supply the development with water without causing harm to the protected sites, Southern Water [‘SW’], have objected to the application alleging that it is necessary for it to demonstrate ‘water neutrality’.

13. It is also worth observing at this stage that it is highly regrettable that NE, who first set this hare running, and who maintain that ‘water neutrality’ should be demonstrated[13], have not appeared or otherwise taken part in this inquiry, leaving the Council to seek to a defend a position evidentially on a topic which its own Statement of Case and witness freely confess lies outside the Council’s (and his) area of knowledge or expertise[14].

Background to ‘water neutrality’ as an issue:

The 2021 NE Position Statement:

14. In September 2021, Natural England issued a document entitled ‘Natural England’s Position Statement for Applications within the Sussex North Water Supply Zone, September 2021 – Interim Approach’[15][‘the Position Statement’]. This was followed up by an ‘Advice Note’ in February 2022[16].

15. The Position Statement identified NE’s view that it cannot be concluded with sufficient certainty that [groundwater] abstraction in Sussex North Water Supply Zone is not having an adverse effect on the integrity of protected sites in the Arun Valley[17]. It stated that new development ‘must not add to this impact’ and that ‘one way’ of demonstrating that is to show that the development demonstrates ‘water neutrality’.

16. ‘Water neutrality’ is then defined in the Position Statement as:

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[13] NE letter 11.1.24, appended to Council SoC [CD7 1.02]
[14] Council SoC [CD7.102] at para. 2.4
[15] CD8 1.15
[16] CD8 1.16
[17] Following European caselaw [for ref, see the sHRA [CD1 1.01] Section 2 for a summary thereof].

‘*The* <u>*use*</u> *of water in the supply area before the development is the same or lower after the development is in place.’* (emphasis added)

17. Although p. 1 of the Position Statement states that demonstrating ‘water neutrality’ is ‘*one way*’ of development not adding to the potential impact, p. 2 concerns itself only with what LPAs must do to ‘secure water neutrality’ and the help that NE will give LPAs in terms of developing a collective ‘water neutrality strategy’. Whether within or outside that emerging strategy, NE expressly states: *‘Natural England advises that any application needs to demonstrate water neutrality.’*

18. The Advice Note reveals the premise on which the Position Statement (and any subsequent consultation response from NE) is predicated:

‘Natural England is also concerned that the Sussex North Water Supply Zone is likely to be subject to significant future development pressures. These will <u>*necessitate increased abstraction*</u> *within the region and are likely to exacerbate any existing impacts on the Habitats Sites’* (emphasis added)

And

‘if further development were to be consented in this region (<u>*with the requirement for additional abstraction*</u>*) such development* [would be] *likely to have an adverse effect on the Habitats Sites.’* (emphasis added)

19. The Advice Note goes on to state:

‘Natural England is closely working with the relevant local authorities, the Environment Agency and Southern Water in developing a longer-term strategy <u>*to integrate Water Neutrality into the relevant Local Plans*</u>*. However, while this broader strategy remains in development, Natural England are seeking to propose mechanisms whereby the concept of Water Neutrality can be integrated into individual planning decisions to ensure that future development can*

proceed in a manner that does not further adversely affect the Habitats Sites.' (emphasis added)

20. The direct effect of the Position Statement has been to halt the grant of planning permission for new development across the whole WSZ, affecting three local authority areas, of which Horsham District is one.

21. The consequences of this Position Statement have, therefore, been devastating for the delivery of housing in what is supposed to be an area of growth. For Horsham alone, the result has been that it can, on its own figures, now only demonstrate a 2.9 year housing land supply[18]. Mr Smith for the Council gave evidence that some 2,400 dwellings are currently held up by sole reference to this issue – and that was just in Horsham District. The social and economic consequences of creating a moratorium on the delivery of housing across three local authority areas in Sussex since autumn 2021 can scarcely be computed.

22. As noted, this appeal site is part of an allocation in the adopted development plan for Horsham, first identified in 2009. Since October 2011 it has benefitted from outline permission for 2,500 dwellings of which 1,182 (along with the local centre) remain to be consented because of the water neutrality issue. Delivery from Kilnwood Vale has been factored into the Horsham housing trajectories contained in the latest January 2024 AMR[19].

23. Between 2023 and 2028, Kilnwood Vale is expected to deliver 396 dwellings, or 15% of the Horsham housing land supply[20].

SNOWS and the Part C report:

24. The LPAs' response to the Position Statement, as expressly urged on by NE, has been to develop a water neutrality mitigation strategy accompanied by policies requiring compliance with it (or an equivalent scheme) in their emerging local plans[21]. This strategy includes an off-setting scheme known as 'SNOWS'.

[18] See Miss Beuden proof Section 6 and the January 2024 AMR [CD4 1.04]
[19] CD4.1.04
[20] SB proof Section 6 as above.
[21] See Appx to Mr Klieman's proof – draft policy SP9 in the Reg 19 emerging Horsham LP

25. In the meantime, although the Council acknowledges that the Reg.19 emerging LP is only to be accounted 'limited weight' and not itself justify refusal[22], its position has been to refuse (or, in this case, to fail to determine) permission unless the development can demonstrate 'water neutrality' (in the NE sense of 'no net increase in water *use* in the WSZ') through the application of the still-emerging SNOWS off-setting strategy, or by some other bespoke means[23].

26. The SNOWS 'off-setting' scheme is being developed in the context of the jointly commissioned JBA reports entitled the 'Sussex North Water Neutrality Study'[24], and specifically the 'Part C Report' (December 2022)[25].

27. The Part C Report is expressly concerned with establishing 'a strategy to achieve water neutrality'[26] for the purpose of providing an evidence base to emerging local plans. It uses the definition of 'water neutrality' derived from NE, concerning 'total water *use*' in the SN WSZ[27]. It establishes a total projected growth across the SN WSZ to 2039[28] and translates that into additional water demand on the basis of either a 110l/p/d or 85 l/p/d assumption on water efficiency[29], and then represents that, over time, as a trajectory of predicted demand arising from the projected new growth (ie adopted commitments and emerging allocations)[30].

28. The Part C Report then calculates the savings in water demand derived from the SW 'demand management measures' contained in SW WRMP19 (identified as the blue columns in Fig.5.1 and the second row of figures in each of the Tables 10.1-10.4). It estimates that those savings are equivalent to some 6,345-8,335 additional (ie not consented September pre-2021) dwellings (depending on the efficiency assumptions) being able to be delivered to 2030 before the need for off-setting.

[22] Smith xx CBKC, Day 2, and his proof at 3.49
[23] See three recent appeal decisions CD5 1.04, CD5 1.06 and ID.3
[24] CD8 1.14a, b and c
[25] CD8 1.14c
[26] Ibid p. v.
[27] Ibid p.iv
[28] Ibid Table 3.1
[29] Ibid Table 5.1
[30] Ibid Fig. 5.1 and Tables 10.1-10.4

29. Para. 180 of the Part C Report identifies that there is a 0.25Ml/d deficit between the demand arising 2021-2030 and the projected savings from SW demand management measures. Following the principle in the report's para. 176 first bullet that net water *use* must not increase, a calculation is undertaken at its para. 199 to seek to cost the off-setting of this 0.25Ml/d by (in the main) retrofitting existing properties with more efficient fittings to reduce existing water consumption[31].

30. Although no alternative figures or updated report has been evidenced, the Council has, through this inquiry, sought to cast doubt on the reliability of the predicted SW savings as set out in the Part C Report, and hence the calculation of 6-8000 dwellings that they, alone, would offset. In the light of the Regulators' letter of 20th October 2023, it does not seem entirely unreasonable to reduce the amount of savings assumed to be achieved by SW demand management measures to some degree, although the extent of expected under-shoot is evidentially unclear[32].

31. Inevitably, if the SW demand management measures are not as effective as predicted, the 'deficit' rises from 0.25Ml/d that the Part C Report has sought to cost. At 2025, the total demand without any SW savings is 0.42Ml/d; at 2030 it is 2.59Ml/d[33]. The approach of SNOWS, though, is not expected to change – namely that **in order to keep total water *usage* unchanged** the demand after SW savings (whatever they are) is to be made up by development funding the off-sets to the level required.

32. Para. 216 of the Part C Report recognises that the off-setting scheme '*is expected to co-ordinate several million pounds offsetting activity (plus costs to set up and run the scheme) in the period up to 2030.'* Given that some 8,455 dwellings across the three authorities are expected to come forward subject to SNOWS 2025-2030[34], and Mr Kleiman estimates a cost of £2,000 per dwelling[35], that is a cost of c.£17m being imposed on new development to 2030 by the requirement to show 'water neutrality' – and (obviously) more if the Council is right about the unreliability of SW's demand management reductions.

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[31] The measures are summarised Sections 5.3.1-5.3.5 of the Part C Report
[32] Aitken xx NB, Day 3
[33] CD8 1.14c, Appx A, Table 10.3 first row
[34] Miss Beuden's proof at para 6.30
[35] Kleiman xx CBKC, Day 1

33. It is by reference to the still-emerging SNOWS that the Council urges the imposition of its Grampian condition as the necessary step to allow the Inspector to conclude a favourable appropriate assessment and to grant the reserved matters consent that both parties wish to see. Mr Kleiman estimated that SNOWS would be in operation 'by the end of this year' and that he expected this application to be able to access its off-setting provisions 'within 2 years' of grant[36].

Actions of the EA and SW:

34. The EA, as the regulator for potable water supply and the licencing of water abstraction, and Southern Water, as the statutory undertaker for potable water supply in the SN WSZ and the licence holder for the impugned groundwater abstraction source at Hardham, have also acted in response to the NE's concerns.

35. Both the EA and SW are subject to their own Habitats Regulations duties, both under Reg 9 when exercising their statutory functions and under Reg 63 as competent authorities when approving plans or projects. NE have not said that either is in breach of their duties under the Habitats Regulations; the Council has expressly asserted in its written evidence that it does not allege that the EA are in breach of their obligations[37].

36. As noted, the NE concern is limited to the potential effects of licenced groundwater abstraction at Hardham[38], and given that the EA is responsible that licence, the EA is undertaking a Sustainability Review of the licence to establish what, if any, groundwater abstraction at Hardham can be excluded from a likelihood of adverse effects on the integrity of the protected site. This is to report in March 2025 and will inform what, if any, exercise of the EA's powers under s.52 of the Water Resources Act 1991[39] is required. It may be the licence will to be need to be revoked. It may be that it will be amended to a new limit. It maybe that the licence can remain unamended.

[36] Kleiman xx CBKC, Day 1
[37] Smith proof at 3.16
[38] Arising from a query in respect of transmission rates in the SW groundwater model [sHRA, CD1 1.01]
[39] See EA letter 26.4.22 at Mr Aitken's Appx B

37. In the meantime, as the EA and SW accept that there is, currently, no known level of groundwater abstraction at Hardham that can be excluded from having an effect[40], the EA has secured from SW a voluntary commitment to reduce the groundwater abstraction from c.12Ml/d average to c.5Ml/d average. This commitment by SW extends '*at least to the completion of the sustainability review of the licence in 2025'.*[41]

Response of NE to the current application in the light of EA/SW's actions to date:

38. Although NE does not directly accuse the EA of failing in its Habitats Regulations duties by continuing to allow SW to abstract groundwater from Hardham up to a rolling average of 5Ml/d, in its latest consultation response on this application/appeal[42], NE observes that it does not consider it appropriate to 'rule out adverse effects' *from the development* because the EA has not used its statutory powers. Further, NE's continued concerns about even a reduction to 5Ml/d being unable to be excluded as causing harm also lead NE to conclude (in some way unspecified) that the effect of the development cannot be so excluded.

39. In addition, rather than considering whether the development (alone or in combination) would increase groundwater abstraction at Hardham, the letter continues to focus (as did the Position Statement and all other observations by NE) on whether the development would increase 'total water *use*' in the WRZ – ie whether it would be 'water neutral' by NE's definition. It does not address the 'supply side' issue at all.

Law and policy:

40. The correct application of the law and policy does not seem to be materially in dispute.

Habitats Regulations 'appropriate assessments':

[40] See generally EA and SW correspondence at Mr Aitken's Appx B and C
[41] SW letter of 7.7.23 at Mr Aitken's Appx C
[42] NE letter 11.1.24 [Appx to Council SoC, CD7 1.02]

41. The legislation and domestic and European caselaw pertinent to the operation of the Habitats Regulations and, specifically, the operation of Reg.63 is conveniently and accurately summarised in Section 2 of the sHRA[43] and is not in dispute.

42. In short, where an 'appropriate assessment' is required, it must be undertaken in respect of the development's impacts both alone and in combination with other plans and projects, and for it to be favourable, adverse impacts on the integrity of the protected site must be able to be excluded on a test of certainty described as 'beyond reasonable scientific doubt'.

43. By Reg 63(5) a competent authority may only approve a plan or project where that test has been passed, and a favourable appropriate assessment has been concluded[44].

Potable water supply:

44. Similarly, the legislation in respect of the regulation of potable water supplies is conveniently and accurately summarised in Section 2 of the Addendum sHRA[45] and Section 4 of Mr Aitken's proof of evidence[46] and is not in dispute.

45. In short, by s.37 of the Water Industry Act 1991, SW is under a duty to supply potable water to the level demanded of it. It is regulated by the EA, Offwat and, ultimately, by Defra in doing so. By sections 37A-37D of the same Act, SW is also under a duty to prepare and maintain a Water Resource Management Plan ['WRMP'] being a rolling 5-year plan establishing how that demanded supply will be maintained. By para 6.3 of the Water Resources Planning Guidance[47] the WRMP 'must not constrain planned growth', which both the Council and the Appellants agree this appeal proposal comprises[48].

46. SW is under the general duty of Reg 9 of the Habitats Regulations not to harm protected sites in the exercise of its statutory functions. Critically, the WRMP is itself subject to the requirement for a Habitats Regulations Reg 63 'appropriate assessment', meaning

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[43] CD1 1.02
[44] In the absence of 'IROPI' which is not applicable here as it only applies 'in the absence of alternatives'.
[45] CD1 1.03
[46] CD10 1.02
[47] CD8 1.08
[48] Kleiman xx CBKC, Day 1;

that the supply of water identified to maintain the projected supply must be from sources that can be excluded as having an adverse effect on protected sites[49]. Ultimately, it is Defra that authorises the 'publication' of the WRMP in each case.

47. The EA not only is the regulator for the purposes of WRMP, it is also the grantor of abstraction licences under the Water Resources Act 1991. It may amend or revoke such licences under s.52 of that Act[50]. Decisions to grant or vary licences are themselves 'plans or projects' subject to Reg 63 of the Habitats Regulations.

48. The Inspector is (now) the 'competent authority' for the Reg 63 consideration of the planning application/appeal before him.

49. SW is the 'competent authority' for the Reg 63 consideration of the WRMP24, which is to be published this year, and will be operative for the period 2025-2030.

50. The EA is the 'competent authority' for the Reg 63 consideration of grants, amendments or revocation of any abstraction licences required by SW, including, of course, the impugned groundwater abstraction licence at Hardham.

Development Plan and the NPPF:

51. Turning to planning legislation and policy, the Council accepts that the appeal proposals are in accordance with the adopted development plan[51]. They, therefore, benefit from the statutory presumption in s.38(6) of the T&CPA 1990.

52. Specifically, by promoting water efficiency at 91 or 92 l/p/d, as set out in Mr Smyth's evidence[52], the proposals accord with the adopted policy on water efficiency of 110 l/p/d (as per the Building Regulations 'optional' standard). It is agreed that the Reg 19 emerging Local Plan policy, SP9, is (a) of too little weight to be insisted upon[53] and (b)

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[49] See WRPG [CD8 1.08] at para 8.2 and Kleiman xx CBKC, Day 1
[50] See EA letter, 26.4.22, Mr Aitken's Appx B
[51] See SoCG [CD9 1.01]
[52] CD10 1.02 – see the calculations in the updated WNS appended, which are not in dispute and are secured by condition
[53] Smith proof 3.49

would permit 110 l/p/d as the standard if (as is the Appellant's case) 'water neutrality' is not required[54].

53. Subject to a favourable 'appropriate assessment', para. 188 of the NPPF does not apply and the 'presumption in favour of sustainable development' in para. 11(c) of the NPPF would indicate that permission should be granted 'without delay'.

54. Para 194 of the NPPF (although touching directly on pollution) reflects the well-established principle that planning decision-makers are entitled to assume that separate regulatory regimes are operated appropriately in accordance with the statutory duties thereon[55], as enunciated, by way of example, in the *R (An Taisce)* case[56].

55. Indeed, by para. 194, national policy is that planning decision-makers *should* proceed on such an assumption, an injunction which reflects the concerns expressed by Holgate J in the *Sizewell C* case (which specifically concerned the question of as yet unidentified sources of water). At para 91 of the judgment, Holgate J observed that, without this, the planning system would be reduced to a state of sclerosis[57].

56. It is agreed that neither para. 194 nor the general principles in the caselaw obviate the need for the Inspector as 'competent authority' for the reserved matters application to undertake an 'appropriate assessment'[58], but they are matters which the Inspector may properly take into account when judging whether there is sufficient certainty adverse impact can be excluded[59].

57. Of particular pertinence to this case are the obligation on the EA to consider amendment/revocation of abstraction licences under Reg 63 and the obligation on SW to produce a WRMP which 'must not constrain growth' from sources that themselves must be able to be excluded from causing harm (in order for the WRMP to be able to pass a favourable appropriate assessment under Reg. 63). In addition, at all times, both

[54] Smith xx CBKC, Day 2
[55] As acknowledged by Counsel in the xx of Miss Beuden [Beuden xx NB, Day 4]
[56] CD5 1.01
[57] CD5 1.02
[58] Beuden xx NB, Day 4
[59] Beuden rx CBKC, Day 4; and Kleiman xx CBKC, Day 1

the EA and SW must exercise their statutory powers in accordance with the general duty under Reg. 9.

58. Para 194, *An Taisce* and *Sizewell C* indicate that the Inspector, in conducting his own appropriate assessment, both can and should assume these separate regulatory regimes are operated in accordance with their statutory duties (which, to be fair, the evidence shows they are – as expressly accepted by the Council[60]).

Proportionality:

59. Para's 2.4.2-2.4.5 of the sHRA[61] sets out the EU guidance on the application of the 'precautionary principle' in decision-making. The precautionary principle incorporates the principle of 'proportionality':

> '*Proportionality means tailoring measures to the chosen level of protection. Risk can rarely be reduced to zero.'*
>
> And
>
> *'Measures based on the precautionary principle must not be disproportionate to the desired level of protection and must not aim at zero risk, something which rarely exists.'*

The Need for Water Neutrality:

60. As is apparent from the correspondence with the EA and SW and as is agreed between the parties to this inquiry, the 'pathway' for potential harm from a given development (alone or in combination) is an increase in groundwater abstraction at Hardham. Without this, there is no 'pathway' – no risk of development 'adding to' the adverse impacts on the protected site. As the Opening Submissions for the Council[62] fairly put

[60] *supra*
[61] CD1 1.01
[62] ID.2, para. 11

it: the issue is whether it can be demonstrated, with the requisite degree of certainty, that occupations in 2025 will not increase groundwater abstraction at Hardham.

61. As such, it is agreed between the parties that NE's insistence on demonstrating 'water neutrality', defined as 'no increase in water *use* in the WRZ', is a mis-characterisation of the issue in hand[63].

62. What NE should be demanding (all it properly can demand) is demonstration that the development (alone and in combination) will not require an increase in *groundwater abstraction from Hardham.*

63. However, the underlying premise of the NE Position Statement, and all subsequent representations by NE is, as we have seen, an assumption that new development (this site included), with additional demand for potable water, *will* lead to an increase in groundwater abstraction at Hardham. Indeed, the Advice Note[64] is explicit in its assertion that new development will '*necessitate* increased [groundwater] abstraction'.

64. It is, of course, a false premise. It would only be correct if there were no alternative to serving new development other than additional groundwater abstraction from Hardham. However, as the evidence has shown, that is manifestly not the case.

65. Consideration of matter can be divided for the sake of argument into five sections:

    (1) Is demanding 'water neutrality' for all new development in the WSZ a proportionate response to the risk identified to the qualifying interest?
    (2) Has groundwater abstraction at Hardham increased since September 2021 in response to additional development?
    (3) What is the extent of demand management savings programmed by SW to reduce demand?
    (4) Would supply sources in the WRMP24 include groundwater abstraction at Hardham, at levels that cannot be excluded from the potential of harm to the integrity of the protected site?
    And *de bene esse*

[63] All witnesses and both advocates
[64] CD8. 1.16

(5) What evidence is there of adequate alternative sources which do not rely on increased groundwater abstraction at Hardham?

Is demanding 'water neutrality' for all new development in the WSZ a proportionate response to the risk identified to the qualifying interest?

66. The answer is 'No'.

67. Mr Baxter, and only he, gave ecological evidence as to the condition of and risks to the qualifying interest in the protected site, namely the Lesser Ramshorn Whirlpool Snail[65].

68. The snail is dependent on water-filled vegetated ditches with good water quality. At Amberly Wild Brooks, its distribution is limited to one ditch on the eastern side of the site, on land owned by the RSPB, which considers itself to be a nature conservation charity[66].

69. Mr Baxter produced the Natural England 'Climate change vulnerability assessment' (Oct 2023) for Amberly Wild Brooks as his Appx 2. It identified 'climate change risks' as:

Increased flooding
Reduced water quality
Droughts and reduced water levels
Changes to growing seasons
Invasive non-native species
Higher water temperatures
Increased nutrient release
Saline intrusion
Heatwaves
Wildfire risk
Changes in prey
Reduced breeding success

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[65] Baxter xic, Day 2, which was not challenged [any ecological observations by Mr Smith of the Council in xic must be disregarded as falling from someone who admitted no expertise in the subject – Smith xx CBKC, Day 2]
[66] See Mr Baxter's Appx 2

Although it did not specifically direct consideration as to which of these might adversely affect the snails.

70. In addition, the report observed that *'climate change is likely to exacerbate existing pressures on site, as well as water level management challenges, pressure on groundwater resources from abstraction, deer trampling, shading of plant features and pollution.'*

71. Under 'Existing Condition', the report notes:

> '*Ditch condition appears to have unfavourable water quality as well as channel form and succession'*
>
> *'contributory factors'* to unfavourable conditions include:
>
> Complex site hydrology and water level management challenges
> Invasive non-native species
> Saline intrusion and polluted water breaching the site
> Deer trampling of ground nests[67]
> Predator intrusion
> Shading of monitored plant features
> Changes to nearby groundwater and surface water sources
> National declines in populations..,
> Escaped carp travelling up-stream with increased turbidity through sediment disturbance

72. The December 2022 site visit revealed:

> *'Overtopping of flood embankments has been increasing in frequency ... affecting water quality as flood waters contain pollutants including saline intrusion (as the tidal limit is moving further upstream due to sea level rise), increased sedimentation, as well as concerns regarding waste water pollution due to combined sewer overflows (CSO) from sewage treatment works. Water level management plans are ... out of date...* [with] *different priorities and stakeholders' needs across the site ….*
> *'During the summer months, the warmer temperatures and site drainage means that there are increasing signs of drying on the site leading to drying out of*

[67] One speculates not a snail issue

ditches and subsequent reduction in certain plant species, invertebrates…the cause of these changes, in addition to climactic, may also be attributed to changes in groundwater supplies outside the SSSI due to abstraction as well as the site's water level management.

'…the flap valve at one of the sluice structures was broken and thereby allowing leakage into the site. There was also a wastewater smell, which could be indicative of CSO spills onto the site.'

The report notes:

'sluices managed by the Environment Agency as well as management of banks and ditches'

73. Under 'Options for adaptive management' the report states:

> '*the key adaptation options identified include updated and increased water level management and embankment protection to resist changing flood levels and preserve water quality, as well as other management to maintain ditch quality and control invasive species. Accept options include allowing overtopping, flooding and sedimentation process, resulting in a naturally functioning wetland, requiring a review of the SSSI designated features. Direct approaches may include a change in site governance and actions to alter the embankment and ditch network to allow site flooding and creation of a naturally functioning wetland.'*

74. The conclusions of the NE report are inescapable. Although there is mention of the possible influence of abstraction, the overwhelming issues are ones of site management, water level management and the maintenance of sluice features; and water quality, including salinity, disturbance and combined sewer overflow. Not one of the recommended options includes reducing, let alone a cessation of, groundwater abstraction.

75. Further, the issues identified are all within the control either of RSPB as landowner, or the EA as manager of water levels, maintainer of the sluices, ditches and embankments as well as – of course – regulator of the sewage treatment works and combined sewer outflows.

76. A proportionate response to these issues might have been for NE to press for – indeed assist - the RSPB and the EA to improve site management for the snails which are the qualifying interest. With SNOWS imposing a cost at a (conservative[68]) estimate of >c.£17m to 2030, it can hardly be said to be a proportionate response as an alternative to mending the sluices and improving ditch management at Amberley Wild Brooks.

77. Given that the outflow of the sewage treatment works is an issue for water quality, but under the regulation of the EA, a proportionate response might have been to press the EA to resolve that issue through the means of the discharge licence.

78. Finally, a proportionate response might have been to press the EA to order the cessation of groundwater abstraction until the query over transmissibility rates had been resolved (ie March 2025). In the absence of NE appearing at the inquiry to explain themselves, we cannot know if they did, indeed, press the EA to do just that. In the event, we do know that the EA, as a body subject to the Habitats Regs duties, considered that, in the circumstances, reducing groundwater abstraction at Hardham to 5Ml/d pending the licence review *is* a proportionate response.

79. If NE consider that the EA is neglecting its Reg 9 duties by failing to mend the sluices and manage the ditch levels, it should, say so, openly. If NE consider that the EA is failing in its Reg 63 duties by continuing to allow combined sewer overflows to enter the protected site, it should say so, openly. Ultimately, if NE consider that the EA is failing in its Reg 63 duties by continuing to allow a rolling average of 5Ml/d of groundwater at Hardham to be abstracted pending the licence review, it should say so, openly.

80. But what is, very plainly, *not* a proportionate response by NE to the issues facing the snails at Amberley Wild Brooks is to issue a Position Statement to local planning authorities and cause an effective moratorium on housing development across three Districts for four years. By doing so, rather than tackling the EA on its record of site management, sewer issues and – even – the abstraction licence changes, NE is, with respect, 'tilting at the wrong windmill'.

[68] Because this still assumes all the SW demand management measures are effective, which the Council has put into doubt (see above)

81. NE's assumption is that increased development will necessitate increased groundwater abstraction at Hardham. Until the sustainability review concludes in 2025, adverse impacts of groundwater abstraction at Hardham cannot be excluded. The EA consider that a proportionate response is to minimise groundwater abstraction at Hardham until the sustainably review is concluded. The NE approach has been to stop all new development. That is not proportionate, given the EA's actions and the ample alternative supplies available (as to which see below).

82. There may well be need for improved site conditions to improve habitat for the snails; there is no need for 'water neutrality' across the WSZ.

Has groundwater abstraction at Hardham increased since Sept 2021 in response to additional development?

83. Again, the answer is plainly 'No'.

84. In response to the concerns about the groundwater modelling raised by NE that led them to opine that there were currently no levels of groundwater abstraction at Hardham that could be excluded from having an adverse effect, the EA not only embarked upon a sustainability review of the licence that will report in March 2025, but also secured a commitment to 'minimise' abstraction under the existing licence, which resulted in abstraction falling to 40% of its September 2021 levels (c.5Ml/d compared with c.12Ml/d).

85. Further, as is apparent from the correspondence, both the EA and SW contemplate the situation where the sustainability review requires that the groundwater abstraction licence to be revoked.

86. As the EA clearly state:

> '*Any licence cap will be specifically designed to ensure protection of the designated site rather than be determined by what is operationally possible.'*[69]

[69] EA letter 13.1.23 at Mr Aitken's Appx B

87. Thus, there is – and will be – no link between increased development demand and increased groundwater abstraction at Hardham. It has already been reduced, regardless of demand; it will, if necessary, be reduced still further (to zero if necessary), again, heedless of demand.

88. The essential premise of NE that there is a causal relationship between increased development and increased groundwater abstraction is misplaced. There is no need for 'water neutrality' across the WSZ to avoid that. The relationship does not exist.

89. In response to this unassailable factual situation, NE's 11th January 2024 letter declines to acknowledge SW's minimisation commitment as mitigation, on the basis that it is 'voluntary' and hence 'not secure'. At the inquiry, the Council adopted NE's line.

90. But such a complaint does not withstand scrutiny. Counsel for the Council carefully phrased her question: '*Prior to licence change,* what statutory powers are there to enforce a voluntary undertaking?'[70]

91. Of course, there is no need to have statutory powers to enforce an undertaking if it is being complied with. If, on the other hand, the undertaking were to be breached, then the EA can resort to its powers under s.52 of the WRA 1991 to vary the licence straight away. SW plainly recognise that when they say that the commitment to minimise groundwater abstraction at Hardham continues until at least the sustainability review of the licence[71].

92. There is, therefore, no need for 'water neutrality' in addition.

What is the extent of demand management savings programmed by SW to reduce demand?

93. As set out above, the Part C Report[72] established water savings from demand management measures in the SW WRMP19 and tabulated them in the Table 10 series,

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[70] Baxter xx NB, Day 2; Aitken xx NB, Day 3
[71] SW letter 7.7.23 at 'Point 2' [Mr Aitken's Appx C]
[72] CD8 1.14c

while graphically representing them in Fig. 5.1. As a result of this, it calculated that the water demand of (in round terms) between 6,000 and 8,000 dwellings could be off-set by the SW measures to 2030. These 6-8,000 dwellings were additional to those which had received full planning permission prior to September 2021.

94. This led the Appellants to identify a yet further reason why 'water neutrality' was not justified for its development.

95. The Part C Report's assessment of 'SW contribution' was based necessarily on the WRMP19. Although the Part C Report was intended as part of the evidence base for the emerging Local Plan, those savings, therefore, were directed to the demand from projected growth ('planned growth' in WRPG terms) in the currently adopted local plans. That planned growth necessarily included Kilnwood Vale and the appeal site as a phase of that allocation, as the strategic development had been part of the development plan from 2009[73].

96. The Part C Report calculated the 6-8,000 dwellings that these savings were equivalent to *after* taking account of the increased demand from those dwellings with full consent as at September 2021. Consequently, the balance of the savings from the WRMP19 water management measures were directed to the need arising from the as yet unconsented development (ie without full planning permission) in the adopted local plan, of which the appeal scheme's 280 dwellings forms a part.

97. Growth in the emerging local plans would then be additional to that and their supply would be a matter for those local plans (para. 20(b) of the NPPF) and the emerging WRMP24 hereafter.

98. Hence the Appellants' conceptual division of development needs into three categories: (1) dwellings consented prior to Sept 2021; (2) dwellings planned for in the adopted local plans but without consent, which are planned for in the WRMP19; (3) additional emerging local plan allocations, to be planned for in the WRMP24. The appeal dwellings fall into the second category and are, therefore, firmly within the 6,000-8,000 dwelling headroom the Part C Report identified.

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[73] Miss Beuden proof at Section 2

99. The Council's evidence[74] reacted to this as amounting to a threat to the workability of the SNOWS regime. But, in truth, that defence was misdirected. The Appellants' case is that SNOWS is and always was unnecessary and an irrelevant distraction. It was founded on a misconceived notion – led on by NE - that any deficit between the SW savings and the water demand from new development would need to be met by off-setting (rather than additional non-groundwater-at-Hardham sources). If the Appellants case succeeds, it is because the Inspector has (rightly) concluded that 'water neutrality' and SNOWS are unnecessary.

100. However, as a piece of analysis, the Part C Report had, at least, conveniently calculated a dwellings-number equivalent of the WRMP19 water management savings. It gave a massive headroom easily able to accommodate the appeal scheme even without additional non-groundwater supply.

101. In the course of the inquiry, the Council sought to cast doubt on the Part C Report's calculations of the SW savings. Although principally directed to the reliability of the 6-8,000 estimate, it also served to suggest that the difference between new demand and savings at 2030 might be more than the 0.25Ml/d quoted in the report.

102. The Council's doubts over the delivery of the whole of the projected WRMP19 savings are at least reasonably founded in the Regulators' letter in Appx A of Mr Aitken's evidence, but that should not lead to their dismissal altogether. After all, the purpose of the letter is to inform the formulation of the WRMP24, to achieve better savings than theWRMP19 had managed to do.

103. So, although the savings might not be as high as shown on the blue columns in Fig 5.1 or the Tables in Appx A to the Part C Report, it can be anticipated that there will be some. The full SW savings equated to 6,000-8,000 dwellings; there is no replacement figure available; the appeal scheme is only 280 dwellings. It can fairly be anticipated that, the Council's doubts notwithstanding, here will remain ample headroom in the WRMP19 savings to accommodate the appeal scheme without calling on increase in supply.

[74] Kleiman proof and equivalent part of Smith proof

104. What is worth noting at this stage is that even if the 0.25Ml/d shortfall identified at para 180 of the Part C Report turns out to be unrealistic, the *total* demand from new development without any assumed savings from SW measures is 0.42 Ml/d at 2025 and 2.59Ml/d at 2030.

105. Rather than an attempted off-set through an unnecessary 'water neutrality' scheme such as SNOWS, these are the figures to which attention should be paid when considering available sources of supply other than increased groundwater abstraction from Hardham (as to which see below).

Would supply sources in the WRMP24 include groundwater abstraction at Hardham at levels that cannot be excluded from the potential of harm to the integrity of the protected site?

106. Once more, the answer is a clear 'No'.

107. Total groundwater abstraction (of which Hardham has been a part) only ever accounted for 35% of supply for the SNWRZ. Since the NE Position Statement, Southern Water has already reduced its reliance on groundwater at Hardham from c.12Ml/d average to c.5Ml/d average. Groundwater abstraction now accounts for some 14% of total supply, of which groundwater abstraction at Hardham is only a part. Thus, some 86% of supply comes from sources other than groundwater abstraction.

108. Additional demand for potable water can, therefore, come from demand management measures (including improving leakage rates) planned for in the WRMP and/or greater utilisation of these other sources, rather than increasing groundwater abstraction from Hardham. New development does not increase groundwater abstraction at Hardham.

109. As set out above, the supply of potable water is a statutory undertaking, conducted by the water undertaker and regulated by the Environment Agency and ultimately Defra. The water undertaker is under a duty to supply the development needs projected by the local authorities in a given area. It is under a duty to demonstrate how it will do that through its WRMP, repeated on a five-yearly basis, with a continual

annual review which, in terms, ‘must not constrain growth’. But it is also under a duty to demonstrate how this will be achieved without harming the environment.

110. Specifically, as noted above, each WRMP must be accompanied by an HRA demonstrating that it would not harm Habitats Regulations protected sites. Only a favourable appropriate assessment establishing this would enable Defra to authorise the publication of the WRMP.

111. It is simply not possible, given the statutory framework, for the WRMP24 to contain an unsustainable source of groundwater abstraction from Hardham.

112. This is because the WRMP24 and its accompanying HRA will have to be produced this year, ahead of the reporting of the sustainability review into the Hardham abstraction licence. That review might conclude that there is no level of groundwater abstraction that can be excluded from having an adverse effect on the protected site and that, accordingly, the licence will need to be revoked. The WRMP24 will have to allow for this contingency in establishing scenarios for a positive supply/demand balance. In other words, it will have to establish how projected development needs can be accommodated on the basis that there is *no* reliance on groundwater abstraction from Hardham.

113. It may be, in due course, that the sustainability review concludes that groundwater can be abstracted from Hardham, in which case supply from that source can be included. But that will not be known until March 2025. Until then, adverse impacts cannot be excluded and so the WRMP HRA would be unable to support a favourable outcome based on reliance on any groundwater abstraction from Hardham.

114. Unsurprisingly, therefore, the dWRMP24 is already planning for such a scenario. At para 3.2.1, the dWRMP24 records:

> ‘*we are looking at a potential scenario where Pulborough groundwater source is no longer available’*

At para. 5.3.7, the dWRMP24 further states:

'We have been ambitious – through our 'alternative' scenario we are investigating what solutions will be required to allow us to stop all abstractions in our most sensitive catchments including the River Itchen and Lower River Rother and River Arun…' [ie more than the groundwater source at Hardham].

115. Again, NE's presumed link between increased demand from development and increased groundwater abstraction at Hardham is a false one. 'Water neutrality' is not required.

What evidence is there of adequate alternative sources which do not rely on increased groundwater abstraction at Hardham?

116. As a result of the above, all that one needs to answer the question of 'is there a need to be 'water neutral' both in the SN WSZ and elsewhere nationally is three references: para. 6.3 of the WRPG that the WRMP must not constrain 'planned growth', whether the site in question is 'planned development' in the WRMP (which this site is) and para. 8.2 of the WRPG that the WRMP must be subject to HRA. *Sizewell C* at para.91 would indicate, under those circumstances, there is no need for the planning decision maker to enquire further. Risk to protected sites can be excluded.

117. In strict terms, therefore, it is not necessary for the Appellants on this application to provide evidence as to water supply sources which do not engender risk to protected sites. The WRMP legislation is set up to prevent that, and the Inspector is both entitled to assume that that statutory regime will operate appropriately; indeed, he is told by national policy and by Holgate J that he should so assume.

118. However, notwithstanding that, we are fortunate in this case to have direct evidence that there are ample alternative sources available to SW to meet all projected development needs (and, indeed, way more), even without reliance on any demand management measures (over which the Council now cast doubt), and even in the context that groundwater abstraction at Hardham must cease (which must be the working assumption until the sustainability review reports in March 2025).

119. The first thing to consider is timeframe. This development is not intended to be occupied until 2025, and the Appellants are content to be tied to that by condition (although for the reasons that will become obvious hereafter, that is not strictly necessary). That gives a *terminus post quem* for consideration of the issue.

120. The Part C Report has concentrated on the period up to 2030 as showing a potential deficit between projected demand and expected SW savings, after which SW supply infrastructure is expected to be in place. 2030 would also be the start date of the next WRMP, WRMP29. That gives a *terminus ante quem* for the issue.

121. Although there are a variety of sources not involving increased groundwater from Hardham that could potentially be deployed by SW (eg increased surface water abstraction under existing licences, the Littlehampton WTW recycling, or de-salination)[75] the inquiry has concentrated on the availability of the three 'easy ones'[76]:

SES import
Portsmouth import
Weir Wood reservoir

122. Again, by reference to Weir Wood Reservoir, this gives 2025 as the *terminus ante quem* for questions over the supply of the appeal scheme. This is because the bringing back into service of the Weir Wood Reservoir is required by 31st March 2025 by statutory notice served on SW by the Drinking Water Inspectorate under Reg 28(4) of the Water Supply Regulations 2016[77]. Failure to comply with its terms engages enforcement action and amounts to a criminal offence.

123. The Inspector can have sufficient certainty, therefore, that by 31.3.2025, Weir Wood will be operational. The SW Statement of Response Annex 5.2[78] states that it will have a peak deployable output of 13Ml/d. Even though some may be destined for export, there is more than ample to serve development needs.

[75] Aitken xx NB, Day 3
[76] As Mr Aitken put it, meaning those about which we know the most in terms of timing of delivery.
[77] ID.6
[78] CD8 1.04 at p. 7

124. As discussed above, projected development needs at 2025 are 0.42Ml/d *without* any allowance for SW demand management savings[79]. Should there be a need to revoke Hardham's groundwater abstraction licence altogether, there would be a need to find about another 5M/d. Take the worst case, add the two together and one reaches 5.42Ml/d; at 2030, the equivalent figures are 2.59Ml/d + Hardham, giving 7.59Ml/d. It will be apparent that Weir Wood alone obviates the need for *any* reliance by SW on Hardham groundwater abstraction, let alone a need to increase it.

125. This underscores the observation in the Council's Statement of Case[80] at para. 5.4: *'Both parties agree that the future availability of sufficient water to serve the development is not in question, it is just a matter of when'*, echoed in the proof of Mr Smith at para. 4.4 '*The fundamental issue is not whether there is sufficient water, but when'* and the Council's Opening submissions at para 10[81]: 'The question is when?'.

126. The answer, by reference to Weir Wood alone is: no later than 31st March 2025.

127. Mr Aitken was asked about the 'leap' between first occupations in 1st January 2025 and Weir Wood in 31st March 2025[82]. But it must be remembered:

(a) a 'severe' drought (1:200 or 1:500[83]) is most unlikely between January and March;

(b) even in the 2022 drought[84], groundwater abstraction at Hardham was not materially increased[85];

(c) the SW Statement of Response has now made it clear that increasing groundwater abstraction at Hardham has been taken out of the drought order – so another 'severe' drought, were it to happen between January and March 2025, would *not* lead to further abstraction from that source[86]; and lastly

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[79] CD8 1.14c, Appx A, Table 10.3, first row. The SW SoR Annex 5.2 at p. 7 does add that SW are continuing to deliver water efficiency, leakage reduction and the Littlehampton recycling scheme [CD8 1.02]

[80] CD7 1.02

[81] ID.2

[82] Aitken xx NB, Day 3

[83] For context, in 1824, George IV was on the throne, the next return would be expected 2224; in 1524, Henry VIII was on the throne; the next return date would be expected 2524.

[84] 'the 5th dryest year since 1836'

[85] See sHRA Fig 5.1 at p.19 and Annex 6530/5 [CD1 1.03] and ID.8

[86] CD8 1.04 at p. 14 and p.17

(d) for belt and braces, the Appellants have indicated that the Inspector could impose a restriction on occupation until 31st March 2025, if he felt it necessary to close the gap[87].

128. So, Weir Wood, alone, would supply all the projected development needs without the need for any increase in groundwater abstraction at Hardham, indeed without the need for *any* abstraction at Hardham at all.

129. But there are two other sources 'easy' in addition and these are available right now.

130. The SW Statement of Response Annex 5.2 has confirmed that SW has extended the amount and time-frame for bulk imports from SES. This leads to an additional 2.7Ml/d[88] available for immediate deployment.

131. The SW Statement of Response Annex 5.2 has similarly confirmed that SW has agreed with Portsmouth Water the ability to take up to the full 15Ml/d bulk import, even up to a 1 in 200 year drought event[89].

132. Previously there had been some doubt about full availability of the 15Ml/d at 1in 200 or 1 in 500 year events[90]. For the 1 in 200 event, this has now been resolved and, in any event as noted above, for any 'severe' drought, the Statement of Reasons has identified that groundwater abstraction at Hardham has been taken out of the drought orders, as explained above.

133. Drought pressure would not, therefore, increase abstraction of groundwater at Hardham. Again, Portsmouth Water's full 15Ml/d is available for immediate deployment.

134. Availability of the full 15Ml/d from Portsmouth Water adds a resource of 9Ml/d on top of current usage. Together these two bulk import sources, available today, come to an additional 11.7Ml/d of water to be called upon by SW to meet development needs.

[87] Conditions RTS, Day 4
[88] CD8 1.04 at p. 8
[89] Ibid p. 9
[90] See SW letter 7.7.23 [Mr Aitken, Appx C]

135. As the development demand figures for 2025 (unmitigated by SW demand savings) are (in combination with all development across the three districts) 0.42 Ml/d on their own, or 5.42Ml/d if one works on the contingency of shutting down Hardham altogether, it is apparent that there is more than ample alternative water to increasing (or even relying on) groundwater abstraction at Hardham. After March 2025, Weir Wood comes on stream adding a further 13Ml/d to available supply, giving a total of 24.7Mld.

136. 24.7Ml/d massively exceeds the 5.42Ml/d to be found at 2025 (on the assumption of no Hardham); it massively exceeds 7.59Ml/d to be found at 2030; it massively exceeds the demand + 'no Hardham' even at the Part C Report 'end date' of 2039 – all without taking any account of SW demand management and the deployment of other non-groundwater-at-Harden sources.

137. Consequently, the NE premise that increased development, unless 'water neutral', would increase groundwater abstraction at Hardham is demonstrably false. NE do not appear to have considered 'supply side' at all; the Part C Report explicitly does not do so[91], being concerned with establishing levels of off-setting in order to achieve no increase in water ***use*** in the WSZ. With all this supply available, there is no need for water use to be fixed; there is no need for 'water neutrality'.

138. Against this, the Council ponder 'if it is available, why are SW still abstracting 5Ml/d from Hardham?'[92] The answer is, of course, because they can – for now. The EA have not asked them to go below that level pending the conclusion of the sustainability review. SW are a commercial organisation as well as exercising statutory powers and there is a commercial advantage to not buying in additional water supplies from SES and Portsmouth Water while groundwater at Hardham is still available to them[93]. As we have seen, the EA are quite clear that the decision on the licence once the review has reported will be '*to ensure protection of the designated site rather than be determined by what is operationally possible'*.[94]

[91] Kleiman xx CBKC, Day 1
[92] Aitken xx NB, Day 3
[93] Ibid; Mr Aitken's answer
[94] EA letter 13.1.23 [Mr Aitken's proof, Appx B]

139. Another line of doubt was sought to be sown by the Council in pointing out that SES and Portsmouth Water were under contractual arrangement which the inquiry has not seen and may be changed[95]. But, while this is true, it does not mean that the Inspector's 'appropriate assessment' should ignore them. The contractual supplies are among a range of factors that individually and collectively break the 'pathway' of harm from the development to the protected site.

140. The evidence is that SES and Portsmouth bulk supplies *are* available; if that were to change, they would need to be replaced by other non-groundwater-abstraction-at-Hardham for the WRMP to satisfy its own HRA; Holgate J indicates a planning decision-maker does not even need to know where the water supplies are coming from, as that is subject to its own regulatory regime. If it was proper to cast doubt on the certainty of even identified supplies because they were subject to commercial contracts, no water supply could be assumed as secured. That wouldn't just lead to sclerosis in the planning system, it would lead to paralysis.

141. As to Weir Wood, the Council's initial doubt over timescale for delivery appears to have originated before receipt of confirmation via the SW Statement of Reasons, and in ignorance of the DWI Reg 28(4) Notice served on SW[96]. 'By 31st March 2025' is a requirement of that Notice.

142. For all of the above reasons, the only rational conclusion on the evidence is that there is ample certain supply well in excess of projected water demand from new development without any increase in groundwater abstraction at Hardham, and indeed without any continuing reliance on groundwater abstraction at Hardham, should the sustainability review conclude that it is necessary to revoke the licence altogether.

143. 'Water neutrality' is not required.

'Cogent' and 'compelling' reasons not to follow NE advice:

[95] Aitken xx NB, Day 3

[96] ID.6

144. NE is the Government's statutory advisor on nature conservation matters and, ordinarily, a planning decision-maker will give substantial weight to its advice. The decision-maker is not bound by that advice, however, and the High Court has been careful to preserve the ability of planning decision-makers not to follow it. The case of *Wyatt*[97] uses the words 'cogent reasons'; the sHRA[98] cites the *Shadwell* case, which uses the phrase 'cogent and compelling reasons' for departing from the NE advice.

145. It is respectfully submitted that there are a host of cogent and compelling reasons for the Inspector not to follow NE's advice in undertaking his 'appropriate assessment.'

146. In simple terms, for all the reasons explored above, the NE has got the position on the need for 'water neutrality' in the SN WSZ wrong - and badly wrong.

147. That there is currently no known level of groundwater abstraction at Hardham pending the EA's sustainability review is not in dispute. But it is a logical fallacy to jump from that proposition to the advice to local planning authorities that for new development to be acceptable in Habitats Regs terms, it must be able to demonstrate that it is 'water neutral' in the sense of not increasing water *usage* in the WSZ.

148. First, it is a disproportionate response to the issue at hand. As we have seen, there are a host of site management issues at play in the protected site, including sluice, water level and ditch management undertaken by the EA, as well as combined sewer issues regulated by the EA. Groundwater abstraction from Hardham is itself regulated by the EA. If NE really want to take up their lance and enter the lists on behalf of the snails at Amberley Wild Brooks, their proper target is the EA.

149. Now, in the absence of any appearance by NE at this inquiry, we cannot know if NE sought to get the EA to resolve the site management issues, or more tightly regulate the combined sewer overspills. Certainly, the EA does not appear to consider that its Habitats Regs duties required such action.

[97] CD5 1.05, para. 9(4)
[98] CD1 1.01

150. We do know that the EA responded to NE's concerns about the impact on the snails by instituting a sustainability review, concluding in 2025, and securing an undertaking from SW to 'minimise' groundwater abstraction in the meantime (leading to a reduction from c12Ml/d to c5Ml/d average), and that the EA, as water regulator, considers that it is acting in accordance with its Habitats Regs duties, which will be discharged once the review is concluded and the decision to amend/revoke the licence is made.

151. NE has not – or at least has not publicly – stated that the EA's course of action is in breach of the EA's Habitats Regulations duties, notwithstanding the shared position that until the review is concluded, there is no known level of groundwater abstraction from Hardham that can be excluded from having an adverse effect.

152. Maybe NE was taciturnly dissatisfied with the EA's view of what was a proportionate course of action – again, in the absence of their appearance at the inquiry, we cannot know. But what we do know is that NE, in the context of some continuing abstraction from Hardham until the review, turned its lance upon the planning system. It wrote to the local planning authorities and advised them that unless new development can show 'water neutrality' it would 'add to this harm', resulting in an effective moratorium on housing delivery across three LPAs in Sussex since 2021. In Horsham alone, as we have seen, some 2,400 dwellings are currently caught up in this *impasse*, of which 1,182 are the Appellants' dwellings seeking to deliver plan-led growth at Kilnwood Vale.

153. The second cogent and compelling reason then makes itself apparent. The NE Position Statement states that (as groundwater abstraction at Hardham cannot be excluded from harm) development must not 'add to it'. That is uncontroversial. But p. 2 of the Position Statement, and the whole of the Advice Note that followed, focus on demonstrating 'water neutrality' in the sense of not increasing water *usage* in the WRZ.

154. Now, both parties and all witnesses to this inquiry agree that to require a 'no increase in use' is a mischaracterisation of the issue. What is in question is 'no increase in groundwater abstraction at Hardham' as a result of the development (alone and in combination). In the absence of NE's appearance at the inquiry, this mischaracterisation remains unanswered – indeed it seems to be unrecognised by NE.

155. The third cogent and compelling reason then presents itself: the NE premise is that any new development would add to increased groundwater abstraction at Hardham. Indeed, the Advice Note is explicit in its premise: increased development *'necessitates'* increased groundwater abstraction.

156. That premise manifestly false on the evidence.

157. First, groundwater abstraction at Hardham has not increased since September 2025, it has fallen – to around 40% of its previous levels, with a commitment not to increase until the sustainability review has concluded. Thus, the link between increased demand and increased groundwater abstraction at Hardham has already been severed. The causational pathway from development to harm has been broken.

158. Secondly, SW is already planning for water supply on the assumption that groundwater abstraction at Hardham is not increased, indeed, on the assumption that it ceases altogether. Future development needs would not, therefore, increase groundwater abstraction from Hardham or even rely on any such abstraction if the sustainability review concludes it must cease.

159. Thirdly, the adequacy of non-groundwater-at-Hardham supply is not in doubt in usual conditions, and has been 'battle tested'[99] in the 2022 drought where groundwater abstraction at Hardham was not materially increased, nor was Portsmouth Water's supplies increased above c.7Ml/d, nor were hosepipe bans resorted to, and yet adequate supply was maintained. Since then, and in any event, the use of groundwater at Hardham has been taken out of the drought orders, so a supply/demand stress during any future 'severe' drought would not lead to increased groundwater abstraction at Hardham.

160. There is, therefore, no link between increased development demand and increased ground water abstraction at Hardham.

[99] Mr Baxter's phrase, Baxter xic, Day 2

161. The fourth cogent and compelling reason is that NE seem, in concentrating on 'water neutrality' as not increasing water usage, to have completely failed to consider the supply side of the equation.

162. SW demand management measures reduce the net demand from new development compared to current supply, and – on the Part C Report's calculations - create a 'headroom' equivalent to some 6,000-8,000 new dwellings (on top of those with full permission at September 2021) to 2030 without the need to increase supply at all.

163. But even wholly setting those savings aside, the question becomes simply: is there enough supply from existing or new sources to meet predicted development needs without resorting to increasing groundwater abstraction at Hardham?

164. For all the reasons and evidence rehearsed above, the answer is an unequivocal 'yes'.

165. Two sources alone (SES and Portsmouth) amount to an additional 11.7Ml/d available today. Weir Wood adds a further 13Ml//d at 2025, adding to some 24.7M/d. This plays 0.42Ml/d development demand at 2025 if one wholly ignores SW management savings. Should it be found, in 2025, that groundwater abstraction at Hardham must cease, the 24.7Ml/d plays a total demand of 5.42Ml/d.

166. The moment the supply side is taken into account, the need for 'water neutrality', and water off-setting through a mechanism like SNOWS or similar, simply falls away.

167. Again, to the frustration of both parties, the absence of NE at this inquiry means that its position has not been able to be tested in the light of these supply-side matters.

168. The fifth cogent and compelling reason is that, notwithstanding the very clear evidence on the EA's action in severing the pathway, and SW's actions in securing alternative water supplies to meet its customers' needs, there is absolutely *no* requirement for an individual planning application to demonstrate that its water supply will not increase adverse impacts on protected sites.

169. That is because, as rehearsed above, the supply of potable water is a process regulated under its own statutory regime. That statutory regime includes subjecting the supply of potable water to 'appropriate assessment' under the Habitats Regulations both in terms of the long-term supply/demand management through the WIA 1991 WRMP process and specifically in terms of individual sources through the WRA 1991 abstraction licences.

170. By national policy and by High Court authority, the planning system is entitled and indeed should assume that that separate regulatory regime is operated according to those duties. NE has not publicly said that the EA is not operating in accordance with its duties; the Council has publicly said that it thinks the EA are doing so.

171. By issuing its Position Statement to the three LPAs, NE is, however, subverting that important principle and has caused the very sclerosis Holgate J warns against.

172. The sixth cogent and compelling reason is the absence of any objection from either the water regulator, the EA, or the statutory undertaker, SW, on the basis that the development should be showing 'water neutrality'. If either of those bodies considered that, without 'water neutrality', potable water could not be supplied to the development (alone or in combination) without increasing groundwater abstraction at Hardham, they could be expected to have said so.

173. It speaks volumes, we'd suggest, that no objection has been raised from either the EA nor SW, who are both 'competent authorities' in their own sphere. They, after all, are the statutory bodies with specific expertise and knowledge. There can be no doubt that both are well aware that there is ample water to supply projected needs without reliance on groundwater abstraction at Hardham.

174. Lastly, the seventh cogent and compelling reason is the conduct of NE, itself. Given the above six serious challenges to NE's Position Statement, both as a matter of principle and on the evidence in SN WSZ, and given that this non-determination appeal (shorn of all other outstanding planning issues) is expressly a vehicle for testing NE's position and getting the matter of 'water neutrality' in SN WSZ before a planning Inspector/Secretary of State, to break the *impasse* that has blocked meaningful housing

delivery across three LPAs since 2021, it might have been thought that NE would have shown its face to defend its position.

175. The use of the word ‘regrettable’ that NE has not done so is a very mild – and very English - expression of the profound frustration felt by both parties and all witnesses at this inquiry at NE’s refusal to take the stand.

176. The very fact that the NE position is founded on a premise which both the Council and the Appellants have agreed is a mischaracterisation of the issue reduces the weight of NE’s advice to ‘limited’. The weight to be given to that position, challenged cogently on so many fronts, is reduced still further by NE’s unwillingness even to attend the inquiry.

Conclusion:

177. The Executive Summary of JBA’s Part C Report might be through to betray an enthusiasm for the concept of imposing ‘water neutrality’ even without the necessity of the Habitats Regulations[100] simply as ‘a good thing’ in its own right.

178. That is very dangerous thinking. It would be to impose a tax unauthorised by Parliament, in breach of a constitutional principle rather conclusively established by an axe in 1649. It was comforting to hear, therefore, through Mr Smith[101], that the Council, for its part, had no such ambition. Given the statutory framework, the supply of water is a duty placed on others, who must operate – and are paid to operate – the regime without risk to the environment.

179. In addition, while SNOWS contemplated obliging developers to pay to retrofit the properties of third parties with free water efficiency measures, potentially running in excess of £17m to 2030 alone, Mr Smith was able re-assure the inquiry that the financial advantages of this in no way motivated the LPAs in developing an off-setting regime[102].

[100] CD8 1.14c, p. iv
[101] Smith xx Council, Day 2
[102] ibid

180. Further, the potential of SNOWS to be used as an additional 'DM' tool to 'ration' sustainable water supply to developments favoured by the LPAs and deny it to those being promoted outside allocations, was eschewed by Mr Smith, who recognised such an approach as a wholly improper use of planning policy[103].

181. Lastly, were there to be any hint from SW that it was beginning to get enthusiastic about LPAs imposing 'water neutrality', that would need to be seen in the light of the undoubted commercial benefit such a principle would confer on them; in effect they would be being paid to render a supply of water (as is their statutory duty) while not having, in net terms, having to find it or to pay for it.

182. As Mr Aitken put it[104], the principle of imposing 'water neutrality' on the customer is at odds with supply duties on the water undertaker under the Water Industry Act to supply sufficient water as demanded, while also protecting the environment and specifically Habitats Regulations protected sites. Fortunately, the EA are, it seems, fully aware of that and, through the on-going WRMP process, are requiring SW to identify its supply sources which do not rely on increasing groundwater abstraction from Hardham. SW have responded appropriately, as we have seen through the Statement of Response, to do just that.

183. NE's justification for imposing 'water neutrality' needs, therefore, to be critically and carefully examined. There seems, to date, regrettably, to have been an uncritical acceptance by the LPAs that NE's position *is* justified, the result of which has been all that feverish activity described in Mr Kleiman's evidence around SNOWS: meetings for this that and the other, committees, sub-committees and working groups, strategy reviews, governance arrangements, newly employed 'water neutrality officers' tasked to deliver something which was, on proper analysis, not required in the first place and the effect of which has been to devastate housing delivery in a time of a national and regional housing crisis. Sometimes it seems that the rush to impose 'water neutrality' is something of an unstoppable bureaucratic juggernaut.

[103] Ibid.

[104] Aitken questions from Inspector, Day 3

184. But, when the question is asked whether 'water neutrality' is justified in the first place, it is readily apparent that the answer is 'No'. NE's premise on which its Position Statement is founded is a false one in its own terms, compounded by the error in the Position Statement's characterisation of the subject of 'water neutrality' itself as meaning '*the use of water in the supply area before the development is the same or lower after the development is in place.*'

185. That, both parties and all witnesses to this inquiry agree, is manifestly an erroneous characterisation. If – as acknowledged - the issue is a potential link between groundwater abstraction at Hardham and an adverse impact on the relevant interest in the protected site, then to achieve the aim that 'development must not add to this impact', it is not necessary that the water *use* in the WRZ must be frozen. What must not increase, as a result of the development, is groundwater abstraction at Hardham.

186. It is for this reason that the 'Part C' report advocating 'SNOWS' has been, with all due respect to those who have been happily engaged upon it, a (no doubt expensive) colossal waste of everyone's time and effort.

187. It is predicated on establishing how much development can come forward without increasing water usage in the WRZ. It looks only at 'off-setting' such demand so that usage is not increased. It does not consider whether increased usage could be supplied from sources that do not involve an increase in groundwater abstraction at Hardham – which is the real question.

188. As the above submissions demonstrate, the evidence shows that there is ample water available to Southern Water to supply projected development needs without *any* groundwater abstraction at Hardham.

189. In short, the evidence is that Southern Water can fulfil its supply duties even if it has to stop all groundwater abstraction at Hardham. The fundamental premise of NE that new development without water neutrality equates to increased groundwater abstraction at Hardham does not withstand a moment's scrutiny when exposed to the evidence of available supply.

190. Moreover, given that water supply is a regulated regime and the EA has already taken action in accordance with its Habitats Regulations duties, the premise of NE's Position Statement is false as a matter of process as well as fact:

> *if* the Sustainability Study reports in 2025 that there is no hydrological linkage, there will be no need to restrict abstraction;
> *if,* conversely, it cannot exclude a linkage – and hence a risk of harm – such that reduced *or zero* groundwater abstraction is required, the WRMP24 will already have demonstrated how supplies to projected development demands can be maintained without any reliance on groundwater abstraction at Hardham.

191. As is common ground in this inquiry, the Inspector is entitled as a matter of law to assume that parallel regulatory regimes operate appropriately and, indeed, as a matter of policy he '*should'* assume so.

192. Without this fundamental recognition of the proper operation of the regulatory regimes subject to exactly the same Habitats Regulations obligations, Holgate J warns that we will introduce sclerosis into the planning system. This is *precisely* what NE's Position Statement has done in North Sussex since September 2021.

193. Indeed, in this case we have seen EA and Southern Water responding to NE's underlying concern about potential linkage at Hardham with impacts on the protected interests, recognising their own on-going duties under the Habitats Regulations, such that any possible link between development growth and increased groundwater abstraction at Hardham has, already, been severed without the need to resort to 'water neutrality' being imposed on that new development. The regulatory system for supplying sustainable potable water is working as it should.

194. As observed above, the only answer needed to a suggestion that developers have to fund 'water neutrality' is to point to para. 6.3 and para. 8.2 of the WRPG and ask, is this site 'planned development'? If it is, the WRMP process will provide for its water supply, under the WIA 1991 and do so in a manner consistent with the Habitats Regulations.

195. In addition, however, we are, as a matter of comfort to the Inspector, blessed in this case with an abundance of evidence – now having been explored through the inquiry - that there is a ample water supply available to Southern Water to deploy as it sees fit to satisfy projected development demands, not just of Kilnwood Vale and existing commitments, but all emerging local plan allocations across all three affected LPAs, without any recourse to 'water neutrality', 'SNOWS' or anything like it.

196. In short, 'water neutrality' is an irrelevance, and SNOWS has been a distracting waste of officers' time and taxpayers' money.

197. We return to the fact that neither the EA, as regulator, nor Southern Water, as supplier, suggest that there is insufficient water supply to serve the proposed development in the absence of demonstrating 'water neutrality' without risking harm to the protected sites. They will be well aware that there is more than sufficient water available to them without doing so.

198. On the evidence of Mr Smith for the Council[105] no one would be more delighted than the Council if it were decided that 'water neutrality' (and with it, SNOWS) were unnecessary and could be set to one side. The c.2,400 dwellings currently held up by this issue (including 1,182 dwellings at Kilnwood Vale, of which the appeal scheme forms a part), and the other dwellings stuck in the system in the other two LPAs could be released to contribute to what is undoubtedly a much-needed Housing Land Supply.

199. There is, on the evidence, no reason why consent should not be granted 'without delay'[106] for this appeal, thereby curing the sclerosis caused by the *impasse* created by NE's manifestly erroneous position – a position that it has (one may say, at the very least) 'regrettably' failed even to turn up to defend.

CHRISTOPHER BOYLE KC,
18th March 2024

Landmark Chambers,
180 Fleet Street, London, EC4A 2HG.

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[105] Smith xx CBKC, Day 2
[106] NPPF para 11(c)

Water Supply, Demand and Resources Evidence

Council application reference: DC/23/0856

PINS Ref: APP/Z3825/W/23/3333968

Kilnwood Vale Sub-phase 3DEFG, Crawley Road, Faygate, West Sussex

LPA Horsham District Council

Dated: 12/02/24

Alistair Aitken C Eng MICE MCIWEM C.WEM

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Appendices

Appendix A

Letter from DEFRA/EA/OFWAT WRMP19 Annual Review 2023

Appendix B

Correspondence with The Environment Agency

Appendix C

Correspondence with Southern Water

Appendix D

Water Neutrality in Sussex North Webinar Q&A dated 5th October 2023

Alistair Aitken
alistairaitken@fortridge.co.uk

Client
Crest Nicholson Operations Limited

February 2024

1.0 Introduction

Qualifications

1.1 My name is Alistair Aitken and I am and have been a Director of Fortridge Consulting Limited since 2002. Fortridge Consulting Limited is a civil engineering consultancy that provides advice to clients on development sites and, in particular, on infrastructure planning and design.

1.2 I have a Bachelor of Science Degree (with Honours) in Civil Engineering. I am also a Chartered Member of the Institution of Civil Engineers and the Chartered Institution of Water and Environmental Management.

1.3 I am responsible for undertaking project work including managing and coordinating all technical aspects and the general day to day management of projects.

1.4 Prior to establishing Fortridge Consulting Limited, I worked in various roles including Divisional Technical Director at Bryant Homes, Water Leader at Arup Leeds and Director of Engineering at Pell Frischmann Water.

1.5 I have extensive experience in infrastructure planning and design and in particular relevance for this appeal experience of water supply planning and design.

1.6 Fortridge Consulting Limited were instructed by Crest Nicholson to provide technical support in relation to water supply matters for their site at Kilnwood Vale. An element of the work includes planning support to inform a reserved matters application (ref: DC/23/0856) for a residential development, for up to 280 homes.

Scope and Structure of Water Supply and Resources Evidence

1.7 The scope of my evidence is to provide an explanation of how water supply including water resources is regulated and provided by Southern Water and the roles and responsibilities of other regulatory bodies in respect of water supply.

1.8 More specifically I shall set out how in North Sussex water supply has been planned and provided in the past and how it is planned for the future by reference to water resource management plans published by Southern Water.

1.9 I will set out how the duties imposed upon the local planning authority mirrors the duties imposed on both the EA and the water undertaker, so they shouldn't be operating their separate regulatory regimes.

1.10 Finally, we will explain how Southern Water can supply water to the North Sussex Water Supply Zone without reliance on groundwater from Hardham.

2.0 Description of the Site

Planning

2.1 Kilnwood Vale has benefited from outline planning permission since October 2011, has been substantially implemented, and from the evidence available, is accounted for under Southern Water's Water Resource Management Plan.

2.2 This application seeks detailed consent for the residential parcels of sub-phase 3DEFG of the Kilnwood Vale development, comprising a 6.71ha parcel for 280 dwellings including 70 (25%) affordable homes, together with associated landscaping, drainage, access and parking.

2.3 The description of development is as follows:

"Reserved Matters approval sought for layout, appearance, scale and access, in accordance with DC/15/2813 for Phase 3DEFG of the Kilnwood Vale development, comprising of 280 dwellings with associated landscaping, access and parking."

2.4 Since planning permission was first granted in October 2011 a number of residential phases have achieved reserved matters consent and have been built out and are now occupied.

2.5 Approximately 1,200 dwellings have been completed at Kilnwood Vale, largely within the southern section of the strategic site. A number of recently submitted reserved matters applications are presently under consideration by the Council for the development of the remainder of the site.

2.6 Phase 3DEFG has been designed to ensure that the development accords with the parameters, principles and objectives approved under the extant consent, to deliver a high quality living environment envisaged by the masterplan and design principles.

2.7 Phase 3DEFG of Kilnwood Vale forms part of Part A of the approved, hybrid, outline planning application submitted to HDC in July 2010. As the Kilnwood Vale site was allocated in the West of Bewbush Joint Area Action Plan (JAAP) in 2009, and was subsequently been taken forward in the HDPF, which was adopted in 2015 (Horsham

District Council, 2015), Phase 3DEFG of Kilnwood Vale was accounted for within the HDPF (2015).

Infrastructure Already Provided

2.8 Water mains, sized for the whole development where appropriate, have been provided on the site through a combination of requisitioned water mains in accordance with S41-44 of The Water Industry Act and self-laid mains provided under self-lay agreements with Southern Water.

3.0 Background

Status of Planning at Kilnwood Vale

3.1 Horsham District Council ('the Council') failed to determine the application for reserved matters approval within the prescribed period and an appeal was made on the grounds of non-determination.

3.2 The Council's Statement of Case **[CD7 1.02]** finds that this describes the Council's position at paragraph 4.5, which states:

"The Council's case will set out that the appellants have misinterpreted the Council's Part C Mitigation Strategy document (which sets out how a strategy to ensure that current and future planned growth in the water supply zone can come forward without breaching the Habitats Regulations) by seeking to incorrectly and arbitrarily disaggregate development which they consider informed the current WRMP19 from that being planned for in the various new local plans being produced by Horsham District Council, Crawley Borough Council, and Chichester District Council"

In the context of this statement its important to recognise both the role and the status of the emerging Part C Mitigation strategy which I will discuss later.

It is the appellants position and my evidence that water neutrality is not required as the concerns underpinning Natural England's position statement (namely that increased development would result in increased groundwater abstraction at Hardham does not and will not arise).

Water Supply and Resources Evidence

3.3 The Natural England Position Statement sets out their substantive advice for all applications which fall within the Sussex North Water Supply Zone. The premise is that:

(i) groundwater abstraction may be having an adverse effect on protected sites within the Arun Valley.

"As it cannot be concluded that the existing abstraction within Sussex North Water Supply Zone is not having an impact on the Arun Valley site, we advise that developments within this zone must not add to this impact.";

(ii) New development would increase groundwater abstraction (and/or prevent or make more difficult future abstractions of groundwater to zero).

3.4 Groundwater is water which filters downwards through the ground to below the water table, where it is held in porous rocks and strata. Geological formations that contain groundwater which can be extracted are called aquifers, and are an important sources of drinking water in the UK.

3.5 The Position Statement says that development must not add to this impact (i.e. by increasing groundwater abstraction) and **one way** of achieving this is to demonstrate water neutrality. It is not suggested that this is the only way. The other (obvious) way to not increase the impact is to provide for increased water demand by supply sources that do not rely upon increased groundwater abstraction from Hardham, this is explored below, is precisely what Southern Water is planning to do.

3.6 In this context, It is important to understand that the Sussex North Water Supply Zone is not only supplied by water from groundwater abstraction but also from other sources including Weir Wood Reservoir, river abstraction from the River Rother and the River Arun, bulk transfers from their own Sussex Worthing water supply zone, and agreements with neighbouring water undertakers such as Portsmouth Water Sutton and East Surrey (SES) Water.

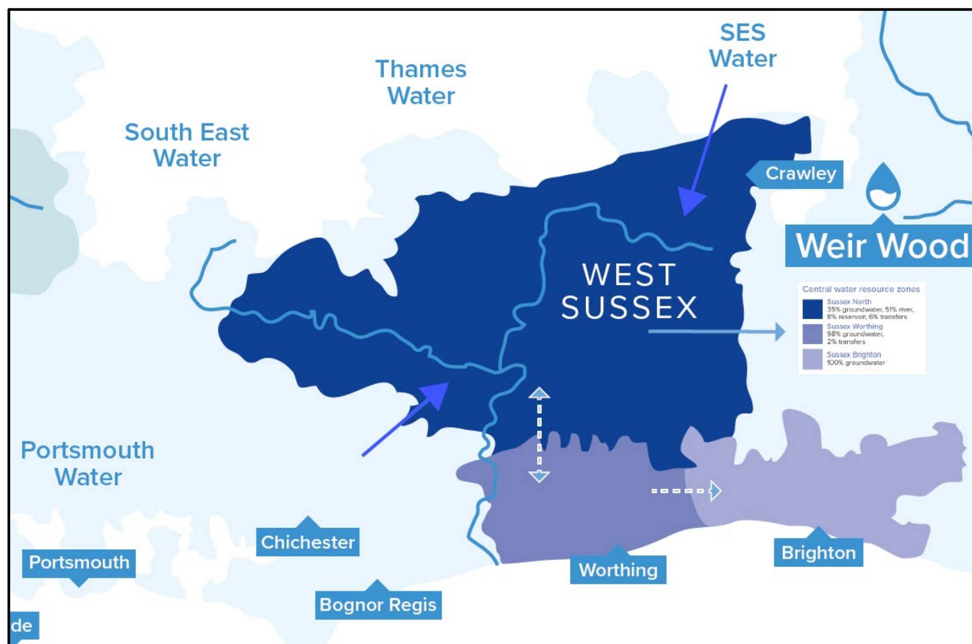

Figure 1 Sussex North Area (dark blue)

3.7 According to Southern Water's WRMP19 document "Securing a resilient future for water in the South East" [**CD8 1.01]**, published before the NE Position Statement and before any reduction measures, the Sussex North Water Resource Zone ("WRZ") was supplied 35% from groundwater, 51% from rivers (Rother and Arun), 8% from reservoir and 6% from transfers.

3.8 Since the NE Position Statement (September 2021), Southern Water has reduced the amount of groundwater abstraction from an average 12.7Ml/day (2021) to a rolling average of 5Ml/day. Southern Water has clarified in a letter dated 7th July 2023 (Letter in Appendix C) to Fortridge that it is operating a voluntary reduction to a rolling average of only 5Ml/day. The letter says:

"Meanwhile we have voluntarily reduced our Hardham groundwater abstraction volumes. We commenced a reduction in autumn 2021, with a target rolling average of 5 Ml/day, representing approximately 40% reduction from previous typical levels (average daily abstraction groundwater abstraction from 1/1/19 to 31/7/21 was 12.7 Ml/d; or, since 1/1/02, was 11.7 Ml/d). This commitment extends at least to the completion of the sustainability review of the licence in 2025."

3.9 The current proportion of the water supplied to the Sussex North Water Resource Zone ("WRZ") is 14% from groundwater and 86% from other sources.

3.10 During the extremely dry summer of 2022, when hosepipe bans, known as 'Temporary Use Bans, were deployed elsewhere in Southern Water's area, The Sussex North area was supplied with water **without the introduction of any drought measures**, **and without increasing groundwater abstraction** above the voluntarily reduced levels. (Reference Southern Water's website)

3.11 As explained below Southern Water is planning for growth including this development **without increased groundwater abstraction** and indeed modelling scenarios without any groundwater abstraction at Hardham.

3.12 Southern Water is planning for drought scenarios without groundwater abstraction. The Water Resources Management Plan 2024 Statement of Response Annex 5.2: Responses to non questionnaire respondents by organisations August 2023 Version 1 **[CD8 1.04]** page 14 says:

"Our Pulborough drought options relate only to the surface water abstraction and assume the groundwater will be unavailable and the MRF condition would not be modified to allow any additional groundwater abstraction."

4.0 Water Supply Planning and Regulation

4.1 There is a statutory framework in place, primarily in the Water Industry Act 1991 ("The Act"). The Act places a duty on water companies to provide supplies water to persons who demand them (S37 WIA) and to improve and extend the network.

4.2 There is also a duty to prepare and maintain a Water Resource Management Plan, with 25 year horizon. These duties are set out in sections 37A to 37D of the Water Industry Act 1991. The WRMP process as explained below more fully is regulated by DEFRA. The current WRMP is WRMP19 and the emerging WRMP is dWRMP24. This process should take account of growth. At Section 6.3 of the Water Resources Planning Guide ("WRPG") **[CD8 1.08]** it says: "*Your planned property and population forecasts, and resulting supply, must not constrain planned growth.*"

4.3 In the WRMP a water company must demonstrate how it will ensure secure supplies while protecting and enhancing the environment.

Regulation of Water Resources Planning in England

4.4 The Environment Agency (EA) administers the water abstraction and impoundment licensing system and has a general duty to secure the efficient and proper use of water resources in England. The EA are responsible for implementation of the Water Framework Directive (WFD) and production of River Basin Management Plans (RBMPs).

4.5 The statutory water undertakers in England and Wales each have the duty to maintain and develop a reliable, efficient and economical system of water supply in their areas of appointment.

4.6 They have a statutory duty to prepare WRMPs. Defra, EA, NRW and Ofwat produce joint guiding principles on the information to be included in the plans and review their quality and robustness. Defra has produced guidelines setting out their expectations for the WRMPs. UK Water Industry Research (UKWIR) has undertaken work to define appropriate approaches and methodologies to both inform and support this guidance.

4.7 Ofwat has a duty to ensure that water companies provide domestic and business customers with a good quality service that represents value for money. Under the Water Act 2014, Ofwat was also given a new resilience duty to promote management of water

resources in a sustainable way. Every five years Ofwat undertakes the price review for the water industry, this is known as the AMP . It requests detailed business plans from water companies setting out their investment and operational requirements and determines the price limits that water companies may charge their customers.

4.8 Price limit periods in the water sector are sometimes known as Asset Management Plan (AMP) periods. The current period (2020-25) is commonly known as AMP 7 because it is the seventh price review period since privatisation of the water industry in 1989. AMP periods are five years in duration and begin on 1 April in the years ending in 0 or 5. The upcoming Asset Management Plan is AMP8 (2025-30).

4.9 Water company business plans include proposals to maintain the water supply-demand balance, derived from each water company's WRMP. The last price review took place in 2019 (with draft determinations being made in July, and final determinations in November), with the latter determining the investment schemes to be undertaken on water resources and demand management over the five years to 2024. The next round of business plans and pricing will be confirmed in December 2019 and will run between 2025 and 2030. Although these plans are prepared in five-year cycles, water companies take into consideration longer-term forecasts in their development. They must also adjust plans for material changes in circumstance.

4.10 Water companies in England and Wales are required to prepare and maintain drought plans under the Water Industry Act 1991, as amended by the Water Act 2003. Following the Water Act 2014, these are produced every five years.

4.11 Drought plans set out how water companies will supply water to their customers during periods of low rainfall when water supply becomes depleted, whilst minimising any negative impacts of their actions during a drought. Plans should set out the short-term operational steps that companies will take before, during and after a drought. Both EA/Defra and NRW have produced separate guidance on what should be included in water company drought plans.

4.12 Natural England are responsible for maintaining and enhancing Sites of Special Scientific Interest (SSSIs), European sites, landscape and delivery of wider biodiversity.

4.13 Natural England's (NE) core responsibilities are documented in their Framework Document (2022)

4.14 NE has been established under the **Natural Environment and Rural Communities Act 2006 ("NERC Act")**. Its general purpose, set out in section 2(1) of the Act, is to: "*ensure that the natural environment is conserved, enhanced and managed for the benefit of present and future generations, thereby contributing to sustainable development*."

4.15 Some of the key responsibilities undertaken by NE are:

i. Acts as a statutory consultee in relation to planning and development with local authorities.

ii. Has a duty to advise on legally binding targets for air quality, water, biodiversity, and waste with the intention of halting the decline in species abundance by 2030.

iii. Has enforcement powers (under the **Wildlife and Countryside Act 198132** and other enactments); and the power to bring criminal proceedings directly or through a person authorised to prosecute on Natural England's behalf (section 12 of the NERC Act).

4.16 Local planning authorities and water undertakers need **to work effectively together to ensure that investment in water related infrastructure and operations is timely and meets the needs of society and of the environment.** Water companies are statutory consultees on Local Plans in England.

4.17 Horsham District Council is responsible for determining planning applications under the Town and Country Planning Act.

4.18 A range of other environmental organisations and stakeholders take an active interest in water resources planning as it affects their concerns. For example, the Canal & River Trust undertake water resources planning and drought planning to meet the demands of maintaining navigation across the 2000-mile waterway network it manages in England and Wales.

Water Resource Management Plans

4.19 Water Resources Management Plans (WRMPs) show how each of the water companies that operate in England intends to maintain the balance between supply and demand for water over the next 25 years. Preparation of the Plans – which had previously been voluntary – became a statutory requirement in 2007 to make them more robust in addressing security of supply, improve environmental protection from abstraction and also to provide transparency in the planning process and the opportunity for stakeholders and customers to make representations on their content.

4.20 Water companies have a statutory duty to maintain adequate supplies of water. The preparation and maintenance of WRMPs became a statutory requirement in April 2007 under the Water Industry Act 1991 [1], as amended by the Water Act 2003 [2]. This sets out the requirement for preparation and publication of a WRMP, describes what the WRMP should address and the need for review and revision. The Water Resources Management Plan Regulations 2007 ("the 2007 Regulations") [3] set out the consultation process including the handling of representations and the companies' statements of response as well as the power of the Secretary of State for Environment, Food and Rural Affairs (SofS) to hold an inquiry or hearing. Water Resources Management Plan Directions ("the Directions") [4-7] provide further detail on additional matters to be addressed in the WRMP.

4.21 The overarching objective of the WRMP process is to "look ahead 25 years and describe how a water company aims to secure a sustainable supply demand balance for the supply of water taking into account the implications of climate change and assessing the impact of each option in terms of greenhouse gas emissions". The WRMP is complemented by the water company's drought plan, which sets out the short-term operational steps the company will take as a drought progresses.

4.22 Companies are required to set out a forecast of the demand for water that shows the need for households and non-households (such as manufacturing or agricultural operations) and what they expect to leak from their network of pipes. This initial forecast that they need to calculate is called the "baseline". This should show what happens to the demand for water over the next 25 years and should include:

4.22.1 the effect on demand if the company did not change its current practices or policies;

4.22.2 any effects of forthcoming changes to legislation relating to demand management and related policies that Defra set out to be implemented in the 25 year period, and

4.22.3 a description of how climate change may alter household and business use of water over the 25 year period.

4.23 This is then compared against a baseline forecast of available water supply, assuming current resources and future changes that are known about. Companies should also consider the impact of climate change on supply, and forecast the required level of headroom to allow for uncertainty in the assessment. Headroom is a buffer between supply and demand designed to cater for specified uncertainties.

4.24 This gives a calculated surplus or deficit of water for each year, known as the "baseline supply-demand balance". Companies aim not to have a deficit. Where there is a deficit, companies should choose water management options to meet the difference. A company's WRMP should consider the costs and benefits of a range of options and justify the preferred option set. These options should include existing as well as new measures.

4.25 The company is then required to prepare a final supply-demand balance, taking into account its preferred options for water management, to demonstrate that the WRMP meets the forecast demand.

4.26 A company's WRMP should be a stand-alone document that provides a realistic strategic plan for managing water resources. Companies should provide evidence in their WRMPs in support of their preferred strategy and full details of the assumptions they have made. Companies should demonstrate a clear understanding of the performance of their systems, the main factors affecting their supply-demand balance, and how their preferred WRMP is both flexible and robust to the various risks and uncertainties, including the potential impacts of climate change.

4.27 Once a WRMP has been finalised, the water company must keep it under constant review and report any changes in its annual review to the secretary of State. If there is a **material change** at any point in the WRMP, the company must start the process to develop a new WRMP.

4.28 Each WRMP is supported by a Strategic Environmental Assessment (SEA). The SEA is a process that aims to integrate environment and sustainability considerations into strategic decision-making and the requirements for SEA are set out in the **Environmental Assessment of Plans and Programmes Regulations 2004 (the SEA Regulations)**. The SEA process includes the assessment of the likely significant effects of the WRMP and its reasonable alternatives. It assesses the likely significant environmental effects (including inter and intra cumulative effects) of the options in the WRMP with other relevant programmes, plans and projects and identifies ways in which adverse effects can be avoided, minimised or mitigated and how any positive effects can be enhanced. It does so by including such information as may reasonably be required, taking into account current knowledge and methods of assessment, the contents and level of detail in the plan, its stage in the decision making process and the extent to which certain matters are more appropriately assessed at different levels in the process to avoid duplication. This is used to inform the development and selection of the demand management and supply side options proposed within the WRMP. A monitoring plan is outlined to allow for the identification of any unforeseen environmental effects and implementation of remedial action where necessary.

4.29 The current guidance for Water Resources Planning is contained in a document published on the government's website. It is called: Water Resources Planning Guideline" ("WRPG") and is now at version 12 (updated March 2023)" **[CD8 1.08]**

4.30 The relevant elements of the WRPG **[CD8 1.08]** are discussed in this PoE. (Section 1.1 Page 3/102):

"If you are a water company in England or Wales, you must prepare and maintain a water resources management plan (WRMP). Your WRMP sets out how you intend to achieve a secure supply of water for your customers and a protected and enhanced environment. The duty to prepare and maintain a WRMP is set out in sections 37A to 37D of the Water Industry Act 1991. You must prepare a plan at least every 5 years and review it annually.

In your plan you must forecast your supply and your demand over at least the statutory minimum period of 25 years. If you forecast a deficit you should consider:

- *supply-side options to increase the amount of water available to you*

- *demand-side options which reduce the amount of water your customers require*

To determine your preferred programme you should identify and appraise a range of options. You should justify the selection of the options included in your preferred plan. If you do not have a deficit you should still produce a best value plan. This should consider government policy and wider objectives such as increasing your surplus to facilitate water trading.

When you produce a preferred plan, there are uncertainties. We therefore recommend using adaptive planning. In this concept, when we refer to a preferred programme, this can also be referred to as representing the 'most likely' future (based on the uncertainties) and the pathway through it. That is, the route through the adaptive planning you will most likely follow.

This guideline focuses on the legal requirements and technical approaches you should follow to develop a WRMP. You should consider this guideline in conjunction with any relevant government policy and outcome expectations."

4.31 Section 1.4 (page 6/102) explains that the Environment Agency, Natural Resources Wales, and OFWAT are responsible for jointly writing the guide.

4.32 Sections 1.4.1-1.4.6 (pp 6/102-8/102) sets out the roles of the different regulators in the WRMP process. In England the regulators are the Environment Agency, Ofwat, the Drinking Water Inspectorate (DWI), the Regulators' Alliance for Progressing Infrastructure Development (RAPID) and Natural England.

4.33 Section 3 of the Guidelines sets out in more detail how water companies are expected to form and maintain a WRMP. (Section 3.1, page 14/102 [**CD8 1.08**]):

*"This section explains what steps you need to take to develop and publish your water resources management plan (WRMP or the plan). It starts from early engagement with regulators and customers, through to publishing your final plan. Once published, you **must** report on your plan annually."*

4.34 The process of preparing a WRMP is set out in Sections 3.1-3.9:

3.1 Legal Requirements

3.2 Reginal Plan Process

3.3 Pre-consultation

3.4 Write a draft plan

3.5 Send your draft plan

3.6 Publish, distribute and consult on your draft plan

3.7 Publish Statement of Response

3.8 Publish Final Plan

3.9 Review and maintain your final plan

4.35 Water companies can be left in no doubt about the importance of preparing and maintaining a WRMP. (Section 3.9, page 24/102 [**CD8 1.08**])

"You must maintain your plan. You should treat it as a live document. You should implement your plan, monitor its progress, and take action if required. Your final plan should show how the interventions within it will be translated into delivery plans and monitored during the relevant asset management period. You must review your published plan every year and report to the Secretary of State or the Welsh Ministers. This should be on or before the anniversary of publication of the final WRMP. You should follow the latest Annual Review guidance."

If through the annual review you demonstrate or indicate a 'material change of circumstance' (as described in the Water Industry Act 1991 Section 37A (6)) you must prepare a revised draft. A new revised plan must follow the procedures for preparing and publishing a plan as set out in the Water Industry Act 1991 Section 37B 'Water resources management plans: publication and representations'.

The definition of a material change of circumstances is not given as it relates to the final plan. The following lists possible examples, but you should not consider them definitive:

- *a significant change in level of service from what was in the published plan*
- *new or significant changes to the measures that were identified in the published plan and are likely to have significant public or environmental interest*
- *a significant change in costs*
- *a change that could cause significant adverse effects on the environment*

As a first step you should consult with the Environment Agency and, or Natural Resources Wales on any substantial changes that you wish to make to your plan. You will need to inform Defra or the Welsh Government if there is a material change of circumstances, within 6 months."

4.36 Section 4 of the Guidelines sets out in more detail how water companies are expected to develop their plans.

4.37 Section 5 of the Guidelines sets out in more detail how water companies are expected to develop their supply forecast including achieving sustainable abstraction.

4.38 Section 6 of the Guidelines sets out in detail how water companies are expected to develop their demand forecast, covering existing demand including leakage and forecast demand for both household and non-household customers.

4.39 Importantly at 6.3 of the WRPG [**CD8 1.08**] is concerned with forecasting population, properties and occupancy , the guideline says:

"Your planned property and population forecasts, and resulting supply, ***must not constrain planned growth****. For companies supplying customers in England you should base your forecast population and property figures on local plans published by the local council or unitary authority. Local authorities will be at different stages of publication of their Local Plans." (Emphasis added)*

4.40 Importantly at 6.6 (pp65/102-66/102) of the WRPG **[CD8 1.08]** is concerned with leakage. The guidelines say:

"Reducing leakage is an essential part of reducing the demand for water. Not least because many customers are more responsive to reducing their own water use if water companies reduce their leakage.

Reducing leakage is important for the efficient use of resources, improving resilience and reducing the environmental impact. Leaking water costs you as you pump, abstract and treat the water. You should therefore show leadership by making sure you keep leakage under control. You should follow government policy and regulators and customers' expectations to continue to reduce water loss through leaks.

You should demonstrate how your leakage proposals build on your work to manage leakage to date and form part of a long term approach to demand management."

4.41 The WRPG sets out a process that is carefully regulated, reviewed and managed by DEFRA with the input of the EA and NE.

5.0 Overview of Water Supply in Sussex North Water Supply Zone

Water Resources in Sussex North (not just groundwater)

5.1 The Sussex North Water Supply Zone is not only supplied by water from groundwater abstraction but also from other sources including Weir Wood Reservoir, river abstraction, bulk transfers from Portsmouth Water, Sutton and East Surrey Water and from the Sussex Worthing water supply zone.

5.2 According to Southern Water's WRMP19 document "Securing a resilient future for water in the South East" **[CD8 1.01]**, published before the NE Position Statement and before any reduction measures, the Sussex North Water Resource Zone ("WRZ") was supplied 35% from groundwater, 51% from rivers (Rother and Arun), 8% from reservoir and 6% from transfers.

5.3 Since the NE Position Statement Southern Water has reduced the amount of groundwater abstraction from an average 12.5Ml/day (2021) to less than half that figure. Indeed in a report on groundwater minimisation Southern Water reported 2.6Ml/day (Dec21-Jan22). Southern Water has clarified in a letter to Fortridge that it is operating a voluntary reduction to a rolling average of only 5Ml/day (Appendix A).

5.4 The current proportion of the water supplied to the Sussex North Water Resource Zone ("SNWRZ") is supplied 14% from groundwater and 86% from other sources. Southern Water holds abstraction licences for surface water abstraction from the River Rother (75Ml/day) and the River Arun (10Ml/day) at Hardham. It is also able to supply water into SNWRZ from a water resource zone to the south called Sussex Worthing and has bulk supply agreements in place with Portsmouth Water and Sutton and East Surrey Water as well as a supply from Weir Wood Reservoir.

5.5 Weir Wood reservoir has been out of service for a considerable amount of time and is due back in service during 2025, if not sooner.

5.6 During the extremely dry summer of 2022, when hosepipe bans were deployed elsewhere in Southern Water's area, the Sussex North area was supplied with water

without the introduction of any drought measures, even allowing for the voluntary reduction in groundwater abstraction.

Natural England Position Statement introducing Water Neutrality

5.7 On 14th September 2021, Natural England published a Position Statement **[CD8 1.15]**. Within this note, NE explain that it could not conclude that groundwater abstraction for drinking water supplies within the Sussex North Water Supply Zone (SNWSZ) was not having a negative impact on a number of designated sites including Amberley Wild Brooks Site of Special Scientific Interest (SSSI) and Pulborough Brooks SSSI. These form part of the Arun Valley Special Protection Area (SPA), Arun Valley Special Area of Conservation (SAC) and Arun Valley Ramsar site. As a result, NE advised HDC that any new development that takes place within Horsham must not add to this negative impact, i.e. all development should be water neutral.

5.8 The actual wording in the Position Statement was:

"As it cannot be concluded that the existing abstraction within Sussex North Water Supply Zone is not having an impact on the Arun Valley site, we advise that developments within this zone must not add to this impact."

5.9 The Note went on to say:

"Developments within Sussex North must therefore must not add to this impact and one way of achieving this is to demonstrate water neutrality."

5.10 The area affected covers the Sussex North Water Resource Zone. This area covers three planning authorities: Horsham, Crawley and parts of Chichester. These areas are supplied with water by Southern Water from its Sussex North Water Resource Zone. This supply is sourced from abstraction points in the Arun Valley, which includes locations such as Amberley Wild Brooks Site of Special Scientific Interest (SSSI), Pulborough Brooks SSSI and Arun Valley Special Protection Area/Special Area of Conservation and Ramsar site.

5.11 The issue is related to the abstraction of groundwater at Hardham and the possibility that groundwater abstraction might be affecting the protected wetlands and the habitat of the little whirlpool ramshorn snail, a protected species.

5.12 The aquifer beneath the protected sites is 'confined' meaning there are impermeable clay layers both above and below the aquifer. This is well documented in various reports concerning the local aquifers.

5.13 The planning authorities have applied the 'test' to new planning applications including outline and reserved matters applications, effectively preventing development from taking place if water neutrality could not be demonstrated.

5.14 Southern Water has responded to the situation at Hardham by reducing groundwater abstractions from an average daily abstraction of about 12.7Ml/day to a target of about 5Ml/day.

5.15 The Environment Agency are the competent authority for the licensing of water abstractions but has not made a positive move to change the licence conditions on the groundwater abstraction licence that has an upper limit of 36Ml/day. Instead, they have secured an undertaking from Southern Water to minimise groundwater abstraction from Hardham and for permanent changes to the groundwater abstraction licence they are awaiting the outcome from a sustainability study, (also referred to as a hydrological study) that has been commissioned to try and understand the relationship, if any, between the groundwater abstractions and water environment within the protected sites. The study report will be published in 2025.

5.16 If there is a relationship between the groundwater abstractions and water environment then The Environment Agency will need to amend the licence conditions for groundwater abstraction to accord with Natural England's objectives in relation to the protected sites and Natural England can then withdraw its Position Statement.

5.17 If there isn't a relationship between the groundwater abstractions and water environment then The Environment Agency will not need to amend the licence conditions for groundwater abstraction and Natural England can withdraw its Position Statement.

5.18 In following this course of action the Environment Agency is fulfilling its duties under the Habitats Regulations to protect the European sites in the Arun valley because: (see EA letters in Appendix C)

“the reduction reduces risk of deterioration of, and risk of adverse effects to, the site whilst the detailed investigations are carried out”

6.0 Water Planning in Sussex North Water Supply Zone

Southern Water's WRMP19

6.1 The background to the Water Resources Management Plan (WRMP) 2019 and its provisions are discussed in the sHRA [**CD1 1.01/1.02**]. The WRMP is a forward looking plan and predicts future water demands across the south-east over the period 2020–2070. WRMPs are updated every 5 years and are informed by a detailed data analysis supplied from a variety of authoritative sources.

6.2 Such data considers a wide range of factors and takes into account not only growth in housing, commercial and business needs but also any changes in the availability of water resources and any reductions in abstractions that may be required including environmental considerations.

6.3 In regard to this latter point the WRMP 2019 allows for a significant reduction in groundwater abstraction as set out at paragraph 5.3.4 of the sHRA which quotes from the WRMP 2019 *"Whilst we have not yet been notified of any certain sustainability reductions, it is possible that we will need to make changes to our licences by 2027 to protect and enhance the environment. The potential scale of these could be significant, but is not yet certain.* <u>We have allowed for this in our estimates</u>*"* (our emphasis).

6.4 It is highlighted that the purpose of the WRMP 2019 is to project the water requirements of the area over its plan period, in this case 2020 – 2070, (and identify sufficient supply for the 1 in 200 drought year conditions). Over the WRMP period (50 years), significant housing growth is projected but it is pertinent to note that this will not all occur on day one of the plan. On the contrary, such growth will take a considerable time to come forward and hence Southern Water would have ample time in which to bring forward the required infrastructure upgrades should these be commercially desirable or potentially necessary. Indeed, the WRMP is itself replaced every 5 years; WRMP 2019 is already being reviewed in the draft WRMP 2024. The availability of such infrastructure upgrades is not in question and a range of options are available for Southern Water to deploy9 including through the re-opening of the existing Weir Wood Reservoir which is currently closed for maintenance and / or through the re-opening of two boreholes

currently out of commission at Petersfield and West Chiltington or through the upgrade of the pumping infrastructure at Steyning borehole which is currently at a reduced output due to lack of pump capacity or through possible import from other WRZ's (there is already a link to Sussex Brighton WRZ and Portsmouth Water).

WRMP supply commitments (to accommodate the housing growth assessed in 2019)

6.5 As noted above, Southern Water is under a legal duty to produce a WRMP every five years. Furthermore, the plan must be reviewed annually, and where a material change in circumstances arises, Southern Water is under the same duty to revise the WRMP and publish an updated plan to account for any such changes, so as to fulfil its duty to supply water to all new development in the plan area. In so doing Southern Water exercises its statutory powers and duties in accordance with the obligations placed on it as Competent Authority. It is not possible for Southern Water to ignore this requirement and as such this provides a binding assurance that sufficient supply would be available to accommodate the same level of housing growth assessed in 2019 despite sustainability reductions.

6.6 The per capita consumption figures allowed in WRMP19 are based on consumption figures contained in the Water Resources Management Plan 2019 Annex 2: Demand Forecast December 2019 Version 1.

6.7 For Sussex North the population was stated as 270,000 with a Total Demand of 61Ml/day.

6.8 The measured household demand was about 305l/household/day

6.9 The per capita consumption figures varies by customer group and location. For the Central area used in the demand forecasts was in the range 115-128l/p/d for 20/21, reducing towards 100l/p/day by 2070.

Allowance in the dWRMP24 for further sustainability reductions

6.10 The sustainability reduction commitments in WRMP19 are taken forward and added to with increased commitments set out in Southern Water's draft dWRMP 2024 (revision October 2022) (consulted upon from 14 November 2022 to 20 February 2023). This

discusses the requirements of increased sustainability reductions with details set out within the WRMP 2024 Technical Report:

"1.3 Our WRZs face a range of pressures, some of which are common to all WRZs and some unique to particular areas. This might include vulnerability of existing supplies to climate change or abstraction licence changes in order to provide greater environmental protection. Some areas are also predicted to experience significant growth over the coming decades, increasing the demand for water.

2.3.2 the EA and Natural England have set out their expectations on the need to deliver ambitious reductions in abstraction to protect the environment. We have included a range of scenarios in our plan that seek to meet the current and future needs of the environment. We have also included an explanation of the activities needed to deliver them (see Section 5.3.8).

2.6 In planning to provide resilient supplies for customers, we face a number of challenges and opportunities. The greatest challenge is the scale and timing of sustainability reductions to our abstraction licences, which have recently been made and are likely to be needed to protect and improve the environment. We need to investigate, design and secure permissions to build a number of large-scale solutions over the next few years, while we keep our plans flexible enough to adapt to the final scale of licence changes needed to meet environmental targets.

2.7 Abstraction licence changes have already restricted the volume of water we can take from existing sources, reducing the water available in dry and very dry years. We expect further restrictions on our licences going forward, to protect and improve rivers, aquifers, reservoirs and coasts."

6.11 It is therefore apparent that the WRMP has identified the planned sustainability reductions and included measures to fully accommodate these whilst still meeting its duty to supply consumers.

WRMP 2024's consideration of groundwater abstraction at Hardham

6.12 The WRMP 2024 Technical report **[CD8 1.02]** also specifically addresses groundwater abstraction at Hardham:

"2.6.1 In our Central Area we have taken action to protect designated habitats in the Arun Valley and to ensure we have sustainable abstraction licences and secure supplies for our customers for the long term…..To ensure we have a robust plan, we have worked closely with WRSE and our neighbouring water companies to consider a range of potential futures relating to abstraction licence changes, growth and climate change".

6.13 Further detail is provided at section 3.2.1:

3.2.1 SNZ WRZ remains an area under stress from growth and the environmental

needs of the Arun Valley…..Our own requirement to mitigate the potential impact of abstraction from the Pulborough groundwater source has seen us successfully ***reduce abstraction by more than 50% from the source compared to the average abstraction in the first half of 2021–22****. We are continuing to use alternative sources of supply and maximise the bulk import from PWC wherever possible. We are currently investigating the opportunity to formalise this operational regime outside of drought conditions (when we are more reliant on groundwater sources) and whether this could be an alternative solution to water neutrality…….Investigations and discussions between Southern Water, the EA and Natural England on the long term sustainability of the Pulborough groundwater abstraction are ongoing. This includes a sustainability investigation to assess a sustainable level of ground and surface water abstractions…..In the meantime, Natural England has advised local planning authorities that development in SNZ must not add to this potential adverse effect. In a position statement, issued in September 2021, it stated that water neutrality is required to allow development to proceed, without increasing abstraction from the Pulborough groundwater source……Water neutrality is required as long as there is potential for an adverse effect on the sensitive habitats in the Arun Valley. In practice, this means it is required until an alternative water source to replace groundwater abstraction at Pulborough can be found. In developing WRMP24, we are looking at a* ***potential scenario where Pulborough groundwater source is no longer available****, in order to assess alternative options that could be used to maintain the supply-demand balance. It is possible the water neutrality strategy will be required throughout the time frame covered by affected Local Plans, up to 2037…..We are planning to address the supply-demand balance in SNZ as quickly as possible. Our WRMP19 included the Littlehampton water recycling scheme to provide benefit from 2027– 28. This could create sufficient supply-demand headroom to stop any reliance on the Pulborough groundwater source. Depending on the outcome of the sustainability investigation, water neutrality could be required until this date* (our emphasis).

6.14 The Technical Report **[CD8 1.02]** specifically advises as to the quantum of development that is planned for:

"A water neutrality strategy has been commissioned by the Local Planning Authorities. This has estimated growth in Sussex North up to 2037 to be approximately 22,000 new houses. This is based on development that did not have full planning consent on 14 September 2021 (and is subject to water neutrality)……. New water demand during the plan period is estimated to be 5.5Ml/d should these authorities adopt a water efficiency target of 100l/p/d for new build houses in planning policy. This can be significantly reduced if more ambitious targets of 85l/p/d or 62l/p/d were adopted. These ambitious targets could be achieved with a combination of water efficient fittings and/or the requirement for new-build housing to incorporate rainwater harvesting and/or greywater recycling schemes, where possible……We had already accounted for a significant proportion of growth within our WRMP19, and while these growth forecasts are higher than originally anticipated, a significant proportion of planned growth in SNZ is already offset by our planned interventions" (our emphasis).

6.15 The above underlined passage confirms that WRMP 2019 **had** allowed for the projected growth (of which the application site forms a part). Under the WRMP 2024, the provisions will be updated to allow for the revised growth projections.

Accounting for the current 'minimised' groundwater abstraction at Hardham

6.16 In addition, the draft dWRMP's associated draft HRA sets out on page 38 that:

"Any required licence amendments are factored into the supply-deficit calculations, and the EA will have confirmed that these are valid for the planning period when the WRMP modelling is undertaken. The existing consents regime (taking into account any required sustainability reductions) is therefore 'the baseline'23.....In some instances, when considering water that may be available from existing sources, consultees have indicated that consideration of 'recent actual' abstraction is more appropriate than the currently licenced maximum, particularly for waterbodies that are considered 'over-licensed'; it is understood that these licences have been identified to SWS during the plan-development process and factored into the supply demand balance calculations".

6.17 Accordingly, it is clear that the WRMP has accounted for the current 'minimised' groundwater abstraction level at Hardham and that this has been taken forward as the baseline for the WRMP24 assessment.

The achievability of groundwater abstraction reductions

6.18 The WRMP Technical report **[CD8 1.02]** confirms that the required reductions can be achieved, such as at 4.1.1:

"4.1.1 Working with WRSE we believe that adopting an adaptive planning approach offers us greater ability to account for the uncertainty in the selection and scheduling of future water resource options. This will allow our plan to accommodate large step changes in supplies driven by the need to reduce abstraction but also from more gradual changes driven by climate change or population growth"

6.19 The Technical report also confirms that the plan ensures that abstraction will remain within environmental limits even during drought conditions:

"4.4.2 Our DP22, sets out our proposed levels of service for the use of drought permits and orders. These are intended to temporarily increase supplies by relaxing abstraction

licence conditions, increasing licensed quantities or other measures. The triggers we have proposed to implement these permits and orders are set to keep us in line with our target environmental levels of service of use"

6.20 Indeed, the draft dWRMP 2024 Technical report confirms that, if necessary, reductions **down to zero** are allowed for within the plan (plus see paragraph 3.4.2 above):

*"5.3.7 We have been ambitious - through our 'alternative' scenario we are investigating what solutions would be required to allow us **to stop all abstraction** in our most sensitive catchments including the River Itchen and Lower River Rother and River Arun to remove any potential risk to designated wetlands going beyond the required reductions just to meet flow targets"*

6.21 The actual scale of reductions required will however be confirmed by ongoing investigations as confirmed at section 5.5.4 of the draft WRMP 2024 Technical report:

"Presently there is a lot of uncertainty about both the quantity and location of abstraction licence changes we will need to deliver to protect the environment and therefore the potential impacts on our water supplies. We are addressing this uncertainty through our wide ranging WINEP over the next five years and by 2027 we expect to have finished investigations into the sustainability of most of our water sources. This will allow us to work with the EA, Natural England and other stakeholders to make robust, evidence-based decisions around the scale of abstraction reductions and other mitigations required to protect and restore the environment and improve its resilience to climate change. The conclusion of our WINEP investigations and options appraisal between 2024 and 2027 will therefore be critical to informing the likely Environmental Destination pathway we are likely to follow".

Southern Water's DRAFT dWRMP24 Consultation and Statement of Response (SOR)

6.22 Southern Water has been preparing its next Water Resources Management Plan WRMP24 for the period 2025 onwards.

6.23 During the preparation of the plan Southern Water has consulted (November 2022 – February 2023) with stakeholders as required by the guidance. On their website Southern water says:

"Between 14th November 2022 and 20th February 2023, we consulted on our draft WRMP 24 (dWRMP24) which looks ahead to 2075. We had over 500 responses and welcomed all the feedback we received. As part of the consultation process, we have produced a Statement of Response (SoR) which addresses the issues raised in the consultation."

6.24 The Statement of Response was published in August 2023 and includes eight annexes. The responders included The Environment Agency, Natural England and Ofwat and are contained in a document called : Water Resources Management Plan 2024 Statement of Response Annex 5.2: Responses to non questionnaire respondents by organisations August 2023 Version 1 **[CD8 1.03].**

6.25 The responders have provided a comprehensive response to the dWRMP24 and raised a number of comments and proposed recommendations.

6.26 At R1.1 of Annex 5.2 the EA has raised concerns over "Delivery of options to remove Natural England's Water Neutrality constraints"

6.27 There are clear concerns surrounding the outage of Weir Wood Reservoir and the EA recommends more detail is required concerning the Deliverable Output ("DO") from the reservoir.

6.28 Southern Water's response shows the significance of Weir Wood Reservoir in the delivery of water within the supply zone:

"We have updated the programme of delivery of supply-demand schemes in Sussex North WRZ which includes schemes that were in WRMP19, the return to service of Weir Wood WSW and additional mitigation options. Weir Wood WSW is scheduled to provide the follow PDO benefit over the next five years:

2023-24: 0Ml/d
2024-25: TBC
2025-26: 13Ml/d
2026-27: 13Ml/d
2027-28: 13Ml/d

We will also continue to deliver our water efficiency and leakage reduction programmes and the Littlehampton WTW recycling scheme."

6.29 In addition, Southern Water has reached agreement with a neighbouring water supplier Sutton and East Surrey Water to extend current arrangements to supply an additional 2.7Ml/day: (Reference: Water Resources Management Plan 2024 Statement of Response Annex 5.2: Responses to non questionnaire respondents by organisations August 2023 Version 1 **[CD8 1.03] page 8**)

"We have agreed in principle with SES Water to extend the current arrangement we have with them in Sussex North WRZ to 2031 and increase DO benefit from the current 1.3Ml/d to 4Ml/d. This has now been incorporated in our revised dWRMP24."

6.30 It is noted that even without Weir Wood Reservoir, Southern Water has been able to supply water within Sussex North with a reduced abstraction to 5Ml/day and did not implement any drought measures in the zone during the drought in 2022.

6.31 At R1.2 of Annex 5.2 the EA has raised concerns over "Portsmouth Water bulk supply to Sussex North". The agreement with Portsmouth Water is for up to 15Ml/d to be supplied. The EA has highlighted the need for contingency planning in the eventuality that Portsmouth Water is unable to supply the agreed amount of water.

6.32 Southern Water's responses shows they have discussed drought scenarios with Portsmouth Water and there is confidence concerning the provision of 15Ml/day in droughts up to 1 in 200 year severity and contingency plans in case the full 15Ml/day cannot be delivered. (Reference : Water Resources Management Plan 2024 Statement of Response Annex 5.2: Responses to non questionnaire respondents by organisations August 2023 Version 1 **[CD8 1.03] page 9**)

6.33 *"We have discussed this with Portsmouth Water and agreed that the bulk supply to Pulborough will remain at 15Ml/d for WRMP24 and have agreed with Portsmouth Water that we should both assume a volume of 15Ml/d. Whilst there are risks that the water may not be fully available in extreme droughts, it is the intention of the bulk supply agreement to provide this volume in droughts up to 1-in-200 year drought severity."*

6.34 *"Our Drought Plan contains a toolbox of interventions which could be implemented if the situation arose whereby the full 15Ml/d bulk supply was not available. In addition, we have developed a Contingency Plan to accompany the revised dWRMP24 which includes some actions which could be implemented quickly if the need arose."*

6.35 *“The other key mitigation is early and continuous dialogue with Portsmouth Water so we have advanced warning if the full 15Ml/d volume cannot be delivered so that we can start taking mitigation actions.“*

6.36 In addition, Southern Water has an agreement in place with Sutton and East Surrey Water (SES) and they have agreed to extend the current arrangement to increase DO benefit by a further 2.7Ml/day.

6.37 *“We have agreed in principle with SES Water to extend the current arrangement we have with them in Sussex North WRZ to 2031 and increase DO benefit from the current 1.3Ml/d to 4Ml/d. This has now been incorporated in our revised dWRMP24.”*

6.38 The WRMP24 process will be concluding this year and the dWRMP24 will be updated to take into account the response contained in the SoR. It is expected that WRMP24 will be published in December 2024.

The Emerging Local Plan

6.39 The local plan is being updated by Horsham District Council (HDC) and according to the HDC website is expected to be published and adopted by the end of May 2025.

6.40 The Horsham District Council emerging local plan includes policies for water neutrality based on the premise that new development would lead to increased groundwater abstraction and thereby could add to the impact to the protected areas.

6.41 As explained in Dan Smyth’s evidence [CD10 1.03] JBA carried out a three-part study on behalf of the affected local authorities (the Parts A, B and C studies) and discusses alternative options for the supply of water to facilitate development and the work that Southern Water is doing to reduce demand and provide more efficient supplies by reducing leakage, amongst other measures.

6.42 The detail behind the final mitigation strategy is contained in Sussex North Water Neutrality Study: Part C – Mitigation Strategy Final Report December 2022 **[CD8 1.14]**.

6.43 The report is being used to develop an offsetting strategy called SNOWS (Sussex North Offsetting Water Scheme). This scheme, as we understand it, will set out options for saving water within existing buildings where the existing water use is inefficient such as

schools, outdoor leisure facilities, commercial buildings and residential buildings. The 'saved water' can then be used to offset the demand from new development.

6.44 There is some curious wording in the Executive Summary of that document:

"……this is an opportunity, for the first time in the UK, to facilitate development at the Local Plan level which does not lead to increased water abstraction and its consequent pressures on the environment."

6.45 It is for the competent authorities to ensure that the water supply system complies with its statutory duties including the Habitats Regulations and it is perfectly reasonable for the Local Planning Authorities to assume this is carried out by Southern Water, The Environment Agency and Natural England.

6.46 At 1.6 of the Part C Mitigation Strategy **[CD8 1.14]** para28, it quite rightly says:

"Water neutrality is required as long as there is potential for an adverse effect on the sensitive habitats in the Arun Valley."

6.47 Clearly, the converse applies, that if the potential for an adverse effect is removed then water neutrality is not required or to put it another way, if the pathway that could be causing and adverse effect is removed then this would satisfy the Habitat Regulations and Natural England can remove its position statement.

6.48 As explained in Section 5 above Southern Water has agreed to a reduction in groundwater abstraction to 40% of the abstraction prior to Natural England Position Statement.

6.49 For the reasons stated above SNOWS is not required.

6.50 The current position is that Kilnwood Vale 3DEFG is included in committed growth that is allowed for in dWRMP24. There is ample supply of water within the water supply zone.

6.51 The position for growth beyond the already planned growth is a matter for the Local Plan which will be taken into account within the Water Resource Management Plans and Water Industry Asset Management Plans that support the planning process in terms of water supply and treatment, through WRMP's and DWMP's.

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

In the matter of an application made pursuant to s.288 Town & Country Planning Act 1990

BETWEEN:

CREST NICHOLSON OPERATIONS LIMITED

Claimant

-and-

(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

(2) HORSHAM DISTRICT COUNCIL

Defendants

LIST OF ESSENTIAL DOCUMENTS FOR ADVANCE READING BY THE COURT

Tab No.	Document	Date	Page(s) in core claim bundle
1.	Statement of Facts and Grounds	4 December 2024	9 – 29
2.	Decision Letter of the Secretary of State for Housing, Communities and Local Government	25 October 2024	33 – 41
3.	Section 10 of Darren McCreery's Report to the Secretary of State for Housing, Communities and Local Government	30 July 2024	86 – 109
4.	Sections 4, 5 and 6 of Proof of Evidence of Alistair Aiken	12 February 2024	176 – 200
5.	R (Harris and another) v Environment Agency [2022] EWHC 2264 (Admin)	2022	428 – 455

7.0 Correspondence with Statutory Bodies

Correspondence with the Environment Agency and Southern Water

7.1 We have written to both the Environment Agency and Southern Water to seek clarification concerning their action in response to the NE Position Statement. We will discuss below the correspondence with each body.

Correspondence with the Environment Agency

7.2 Following the Position Statement published by Natural England during 2022 and 2023 we have written to the Environment Agency, as the competent authority, to seek clarification concerning various points relating to the regulators own position in respect of the effect on water supply and the grant of abstraction licences.

7.3 The correspondence is included in Appendix B of the proof of evidence and is referred to below.

7.4 The following two questions were asked in a letter to the EA dated 4th April 2022:

1. Does the Environment Agency accept Natural England's allegation that: "it cannot be concluded that the existing abstraction within Sussex North Water Supply Zone is not having an impact on the Arun Valley site [European sites]" ?
2. Does the Environment Agency accept that Hardham groundwater abstraction licences authorise a level of abstraction that cannot be excluded from having adverse effect on the European sites? We note that the current levels of abstraction are significantly lower than the licenced maximum levels.

7.5 The EA responded on 26th April 2022, in response to the first question:

"The Environment Agency does agree with Natural England that "it cannot be concluded that the existing groundwater abstraction at Hardham is not having an impact on the Arun Valley site."

I have set out the reason for this below.
The abstraction licence held by Southern Water for abstraction from groundwater at Hardham in Sussex was originally issued as a Licence of Right in January 1966. The Environment Agency reviewed the impact of all relevant permissions, including this abstraction licence, on the Arun Valley Special Protection Area (SPA). At that time, it was concluded that the abstraction licence could be affirmed as it was concluded that there was no adverse effect on site integrity.

In 2016 the Arun Valley was designated as a Special Area of Conservation (SAC) and further new information came to light which suggested that there could be a pathway for the groundwater abstraction at Hardham to impact on the designated site. It is for this reason that we agree with Natural England's view."

7.6 In response to the second question:

"The Hardham groundwater licence is not time limited. Where there are concerns about the sustainability of a permanent abstraction licence there are two options for changing the licence. Under Section 51 of the Water Resources Act 1991 a licence holder can apply to change their abstraction licence or under Section 52 of the Water Resources Act we can take action to impose licence changes.

In exercising our powers, we have to take account of our legal obligations when undertaking this action – these include our duties and obligations to protect the environment as well as any legal duties regarding the impact of our action on the licence holder and any duties they may have to provide public water supply.
Where new information suggests that a permanent Water Company abstraction licence may be having an impact on a designated site, and before taking action to change an abstraction licence we would usually require an investigation to be carried out. This would provide evidence of the nature of the impact and determine what measures may be necessary to protect or restore the site. We use the results of the investigation to determine any changes to the licence which may be necessary. When doing so we would look to Natural England for their views before we come to any decisions on what, if anything, we would do about the abstraction.

In line with this procedure, I can inform you that Southern Water is carrying out an investigation into the impact of the Hardham groundwater abstraction licence which will conclude in 2025 after collection of a range of hydrological and ecological data. Whilst this work is being carried out, Southern Water has made commitments to minimise use of the Hardham groundwater abstraction."

7.7 Clarification was sought in a further letter to the Environment Agency dated 25th May 2022, asking the following questions:

"Further to our letter dated 4th April 2022 and your response dated 26th April 2022 we would like to seek clarification to your response.

1. How is Southern Water's commitment to minimise the use of Hardham groundwater abstraction monitored and enforced?
2. What is the meaning of the word 'minimise'?
3. Are the Environment Agency satisfied that this commitment discharges the Environment Agency's duty under Regulation 9 of the Habitat Regulations?"

7.8 The EA responded on 6th June 2022 as follows:

"How is SW's commitment to minimise the use of Hardham GW abstraction monitored and enforced?

Southern Water voluntarily submits all their abstraction returns to us on a monthly basis (over and above what is currently required on their licences). They additionally provide updates to us on a more frequent basis for the Hardham groundwater abstraction. We review these returns and discuss them with the Company.
As the minimised use of the Hardham GW abstraction is a voluntary action and not required under the terms of the Hardham abstraction licence, we do not formally enforce it.

What is the meaning of the word "minimise"?

In this context, the term "minimise" refers to Southern Water using best endeavours to keep abstraction as low as possible whilst meeting customer demands and managing its operational assets.

Are the EA satisfied that this commitment discharges the EA's duty under Regulation 9 of the Habs Regs?

In relation to the Hardham groundwater abstraction, we are complying with our Regulation 9(3) Habitats Regulations duty to have regard to the Habitats and Wild Bird Directives in exercise of our functions by ensuring that a staged, time bound investigation is carried out to ensure that any necessary or appropriate evidence-based changes to the abstraction licence are made as soon as possible.

Southern Water has set up a steering group, including local stakeholders, to guide their investigation through to completion in 2025. This process is in line with actions we have taken for other designated sites which follow a pattern of investigation in advance of any licence changes being considered. Whilst the investigation is being carried out, any potential impacts on the site associated with abstraction will be reduced by Southern Water voluntarily agreeing to reduce abstraction at Hardham groundwater source as much as possible."

7.9 The following questions were asked in a letter to the EA dated 5th January 2023 following the provision of abstraction records by Southern Water:

"We would be grateful for the Environment Agency's clarification, following your correspondence of 26 April 2022, of the following:

1. Is the Environment Agency satisfied that this commitment to minimise average abstraction, at an average 4.2Ml/day cap, discharges the Environment Agency's duty to safeguard the SAC under the Habitat Regulations i.e. at this capped level of abstraction there can be no adverse effect on the integrity of the designation?
2. Is there a requirement to update the abstraction licence terms to reflect this revised cap?"

7.10 The EA responded on 13th January 2023 as follows:

In response to the first question:

"The protection of the SAC will be secured by making any necessary changes to the abstraction licence. A voluntary commitment to reduce abstraction does not secure the necessary protection although it is a welcome step to reducing the risk of deterioration of, and risk of adverse effects to, the site whilst the detailed investigations are being carried out in relation to the abstraction.

In response to the second question:

"The reduced abstraction was determined by operational conditions in relation to how Southern Water could meet its demands for water with the sources of water available to them at the time.

Any licence cap will be specifically designed to ensure protection of the designated site rather than be determined by what is operationally possible. Working out what is needed to protect the designated site will take time and is the fundamental objective of the ongoing investigation."

7.11 On 21st June 2023 further questions were asked to the EA

"In the light of the matters set out above, the EA is requested to answer the following questions:

(1) Does the EA agree with NE that there is currently no known level of groundwater abstraction at Hardham that can be excluded from having significant effects on the European Protected sites?
(2) Does the EA continue to be of the view that what (if any) abstraction whose effects can so be excluded will only be established after the investigations currently being undertaken by Southern Water (scheduled for completion in March 2025)?
(3) Does the EA continue to be of the view (expressed in its letter of 13th January 2023) that, pending the licence review in the light of Southern Water's investigations, a voluntary reduction by Southern Water to abstraction of 4.2Ml/day does *not* discharge the EA's duties under the Habitats Regulations?
(4) If the answer to (3) is 'yes', will the EA secure a cessation of abstraction from Hardham, pending the licence review?
(5) If the answer to (3) is 'no', will the EA secure that, pending the licence review, Southern Water does not increase its abstraction above 4.2Ml/day? "

7.12 The EA responded to each of the questions (points) on 11th July 2023 as follows:

Point 1 Does the EA agree with NE that there is currently no known level of groundwater abstraction at Hardham that can be excluded from having significant effects on the European Protected sites?

Subject to the outcome of the sustainability investigation that is underway and due to complete in 2025, we agree with NE that there are no known levels of abstraction that can be excluded from having likely significant effect at this time. This means we need to investigate fully to decide what appropriate action should be taken because, although we agree likely significant effects cannot be ruled out, that does not indicate what action may need to be taken in relation to abstraction up to, and including, the potential revocation of abstraction licences.

Point 2 Does the EA continue to be of the view that what (if any) abstraction whose effect can be so excluded will only be established after the investigations currently being undertaken by Southern Water (scheduled for completion in March 2025)?

As a result of our response on Point 1 set out above, our view continues to be that the investigation will determine what level of abstraction, if any, is sustainable.
We will then be able to take appropriate action to address this. We consider this to be a reasonable approach and in line with the Harris judgment.

Point 3 Does the EA continue to be of the view (expressed in its letter of 13 January 2023) that, pending the licence review in the light of Southern Water's investigations, a voluntary reduction by Southern Water to abstraction of 4.2 Ml/day does not discharge the EA's duties under the Habitats Regulations?

As we stated in our letter dated 6 June 2022 and confirmed in our letter dated 13 January 2023, Southern Water's voluntary reduction in abstraction does not discharge the Environment Agency's duties under the Habitats Regulations.

We would discharge our duties securing the protection of the SAC by making any necessary changes to the abstraction licence. This would be done following the outcome of the Investigation.

We welcome Southern Water's voluntary action to reduce their abstraction; such a reduction will be providing environmental protection that would otherwise not be occurring. This level of reduced abstraction is determined by Southern Water as part of the operational conditions in which they can meet public water supply demands with the sources of water available to them.

On the second page of your letter dated 21 June 2023 you refer to the Harris judgement. We do not accept that we are in breach of our Habitats Regulations duties in relation to Hardham abstraction. The Harris judgment found that Environment Agency's approach to dealing with damaging abstraction in north Norfolk was insufficient in that we were only taking action in relation to some SSSIs and not all the SSSIs that made up the Broads SAC. The judgment said we had to do more and our response, which was accepted by the court, and the Harrises who brought the judicial review, was the production of the Broads Sustainable Abstraction Plan in which we detailed what further investigation and modelling we would be doing over the next few years on those other SSSI components and once completed the actions we would take on licences.

This is a different situation to what we are doing in relation to the Hardham abstraction where we are already undertaking the investigation of impacts of

licences thus fulfilling our Habitats Regulations duty so long as we then take action depending on the outcome of investigation.

The Harris judgment does not mean we must immediately revoke the Hardham licence but rather, so long as we are addressing the issues of effects on the SAC and have a plan to act once the extent of the effects is known, then we are taking appropriate steps as per the Harris judgment.

Point 4 If the answer to (3) is yes, will the EA secure a cessation of abstraction from Hardham, pending the licence review?

For the operational reasons set out above, we continue to welcome Southern Water's voluntary action in reducing their abstraction, at the same time as balancing their operational needs to supply water. The licence review will determine whether the licence should be revoked or not but we cannot prejudge the outcome of that review before we know the extent of effects of abstraction and whether revocation is the only action available to ensure no adverse effects on the SAC.

Point 5 If the answer to (3) is 'no' , will the EA secure that, pending the licence review, Southern Water does not increase its abstraction above 4.2 Ml/day?

We will continue to work closely with Southern Water regarding their voluntary action to reduce abstraction taking into account their operational supply and investigation needs until the investigation concludes and the appropriate course of action is taken.

7.13 The correspondence with the Environment Agency shows that they believe they are complying with their duties under the regulations and it follows that the agreed voluntary groundwater abstraction of 5Ml/day is an acceptable level that complies with the EA's duties.

7.14 The agreed voluntary groundwater level abstraction of 5Ml/day is 40% of the abstraction levels prior to the NE Position Statement.

Correspondence with Southern Water

7.15 A letter was also sent to Southern Water on 21st June 2023, asking the flowing questions:

"In the light of the matters set out above, Southern Water is requested to answer the following questions:

(1) Does Southern Water agree with NE that there is currently no known level of groundwater abstraction at Hardham that can be excluded from having significant effects on the European Protected sites?

(2) Does Southern Water agree that what (if any) abstraction whose effects can so be excluded will only be established after the investigations currently being undertaken by you at the EA's request (scheduled for completion 2025)?

(3) Does Southern Water agree that, pending the licence review in the light of Southern Water's investigations, a voluntary reduction by Southern Water to abstraction of 4.2Ml/day does *not* discharge its duties as statutory undertaker under the Habitats Regulations?

(4) If the answer to (3) is 'yes', will Southern Water commit to a cessation of abstraction from Hardham pending the licence review, and will utilise alternative sources available to it?

(5) If the answer to (3) is 'no', will Southern Water commit that, pending the licence review, it will not increase its abstraction above 4.2Ml/day and will utilise alternative sources available to it?"

7.16 Southern Water responded to each of the questions (points) on 7th July 2023 as follows:

"1. Does Southern Water agree with NE that there is currently no known level of groundwater abstraction at Hardham that can be excluded from having significant effects on the European Protected sites?
In September 2021 Natural England (NE) issued a Position Statement for applicants of new development within Sussex North Water Resource Zone (WRZ) (the NE Position Statement). This confirmed that it cannot be concluded that the existing abstraction within Sussex North Water Supply Zone is not having an impact on the protected sites in the Arun valley. Natural England has advised that new developments within this zone must not add to this impact and making development 'water neutral' is one way of preventing any further negative impact. This position has been adopted by the relevant local planning authorities who require that any development in the Sussex North WRZ must demonstrate water neutrality. The Position Statement defines water neutrality as "the use of water in the supply area before the development is the same or lower after the development is in place."

Currently we are carrying out an environmental investigation (sustainability study) of the potential impacts of our groundwater abstractions at Hardham, with the key objectives to scientifically inform the potential water supply mechanisms to the Arun valley protected sites and determine any hydrogeological linkages to our groundwater abstraction at Hardham. Until the investigation is completed, which is expected at the end of March 2025, and the scientific information is available, we cannot confirm what level of groundwater abstraction (if any) might be having an impact.

2. Does Southern Water agree that what (if any) abstraction whose effects can so be excluded will only be established after the investigations currently being undertaken by you at the EA's request (scheduled for completion 2025)?

Yes, that is correct. There is uncertainty over the cause of the wildlife decline at the Arun valley protected sites. NE believe that Southern Water's groundwater abstraction activity at its Hardham Water Supply Works (WSW) could be contributing to this impact. As mentioned above, we are undertaking a full sustainability study of our Hardham groundwater abstraction and the extent of its impacts on the protected sites to understand any links and to ensure that it is sustainable in the long term. This investigation is due to complete in 2025. Meanwhile we have voluntarily reduced our Hardham groundwater abstraction volumes. We commenced a reduction in autumn 2021, with a target rolling average of 5 Ml/day, representing approximately 40% reduction from previous typical levels (average daily abstraction groundwater abstraction from 1/1/19 to 31/7/21 was 12.7 Ml/d; or, since 1/1/02, was 11.7 Ml/d). This commitment extends at least to the completion of the sustainability review of the licence in 2025.

We are investigating NE's concerns further to ensure that our abstraction is not causing an impact and is sustainable in the long term. This could mean we take less from the Hardham groundwater source in future; however, our position will be informed by the completion of our sustainability study in 2025.

3. Does Southern Water agree that, pending the licence review in the light of Southern Water's investigations, a voluntary reduction by Southern Water to abstraction of 4.2 Ml/day does not discharge its duties as statutory undertaker under the Habitats Regulations?

We are not entirely clear what is meant / what you are asking by this question but provide the following comment:

Southern Water takes its duties and statutory obligations as a statutory undertaker very seriously including those set out under The Conservation of Habitats and Species Regulations 2017 (The Habitats Regulations 2017).

Our Water Resource Management Plan (WRMP) sets out our strategy for how we intend to achieve a secure supply of water for our customers and a protected and enhanced environment, which includes Hardham and the Arun valley protected sites. The WRMP is a statutory plan which must be accompanied by a Habitats Regulations Assessment (HRA).

In response to the Position Statement issued by Natural England in September 2021 we have voluntarily reduced our ground water abstraction to a rolling average of 5 Ml/d, which is significantly lower than our licensed abstraction limit and approximately 40% reduction from previous typical levels of this abstraction. We are hopeful that this will minimise any potential environmental deterioration which may be linked to our abstraction of ground water. Our position on this will be confirmed once the results of the sustainability study are available in 2025.

Please note that our voluntary agreement to reduce our abstraction is to target a rolling average abstraction rate of 5 Ml/day as opposed to 4.2 Ml/day as stated in your correspondence to us dated 21st June 2023.

4. If the answer to (3) is 'yes', will Southern Water commit to a cessation of abstraction from Hardham pending the license review, and will utilize alternative sources available to them?

Again, we are not entirely clear what is meant / what you are asking by this question but provide the following comment:

Our position is that in most water resource conditions Southern Water has a sufficient supply available to meet demand in the Sussex North WRZ and that we have some flexibility in where water is sourced from, thereby enabling the commitment to reduced abstraction from the Hardham groundwater source while the sustainability study is ongoing.

However, when dry periods are experienced and these become more severe, the output of several other sources in Sussex North WRZ become constrained by water availability, placing more reliance on the Hardham groundwater source. In the scenario of a severe drought or major operational supply outage we would potentially need to increase our groundwater abstraction to a higher rolling average, including potentially up to the full licensed abstraction limit for short periods, to ensure the expected supply to our existing customers in the Sussex North WRZ. For this reason, we would not be in a position to commit to a cessation of abstraction from Hardham or to a fixed limit of 5 Ml/d (or 4.2 Ml/d as quoted in your letter of June 21st)

5.If the answer to (3) is 'no', will Southern Water commit that, pending the license review, it will not increase its abstraction above 4.2 Ml/day and will utilize alternative sources available to it?
As previously stated, we are committed to continue to abstract a target rolling average of 5 Ml/d from our groundwater source at Hardham, whenever conditions are favorable to do so. We also require the flexibility of potentially abstracting up to our full licensed amount during extreme events to ensure resilience in our supply of water to existing customers. Our daily abstraction will at times be over the 5 Ml/d and there will be times when abstraction is below this amount. The variation in our ground water abstraction is dependent on factors such as demand, network flexibility and availability of water from other sources. For these reasons, we are not in a position to agree to a fixed daily limit of abstraction less than our licensed daily limit."

7.17 The response from Southern Water clarified that the agreed voluntary reduction in groundwater abstraction is a rolling average of 5Ml/day, representing 40% reduction in groundwater abstraction.

7.18 The response also confirms Southern Water's commitment to the agreed voluntary reduction in groundwater abstraction is a rolling average of 5Ml/day to at least the completion of the sustainability study in 2025.

7.19 The Environment Agency has confirmed that it will take appropriate action once the study is complete. The licence review will determine whether the licence should be revoked or not but they cannot prejudge the outcome of that review before they know the extent of effects of abstraction and whether revocation is the only action available to ensure no adverse effects on the SAC.

7.20 In the meantime, they have welcomed Southern Water's voluntary action to reduce their abstraction; such a reduction will be providing environmental protection that would otherwise not be occurring. This level of reduced abstraction is determined by Southern Water as part of the operational conditions in which they can meet public water supply demands with the sources of water available to them.

7.21 Clearly, the Environment Agency has not disagreed with the 5Ml/day groundwater abstraction level and therefore they must be satisfied that this level of abstraction is not adding to the possible environmental impact. Indeed, the reduced level of groundwater abstraction is an improvement when compared with the levels of groundwater abstraction prior to the NE Position Statement.

WRMP19 Annual Review 2023

7.22 Included in Appendix A is a copy of a joint letter dated 20th October 2023 from DEFRA/EA/OFWAT to Southern Water following the 2023 annual review of WRMP19. The letter illustrates the regulatory control mechanisms that is in place for ensuring the water resource plans are delivered.

7.23 The letter expresses deep concerns:

"We are deeply concerned with your company performance to deliver water to customers and protect the environment."

7.24 *In summary, they are that:*

- *Your reported supply-demand balance (SDB) is significantly below your WRMP19 forecast.*
- *The large difference between your WRMP19 forecast and 2022-23 reported SDB is driven in large part by leakage, which is also significantly above your WRMP19 forecast.*
- *Your reported outage is above your WRMP19 outage allowance and has also contributed to your below-forecast SDB outturn figure.*
- *We have ongoing concerns regarding the resilience of supply in your Sussex North zone and Hampshire area.*
- *You have informed us that there will be delays to your Ford recycling and Hampshire Water Transfer and Water Recycling projects.*
- *You are concerned that your bulk transfer agreement with Portsmouth Water to your Hampshire zone has been cancelled, in turn negatively impacting your SDB.*

7.25 The letter sets out in an Annex details on the expected action and response required by Southern Water.

7.26 The letter says: *"Your WRMP is an essential plan for securing customers' water supplies, in a sustainable way for the environment. It is therefore vital for you to maintain and deliver your plan to the satisfaction of your regulators and customers."*

7.27 The letter sets out their concerns in more detail in an Annex:

"In addition, we have ongoing concerns regarding the supply resilience in your Sussex North zone and Hampshire area.

The Weir Wood reservoir outage is ongoing, and it has been excluded from your deployable output"

7.28 The Annex sets out action that Southern water should take:

"Ensure timely delivery of your proposed plans to rebuild the Weir Wood reservoir in 2024/25, as this will play an important role in the resilience of supplies to the Sussex North area."

7.29 Concerning leakage:

"Leakage

Your reported leakage (108.5 Ml/d) is 18.8% above forecast (91.34 Ml/d) and has increased by 11.7 Ml/d (12%) since last year. Your leakage is a significant contributing factor to your above-forecast SDB, and this is the third consecutive year that you have failed to meet your leakage target."

7.30 The letter from DEFRA/EA/Ofwat sets out their concerns about how Southern Water is implementing its plan. Implementing the plan is very important to ensure resilience of supplies, particularly whilst the effective supply of water has been disrupted.

7.31 Dealing effectively with leakage is one of the component parts in the efficiency savings a water undertaker has to demonstrate within its WRMP and can improve its ability to supply water.

Water Neutrality in Sussex North Webinar Q&A dated 5th October 2023

7.32 Included in Appendix D of this evidence is a copy of Southern Water's slides following a water neutrality webinar. Below are some relevant extracts from the slides, emboldened to illustrate the important points:

What action has Southern Water taken to date? Do you plan to increase groundwater abstraction in the future?

To mitigate the potential impact of abstraction from the Pulborough groundwater source*, Southern Water has reduced abstraction by more than 50% from the source compared to the average abstraction in the first half of 2021–22.* ***We are continuing to use alternative sources of supply and to maximise the bulk import from Portsmouth Water wherever possible.*** *We are currently investigating the opportunity to formalise this operational regime outside of drought conditions (when we are more reliant on groundwater sources) and whether this could be an alternative solution to water neutrality.*

Southern Water is currently in partnership with Natural England, the Environment Agency, Sussex Wildlife Trust, the RSPB and Atkins Ltd, to investigate the groundwater source further, through a ***Sustainability Study****. The outcome of this Study will inform future decisions about the sustainability of groundwater abstraction at Pulborough and what level of groundwater abstraction may be possible.*

Does Southern Water have any plans to either increase or reduce groundwater extraction in Sussex North?

Sussex North is supplied from a mix of water sources including the River Arun and the Western Rother, Weir Wood reservoir near East Grinstead and a transfer from Portsmouth Water. Approx 35% of water supply in Sussex North is **normally** provided by groundwater. Whilst a Sustainability Study is carried out (see above), **Southern Water has voluntarily reduced our groundwater abstraction from Pulborough to an average of 5Ml/d, to mitigate the potential impact of abstraction at that locality.** The outcome of the Sustainability Study will inform future decisions about the sustainability of groundwater abstraction at Pulborough and what level of groundwater abstraction may be possible.

A Southern Water Comment:

Currently there is detailed hydrometric and ecological monitoring underway, for which at least two years of study is needed; this will be continuing ***until spring 2024****. The team will then move on to the impact assessment, in parallel with the development of a numerical groundwater model. The study is expected to reach* ***its conclusion at the end of March 2025.***

HORSHAM Q&A answer from the same webinar:

SNOWS will operate – and water neutrality requirements will apply – ***until Southern Water have out in place sufficient measures to mitigate the impacts of their abstractions near Pulborough****. It will however be planned until the end of the local plan*

periods in 2039/40 so that the local planning authorities can demonstrate that their local plans are water neutral.

7.33 The answers to the questions say that Southern Water has already taken action to mitigate the potential impacts on the protected sites and that the reduction to 5Ml/day will continue until the sustainability study is completed in March 2025.

7.34 The last sentence from Horsham District Council's Q&A, surprisingly, seems to imply that the LPA's are planning for SNOWS after Southern Water has in place sufficient mitigation measures. As we will explain below there is no need for a mitigation strategy after Southern Water has in place sufficient mitigation measures.

8.0 Response to Council's Reason for Refusal on Water Supply

8.1 In its Statement of Case, section 2.6, Horsham District Council

2.6 In the absence of a decision-notice confirming the Council's grounds for objection, the following section of this statement will establish the Council's position in respect of this appeal.

8.2 In its Statement of Case, section 4.0, Horsham District Council refers to the Effects on Habitats sites.

"4.1 As set out in the Appellant's Statement of case and Shadow HRA the application site falls within the Sussex North Water Supply Zone1 where Natural England have identified that water abstraction cannot be ruled out as having an adverse impact on the integrity of the Arun Valley SAC, SPA and Ramsar habitats sites. As a consequence, and in accordance with the Position Statement issued by Natural England on 14 September 2021, development cannot proceed in the water supply zone until a strategic solution is in place, or unless it has been demonstrated to be water neutral. All development proposals must as a result comply with the Conservation of Habitats and Species Regulations 2017 (as amended) (the "Habitats Regulations")."

8.3 Again, for clarity and the avoidance of doubt, the NE position statement **[CD8 1.15]** refers to **groundwater** abstraction and proposes that water neutrality as one way of achieving the certainty that the impact is not being added to.

8.4 As we have discussed above, another way of achieving no adverse effect on the sensitive habitats in the Arun Valley could be by ceasing groundwater abstraction at Hardham and substituting the water from that groundwater source with water from other sources, such as bulk imports from Portsmouth Water and Sussex Worthing and by bringing back into service Weir Wood Reservoir as well as tackling leakage effectively.

8.5 In its Statement of Case, section 5.4, Horsham District Council refers the dispute between the parties being a narrow one:

"5.4 The dispute between parties is therefore, essentially, a very narrow matter relating to the construction of a Grampian condition that both parties consider in principle to be necessary to provide certainty that adverse impact on the integrity of the Arun Valley habitats sites will be avoided. Both parties agree that the future availability of sufficient

water to serve the development is not in question, it is just the case of when it will be available and the mechanism by which occupations can then take place."

8.6 For all the reasons set out in this evidence it is apparent that those with statutory responsibly for the supply of water are fulfilling their duties.

8.7 The water undertaker, Southern Water set out in its WRMP19 and dWRMP24 that it has established there is ample water to supply of water to meet the needs of planned and committed development.

8.8 Southern Water has already reduced groundwater abstraction at Hardham and are considering options for no reliance on groundwater abstraction at Hardham.

8.9 The Environment Agency as the regulator considers that it is fulfilling its statutory duties in securing the sustainability report and the undertaking for reduced groundwater abstraction from Southern Water at least until the outcome of the sustainability report is decided.

8.10 The appeal scheme is within the development growth modelled within WRMP19 and dWRMP24

8.11 The actual demand from the appeal the scheme will be less than modelled within dWRMP24. Details are contained in Mr Smyth's evidence.

8.12 It can therefore be concluded that appeal scheme can be provided with ample water that does not increase groundwater abstraction at Hardham.

8.13 Ample water should be available from other sources should groundwater abstraction cease altogether.

8.14 As a consequence, there is not need for the imposition of a planning condition.

8.15 Further, there is no need to develop or rely upon a mitigation strategy such as SNOWS.

8.16 The imposition of an offsetting scheme (SNOWS) is not required because Southern Water can fulfil its statutory duty to supply water to existing and planned development as explained it its dWRMP24.

9.0 Conclusions

9.1 In my evidence I have provided an explanation of how water supply including water resources is regulated and how it is provided by Southern Water and the roles and responsibilities of other regulatory bodies in respect of water supply.

9.2 I have set out how in North Sussex water supply has been planned and provided in the past and how it is planned for the future by reference to water resource management plans (WRMP19 and dWRMP24) published by Southern Water.

9.3 I have explained the impact the Natural England Position Statement 2021 has had on water supply to North Sussex.

(i) groundwater abstraction may be having an adverse effect on protected sites within the Arun Valley.

"As it cannot be concluded that the existing abstraction within Sussex North Water Supply Zone is not having an impact on the Arun Valley site, we advise that developments within this zone must not add to this impact."

(ii) New development would increase groundwater abstraction (and/or prevent or make more difficult future abstractions of groundwater to zero).

9.4 Southern Water has agreed to a voluntary reduction in groundwater abstraction is a rolling average of 5Ml/day, representing 40% reduction in groundwater abstraction to at least the completion of the sustainability study in 2025.

9.5 Clearly, the Environment Agency has not disagreed with the 5Ml/day groundwater abstraction level and therefore they must be satisfied that this level of abstraction is not adding to the possible environmental impact. Indeed, the reduced level of groundwater abstraction is an improvement when compared with the levels of groundwater abstraction prior to the NE Position Statement.

9.6 The current proportion of the water supplied to the Sussex North Water Resource Zone ("SNWRZ") is supplied 14% from groundwater and 86% from other sources. Southern Water holds abstraction licences for surface water abstraction from the River Rother (75Ml/day) and the River Arun (10Ml/day) at Hardham. It is also able to supply water

into SNWRZ from a water resource zone to the south called Sussex Worthing and has bulk supply agreements in place with Portsmouth Water and Sutton and East Surrey Water as well as a supply from Weir Wood Reservoir.

9.7 Weir Wood reservoir has been out of service for a considerable amount of time, including during the 2022 drought, and is due back in service during 2025, if not sooner.

9.8 I have explained how the duties imposed upon the local planning authority mirrors the duties imposed on both the Environment Agency and the water undertaker, so they shouldn't be operating their separate regulatory regimes.

9.9 The Environment Agency has confirmed that it will take appropriate action once the sustainability study is complete. The licence review will determine whether the licence should be revoked or not but they cannot prejudge the outcome of that review before they know the extent of effects of abstraction and whether revocation is the only action available to ensure no adverse effects on the SAC.

9.10 This appeal started as a Habitats Regulation case because of the possible affect on protected habitats as set out in NE's Position Statement. However, for the reasons explained in this proof of evidence, by removing the potential source of harm to the habitats, being the abstraction of groundwater at Hardham then the requirement for Water neutrality falls away.

9.11 On the basis of the above review, it is concluded that the reduction in groundwater abstraction at Hardham has been fully planned and allowed for within dWRMP24. The dWRMP24 also confirms that any new infrastructure requirements to facilitate new housing have been identified and can be readily brought forward in line with growth, so these are in place and able to service increased water demand from new development without requiring any additional groundwater abstraction at Hardham.

9.12 Southern Water's demand reduction measures are in line with government policies and are an integral part of their Water Resource Management Plan which is reviewed and managed on an annual basis or more frequently if required by the regulators.

9.13 If the pathway of groundwater abstraction at Hardham was to cease then Natural England can remove its Position Statement and amend its advice concerning the impact from groundwater abstraction at Hardham.

9.14 If the pathway of groundwater abstraction at Hardham was to cease then there is no need for a planning condition.

9.15 The imposition of an offsetting scheme (SNOWS) is **not** required because Southern Water can fulfil its statutory duty to supply water to existing and planned development as explained it its dWRMP24.

Appendix A

Letter from DEFRA/EA/OFWAT **WRMP19 Annual Review 2023**

Department
for Environment
Food & Rural Affairs

Tim McMahon
Water Managing Director
Southern Water Services

Sent by e-mail only.
Tim.Mcmahon@southernwater.co.uk

20 October 2023

Dear Tim

Southern Water WRMP Annual Review 2023

We are writing this letter to you jointly from Defra, the Environment Agency and Ofwat.

Thank you for your water resource management plan (WRMP) Annual Review 2023. The delivery of WRMPs is important in providing resilient water services for customers and protecting and enhancing the water environment, and so the efforts of companies in providing progression updates against this delivery is welcomed.

The Environment Agency and Ofwat (the Regulators) have assessed your WRMP Annual Review 2023 and have highlighted serious concerns with your security of supply and risk to the environment. You should take immediate action to address the issues that are set out in this letter.

This year, the annual review is particularly important because of its position ahead of final WRMP24 and the submission of price review 2024 (PR24) business plans. As such, regulators have applied enhanced scrutiny to the process and we expect companies to step up in response to the concerns accordingly.

We expect companies to achieve their WRMP19 commitments as funded at PR19 on demand reduction and supply side delivery. Good performance and delivery against WRMP19, and the forecasts it sets out, gives confidence in the WRMP24 starting position, effectiveness of spend and deliverability. With increased investment at PR24, Ofwat will take account of progress with WRMP19 delivery when assessing business plans.

We are deeply concerned with your company performance to deliver water to customers and protect the environment.

Our concerns are set out in further detail in the table in Annex 1. In summary, they are that:

- Your reported supply-demand balance (SDB) is significantly below your WRMP19 forecast.

- The large difference between your WRMP19 forecast and 2022-23 reported SDB is driven in large part by leakage, which is also significantly above your WRMP19 forecast.
- Your reported outage is above your WRMP19 outage allowance and has also contributed to your below-forecast SDB outturn figure.
- We have ongoing concerns regarding the resilience of supply in your Sussex North zone and Hampshire area.
- You have informed us that there will be delays to your Ford recycling and Hampshire Water Transfer and Water Recycling projects.
- You are concerned that your bulk transfer agreement with Portsmouth Water to your Hampshire zone has been cancelled, in turn negatively impacting your SDB.

The actions which the Regulators require you to take to address these concerns are set out in the table at Annex 1. We also require you to provide us with evidence in writing by the deadlines in the table at Annex 1 which shows us that you have taken the actions specified.

The adjustments applied to your Supply Demand Balance Index (SDBI) calculation this year relating to internal transfers and source availability, were not reflected in your annual review reporting. We expect data to be fully board assured and consistent between SDBI and annual review. The explanation and narrative for the assumptions in the SDBI submission must be improved next year. SDBI submission data should fully explain any adjustments made and this would need early engagement with EA if these adjustments are different from assumptions within the WRMP. As per previous EA correspondence we expect all relevant evidence to be provided in relation to the hands-off-flow condition on Hardham surface water under drought events. It should be clear how you use your sources across your zones and under which events you expect to use Hardham drought permits/orders. We will be reviewing our guidance in light of the issues encountered this year and taking a more robust approach to data quality, transparency, and assurance for 2023-24 reporting. You should ensure that any adjustments are included in the final drought plan and revised dWRMP24.

Finally, we have previously requested that you report your progress against actions from previous Annual Reviews to Defra on a six-monthly basis. We expect you to continue to report your progress against previous actions, as well as the issues and actions identified during this year's Annual Review, to Defra, on the same six-monthly basis.

As our review indicates that there has not been the level of progress to give confidence that improvements will be seen, or targets reached, by the end of AMP7, we will be setting up a programme of meetings between Southern Water, and Senior Management from Defra, Ofwat and the Environment Agency. These will take place every 6 months, at the beginning of December and in July, to report progress with the delivery of your actions and to discuss our concerns and obtain an understanding of how Southern Water intends to address these and deliver the funded improvements.

Your WRMP is an essential plan for securing customers' water supplies, in a sustainable way for the environment. It is therefore vital for you to maintain and deliver your plan to the satisfaction of your regulators and customers.

Yours sincerely

Richard Thompson
Deputy Director,
Water Management and Investment,
Environment Agency

Chris Walters
Senior Director,
Price Reviews,
Ofwat

Martin Woolhead
Deputy Director,
Water Management,
Defra

Annex 1:

The following table details the issues we have identified, the impact and the actions we require you to take.

<table>
<tr><th>Issue</th><th>Impact</th><th>Action and deadline</th></tr>
<tr><td>SDB

You have missed your WRMP19 forecast of 76.2 Ml/d by 11.41Ml/d (15%). You have re-submitted your data and included the benefits of interzonal transfers in the total WAFU, which has resolved deficits in your 5 WRZs. However, we expect you to ensure you represent your annual review data in a way that better reflects the true losses, operations, and supply risk across all zones.

In addition, we have ongoing concerns regarding the supply resilience in your Sussex North zone and Hampshire area. The Weir Wood reservoir outage is ongoing, and it has been excluded from your deployable output.</td><td>Missing your SDB forecast impacts your resilience in a dry year and represents a risk to your customers' security of supply. It also represents a potential risk to the environment should drought permits/orders be needed, and a risk of deterioration of the quality of water bodies. The ongoing outage at the Weir Wood reservoir increase these risks.</td><td>You should:
• Provide us with a detailed action plan to bring your SDB in line with your WRMP19 and WRMP24 forecasts.
• Deliver the action plan.
• Demonstrate progress in the development of your supply mitigation options that aligns with the programme of work set out in your WRMP19 and PR19 Business Plan to assure the Regulators that security of supply will be maintained, and the resilience will improve, via Defra six-monthly reporting and regular liaison meetings with the Environment Agency.
• For future annual review submissions, closely follow the Annual Review guidance and incorporate all your interzonal transfers in the final SDB calculations.
• Ensure timely delivery of your proposed plans to rebuild the Weir Wood reservoir in 2024/25, as this will play an important role in the resilience of supplies to the Sussex North area.

Deadline: end of November 2023 for provision of the action plan, regular updates via Defra/EA/Ofwat six-monthly reporting and regular liaison meetings with the Environment Agency, delivery of action plans throughout remainder of the WRMP19 period.</td></tr>
</table>

Issue	Impact	Action and deadline
Leakage Your reported leakage (108.5 Ml/d) is 18.8% above forecast (91.34 Ml/d) and has increased by 11.7 Ml/d (12%) since last year. Your leakage is a significant contributing factor to your above-forecast SDB, and this is the third consecutive year that you have failed to meet your leakage target. We note that your WRMP24 baseline leakage is forecasted for 2022-23 is 87.24Ml/d and 84.46 Ml/d at the start of the planning period in 2025-26. We are concerned that without significant action to reduce leakage in the short-term, this may pose a risk to supplies.	Your above-forecast leakage has negatively impacted your SDB and is a contributing factor to missing your SDB forecast. Achieving your planned demand management and leakage reductions targets is important reputationally, particularly when you are asking your customers to reduce their water use. Falling behind on demand management and leakage reductions results in an increased risk in a dry year in the short term and deviation from long term demand reduction glidepaths and ambition. Current performance makes achieving the planned WRMP24 starting point, and subsequent glidepath, more difficult.	You should: • Provide us with an action plan that demonstrates how you plan to bring leakage in line with your WRMP19 leakage forecast. The action plan should clearly identify the actions you will take and the dates for delivery of these actions. • Deliver the action plan. • Provide an update on progress with delivery of the action plan and your performance against WRMP19 leakage forecasts to Defra/EA/Ofwat every six months following the end of November 2023. **Deadline: end of November 2023 for provision of the action plan, regular updates via Defra/EA/Ofwat six-monthly reporting, delivery of action plan throughout remainder of the WRMP19 period.**

Issue	Impact	Action and deadline
Outage Your reported outage is 76.6 Ml/d, which is 8Ml/d (11.4%) above your WRMP19 outage allowance of 68.7 Ml/d. The ongoing outage at Weir Wood reservoir has contributed to this issue, with the source planned to be at full capacity from 2024-25.	Outage has negatively impacted your SDB and is a contributing factor to missing your SDB forecast, representing a risk to security of supply for customers.	You should: • Provide us with an action plan to bring outage in line with your WRMP19 outage allowance. The action plan should clearly identify the actions you will take and the dates for delivery of these actions. • Deliver the action plan. • Provide an update on progress with delivery of the action plan and your performance against your WRMP outage allowance to Defra every six months following the end of November 2023. • Continue to actively monitor your outage and provide updates via your regular liaison meetings with the EA, on any sites that are planned for delivery within AMP7, including Weir Wood reservoir. **Deadline: end of November 2023 for provision of the action plan, regular updates via Defra/EA/Ofwat six-monthly reporting, delivery of action plan throughout remainder of the WRMP19 period.**
Supply Schemes You have reported delays to two of your key supply schemes of Ford recycling and Hampshire Water Transfer and Water Recycling project. Your bulk transfer agreement with Portsmouth Water for 9 Ml/d has been cancelled.	The delays to your supply schemes puts both customers' security of supply and the environment at risk. We expect you to take all possible actions to bring your delayed schemes back on track. We also expect that your revised WRMP24 plan clearly explains SDB deficits caused by delays	You should: • Provide us with an action plan detailing additional/mitigating supply and/or demand options you will be implementing to minimise the risks to your customers' security of supply and the environment, to bring your SDB in line with your WRMP19 forecast and WRMP24 baseline forecast. • Deliver the action plan. • Provide an update on progress with delivery of the action plan to Defra every six months following the end of November 2023. This should include evidence of on ground delivery.

Issue	Impact	Action and deadline
	or non-delivery of WRMP19 schemes and how you will resolve these deficits to, secure water supply for your customers and protect the environment. The cancellation of the bulk transfer agreement with Portsmouth Water negatively impacts your deployable output and SDB, and represents further risks to security of supply for your customers.	• Ensure your revised WRMP24 clearly explains SDB deficits caused by delays or non-delivery of WRMP19 supply schemes and how you will resolve these. **Deadline: end of November 2023 for provision of the action plan, regular updates via Defra/EA/Ofwat six-monthly reporting, delivery of action plan throughout remainder of the WRMP19 period.**

Appendix B

Correspondence with The Environment Agency

Letter to EA dated 4th April 2022

Letter from EA dated 26th April 2022

Letter to EA dated 25th May 2022

Letter from EA dated 6th June 2023

Letter to EA dated 5th January 2023

Letter from EA dated 13th January 2023

Letter to EA dated 21st June 2023

Letter from EA dated 11th July 2023

FortRidge
Consulting Limited
Stone House Business Centre, Market Place, Chipping Norton, OX7 5NH
Tel: 01608 644265 Web: www.fortridge.co.uk

Our Ref: 10270

Lucy Hunt
Chief Operating Officer
The Environment Agency
National Customer Contact Centre
PO Box 544
Rotherham
S60 1BY

4th April 2022

Dear Ms Hunt,

Water Neutrality – Natural England's Position Statement for Applications within the Sussex North Water Supply Zone September 2021 – Interim Approach

We are instructed by the Home Builders Federation on the important issue of water neutrality and its effect on the housebuilding sector. You will be aware that Natural England's position statement has forced a number of planning authorities to react in a way that affects planning applications and development.

We refer to the attached position statement published by Natural England concerning planning applications in the Sussex North Water Supply Zone.

1. Does the Environment Agency accept Natural England's allegation that: "it cannot be concluded that the existing abstraction within Sussex North Water Supply Zone is not having an impact on the Arun Valley site [European sites]" ?
2. Does the Environment Agency accept that Hardham groundwater abstraction licences authorise a level of abstraction that cannot be excluded from having adverse effect on the European sites? We note that the current levels of abstraction are significantly lower than the licenced maximum levels.

We have attached information received from The Environment Agency concerning abstraction licences and have also attached information received from Southern Water concerning operational records for abstractions at Hardham.

It is important to ascertain from the Environment Agency, as the competent authority for the grant of abstraction licences, answers to the two questions raised above.

Yours sincerely

Alistair Aitken
Director

Encl.(via email) EA Licence Details and SW Abstraction figures.

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for people and wildlife

Environment Agency

Mr A Aitken
FortRidge Consulting Limited
Stonehouse Business Centre
Market Place
Chipping Norton
OX7 5NH

Our ref: 14257/FBNSx/SM
Your ref: 10270
Date: 26 April 2022

Dear Mr Aitken

Re: Water Neutrality - Natural England's Position Statement for Applications within the Sussex North Water Supply Zone September 2021 - Interim Approach

Thank you for your letter dated 4 April to our Chief Operating Officer, Lucy Hunt. As Area Director for Solent and South Downs Lucy has asked me to respond on her behalf. In your letter to which you attached Natural England's position statement you asked two questions of us which I address in turn below.

1 Does the Environment Agency accept Natural England's allegation that "it cannot be concluded that the existing abstraction within Sussex North Water Supply Zone is not having an impact on the Arun Valley (European site)"

The Environment Agency does agree with Natural England that “it cannot be concluded that the existing groundwater abstraction at Hardham is not having an impact on the Arun Valley site.”
I have set out the reason for this below.

The abstraction licence held by Southern Water for abstraction from groundwater at Hardham in Sussex was originally issued as a Licence of Right in January 1966. The Environment Agency reviewed the impact of all relevant permissions, including this abstraction licence, on the Arun Valley Special Protection Area (SPA). At that time, it was concluded that the abstraction licence could be affirmed as it was concluded that there was no adverse effect on site integrity.

In 2016 the Arun Valley was designated as a Special Area of Conservation (SAC) and further new information came to light which suggested that there could be a pathway for the groundwater abstraction at Hardham to impact on the designated site. It is for this reason that we agree with Natural England's view.

2 Does the Environment Agency accept that the Hardham groundwater licenses authorise a level of abstraction that cannot be excluded from having adverse effect on the European sites? We note that the current levels of abstraction are significantly lower than the licensed maximum levels.

The Hardham groundwater licence is not time limited. Where there are concerns about the sustainability of a permanent abstraction licence there are two options for changing the licence. Under Section 51 of the Water Resources Act 1991 a licence holder can apply to change their abstraction licence or under Section 52 of the Water Resources Act we can take action to impose licence changes.

In exercising our powers, we have to take account of our legal obligations when undertaking this action – these include our duties and obligations to protect the environment as well as any legal duties regarding the impact of our action on the licence holder and any duties they may have to provide public water supply.

Where new information suggests that a permanent Water Company abstraction licence may be having an impact on a designated site, and before taking action to change an abstraction licence we would usually require an investigation to be carried out. This would provide evidence of the nature of the impact and determine what measures may be necessary to protect or restore the site. We use the results of the investigation to determine any changes to the licence which may be necessary. When doing so we would look to Natural England for their views before we come to any decisions on what, if anything, we would do about the abstraction.

In line with this procedure, I can inform you that Southern Water is carrying out an investigation into the impact of the Hardham groundwater abstraction licence which will conclude in 2025 after collection of a range of hydrological and ecological data. Whilst this work is being carried out, Southern Water has made commitments to minimise use of the Hardham groundwater abstraction.

I trust that this information provides you with the answers to the questions you were seeking from us.

Yours faithfully,

Area Director
Solent and South Downs Area

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Stone House Business Centre, Market Place, Chipping Norton, OX7 5NH
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Our Ref: 10270

Simon Moody
Area Director – Solent and South Downs
The Environment Agency
Guildbourne House
Chatsworth Road
Worthing
BN11 1LD

25th May 2022

Dear Mr Moody,

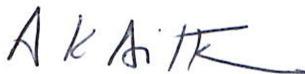
Water Neutrality – Natural England's Position Statement for Applications within the Sussex North Water Supply Zone September 2021 – Interim Approach

Further to our letter dated 4th April 2022 and your response dated 26th April 2022 we would like to seek clarification to your response.

1. How is Southern Water's commitment to minimise the use of Hardham groundwater abstraction monitored and enforced?
2. What is the meaning of the word 'minimise'?
3. Are the Environment Agency satisfied that this commitment discharges the Environment Agency's duty under Regulation 9 of the Habitat Regulations?

We look forward to your response on this important matter.

Yours sincerely



Alistair Aitken
Director

Encl.

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Registered in England and Wales No. 4579267

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for people and wildlife

Environment Agency

Mr A Aitken
FortRidge Consulting Limited
Stonehouse Business Centre
Market Place
Chipping Norton
OX7 5NH

Our ref: 14257/FBNSxData/SM
Your ref: 10270
Date: 06 June 2022

Dear Mr Aitken

Re: Water Neutrality - Natural England's Position Statement for Applications within the Sussex North Water Supply Zone September 2021 - Interim Approach

Thank you for your email and accompanying letter dated 25 May 2022 in which you seek further clarification to our letters dated 4 April 2022 and 26 April 2022.

Simon Moody has asked that I respond directly on his behalf as Environment Planning Manager for Solent and South Downs Area.

How is SW's commitment to minimise the use of Hardham GW abstraction monitored and enforced?

Southern Water voluntarily submits all their abstraction returns to us on a monthly basis (over and above what is currently required on their licences). They additionally provide updates to us on a more frequent basis for the Hardham groundwater abstraction. We review these returns and discuss them with the Company.

As the minimised use of the Hardham GW abstraction is a voluntary action and not required under the terms of the Hardham abstraction licence, we do not formally enforce it.

What is the meaning of the word "minimise"?

In this context, the term "minimise" refers to Southern Water using best endeavours to keep abstraction as low as possible whilst meeting customer demands and managing its operational assets.

Environment Agency

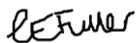
Are the EA satisfied that this commitment discharges the EA's duty under Regulation 9 of the Habs Regs?

In relation to the Hardham groundwater abstraction, we are complying with our Regulation 9(3) Habitats Regulations duty to have regard to the Habitats and Wild Bird Directives in exercise of our functions by ensuring that a staged, time bound investigation is carried out to ensure that any necessary or appropriate evidence-based changes to the abstraction licence are made as soon as possible.

Southern Water has set up a steering group, including local stakeholders, to guide their investigation through to completion in 2025. This process is in line with actions we have taken for other designated sites which follow a pattern of investigation in advance of any licence changes being considered. Whilst the investigation is being carried out, any potential impacts on the site associated with abstraction will be reduced by Southern Water voluntarily agreeing to reduce abstraction at Hardham groundwater source as much as possible.

I trust that this response provides you with the answers to the follow-up questions you sought from us.

Yours faithfully,



Catherine Fuller
Environment Planning Manager
Solent and South Downs Area

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Our Ref: 10270

Simon Moody
Area Director – Solent and South Downs
The Environment Agency
Guildbourne House
Chatsworth Road
Worthing
BN11 1LD

5 January 2023

Dear Mr Moody,

Water Neutrality – Natural England's Position Statement for Applications within the Sussex North Water Supply Zone September 2021 – Interim Approach

We write further to our previous correspondence on the matter of water neutrality. You will recall that Fortridge is advising the Home Builders Federation on this issue which is currently significantly restricting the supply of new homes and other development in the region.

As you are aware, under the Habitats Regulations the Environment Agency has a duty to safeguard SACs and SPAs with this duty also extending to Ramsar sites under government policy. The requirements of this duty were recently highlighted in the Harris High Court case[1]. In September 2021 Natural England issued a position statement[2] setting out that in their view *"As it cannot be concluded that the existing abstraction within Sussex North Water Supply Zone is not having an impact on the Arun Valley site, we advise that developments within this zone must not add to this impact"*. Following the identification of this new information in Natural England's position statement, it was then incumbent upon the Environment Agency to act under their required legislative duties so as to safeguard Arun Valley SAC. There were two parts to the Environment Agency's actions:

- Firstly, the Agency required an investigation into the impact of the Hardham groundwater abstraction licence. This will conclude in 2025, after collection of a range of hydrological and ecological data;
- Secondly, while the outcome of this investigation is awaited, the Environment Agency has required Southern Water to 'minimise' abstraction at Hardham, using best endeavours to keep abstractions as low as possible and an undertaking was obtained from Southern Water to do so.

Reference to data supplied by Southern Water of the abstraction volumes at Hardham, finds that in response to the Environment Agency's requirement, that abstraction volumes have been more than halved (from an average 12.1Ml/day Ml/day to an average of 4.2Ml/ day) since the time of publication of Natural England's position statement (see attached records

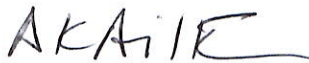
[1] Harris v Environment Agency September 2022. [2022] EWHC 2264 (Admin), [2022] WLR(D) 367. https://www.bailii.org/ew/cases/EWHC/Admin/2022/2264.html
[2] Natural England's position statement for applications within the North Sussex Interim position. Supply Zone. September
2021

from Southern Water concerning abstractions). We would be grateful for the Environment Agency's clarification, following your correspondence of 26 April 2022, of the following:

1. Is the Environment Agency satisfied that this commitment to minimise average abstraction, at an average 4.2Ml/day cap, discharges the Environment Agency's duty to safeguard the SAC under the Habitat Regulations i.e. at this capped level of abstraction there can be no adverse effect on the integrity of the designation?
2. Is there a requirement to update the abstraction licence terms to reflect this revised cap?

We look forward to your response on this important matter.

Yours sincerely



Alistair Aitken
Director

Encl.

Attachment: Southern Water Abstraction Records (EIR response)

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Mr A Aitken
FortRidge Consulting Ltd
Stone House Business Centre
Market Place
Chipping Norton OX7 5NH

Our ref: WNSxN/SM/Jan23
Your ref: 10270

13 January 2023

Dear Mr Aitken

Water Neutrality - Natural England's Position Statement for Applications within the Sussex North Water Supply Zone September 2021 - Interim Approach

Thank you for your letter dated 5 January 2023 in which you set out your position of advising the House Builders Federation on Water Neutrality, reflected your understanding of our response with regard to our duty to safeguard SPAs, SACs under the Habitats Regulations and Ramsar sites under Government policy and the ongoing investigation into the impact of the Hardham groundwater licence.

I have responded to the two specific questions you posed below:

Is the EA satisfied that this commitment to minimise average abstraction, at an average 4.2 Ml/d cap, discharges the Environment Agency's duty to safeguard the SAC under the Habitat Regulations i.e. at this capped level of abstraction there can be no adverse effect on the integrity of the designation?
The protection of the SAC will be secured by making any necessary changes to the abstraction licence. A voluntary commitment to reduce abstraction does not secure the necessary protection although it is a welcome step to reducing the risk of deterioration of, and risk of adverse effects to, the site whilst the detailed investigations are being carried out in relation to the abstraction.

Is there a requirement to update the abstraction licence terms to reflect this revised cap?
The reduced abstraction was determined by operational conditions in relation to how Southern Water could meet its demands for water with the sources of water available to them at the time.

Any licence cap will be specifically designed to ensure protection of the designated site rather than be determined by what is operationally possible. Working out what is needed to protect the designated site will take time and is the fundamental objective of the ongoing investigation.

I trust that this response addresses your queries.

Yours sincerely

Simon Moody
Area Director – Solent and South Downs
Environment Agency, Guildbourne House, Chatsworth Road, Worthing, West Sussex, BN11 1LD
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Our Ref: 10281

Simon Moody
Area Director – Solent and South Downs
The Environment Agency
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Worthing
BN11 1LD

21 June 2023

Dear Mr Moody,

Water Neutrality – Natural England's Position Statement for Applications within the Sussex North Water Supply Zone September 2021 – Interim Approach

As you will be aware from earlier correspondence, we act for [HBF/Croudace] and are writing to you in connection with the implications of licenced water abstraction at Hardham, serving the Sussex North Water Resource Zone.

By the EA's letter to us dated 26th April 2022, you advised that the EA agrees with Natural England's view that *'it cannot be concluded that the existing groundwater at Hardham is not having an impact on the Arun Valley* [European Protected] *site.'*

You further advised that *'Southern Water is carrying out an investigation into the impact of the Hardham groundwater abstraction licence which will conclude in 2025'*. This work, you say, will inform action under either s.51 or 52 of the Water Resources Act 1991 to alter the terms of the licence. You further advised *'Whilst this work is being carried out, Southern Water has made commitments to minimise use of the Hardham groundwater abstraction.'*

By the EA's letter to us dated 6th June 2022, you advised the EA's position is *'we are complying with our Regulation 9(3) Habitats Regulations duty...by ensuring a staged, time bound investigation is carried out to ensure that any necessary or appropriate evidence-based changes to the abstraction licence are made as soon as possible'* and that *'Whilst the investigation is being carried out, any potential impacts on the site associated with abstraction will be reduced by Southern Water voluntarily agreeing to reduce abstraction at Hardham ground water source as much as possible.'*

Subsequently, Southern Water's data showed that as a result of the voluntary reduction in abstraction, Hardham's abstraction volumes have fallen from an average of 12.1Ml/day to 4.2Ml/day.

However, when we asked whether, in the light of the High Court's ruling in *Harris*[1], the above voluntary reduction satisfied the EA that it (the EA) had discharged its duties under the Habitat Regulations, you advised us (EA's letter to us dated 13th January 2023) as follows: *'The protection of the SAC will be secured by making any necessary changes to the abstraction licence. A voluntary commitment to reduce abstraction does not secure the necessary protection although it is a welcome step to reducing the risk of deterioration of, and risk of adverse effects to, the site while the detailed investigations are being carried out in relation to the abstraction.'*

In short, you answered 'No'.

This appears to be an admission that, contrary to the statement in the letter of 6th June 2022, the EA considers that it is currently failing to comply with its Habitat Regulations duties as elucidated in the *Harris* case.

For the purpose of considering the Reserved Matters application made by Croudace for residential development at Downside, Storrington, we have had regard to Southern Water's adopted WRMP2019 and its draft WRMP2024. We would note that the residential site is accounted for in the projected growth figures referenced in those WRMPs.

At section 7.2.4 of the draft WRMP2024 Technical Report, Southern Water record that they have an agreement to import up to 15 Ml/d from Portsmouth Water. Currently, 6 Ml/day is being imported, leaving an additional 9 Ml/day headroom from this source. As the 'minimised' abstraction from Hardham now sits at 4.2 Ml/day, it is apparent that there is ample scope for this to be reduced to zero, by increasing importation from Portsmouth, while still preserving a 4.8 Ml/day headroom capacity from that source.

The Technical Report identifies demand from planned growth to 2037 to be some 5.5 Ml/day, leaving only a 0.7 Ml/day shortfall, assuming *no* reliance on Hardham;

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[1] *Harris v EA* [2022] EWHC 2264 (Admin)

however, housing growth post-2030 will benefit from supplies from infrastructure upgrades, not groundwater abstraction from Hardham.

A shadow HRA was submitted to Horsham District Council ['the Council'] on 28th June 2022. Following Natural England's consultation response and Horhsam's own HRA dated 18th October 2022, an Addendum shadow HRA was submitted to the Council on 10th March 2023. The sHRA and the Addendum sHRA are attached to this letter for convenience [Annexes A and B].

By letter dated 9th May 2023, Natural England responded to the Council's consultation on the Addendum sHRA. We attach that consultation response [Annex C].

On p. 2 of their letter, NE assert:

(i) That as Southern Water's commitment to minimise abstraction at Hardham is voluntary, it '*lacks the certainty required*' to be considered as mitigation in an HRA;

(ii) Additionally, '*there is* <u>*no known level*</u> *of abstraction from the impacting groundwater abstractions which would rule out* [adverse effects on the European Protected Sites]'.

In the light of the matters set out above, the EA is requested to answer the following questions:

(1) Does the EA agree with NE that there is currently <u>no known level</u> of groundwater abstraction at Hardham that can be excluded from having significant effects on the European Protected sites?

(2) Does the EA continue to be of the view that what (if any) abstraction whose effects can so be excluded will only be established after the investigations currently being undertaken by Southern Water (scheduled for completion in March 2025)?

(3) Does the EA continue to be of the view (expressed in its letter of 13th January 2023) that, pending the licence review in the light of Southern Water's investigations, a voluntary reduction by Southern Water to abstraction of 4.2Ml/day does *not* discharge the EA's duties under the Habitats Regulations?

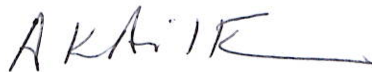
(4) If the answer to (3) is 'yes', will the EA secure a cessation of abstraction from Hardham, pending the licence review?

(5) If the answer to (3) is ‘no’, will the EA secure that, pending the licence review, Southern Water does not increase its abstraction above 4.2Ml/day?

We have written to Southern Water in a similar manner [copy attached for convenience; Annex D].

We look forward to an early response to the above. In the absence of satisfactory answers, our clients reserve the prospect of taking legal action against the EA, as per the *Harris* case, to oblige the EA to act in accordance with its duties under the Habitats Regulations.

Yours sincerely,



Alistair Aitken
Director

Enclosures: [Annexes A, B, C and D]
Annex A: Shadow HRA
Annex B: Addendum to Shadow HRA
Annex C: Natural England letter dated 9th May 2023
Annex D: Copy of letter to Southern Water dated 21st June 2023

Environment Agency

Mr A Aitken
FortRidge Consulting Ltd
Stone House Business Centre
Market Place
Chipping Norton
OX7 5NH

Our ref: WNSxN/SM/Jul23
Your ref: 10281
Date: 11 July 2023

Dear Mr Aitken

Water Neutrality - Natural England's Position Statement for Applications within the Sussex North Water Supply Zone September 2021 - Interim Approach

Thank you for your letter dated 21 June 2023 with enclosed Annexes A, B, C and D in which you reaffirm that FortRidge is acting for HBF/Croudace and that you have written to Southern Water in a similar manner.

I have addressed each point raised in your letter in turn below:

Point 1 Does the EA agree with NE that there is currently no known level of groundwater abstraction at Hardham that can be excluded from having significant effects on the European Protected sites?

Subject to the outcome of the sustainability investigation that is underway and due to complete in 2025, we agree with NE that there are no known levels of abstraction that can be excluded from having likely significant effect at this time. This means we need to investigate fully to decide what appropriate action should be taken because, although we agree likely significant effects cannot be ruled out, that does not indicate what action may need to be taken in relation to abstraction up to, and including, the potential revocation of abstraction licences.

Point 2 Does the EA continue to be of the view that what (if any) abstraction whose effect can be so excluded will only be established after the investigations currently being undertaken by Southern Water (scheduled for completion in March 2025)?

As a result of our response on Point 1 set out above, our view continues to be that the investigation will determine what level of abstraction, if any, is sustainable.

We will then be able to take appropriate action to address this. We consider this to be a reasonable approach and in line with the Harris judgment.

Point 3 Does the EA continue to be of the view (expressed in its letter of 13 January 2023) that, pending the licence review in the light of Southern Water's investigations, a voluntary reduction by Southern Water to abstraction of 4.2 Ml/day does not discharge the EA's duties under the Habitats Regulations?

As we stated in our letter dated 6 June 2022 and confirmed in our letter dated 13 January 2023, Southern Water's voluntary reduction in abstraction does not discharge the Environment Agency's duties under the Habitats Regulations.

We would discharge our duties securing the protection of the SAC by making any necessary changes to the abstraction licence. This would be done following the outcome of the Investigation.

We welcome Southern Water's voluntary action to reduce their abstraction; such a reduction will be providing environmental protection that would otherwise not be occurring. This level of reduced abstraction is determined by Southern Water as part of the operational conditions in which they can meet public water supply demands with the sources of water available to them.

On the second page of your letter dated 21 June 2023 you refer to the Harris judgement. We do not accept that we are in breach of our Habitats Regulations duties in relation to Hardham abstraction. The Harris judgment found that Environment Agency's approach to dealing with damaging abstraction in north Norfolk was insufficient in that we were only taking action in relation to some SSSIs and not all the SSSIs that made up the Broads SAC. The judgment said we had to do more and our response, which was accepted by the court, and the Harrises who brought the judicial review, was the production of the Broads Sustainable Abstraction Plan in which we detailed what further investigation and modelling we would be doing over the next few years on those other SSSI components and once completed the actions we would take on licences.

This is a different situation to what we are doing in relation to the Hardham abstraction where we are already undertaking the investigation of impacts of licences thus fulfilling our Habitats Regulations duty so long as we then take action depending on the outcome of investigation.

The Harris judgment does not mean we must immediately revoke the Hardham licence but rather, so long as we are addressing the issues of effects on the SAC and have a plan to act once the extent of the effects is known, then we are taking appropriate steps as per the Harris judgment.

Point 4 If the answer to (3) is yes, will the EA secure a cessation of abstraction from Hardham, pending the licence review?

For the operational reasons set out above, we continue to welcome Southern Water's voluntary action in reducing their abstraction, at the same time as balancing their operational needs to supply water. The licence review will determine whether the licence should be revoked or not but we cannot prejudge the outcome of that review before we know the extent of effects of abstraction and whether revocation is the only action available to ensure no adverse effects on the SAC.

Point 5 If the answer to (3) is 'no' , will the EA secure that, pending the licence review, Southern Water does not increase its abstraction above 4.2 Ml/day?

We will continue to work closely with Southern Water regarding their voluntary action to reduce abstraction taking into account their operational supply and investigation needs until the investigation concludes and the appropriate course of action is taken.

Yours sincerely

Simon Moody
Area Director - Solent and South Downs

Tel: 07768 900660

Environment Agency, Guildbourne House, Chatsworth Road, Worthing, West Sussex BN1 1LD

Appendix C

Correspondence with Southern Water

Letter to CEO dated 21st June 2023

Letter from Southern Water dated 7th July 2023

FortRidge

Consulting Limited

Stone House Business Centre, Market Place, Chipping Norton, OX7 5NH
Tel: 01608 644265 Web: www.fortridge.co.uk

Our Ref: 10281

Mr Lawrence Gosden, CEO
Southern Water
Southern House,
Yeoman Road,
Worthing,
BN13 3NX

21 June 2023

Dear Mr Gosden,

Water Neutrality – Natural England's Position Statement for Applications within the Sussex North Water Supply Zone September 2021 – Interim Approach

As you will be aware from earlier correspondence, we act for [HBF/Croudace/etc] and are writing to you in connection with the implications of licenced water abstraction at Hardham, serving the Sussex North Water Resource Zone.

By the EA's letter to us dated 26th April 2022, they advised that the EA agrees with Natural England's view that *'it cannot be concluded that the existing groundwater at Hardham is not having an impact on the Arun Valley* [European Protected] *site.'*

They further advised that *'Southern Water is carrying out an investigation into the impact of the Hardham groundwater abstraction licence which will conclude in 2025'*. This work would inform action under either s.51 or 52 of the Water Resources Act 1991 to alter the terms of the licence. They further advised *'Whilst this work is being carried out, Southern Water has made commitments to minimise use of the Hardham groundwater abstraction.'*

By the EA's letter to us dated 6th June 2022, they advised the EA's position is *'we are complying with our Regulation 9(3) Habitats Regulations duty…by ensuring a staged, time bound investigation is carried out to ensure that any necessary or appropriate evidence-based changes to the abstraction licence are made as soon as possible'* and that *'Whilst the investigation is being carried out, any potential impacts on the site associated with abstraction will be reduced by Southern Water voluntarily agreeing to reduce abstraction at Hardham ground water source as much as possible.'*

Subsequently, your data showed that as a result of the voluntary reduction in abstraction, Hardham's abstraction volumes have fallen from an average of 12.1Ml/day to 4.2Ml/day.

However, when we asked whether, in the light of the High Court's ruling in *Harris*[1] the above voluntary reduction satisfied the EA that it (the EA) had discharged its duties under the Habitat Regulations, the EA advised us (EA's letter to us dated 13th January 2023) as follows: *'The protection of the SAC will be secured by making any necessary changes to the abstraction licence. A voluntary commitment to reduce abstraction does not secure the necessary protection although it is a welcome step to reducing the risk of deterioration of, and risk of adverse effects to, the site while the detailed investigations are being carried out in relation to the abstraction.'* (emphasis added). In short, they answered 'No'.

This appears to be an admission that the EA considers that it is currently failing to comply with its duties, as elucidated in the *Harris* case. For convenience, the above correspondence is attached to this letter [Annex A: EA letter dated 6th June 2022 and EA letter dated 13th January 2023].

For the purpose of considering the Reserved Matters application made by Croudace for residential development at Downside, Storrington, we have had regard to Southern Water's adopted WRMP2019 and its draft WRMP2024. We would note that the residential site is accounted for in the projected growth figures referenced in those WRMPs.

At section 7.2.4 of the draft WRMP2024 Technical Report, you record that you have an agreement to import up to 15 Ml/d from Portsmouth Water. Currently, 6 Ml/day is being imported, leaving an additional 9 Ml/day headroom from this source. As the 'minimised' abstraction from Hardham now sits at 4.2 Ml/day, it is apparent that there is ample scope for this to be reduced to zero, by increasing importation from Portsmouth, while still preserving a 4.8 Ml/day headroom capacity from that source.

The Technical Report identifies demand from planned growth to 2037 to be some 5.5 Ml/day, leaving only a 0.7 Ml/day shortfall, assuming *no* reliance on Hardham; while

[1] *Harris v EA* [2022] EWHC 2264 (Admin)

providing that housing growth post-2030 will benefit from infrastructure upgrades, not abstraction from Hardham.

A shadow HRA was submitted to Horsham District Council ['the Council'] on 28th June 2022. Following Natural England's consultation response and Horhsam's own HRA dated 18th October 2022, an Addendum shadow HRA was submitted to the Council on 10th March 2023. The sHRA and the Addendum sHRA are attached to this letter for convenience [Annexes B and C].

By letter dated 9th May 2023, Natural England responded to the Council's consultation on the Addendum sHRA. We attach that consultation response [Annex D].

On p. 2 of their letter, NE assert:

- That as Southern Water's commitment to minimise abstraction at Hardham is voluntary, it '*lacks the certainty required*' to be considered as mitigation in an HRA;
- Additionally, '*there is no known level of abstraction from the impacting groundwater abstractions which would rule out* [adverse effects on the European Protected Sites]';
- And, '*significant groundwater abstraction is currently unavoidable; given that a voluntary abstraction minimisation and not a voluntary abstraction cessation has been implemented ... groundwater abstraction is still required*'.

On p. 3, NE assert:

- Post 2030 upgrades '*are not suitably certain for consideration as mitigation.*'

In the light of the matters set out above, Southern Water is requested to answer the following questions:

(1) Does Southern Water agree with NE that there is currently no known level of groundwater abstraction at Hardham that can be excluded from having significant effects on the European Protected sites?

(2) Does Southern Water agree that what (if any) abstraction whose effects can so be excluded will only be established after the investigations currently being undertaken by you at the EA's request (scheduled for completion 2025)?

(3) Does Southern Water agree that, pending the licence review in the light of Southern Water's investigations, a voluntary reduction by Southern Water to abstraction of 4.2Ml/day does *not* discharge its duties as statutory undertaker under the Habitats Regulations?

(4) If the answer to (3) is 'yes', will Southern Water commit to a cessation of abstraction from Hardham pending the licence review, and will utilise alternative sources available to it?

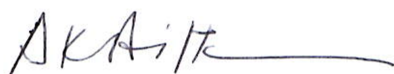
(5) If the answer to (3) is 'no', will Southern Water commit that, pending the licence review, it will not increase its abstraction above 4.2Ml/day and will utilise alternative sources available to it?

We have written to the EA in a similar manner [copy attached for convenience; Annex E].

We look forward to an early response to the above. In the absence of satisfactory answers, our clients reserve the prospect of taking legal action against Southern Water, as per the *Harris* case, to oblige it to act in accordance with its duties as a statutory undertaker under the Habitats Regulations.

In the meantime, please supply us with the HRA and WFD No Deterioration Assessments referred to on p. 3 of your letter to us dated 14th April 2022.

Yours sincerely,



Alistair Aitken
Director

Enclosures: [Annexes A, B, C and D]
Annex A: EA letter dated 6th June 2022 and EA letter dated 13th January 2023
Annex B: Shadow HRA
Annex C: Addendum to Shadow HRA
Annex D: Natural England letter dated 9th May 2023
Annex E: Copy of letter to EA dated 21st June 2023

from
Southern
Water

Alistair Aitken
FortRidge Consulting Limited
Stone House Business Cemtre
Market Place
Chipping Norton
OX7 5NH

Date
7th July 2023

Contact

Tel 0330 303 0368

Dear Mr Aitken,

Planning reference DC/19/2015 - Land North of Downsview Avenue Storrington RH20 4LU
Outline planning application for the erection of up to 62 residential units and the creation of a new vehicle access, all matters reserved except for access

Thank you for your letter dated 21st June 2023 regarding your concerns related to Water Neutrality in Sussex North Water Resource Zone (WRZ). I understand you are representing Home Builders Federation (HBF) and Croudace Homes Limited in respect to their development site 'Land North of Downsview Avenue Storrington RH20 4LU' – Planning reference DC/19/2015.

From reviewing the planning applications, we note that the outline planning application was approved on 15th May 2020, and you currently have two live reserved matters application pending a decision (reference DC/21/0749 and DC/23/0290).

In response to the points made in your letter to us dated 21st June 2023 regarding the bulk supply transfer from Portsmouth Water, we can provide the following further clarity. The bulk supply agreement with Portsmouth Water provides for a minimum daily water supply capacity to Southern Water of 1 Ml/d 'sweetening flow'. The bulk supply agreement enables Southern Water to request adjustment of the minimum daily import up to a maximum daily supply of 15 Ml/d. Notification and implementation of the adjustment to the daily water supply capacity (between the minimum 1 Ml/d and maximum 15 Ml/d limits) is subject to the terms of the bulk supply agreement. In accordance with Southern Water's Water Resource Management Plan (WRMP19) and Drought Plan 2019, during drought conditions, Southern Water would seek to maximise the import under the bulk supply agreement to the full 15 Ml/d capacity and Portsmouth Water's WRMP makes provision for that supply to be available under that circumstance.

Please note that in drought conditions it is possible that Portsmouth Water could however seek to reduce the available supply under the bulk supply agreement. This reflects the different impacts that a drought of different severity or duration can have on different supply areas which have different mixes of water sources and demand pressures. As a drought situation develops (in either company's supply area) the companies will hold discussions to agree the volume of available bulk supply under the bulk supply agreement. There is uncertainty with regards to the availability of the bulk supply in an extreme (1 in 500 year) drought event. Southern Water has assumed supply availability may reduce by 50% in an extreme drought event based on a best estimate of resource

availability. Although currently Southern Water is not experiencing drought conditions, we have been able to agree on a best endeavors basis with Portsmouth Water, the import of greater than 1 Ml/d to support the reduction in use of the groundwater source at Hardham.

Please find our response to your specific questions raised in your letter dated 21st June 2023:

1. **Does Southern Water agree with NE that there is currently no known level of groundwater abstraction at Hardham that can be excluded from having significant effects on the European Protected sites?**

   In September 2021 Natural England (NE) issued a Position Statement for applicants of new development within Sussex North Water Resource Zone (WRZ) (the NE Position Statement). This confirmed that it cannot be concluded that the existing abstraction within Sussex North Water Supply Zone is not having an impact on the protected sites in the Arun valley. Natural England has advised that new developments within this zone must not add to this impact and making development 'water neutral' is one way of preventing any further negative impact. This position has been adopted by the relevant local planning authorities who require that any development in the Sussex North WRZ must demonstrate water neutrality. The Position Statement defines water neutrality as "the use of water in the supply area before the development is the same or lower after the development is in place."

   Currently we are carrying out an environmental investigation (sustainability study) of the potential impacts of our groundwater abstractions at Hardham, with the key objectives to scientifically inform the potential water supply mechanisms to the Arun valley protected sites and determine any hydrogeological linkages to our groundwater abstraction at Hardham. Until the investigation is completed, which is expected at the end of March 2025, and the scientific information is available, we cannot confirm what level of groundwater abstraction (if any) might be having an impact.

2. **Does Southern Water agree that what (if any) abstraction whose effects can so be excluded will only be established after the investigations currently being undertaken by you at the EA's request (scheduled for completion 2025)?**

   Yes, that is correct. There is uncertainty over the cause of the wildlife decline at the Arun valley protected sites. NE believe that Southern Water's groundwater abstraction activity at its Hardham Water Supply Works (WSW) could be contributing to this impact. As mentioned above, we are undertaking a full sustainability study of our Hardham groundwater abstraction and the extent of its impacts on the protected sites to understand any links and to ensure that it is sustainable in the long term. This investigation is due to complete in 2025. Meanwhile we have voluntarily reduced our Hardham groundwater abstraction volumes. We commenced a reduction in autumn 2021, with a target rolling average of 5 Ml/day, representing approximately 40% reduction from previous typical levels (average daily abstraction groundwater abstraction from 1/1/19 to 31/7/21 was 12.7 Ml/d; or, since 1/1/02, was 11.7 Ml/d). This commitment extends at least to the completion of the sustainability review of the licence in 2025.

from
Southern Water

We are investigating NE's concerns further to ensure that our abstraction is not causing an impact and is sustainable in the long term. This could mean we take less from the Hardham groundwater source in future; however, our position will be informed by the completion of our sustainability study in 2025.

3. **Does Southern Water agree that, pending the licence review in the light of Southern Water's investigations, a voluntary reduction by Southern Water to abstraction of 4.2 Ml/day does not discharge its duties as statutory undertaker under the Habitats Regulations?**

   We are not entirely clear what is meant / what you are asking by this question but provide the following comment:

   Southern Water takes its duties and statutory obligations as a statutory undertaker very seriously including those set out under The Conservation of Habitats and Species Regulations 2017 (The Habitats Regulations 2017).

   Our Water Resource Management Plan (WRMP) sets out our strategy for how we intend to achieve a secure supply of water for our customers and a protected and enhanced environment, which includes Hardham and the Arun valley protected sites. The WRMP is a statutory plan which must be accompanied by a Habitats Regulations Assessment (HRA).

   In response to the Position Statement issued by Natural England in September 2021 we have voluntarily reduced our ground water abstraction to a rolling average of 5 Ml/d, which is significantly lower than our licensed abstraction limit and approximately 40% reduction from previous typical levels of this abstraction. We are hopeful that this will minimise any potential environmental deterioration which may be linked to our abstraction of ground water. Our position on this will be confirmed once the results of the sustainability study are available in 2025.

   Please note that our voluntary agreement to reduce our abstraction is to target a rolling average abstraction rate of 5 Ml/day as opposed to 4.2 Ml/day as stated in your correspondence to us dated 21st June 2023.

4. **If the answer to (3) is 'yes', will Southern Water commit to a cessation of abstraction from Hardham pending the license review, and will utilize alternative sources available to them?**

   Again, we are not entirely clear what is meant / what you are asking by this question but provide the following comment:

   Our position is that in most water resource conditions Southern Water has a sufficient supply available to meet demand in the Sussex North WRZ and that we have some flexibility in where water is sourced from, thereby enabling the commitment to reduced abstraction from the Hardham groundwater source while the sustainability study is ongoing.

However, when dry periods are experienced and these become more severe, the output of several other sources in Sussex North WRZ become constrained by water availability, placing more reliance on the Hardham groundwater source. In the scenario of a severe drought or major operational supply outage we would potentially need to increase our groundwater abstraction to a higher rolling average, including potentially up to the full licensed abstraction limit for short periods, to ensure the expected supply to our existing customers in the Sussex North WRZ. For this reason, we would not be in a position to commit to a cessation of abstraction from Hardham or to a fixed limit of 5 Ml/d (or 4.2 Ml/d as quoted in your letter of June 21st)

5. **If the answer to (3) is 'no', will Southern Water commit that, pending the license review, it will not increase its abstraction above 4.2 Ml/day and will utilize alternative sources available to it?**

   As previously stated, we are committed to continue to abstract a target rolling average of 5 Ml/d from our groundwater source at Hardham, whenever conditions are favorable to do so. We also require the flexibility of potentially abstracting up to our full licensed amount during extreme events to ensure resilience in our supply of water to existing customers. Our daily abstraction will at times be over the 5 Ml/d and there will be times when abstraction is below this amount. The variation in our ground water abstraction is dependent on factors such as demand, network flexibility and availability of water from other sources. For these reasons, we are not in a position to agree to a fixed daily limit of abstraction less than our licensed daily limit.

I note your request for the Habitat Regulations Assessment (HRA) and Water Framework Directive (WFD) 'No Deterioration' assessment which we referred to in our response dated 14th April 2022. This request for information will be processed by our Environment Information Regulations Team (EIR) under a separate cover, reference EIR 1964. Please note this will take up to 20 working days.

In conclusion, Southern Water recognises that water is a precious resource and is dedicated to meeting the challenge of securing sustainable long-term water supplies in a way which protects the environment. In response to the NE's Position Statement and to further our protection of the environment we have commenced a sustainability study which is due for completion at the end of March 2025. The sustainability study will look to determine what/if any impact groundwater abstraction is having on the Arun Valley Arun Valley Special Area Conservation (SAC), Arun Valley Special Protection Area (SPA) and Arun Valley Ramsar Site. In the meantime, development proposals with the Sussex North WRZ that would lead to an increase in water demand will need to demonstrate 'water neutrality'. This can be achieved through water efficiency devices, water recycling and offsetting any new demand within the WRZ. Please see our website for further information and for some useful links, including to resources from Waterwise.

We note your reference to your clients reserving their right to taking legal action against Southern Water as per *R (Harris) v Environment Agency [2022]*. We note that case this was a judicial review case brought against the Environment Agency (EA) which found that the EA were too restrictive in

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Southern Water Services Ltd, Registered Office: Southern House, Yeoman Road, Worthing BN13 3NX Registered in England No. 2366670

from Southern Water

their review of numerous water abstraction license in a protected site (the Norfolk Broads) and that this breached The Habitats Regulations 2017.

You will no doubt be aware that this case was brought against the EA, and not the individual abstraction license holders, and in light of your comment, we kindly ask that you clarify the basis of any proposed legal action against Southern Water?

We trust you will find our response satisfactory to your expectations and to reiterate that we would welcome a discussion if you have further questions.

Yours sincerely,

Simon Parker

Director of Asset Management

Appendix D

Water Neutrality in Sussex North Webinar Q&A dated 5th October 2023

Water Neutrality in Sussex North

Webinar Q&A

5th October 2023

Thank you!

Thank you for attending our recent Water Neutrality webinar. Interacting with our customers is one of our top priorities, and we truly enjoyed seeing so many of you!

Please feel free to share some feedback and suggestions for future events so we can improve the experience for you. Any feedback/suggestions can be sent to our dedicated inbox: waterneutrality@southernwater.co.uk

Slide Pack

This pack is accompanied by a copy of the slides that were presented in the session on 5th October. Please do let us know if you have any further questions once you've had some time to absorb what was discussed.

Recording

A recording of this webinar is now available on our website to view: Water Neutrality (southernwater.co.uk)

Q&A:

Is Natural England engaging with the RSPB at Pulborough or Amberley to conserve the snail? What has been done where the snail's habitat is?

Natural England are and will continue to work closely with the RSPB regarding the Arun Valley designated sites, including impacts facing the little ram's-horn whirlpool snail (Anisus vorticulus).
Details of our assessment and issues that have been raised regarding the species will be shared with Southern Water once finalised. ***(Response provided by Natural England)***

What action has Southern Water taken to date? Do you plan to increase groundwater abstraction in the future?

To mitigate the potential impact of abstraction from the Pulborough groundwater source, Southern Water has reduced abstraction by more than 50% from the source compared to the average abstraction in the first half of 2021–22. We are continuing to use alternative sources of supply and to maximise the bulk import from Portsmouth Water wherever possible. We are currently investigating the opportunity to formalise this operational regime outside of drought conditions (when we are more reliant on groundwater sources) and whether this could be an alternative solution to water neutrality.

Southern Water is currently in partnership with Natural England, the Environment Agency, Sussex Wildlife Trust, the RSPB and Atkins Ltd, to investigate the groundwater source further, through a Sustainability Study. The outcome of this Study will inform future decisions about the sustainability of groundwater abstraction at Pulborough and what level of groundwater abstraction may be possible.

Does Southern Water have any plans to either increase or reduce groundwater extraction in Sussex North?

Sussex North is supplied from a mix of water sources including the River Arun and the Western Rother, Weir Wood reservoir near East Grinstead and a transfer from Portsmouth Water. Approx 35% of water supply in Sussex North is normally provided by groundwater. Whilst a Sustainability Study is carried out (see above), Southern Water has voluntarily reduced our groundwater abstraction from Pulborough to an average of 5Ml/d, to mitigate the potential impact of abstraction at that locality. The outcome of the Sustainability Study will inform future decisions about the sustainability of groundwater abstraction at Pulborough and what level of groundwater abstraction may be possible.

Does the Business Partnership Fund exclude the water neutrality area?
Business Partnership Fund (southernwater.co.uk)

Applications from Sussex North will be reviewed on a case-by-case basis to comply with the water neutrality requirements in the region.

Could you please clarify what types of projects the Business Partnership fund (Southern Water) is expected to fund? Will WN-related projects be in scope?

The requirement from the Business Partnership Fund is that any successful projects funded in January 2024 must be complete, and a water saving be demonstrated by December 2024. If a project meets this requirement, then the application will be considered alongside all others by the Steering Group in January 2024. Business Partnership Fund (southernwater.co.uk)

Horsham District Council/SNOWS Q&A:

Can you clarify what type of planning proposals will be allowed to use SNOWS and what sort of impact SNOWS will make on the backlog and in what timescale?

Any planning proposal will be able to request to use SNOWS, however the scheme is intended and will be designed to support planning applications that accord with local authority current and/or emerging development plans, meaning that speculative applications or those otherwise not in accordance with local authority plans will not be eligible to access SNOWS.

Whilst we intend to begin building up offsetting capacity within SNOWS prior to the formal launch of the scheme, we know that there will be insufficient capacity built up to meet anticipated demand at launch and for a period thereafter. Applicants should be mindful that there will not be guaranteed, immediate access to SNOWS during this time and we recommend they continue to explore other options to mitigate access risks if they are considering SNOWS as a potential water neutrality solution for their development.

It is too early in the development of the scheme to confirm the timescales for clearing any backlog, which will itself be fluid over the coming months.

Will SNOWS also support allocations in Neighbourhood Plans? Existing allocations? Not just emerging allocations.

In the current draft of the SNOWS application prioritisation process, Neighbourhood Plan allocations will neither be penalised nor explicitly prioritised but will be considered equally alongside other forms of development, so long as they are in compliance with the Neighbourhood and/or Local Plan.

Should the water neutrality definition relate to that part of the source that there is insufficient evidence to demonstrate that there is no effect on the SAC?

Through significant engagement between the local authorities, Southern Water, and Natural England after the NE position statement was issued to the affected authorities in September 2021, the Sussex North Water Resource Zone - as mapped on the West Sussex County Council website – has been agreed as the area to which water neutrality requirements apply.

Southern Water comments:
Southern Water is working in partnership with the Environment Agency, Natural England, the RSPB, Sussex Wildlife Trust, and Atkins plc to examine the hydro ecology of the Hardham Basin in detail. The timeline for this study is relatively long, because of the complex nature of the investigation. Currently there is detailed hydrometric and ecological monitoring underway, for which at least two years of study is needed; this will be continuing until spring 2024. The team will then move on to the impact assessment, in parallel with the development of a numerical groundwater model. The study is expected to reach its conclusion at the end of March 2025.

Is there any guidance issued on this by the authorities or will there be an SPD? to guide on water neutrality statement content as well as process and stages for credit applications.

WATER for LIFE from Southern Water

When the SNOWS processes have been finalised, we will produce and issue guidance and will engage with the industry prior to scheme launch to outline the processes and respond to any questions. We will not be issuing guidance as a Supplementary Planning Document (SPD) as SNOWS does not sit directly within the remit of the LPAs and remains an optional offsetting solution for applicants. We will keep you updated on the scheme progress and any further scheme guidance through our regular communication channels, including our project newsletter and via regular Southern Water events.

Can you point me at the evidence that water neutrality applies beyond groundwater abstraction please?

The affected local authorities are responding to the issues raised by Natural England's position statement and subsequent correspondence, which can be found on the Horsham DC website here: https://www.horsham.gov.uk/planning/water-neutrality-in-horsham-district/position-statement.

We recommend that queries relating to evidence of harm are directed to Natural England in their capacity as the competent authority for the Arun Valley designated sites.

Are boreholes a sensible solution for developments, and what would happen if they ran dry?

It is not for us to say whether a borehole is a sensible solution for any particular site – it will depend on the site-specific conditions. However, some concerns have been raised about the overall increased proliferation of private boreholes in the Sussex North area because of water neutrality issues.

As part of any planning application, the developer must demonstrate with sufficient certainty that the borehole will not run dry for the period required by the Habitats Regulations, upon Natural England's advice. If a borehole were to run dry, the development would have to rely on mains supply and would therefore no longer be water neutral without additional offsetting. The quality of the abstracted water will need to be shown to be treatable to a potable standard. The FAQs on the Horsham website provide further information on what is required to support a borehole proposal.

When will the offsetting scheme be in place? What volume of housing will this release annually and over what period?

We aim to launch SNOWS in the first half of 2024, though with current resources it is likely to be towards the end of this period, i.e. summer 2024.

It is too early to say what volume of housing will be released annually. The aim of the scheme is to support the local authorities to achieve their local plan growth needs. These trajectories are still being developed by some of the authorities. Growth in early years of the local plans could be severely hampered by the capacity that SNOWS is able to generate.

SNOWS will operate – and water neutrality requirements will apply – until Southern Water have out in place sufficient measures to mitigate the impacts of their abstractions near Pulborough. It will however be planned until the end of the local plan periods in 2039/40 so that the local planning authorities can demonstrate that their local plans are water neutral.

Will any guidance be issued on what should be expected in a water neutrality statement?

Where there is specific information required to access SNOWS that needs to be included within a water neutrality statement or otherwise in the planning application, we will make this clear through any SNOWS guidance for applicants.

If we apply for credits during planning stage, how can we then cover the credits certainty in our water neutrality statement which is a validation requirement?

At this point in time, our expectation would be that the water neutrality statement identifies whether the applicant is seeking to use SNOWS, or a bespoke mitigation solution. The statement would need to identify the amount of water that needs to be offset. You would not need to have secured the credits to be able to submit a valid water neutrality statement with the submission of the application.

What type of licence offsetting has been undertaken? Where are the successes?

License trading is theoretically possible, but certainty is needed over actual abstraction volumes and the linkages to Hardham.

How many credits will SNOWS generate, and over what timeframe?

We don't have this information available yet. Ultimately it will depend on how many offsetting properties SNOWS can secure, how quickly, and then how quickly offsetting measures can be installed in those properties.

As noted above, SNOWS will operate – and water neutrality requirements will apply – until Southern Water have out in place sufficient measures to mitigate the impacts of their abstractions near Pulborough.

Will offsetting credits from the scheme be available to all planning or just for those sites allocated in the emerging local plans?

Any planning proposal will be able to request to use SNOWS, however the scheme is intended and will be designed to support planning applications that accord with local authority current and/or emerging development plans, meaning that speculative applications or those otherwise not in accordance with local authority plans will not be able to access SNOWS.

We have clients redeveloping brownfield sites with an extant water use, but when we cannot get hold of existing water bills due to change of ownership, we must take a baseline of zero. Is there anything that Horsham can propose to avoid developers having to pay very high offsetting/credit fees?

Unfortunately, not. There must be certainty of existing use and if that cannot be provided then a nil baseline must be taken.

How will developers be able to access the SNOWS credit scheme and at what stage of the planning stage? Pre-app?

The exact processes are currently under development. Our current thinking is that access to SNOWS will only be secured at the application stage, not at the pre-app stage, because capacity will be finite, sought after, and we are keen that any credits are used primarily for developments that will be delivered quickly – we want to avoid any credits being 'banked' by applicants.

What will SNOWS credits cost?

We do not have a cost at this stage. Credit costs are being worked up through development of the SNOWS Costs & Funding Plan, which is underway.

The best data available for costs are in the Water Neutrality Mitigation Strategy ('Part C') report, available here:
https://www.horsham.gov.uk/__data/assets/pdf_file/0004/120397/EYP-JBAU-XX-XX-RP-EN-0004-A1-C02-Water_Neutrality_Assessment_Part_C.pdf

It is good that SNOWS will be accessible to SMEs. Might this include standard rules approach to reduce detail required in an AA? e.g. a template AA?

It is for the Local Planning Authority to complete the AA process, not applicants. There are many examples of water neutrality statements that can be found using the planning register and we have clear guidance on our online FAQs about what a statement needs to include.

Can the SNOWS scheme be used to offset any scheme in SNWSZ?

In theory, yes, subject to the scheme's access requirements. Offsetting measures provided anywhere within the Sussex North Water Resource Zone (WRZ) can be used to offset any development within the WRZ, excluding an area around Upper Beeding where offsetting measures cannot be installed but water neutrality requirements apply to new development.

What’s next?

The next webinar will be held in December 2023. At this session we are planning to showcase a range of third-party services and products that can be used to reduce water use. If your business would like the opportunity to present at the next webinar or you would like to provide some information to be included in a follow up pack, please get in touch: waterneutrality@southernwater.co.uk

We will continue to provide monthly updates via our newsletter to keep you all informed.

See you again soon!

WATER for LIFE from Southern Water

GOV.UK

Environment Agency | Office for Water Services | Natural Resources Wales

Guidance

Water resources planning guideline

Updated 14 April 2023

Applies to England and Wales

Contents

Section 1 – Planning for a secure, sustainable supply of water
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Section 1 – Planning for a secure, sustainable supply of water

This guideline is relevant to water companies in England and Wales. It is also relevant to those producing regional plans.

1.1 Your WRMP

If you are a water company in England or Wales, you must prepare and maintain a water resources management plan (WRMP). Your WRMP sets out how you intend to achieve a secure supply of water for your customers and a protected and enhanced environment. The duty to prepare and maintain a WRMP is set out in sections 37A to 37D of the Water Industry Act 1991.[footnote 1] You must prepare a plan at least every 5 years and review it annually.

In your plan you must forecast your supply and your demand over at least the statutory minimum period of 25 years. If you forecast a deficit you should consider:

- supply-side options to increase the amount of water available to you
- demand-side options which reduce the amount of water your customers require

To determine your preferred programme you should identify and appraise a range of options. You should justify the selection of the options included in your preferred plan. If you do not have a deficit you should still produce a best value plan. This should consider government policy and wider objectives such as increasing your surplus to facilitate water trading.

When you produce a preferred plan, there are uncertainties. We therefore recommend using adaptive planning. In this concept, when we refer to a preferred programme, this can also be referred to as representing the 'most likely' future (based on the uncertainties) and the pathway through it. That is, the route through the adaptive planning you will most likely follow.

1.1.1 Outcome based planning

This guideline focuses on the legal requirements and technical approaches you should follow to develop a WRMP. You should consider this guideline in conjunction with any relevant government policy and outcome expectations.

Your WRMP should efficiently deliver resilient, sustainable water resources for your customers and the environment, both now and in the long term. This objective should be at the centre of all your planning methods and decisions.

You should be transparent in your methods, data, assumptions and decisions. This is so that customers, stakeholders, regulators and government can understand and comment on your plan. Your methods should be proportional to the complexity of your problem.

1.2 This guideline

This guideline is designed to help you write a plan that complies with all the relevant statutory requirements and government policy. In this guideline we have used the word 'must' where the action is related to a statutory requirement. If you do not follow a 'must' there is a high risk you will produce a plan that is not legally compliant.

We have used the word 'should' where we believe this action is needed to produce an adequate plan. If you, or a regional group, decide to take a different approach you should clearly demonstrate how you are still fulfilling your obligations. You should discuss this approach with regulators. Regulators are fully supportive of new approaches but will need to work with you to understand and review these.

If the guidance for water companies wholly or mainly in England and Wales differs significantly, we have referred to these companies as follows:

- for companies wholly or mainly in England – 'England' or 'water companies in England'
- for companies wholly or mainly in Wales – 'Wales' or 'water companies in Wales'

There are elements of the guideline that are subject to specific legislative or regulatory requirements that align to the England or Wales geographic boundaries. The main areas that this relates to are as follows:

- setting your environmental destination
- considering the environment and society in your decision making

- complying with environmental legislation, Strategic Environmental Assessment (SEA) and Habitats Regulations Assessment (HRA)
- for plans affecting Wales, obligations in relation to Environment (Wales) Act 2016 and Well-being of Future Generations (Wales) Act 2015

1.3 Developing your WRMP

Your plan should take a long term view, setting a planning period that is appropriate to the risks of your company and region, but which covers at least the statutory minimum period of 25 years. It may be appropriate, depending on the challenges and risks you face, and those in the relevant regional plan,[footnote 2] for you to plan for the next 50 years or more. This is so your plan identifies appropriate solutions to meet future pressures. Your plan should contribute to a protected and enhanced environment.

Before you revise your WRMP you should review which parts of your previous WRMP are still relevant. Your previous WRMP (as an agreed long term plan) should be a starting point to build your regional plan and WRMP. Your new plan should include a review of what has, and has not, changed since the last plan and why. This should include a review of whether your previous plan is still fit for purpose.

You must develop and publish a new plan no later than 5 years from the date when your plan was last published. You must also produce a WRMP if:

- you have been directed to do so by the Secretary of State for the Environment, Food and Rural Affairs (if wholly or mainly in England) or by the Welsh Ministers (if wholly or mainly in Wales)
- if there has been a material change in circumstances, for example identified through your annual review

In producing the plan you:

- must comply with your legal duties
- should follow the relevant government’s policy expectations and any specified outcomes
- must demonstrate how you will ensure secure supplies while protecting and enhancing the environment
- should produce a final WRMP with no deficits in any of your water resource zones over the final planning period
- should demonstrate how you will incorporate national planning (through the national framework (https://www.gov.uk/government/publications/meeting-our-future-water-needs-a-national-framework-for-water-resources)) and regional planning into your WRMP (where applicable)

1.4. Regulator roles and responsibilities

The Environment Agency, Natural Resources Wales and Ofwat are responsible for jointly writing this guideline. The following regulators have a significant role in the WRMP process.

1.4.1 Environment Agency

The Environment Agency is a statutory consultee for WRMPs. It leads on producing this guidance for you to use in compiling your WRMP. It has a statutory duty to secure the proper use of water resources in England. The Environment Agency will work with you as you prepare your plan and will provide a representation as part of your consultation.

At the statement of response stage, its role changes and it becomes a technical advisor to the Department for Environment, Food & Rural Affairs (Defra) and the Secretary of State.

1.4.2 Natural Resources Wales

Natural Resources Wales' purpose is to deliver the sustainable management of natural resources in the exercise of its functions. This includes embedding the sustainable development principle to contribute to the well-being goals for Wales.

Natural Resources Wales is a statutory consultee for WRMPs and the advisor to the Welsh Government for plans affecting Wales. It leads on producing guidance specific to Wales. Natural Resources Wales will work with you in your preparation of your plan and provide a representation as part of your consultation.

At the statement of response stage, its role changes and it becomes a technical advisor to Welsh Government and the Welsh Ministers.

1.4.3 Ofwat

Ofwat is a statutory consultee for WRMPs. Ofwat is a key stakeholder during the development of your plan and will provide a representation as part of your consultation. The WRMPs primarily inform the supply-demand balance part of your business plans that you then submit to Ofwat.

Ofwat determines the extent to, and conditions under which, you can recover the costs of investment through your charges to customers. It does this principally (although not exclusively) through determinations and decisions under Condition B of water companies' Instruments of Appointment (licences). This provides the framework for your price controls, and, where necessary, the imposition of additional supporting licence conditions. Ofwat is required to carry out its statutory functions in accordance with its duties in Part 1 of the Water Industry Act 1991. Ofwat's

primary statutory duties under section 2(2A) of the Water Industry Act 1991 require it, in summary, to set price controls in the manner it considers best calculated to:

- further the consumer objective to protect the interests of consumers, wherever appropriate by promoting effective competition
- secure that water companies properly carry out their functions
- secure that the companies are able (in particular, by securing reasonable returns on their capital) to finance the proper carrying out of those functions
- further the resilience objective to secure the long term resilience of companies' systems and to secure that they take steps to enable them, in the long term, to meet the need for water supplies and wastewater services

1.4.4 Drinking Water Inspectorate (DWI)

DWI has responsibilities under the Water Industry Act 1991 relating to the sufficiency and quality of water supplies.

1.4.5 Regulators' Alliance for Progressing Infrastructure Development (RAPID)

RAPID will help accelerate the development of new strategic water infrastructure and inform future regulatory frameworks. It is made up of the 3 water regulators in England: Ofwat, Environment Agency and DWI. It also works closely with Welsh Government and Natural Resources Wales. Find further information on RAPID's website (https://www.ofwat.gov.uk/regulated-companies/rapid/).

Some water companies received additional funding to investigate and develop strategic regional water resource options in the 2019 price review (PR19) final determination. These companies should account for progress made on these options through a gated process. RAPID will then make recommendations on the solutions and Ofwat will make decisions on funding. You must present the need for these schemes, their timings, and the justification for your decisions in your regional plan and WRMP.

1.4.6 Natural England

Natural England is a statutory consultee for WRMPs in or affecting England. Its purpose is to ensure that the natural environment is conserved, enhanced, and managed for the benefit of present and future generations, thereby contributing to sustainable development.
Protection and enhancement of the natural environment including landscape and biodiversity depend critically on delivering improved, integrated, and sustainable land and water management. Natural England works closely with the water sector to ensure that objectives for European

protected sites, Ramsar sites (internationally important wetland sites) and Sites of Special Scientific Interest (SSSI) are delivered by landowners and public bodies. Also that all public bodies play their part in contributing to the achievement of nature recovery targets and objectives set out in the government's 25 Year Environment Plan and the Environment Act 2021.

1.5 Assurance

You should provide an assurance statement from your Board to Ofwat and Natural Resources Wales or the Environment Agency that you are satisfied that:

- you have met your obligations in developing your plan
- your plan reflects any relevant regional plan, which has been developed in accordance with the national framework (https://www.gov.uk/government/publications/meeting-our-future-water-needs-a-national-framework-for-water-resources) and relevant guidance and policy, or provides a clear justification for any differences
- your plan is a best value plan for managing and developing your water resources so you are able to continue to meet your obligations to supply water and protect the environment, and is based on sound and robust evidence including relating to costs (Section 9 defines a best value plan)

Your assurance statement should be accompanied by a supporting statement. This should detail how the Board has engaged, overseen and scrutinised all stages of development of your plan and the evidence it has considered in giving its assurance statement.

1.6 Links with other plans

Your WRMP is closely related to a number of other frameworks, plans and strategies. This includes important links to other tiers of water resources planning through the national framework and regional plans, where applicable (see Section 2 – National, regional and local planning). You should also consider any relevant SEA and HRA that may affect your plan. You should also consider the following in your WRMP:

A. Government's 25 Year Environment Plan (England only)

Your WRMP should reflect the ambitious nature of the government's 25 Year Environment Plan (https://www.gov.uk/government/publications/25-year-environment-plan) and the first revision of this set out in the Environmental

Improvement Plan (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1133967/environmental-improvement-plan-2023.pdf). You should:

- set out your destination for environmental sustainability and resilience
- support nature recovery
- use natural capital in decision making
- use a catchment approach
- deliver net gain for the environment (this is important)

B. Water Strategy for Wales (Wales only)

Your plan should reflect the long term policy direction in relation to water.

C. Natural Resources Policy and area statement (Environment Wales Act 2016)

You should consider how your plan (where it affects Wales) contributes to the priorities set out within the Natural Resources Policy (https://gov.wales/natural-resources-policy) and any relevant area statement. (https://naturalresources.wales/about-us/area-statements/?lang=en) Area statements are the place-based implementation of the Natural Resources Policy. You should consider the priorities, risks and opportunities highlighted within any area statement relevant to your plan and how collaborative actions linked to these could result in improved outcomes for people and the environment.

D. Business plans

Your business plan sets out your investment plans for the next asset management period. Your investment plans are the mechanism to achieve the planned outcomes set out in your WRMP and deliver wider water system resilience.

Your business plan should reflect Ofwat's price review methodology[footnote 3] and is assessed through Ofwat's price review process. This results in a final determination which sets out how you will fund efficient expenditure from customer bills. This process is agreed on a 5 year cycle.

Ofwat's 'PR24 and Beyond: Final guidance on long-term delivery strategies' provides an early steer to companies to make sure clear links are made between WRMPs and business plans, through the production of long-term delivery strategies. This includes, for example:

- using long-term adaptive planning across all water and wastewater activities
- planning for common reference scenarios
- linking new plans to delivery of previous ones

- using robust and consistent cost estimates

E. Drought plans

Your WRMP is complemented by your water company drought plan. Your drought plan sets out the short term operational steps you will take if the area you cover faces a drought in the next 5 years. It describes how you would enhance available supplies, manage customer demand and minimise environmental impacts as the drought progresses.

You should clearly explain how your drought plan and WRMP link in a way that your customers, regulators, government and interested stakeholders can understand. Your emergency plan will set out the actions you will take in a civil emergency. Your WRMP should set out your current and future levels of service and your justification for the order of actions you will take in a drought.

F. River basin management plans

Your WRMP and drought plan will contribute to the objectives set out in river basin management plans (RBMPs) by ensuring you:

- prevent deterioration and support achievement of protected area and water body status objectives
- have a secure and sustainable set of options to supply your customers
- are contributing to sustainable catchments by ensuring supplies are managed well in a drought
- are demonstrating how you will help your customers to use water wisely

You should identify integrated catchment-based solutions in your plan. These should deliver multiple benefits, for example reducing flood risk and improving resilience of the environment to droughts.

G. Drainage and wastewater management plans

The publication of the first draft drainage and wastewater management plans is expected in 2022. If you are a water and sewerage company, where feasible you should ensure that your long term planning for wastewater and water supply are aligned. Along with highlighting any linkages and, or interdependencies (or both). You should consider alignment in your growth forecasts, climate change scenarios and timetable for delivering solutions. If you are a water-only company, you should ensure your WRMP and your sewerage provider's plans are aligned.

H. Drinking water safety plans (or risk assessments)

These provide a means of identifying hazards and hazardous events that could arise in the catchment area, from the source up to the customer's tap.

Your drinking water safety plans should be kept under continual review. Your WRMP should take account of these safety plans, where appropriate. Your WRMP should consider how you can mitigate any risks due to water quality which might impact your supply-demand balance or preferred options. Where these actions could improve the supply-demand balance, you should consider them as options in your plan.

I. Local authority plans

Local authority plans set out future development, such as housing. Your WRMP should reflect local growth ambitions and plan to meet the additional needs of new businesses and households. (See sub-section 6.3)

J. Local Nature Recovery Strategies (England)

The Environment Act 2021 introduced Local Nature Recovery Strategies for areas in England. Public authorities will have duties in relation to these. Your WRMP should support recovery and enhancement of biodiversity according to opportunities and priorities identified in strategy areas.

K. Nature recovery action plan (Wales)

The Nature recovery action plan for Wales sets out the national biodiversity strategy and action plan for Wales. Your WRMP should show how you have considered the biodiversity and resilience of ecosystems duty.

1.7 Further guidance

This guideline is supported by a number of manuals and technical guidance. These are referred to throughout the guideline and include manuals produced by UK Water Industry Research (UKWIR) and supplementary guidance notes produced by the Environment Agency and Natural Resources Wales. They are listed in the annex to this guideline, which also identifies whether they apply to companies in Wales and are available on request from the Environment Agency and Natural Resources Wales.

> Email water-company-plan@environment-agency.gov.uk to request copies of the supplementary guidance.

Section 2 – National, regional and local planning

When you develop your plan, you should consider how it will contribute to national and regional water resources needs where applicable, while delivering local benefits. Your plan should take account of the following 3 scales of planning.

2.1 National framework (applicable to resource zones in England)

The national framework (https://www.gov.uk/government/publications/meeting-our-future-water-needs-a-national-framework-for-water-resources) sets out the indicative scale of challenge for water resources in England over the next generation.

You are expected to work in regional groups to meet the challenge and together develop a cohesive set of plans. Regional plans should identify the best options to meet the challenges we face, delivering best value for the environment and society.

2.2 Regional planning

Regional plans set out at a strategic level, how the supply of water for people, business, industry, navigation and agriculture will be managed in the region. The regional plan should aim for resilient water supplies for all users for 25 years or more, while protecting and enhancing the environment.

Regional plans will be developed with other large water-users, taking into account the demands of all sectors. This guideline contains the best practice technical methods for producing WRMPs and regional plans. Regional groups should follow this guidance or justify why this is not appropriate.

Additional regional planning guidance (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/872222/Appendix_2_Regional_planning.pdf) is included as an appendix of the national framework and sets out what a regional plan must, should and could do. Regional groups and water companies should work with regulators and others to agree a long term destination for

environmental improvement and sustainable abstraction. The regional plan should show how the environmental destination will be achieved.

Where relevant, your plan should reflect the regional plan unless there is clear justification for not doing so. Your WRMP should explain how you have reflected the regional plan and why you have selected your preferred programme.

It is likely that the regional groups will undertake their planning at varying levels of detail, in part due to the differing challenges faced by each regional group. For this reason, it is not possible for this guideline to prescribe exactly how a regional plan should inform your WRMP.

You should clearly explain how the regional plan has informed each stage of your development of your WRMP (where applicable). As you develop your regional and company plans in parallel, you should address any differences and inconsistencies throughout the process. You should describe the process for reconciling and refining your plans and you should describe the iterations needed.

There can be some legitimate reasons where your plan does not reflect the relevant regional plan. These reasons include but are not limited to:

- further detail or refinement at a WRMP level, which was not undertaken at a regional level given the strategic nature of the regional plan
- identifying a better option at WRMP level, which does not affect the delivery of a regional plan
- minor additions or variation

You should provide a clear justification for any differences between the preferred programme in the regional plan and your preferred programme in your WRMP. This is so that they can be understood by government, regulators, customers and stakeholders.

A best value programme may differ depending on the geographical scale such as resource zone, company level and, where applicable, regional level. You should consider:

- distributional impacts[footnote 4]
- how your solutions may differ (depending on the scale used)

You should explain your preferred plan programme in the context of these scales and impacted customers or companies.

Regional plans in England

Your WRMP should reflect the relevant regional water resources plan. Regional plans are an expectation for companies in England and represent,

at a national level, a fundamental change of approach for this round of planning.

Regional plans in Wales

If you are a water company in Wales and have a resource zone within England, you should include it within the appropriate regional plan.

Where you have a resource zone bordering England and Wales, which is important for cross-border shared supplies, you may also include these in the relevant regional plan.

You should discuss which resource zones should be used to inform a regional plan with the regional group, regulators and Welsh Government. In respect to these resource zones:

- your WRMP should reflect the regional plan
- you should refer to the Welsh Government guiding principles

There is no current requirement from Welsh Government for regional plans to be produced in Wales.

2.3 Local planning

In compiling your plan you should also actively engage with customers and stakeholders at a local or catchment level. You should consider any local pressures and local solutions. For example, local housing growth, or local concern around a particular stretch of river. You should engage with river basin management planning catchment groups and priority catchment groups.

In England you should consider opportunities and priorities set out in Local Nature Recovery Strategies (https://publications.parliament.uk/pa/bills/cbill/58-01/0009/20009.pdf) (Part 6 Environment Act 2021) which embed nature recovery into your planning processes.

In Wales you should refer to the Nature recovery action plan on the Welsh Government website (https://gov.wales/nature-recovery-action-plan-2015), State of Natural Resources report (https://naturalresources.wales/evidence-and-data/research-and-reports/state-of-natural-resources-interim-report-2019/sonarr-2020/?lang=en), Area statements (https://naturalresources.wales/about-us/area-statements/?lang=en) and further details are available on the Wales Biodiversity Partnership website (https://www.biodiversitywales.org.uk/Nature-Recovery-Action-Plan).

Section 3 – How to form and maintain a WRMP

This section explains what steps you need to take to develop and publish your water resources management plan (WRMP or the plan). It starts from early engagement with regulators and customers, through to publishing your final plan. Once published, you must report on your plan annually.

3.1 Legal requirements

When you prepare and publish a WRMP, you must comply with the requirements of Water Industry Act 1991, sections 37A to 37D and any secondary legislation made. This includes the Water Resources Management Plan Regulations 2007 (2007 regulations), and any ministerial directions given under this legislation.

> Guideline updates after WRMP 2024 will consider the changes section 78 of the Environment Act 2021 will make to existing water resources management plan and drought plan legislation.

You must take account of the following legislation as relevant to your plan (this is not an exhaustive list):

- Water Industry Act 1991
- Water Resources Act 1991
- Environment Act 1995
- Water Resources Management Plan Regulations 2007 (2007 regulations)
- Environmental Assessment of Plans and Programmes Regulations 2004
- Conservation of Habitats and Species Regulations 2017
- Water Environment (Water Framework Directive) (England and Wales) Regulations 2017, referred to in this guideline as 'WFD regulations'
- Water Supply (Water Quality) Regulations 2016
- Eels (England and Wales) Regulations 2009
- Wildlife and Countryside Act 1981
- Countryside and Rights of Way Act 2000
- Natural Environment and Rural Communities Act 2006
- Invasive Alien Species (Enforcement and Permitting) Order 2019
- Well-being and Future Generations (Wales) Act 2015
- Environment (Wales) Act 2016
- Marine and Coastal Access Act (2009)

You must consider whether you need to carry out a SEA and HRA for your plan.

3.2 Regional plan process

As set out in Section 2, where applicable, regional plans are a step change in compiling your WRMP.

The timeline for the regional groups can be found in the regional planning appendix (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/872222/Appendix_2_Regional_planning.pdf) of the national framework. Regions are due to start the reconciliation process in September 2021 to ensure alignment and consult on their draft regional plans in early 2022. Table 1 sets out how the regional plan and WRMP timetable fit together.

Table 1: Regional plans and WRMP timetables

Regional plans dates	WRMP dates	Outcome
Jan 2022 – Informal consultation on regional plans	Jan 2022 – pre-consultation with regulators on draft WRMPs	The regional plan consultation will inform you of stakeholder views on strategic options and policies ahead of your WRMP consultation. Pre-consultation with regulators and other stakeholders on WRMP is an early chance to seek feedback on any solutions proposed.
Autumn 2022 – draft regional plans submission (dates to be confirmed)	October 2022 – submission of draft WRMPs followed by consultation (subject to Government direction)	The WRMP consultation should link to the regional plan to help explain relevant policies, strategic options and collaborative working practices with customers.

Regional plans dates	WRMP dates	Outcome
Sept 2023 onwards – Final regional plans published	Sept 2023 onwards – Final WRMP published	To ensure clear and joined up plans, the final regional plans will align with the WRMPs (or have clear justification for any differences).

3.3 Pre-consultation

You should engage at an early stage with your Board, regulators, customers and interested parties, especially if your plan is likely to be complex or include significant change. This reduces the risk of issues being identified at a later stage. You should discuss your plan in the context of your previous WRMP and business plan, your progress with their delivery, and any expected variations.

The new regional planning process will provide an early opportunity to seek views and gain feedback for proposed solutions that you may adopt. You should actively engage with regulators through the regional planning process.

You should continue engagement through the development of your plan (including highlighting significant changes) until you submit your draft plan. There should be no surprises to regulators and stakeholders when you publish your plan. A good pre-consultation should lead to less challenge of a draft plan as it should help identify and resolve concerns early in the process. This should help avoid delays in the later stages of the process which can have implications for your business plan and assessment at the next price review.

Customer and stakeholder engagement on your plan should, where possible, align with customer engagement on your business plan. This should mean that customer preferences identified as part of the WRMP process are reflected in your business plan.

3.3.1 Statutory consultees

You must carry out pre-consultation discussions with the following statutory consultees:

- the Environment Agency and the Secretary of State if your plan will affect sites in England

- Natural Resources Wales and the Welsh Ministers if your plan will affect sites in Wales
- Ofwat
- any licensed water supplier that supplies water to premises in your area through your supply system
- Cadw (in relation to SEA in Wales)

You should also engage as early as possible with relevant SEA and HRA statutory consultees where appropriate.

If your possible options affect a designated site in England or Wales you must contact Natural England or Natural Resources Wales as applicable.

Designated sites include:

- special areas of conservation (SACs, including candidate areas)
- special protection areas (SPAs, including potential areas)
- Ramsar sites (including proposed sites)
- sites of special scientific interest (SSSIs)
- national nature reserves
- local nature reserves (contact local councils)
- local wildlife sites (contact local councils or wildlife trusts)
- marine conservation zones
- landscapes including world heritage sites, European Landscape Convention, national parks, areas of outstanding natural beauty

3.3.2 Non-statutory consultees

You should also carry out pre-consultation discussions with other consultees. These should include as a minimum:

- regional groups (where applicable)
- any water supplier affected by your supply system
- any water companies you have bulk supply or shared resource agreements with
- neighbouring water companies
- local catchment partnerships
- Wales Water Management Forum (Wales)
- any other groups your plan is likely to affect
- any potential water supplier, company or third party you may wish to trade with
- CCW (formerly Consumer Council for Water)
- Public Services Boards (Wales) and other public service providers
- water retailers for business

- DWI
- RAPID
- National Infrastructure Commission
- Forestry Commission (where applicable in England)
- local nature partnerships (where applicable)
- water efficiency groups

3.3.3 Consultation with regulators

You should undertake an enhanced pre-consultation with the Environment Agency and, or Natural Resources Wales and Ofwat. You should discuss your plan's ambition, methods and the approaches that you intend to take while developing your plan.

You should present the following information to the regulators, as a minimum by January 2022 at the latest:

- progress with your WRMP19 delivery, any significant changes you expect, and how these will affect your plan
- the resource zones on which your plan will be based
- problem characterisation assessment
- your planned approach to assessing climate change
- your indicative supply-demand balance at a resource zone level
- your approach to adaptive planning (where appropriate)
- your provisional preferred schemes
- the wider benefits and outcomes you plan to deliver beyond a least-cost plan
- how your plan will reflect the relevant regional plans (if applicable)
- any particular risks or issues you identify in your plan

Regulators will review this information and provide an initial view. They will highlight the areas they wish to work with you on as you compile your plan. Regulators will not sign off any parts of your approach in advance of the consultation. This is because they need to assess the plan as a whole and offer impartial advice to government.

3.4 Write a draft plan

You should use this guideline to write your draft plan, taking into account any feedback from your pre-consultation. Your WRMP should reflect any relevant regional plan as described in Section 2. You must also follow legislation including any directions you receive from the Secretary of State

or the Welsh Ministers. They will issue directions ahead of you submitting your draft plan. They will include the date by which you must submit your draft plan and any other statutory requirements. You may receive further directions during the process.

Your plan should have an easy to read non-technical summary that clearly sets out your planning problem and how you propose to solve it. It should also highlight specific questions you would like responses to during the consultation. It should also summarise the progress since, and differences from, your previous plan. Your non-technical summary should show how your WRMP and other linked plans such as your drought plan, regional plan (if applicable) and your business plan fit together.

Your non-technical summary should sit alongside a more detailed, but still clearly understandable, technical document. Regulators and interested parties need to understand the options you have considered and the decisions you have made. You should provide supporting information in appendices and also complete the water resources planning tables. You should publish these in full at the same time as your main WRMP. When writing your plan, you should also consider the reporting requirements for completing the stages (if applicable) of the SEA and HRA.

3.5 Send your draft plan

You must send your draft plan to the Ministers as required.

If your company area is wholly or mainly in:

- England – you must send your draft plan, statement of response to your consultation and final plan to the Secretary of State. If your plan also affects sites in Wales, you must also send it to the Welsh Ministers
- Wales – you must send your draft and final plan to the Welsh Ministers. If your plan also affects sites in England, you must also send it to the Secretary of State. You must ensure your submitted plan and statement of response complies with the requirements of the Welsh Language (Wales) Measure 2011

Defra will provide you with instructions about sending electronic copies of your plan via a secure transfer site. If your plan affects sites in Wales, the Welsh Government will provide separate instructions for submitting electronic copies of your plan.

When you submit your draft plan to the Secretary of State or the Welsh Ministers for agreement to publish it for consultation, you must submit a statement from your security manager. This must certify that the plan has been reviewed[footnote 4] and that it does not contain any information that

would compromise national security interests. You must highlight the information you propose to redact or edit out in the published version, so that the Secretary of State or the Welsh Ministers may confirm whether it can be removed on grounds of national security.

In this statement you must also say whether the plan contains any information that may be commercially confidential. If you believe a draft plan should not be published because it contains commercially sensitive information, you should inform the Secretary of State or the Welsh Ministers as soon as possible.

You should also provide your assurance statement and supporting statement to the Secretary of State and the Welsh Ministers alongside your draft plan. Sub-section 1.5 describes the requirements of your assurance statement.

3.6 Publish, distribute and consult on your draft plan

You must wait to hear from the Secretary of State or the Welsh Ministers before publishing your draft plan for consultation. Once you have been instructed to publish, you must adhere to Water Industry Act 1991, the 2007 regulations and directions with regards to the consultation and making draft plans available. You must share your draft plan with all consultees listed in the 2007 regulations. If you are submitting your plan to an agreed government secure transfer site, ensure that all relevant statutory consultees have been given access. You should also share your draft plan with all other organisations involved in the pre-consultation discussions. You should publish your assurance statement and supporting statement alongside your draft plan.

You must also publish a statement with the draft plan that:

- specifies whether you have left out any commercially confidential information
- tells people how they can make representations on the draft plan to the Secretary of State or the Welsh Ministers before the end of the consultation period

You should also consider:

- offering to explain the plan to established groups, known interested parties or companies within your area
- including an engaging summary of your plan which clearly sets out your proposals to your customers in plain language
- holding virtual events, road shows or exhibitions

- conducting questionnaires to gain views on your proposals, using phone or in person surveys or other recognised survey techniques
- using social media to highlight the consultation
- innovative web-based engagement
- joint communications with other companies

These are only suggestions and the approach you take will depend on your circumstances and the issues you are facing.

Where you are proposing joint schemes, you should ensure that your messages and narrative are consistent with the other proposers and consider holding joint stakeholder events.

You have 26 weeks (unless specified differently in any new direction) to consult on your draft plan and produce a statement of response. It is your responsibility to decide how long you will consult for. Previously, the consultation period has been around 12 weeks. However, this will depend on your situation. You should allow enough time:

- for consultees to make comments on the plan – allow more time for more complex draft plans
- to produce a statement of response based on the comments you receive

You must state in your consultation that all responses should be sent to the Secretary of State if you are in England, or to the Welsh Ministers if you are in Wales, using the following email or postal addresses.

> Defra
> Water Resources Management Plan Water Services
> Department for Environment, Food and Rural Affairs
> Seacole 3rd Floor
> 2 Marsham Street
> London, SW1P 4DF

Email: water.resources@defra.gov.uk

> Welsh Government
> Water Branch
> Welsh Government
> Cathays Park
> Cardiff, CF10 3NQ

Email: water@gov.wales

The Secretary of State or the Welsh Ministers will send you copies of all the responses on your plan.

Regulators expect to operate a query process during the draft plan consultation stage. This will be similar to Ofwat's approach during its price review process. If you receive a query from a statutory consultee you should respond with supporting evidence where required within 3 working days of the request. A longer response time can be requested if you can justify this. Depending on commercial and security considerations, the query responses should be published on your website in support of the draft plan. You should also include the queries and responses as part of your statement of response.

3.7 Publish a statement of response

You must publish a statement of response after completing the public consultation. You must publish this within 26 weeks of publishing your draft plan for consultation (unless specified differently in any new ministerial direction).

Your statement of response must:

- show that you have considered the representations you have received
- set out the changes you have made to the draft plan as a result of the representations and your reasons for making them – either set as amended text or in a revised draft plan
- say if you have not made changes as a result of representations and explain why
- describe anything that has changed during the consultation period, for example, the conclusion of any projects you had undertaken or external influences such as new sustainability changes
- clearly set out any schemes being accelerated through transitional funding in AMP7, setting out primary benefits to supply demand balance, as well as additional benefits (including resilience and multi benefits) this acceleration will have

You should decide whether the statement of response alone allows your customers and stakeholders to understand clearly and easily the changes you have made. If it does not, you must publish a revised draft plan alongside it.

You will need to assess whether any changes in the WRMP will require changes to other plans, such as your drought plan, regional plan or business plan.

You must publish the statement of response in line with the Water Industry Act 1991, the 2007 regulations and the directions. You must inform everyone who responded to your draft plan that you have published it.

Once completed, you must send your statement of response to the Secretary of State or the Welsh Ministers. If you have a revised draft WRMP or have been requested to provide further information, you should provide it alongside your statement of response. You must notify the Secretary of State or the Welsh Ministers of any further information that may be commercially confidential or which has been, or you consider should be, removed for reasons of national security.

The Secretary of State will send your statement of response and revised draft plan to the Environment Agency and Ofwat for review. The Welsh Ministers will send it to Natural Resources Wales and Ofwat for review.

3.8 Publish your final plan

The Secretary of State or the Welsh Ministers will review your draft plan, the representations made and your statement of response. They will also review technical advice from the regulators and decide whether your plan can be published. They may ask you to complete further work before you can publish your plan. If so, the Secretary of State or the Welsh Ministers will send you the necessary instructions.

If your plan has unresolved issues or significant public interest there may need to be a public hearing, inquiry or examination in public. The Secretary of State or the Welsh Ministers will decide if this step is needed and will inform you.

You must not publish your final plan until you have received permission from the Secretary of State or the Welsh Ministers. Before publishing your final plan you must:

- follow any directions from the Secretary of State or the Welsh Ministers
- undertake a final check of your plan to ensure it is ready to publish

You should ensure your plan still reflects any applicable regional plan, as described in Section 2. It should reflect any changes that have been made to the regional plan as a result of changes from other companies' draft plan consultations.

You must publish the final plan as set out in the Water Industry Act 1991 and the 2007 regulations and directions. This must be completed within the set timescales issued or you may face enforcement action.

You should notify everyone who responded to your consultation and bring it to the attention of anyone else that your plan is likely to affect.

3.9 Review and maintain your final plan

You must maintain your plan. You should treat it as a live document. You should implement your plan, monitor its progress, and take action if required. Your final plan should show how the interventions within it will be translated into delivery plans and monitored during the relevant asset management period. You must review your published plan every year and report to the Secretary of State or the Welsh Ministers. This should be on or before the anniversary of publication of the final WRMP. You should follow the latest Annual Review guidance.

If through the annual review you demonstrate or indicate a 'material change of circumstance' (as described in the Water Industry Act 1991 Section 37A (6)) you must prepare a revised draft. A new revised plan must follow the procedures for preparing and publishing a plan as set out in the Water Industry Act 1991 Section 37B 'Water resources management plans: publication and representations'.

The definition of a material change of circumstances is not given as it relates to the final plan. The following lists possible examples, but you should not consider them definitive:

- a significant change in level of service from what was in the published plan
- new or significant changes to the measures that were identified in the published plan and are likely to have significant public or environmental interest
- a significant change in costs
- a change that could cause significant adverse effects on the environment

As a first step you should consult with the Environment Agency and, or Natural Resources Wales on any substantial changes that you wish to make to your plan. You will need to inform Defra or the Welsh Government if there is a material change of circumstances, within 6 months.

The Environment Agency and, or Natural Resources Wales will provide technical advice to the relative governments.

Section 4 – Basis of planning

A WRMP must set out how you intend to maintain the balance between supply and demand for water during the planning period. The planning period should be appropriate to the risks your company faces, but must cover at least the statutory minimum of 25 years. It may be appropriate, depending on the challenges and risks in the relevant regional plans,

[footnote 5] for you to plan for the next 50 years. This is to ensure your plan identifies the right solutions to meet future pressures. WRMPs must show how you will manage and develop water resources so that you meet your obligations in relation to supplying water and the environment.

Your plan should deliver value for money for your customers. It should reflect wider societal values and government expectations.

4.1 Developing your plan

When producing your WRMP, you should transparently:

- consider the continuity of your plan with your previous WRMP and business plan. Where no changes are required you should use the relevant 5 year period from previous long term plans. Where there are differences between previous plans you should highlight them and explain the reasons. You should include a section in your plan that explains how your backwards look (including previous planned interventions and delivery) has influenced your plan
- forecast how much water, on a sustainable basis, you have available to supply your customers each year over your chosen planning period, for a minimum of 25 years (see Section 5)
- forecast how much demand there will be for water each year over the same period (see Section 6)
- allow for uncertainty in your calculations and forecasts (see Section 7)
- compare supply with demand (including uncertainty) and see if there is a surplus (more supply than demand) or a deficit (less supply than demand). If there is a deficit you must identify options to increase supply or reduce demand so that you achieve an environmentally sustainable secure supply of water (see Section 8).
- if you do not have a deficit consider whether you can identify options to supply other water companies or regional groups, other sectors and to ensure efficient use of water (see Section 8)
- consider the risks to the supply-demand balance that you face and future uncertainties across the planning period. The risks that you identify in your plan, and where appropriate mitigate, should be set in the context of your overall company resilience and risk register
- produce a best value plan (see Sections 9 and 10)
- provide all of this information at a water resource zone level and summarise it at a water company level

Your plan should demonstrate that you have:

- complied with any statutory requirements and had regard to the government policy
- an efficient, environmentally sustainable, secure supply of water, with no final planning deficits, for each water resource zone over your chosen planning period, which must be a minimum of 25 years. Where there are significant challenges a longer timescale should be considered

4.1.1 High-level considerations

You should take account of these high-level considerations in your plan.

England and Wales

You should:

- include your destination for improving the environment, suitably evidenced and which reflects the relevant regional plan. In addition you can plan for a local improvement that is not relevant at a regional scale. You should present evidence for your plan where this is the case. This should be in addition to any approaches or sustainability changes set out by the Environment Agency, Natural England or Natural Resources Wales
- fulfil your WFD regulations obligations. You should ensure your plan supports the achievement of environmental objectives for water resources in the RBMPs by preventing deterioration and supporting achievement of protected area and water body status objectives, as well as not preventing a water body from reaching ‘good’ or ‘good potential’ status in the future
- carry out a HRA, including an appropriate assessment, as set out in the Conservation of Habitats and Species Regulations 2017 (as amended), if your preferred plan would be likely to have a significant effect on a European site (either alone or in combination with other plans or projects)
- ensure that any previous HRA of options included in your preferred plan remains current and covers any material changes in circumstance. Any HRA needs to be available for review and assessment by Natural England and, or Natural Resources Wales and other relevant parties. You should explain how you have considered advice from these bodies
- screen for a SEA and carry out a full SEA if required
- consider how your primary duty to supply wholesome water is related to your WRMP, especially in relation to resilience and contingency planning. This should include the requirement that drinking water quality is not allowed to deteriorate over time
- show the impact of your plan on bills, and any potential affordability concerns resulting from these bill impacts (and any others likely for price review 2024 (PR24)), including any measures to mitigate these
- consider intergenerational and distributional impacts[footnote 6] in your plan
- consider how your plan is compatible with Defra’s or Welsh Government’s long term ambitions for the environment and sustainable management of

natural resources
- ensure that you consider a twin-track approach which considers demand management options alongside any supply options
- reflect the regional plan, where applicable, unless there is clear justification for not doing so (see Section 2)
- consider how your plan contributes to solving the challenges set out in the national framework for England, published in March 2020
- ensure your plan contributes to the conservation and enhancement of biodiversity, delivers net biodiversity gain where appropriate, delivers environmental gain and uses a proportionate natural capital approach. See supplementary guidance 'Environment and society in decision-making (England)'
- if you are in surplus, or have additional sources available. You should provide evidence that you have worked with your neighbouring water companies and regional groups to identify whether this water is available for trading. You should also consider if you have options to further facilitate inter-company trading
- consider your duty to conserve biodiversity under section 40 of the Natural Environment and Rural Communities Act (2006)[footnote 7] and the list of species and habitats of principal importance (https://en.wikipedia.org/wiki/List_of_species_and_habitats_of_principal_importance_in_England) set out in section 41 of the Act (England)
- take a catchment based approach, including engagement across sectors to develop options that provide broader benefits to society
- consider how your plan will contribute to nature recovery and the establishment of Nature Recovery Networks incorporating opportunities and priorities identified in Local Nature Recovery Strategy areas (England)
- consider what your company can do in its WRMP to address the climate emergency. In particular how your plan will contribute to achieving net zero in line with your sector, company, and government specific commitments

Wales

You should:

- if your plan affects Wales, ensure your plan delivers biodiversity and environmental requirements and uses a proportionate natural capital approach. See supplementary guidance 'Environment and society in decision-making (Wales)' and 'Environmental destination for Wales'
- if you are in surplus, you should take into account Welsh Government's guiding principles regarding water trading and commence early consultation with Natural Resources Wales, the Welsh Ministers and other relevant stakeholders in Wales

- plan for the worst drought in your historic record, as a minimum. You should consider contingencies for more challenging but plausible droughts. For example, those you identify through the drought vulnerability framework or equivalent approach. You should identify whether you require solutions for additional resilience
- consider local multi-sector needs and include within your supply-demand balance if you are directly supplying them or if they have the ability to switch your supply during peak periods. You should consider your policies for supporting other water users, such as those who are not connected to your water supply network (for example private water supplies) in circumstances where they are seeking 'alternative water supplies' such as in a drought
- consider how your plan could contribute to the Well-being of Future Generations (Wales) Act 2015, if you supply customers in Wales or your plan affects sites in Wales
- work with the Welsh Government and Natural Resources Wales to understand the implications of the Environment (Wales) Act and sustainable management of natural resources principles for the development of WRMPs, if you supply customers in Wales or your plan affects sites in Wales
- consider the biodiversity and resilience of ecosystems duty, the section 7 biodiversity lists and duty under the Environment (Wales) Act and Nature recovery action plan for Wales (https://gov.wales/nature-recovery-action-plan-2015) if you supply customers in Wales or your plan affects sites in Wales

4.2 New appointments and variations

If you are a new appointments and variation[footnote 8] (NAV) you should produce a WRMP that demonstrates that all the statutory requirements have been met. The level of detail within your plan may be relative to the size of your customer base and on how you obtain your water supplies. If you operate under bulk supply agreements with other water undertakers, some parts of your plan (supply) may be proportionate to reflect this. You should set out how you will:

- engage with the supplier and your customers to continue to maintain water supplies
- feed into the development of your suppliers' planned levels of service
- take account of donor or neighbouring undertaker's data and information when preparing your plan

You should clearly present and explain any differences in planned drought actions in your plan. You should discuss the requirements for your plan with the Environment Agency or Natural Resources Wales at an early stage in

the process. Where other water companies are operating in your supply area, you should consider any water supply management arrangements you will have with them in your draft plan.

If you are a donor of supply that a NAV is including within its forecast, you should ensure that the bulk supply volumes and forecasts (non-potable or potable) are also presented within your plan.

4.3 Water supply and sewerage licences

Retailers with water supply and sewerage licences (WSSLs) can supply non-household customers using public water supply networks. Retailers with a WSSL are not required to prepare their own plans. However, if they are operating in your area, under terms of their special licence conditions, they must provide you with any relevant information you request to inform your plans. You should work with any retailers operating in your area to plan and implement any demand management proposals relevant to non-household customers in your preferred programme.

In Wales

Retailers with WSSLs can only apply for a restricted retail authorisation that authorises the holder to use the supply system of an appointed water company to supply the eligible premises of its customers only. Those retailers eligible to supply non-household customers under restricted retail authorisation must also provide you with any relevant information for your plans. They should also work with you to deliver any demand management proposals relevant to these eligible customers.

4.4 Defining a water resource zone

Your plan should be built up of assessments undertaken at a water resource zone level. A water resource zone describes an area within which the sources of water and distribution of water to meet demand, is largely self-contained (apart from any agreed bulk transfers). You may divide your supply area into one or more water resource zones.

In England, you should define your water resource zones using the Environment Agency's assessment methods (Water Resource Zone Integrity, 2016).[footnote 9] If you are in Wales, you should discuss the assessment of your resource zone integrity with Natural Resources Wales.

Your customers in a resource zone should face the same risk of supply failure and the same level of service for demand restrictions. There will be limitations to achieving this due to the specific characteristics of a distribution network. Water within a water resource zone should be useable throughout your network and for your customers, in terms of water quality and hardness.

You should review whether future changes to your planned supply or demand would cause sub-zonal issues. If this is the case you should consider sub-dividing the resource zone or justify maintaining the current zonal area.

You should provide your planned resource zone configuration and reasoning to the Environment Agency and, or Natural Resources Wales, Ofwat and the DWI during pre-consultation. If you need to combine or divide a resource zone during your planning period, you should discuss your approach with the Environment Agency or Natural Resources Wales.

4.5 Problem characterisation

You should understand the scale and complexity of your planning problem so you can select appropriate methods. You should use the problem characterisation step of UKWIR's Decision making process guidance (https://ukwir.org/WRMP-2019-Methods-Decision-Making-Process-Guidance) to identify the scale and complexity of your planning problem and your vulnerability to various strategic issues, risks and uncertainties. You should use this information and UKWIR's Risk-based planning method (https://ukwir.org/146387?object=151120) to inform your choice of methods so they are proportional in terms of the effort, complexity and costs.

4.6 Drought vulnerability assessment

England

You should use the drought vulnerability framework, or an equivalent approach, to assess the resilience of your current supply system to a range of droughts of differing severity and duration.

You can use the drought vulnerability framework as a screening step to help you understand what droughts you are vulnerable to. In your plan you should present 2 response surfaces for each resource zone. Your response surfaces should use different ending months to reflect the risks that you might face. You should assume you can use whatever supply options and

drought measures are in your plan for the base year. You should present the main sources of uncertainty as recommended by the UKWIR Drought vulnerability assessment manual (https://ukwir.org/drought-vulnerability-framework-0).

You should use the results:

- to highlight any specific types of droughts your system is vulnerable to
- to consider how you can improve your resilience to droughts through your plan

You can consider including further drought response surfaces in your plan, to show the future resilience of your final plan.

Wales

You should base your supply forecast on a design drought. As a minimum, you should assess your plan against the worst drought on record. You should consider contingencies for more challenging, but plausible droughts for a water resource zone where you have identified a vulnerability to these. You should discuss your justification, for setting your design drought (levels of resilience) for each resource zone with Natural Resources Wales or Environment Agency. You should include this justification and supporting evidence within your plan.

You should follow UKWIR's Risk-based planning guidance (https://ukwir.org/146387?object=151120) to inform your assessment of drought vulnerability (risk) and to decide on a design drought. You can use one of the following techniques from the UKWIR guidance:

- conventional plan (risk composition 1 – based on the worst drought on record)
- resilience tested plan (risk composition 2 – consider a more challenging but plausible range of droughts)
- fully risk-based plan (risk composition 3 – based on probability analysis of drought events not seen in the historic record)

You should include a drought vulnerability statement in your plan to reflect the hydrological risks that drought imposes on your supply system. Whatever design event you select, you should still test your plan against a more challenging, but plausible range of drought events. You should clearly justify your risk composition choice, particularly if you choose risk composition 1. You should outline the risks and uncertainty involved, for example, in your behavioural modelling and source output analysis.

You may also choose to use the drought vulnerability framework assessments from your drought plan to complement your approach. You should do this for those resource zones that are most likely to be vulnerable to a range of droughts. You should engage early with Natural Resources Wales to discuss its expectations for using the drought vulnerability framework for your resource zones within Wales.

4.7 Levels of resilience

The point of failure is defined as: implementing exceptional demand restrictions on customers, associated with emergency drought orders, such as standpipes. Your plan must set out your planned level of service for this failure, as well as your actual level of service. Your plan should explain how your company defines this level of failure. Where companies share a water source that is managed through a formal agreement, you should develop a shared user understanding of the system's resilience, including rule curves and failure point. You should discuss with regulators (as relevant) your assumptions for resilience of the shared source and clarify any differences from other companies who share that source.

Your plan must also set your planned level of service for other customer restrictions over the planning period. You should explain the frequency that you plan to restrict water supplies for your household and non-household customers using temporary use bans and non-essential use bans. These should be consistent with your drought plan and the assumptions in the regional plan, where relevant.

You should describe how you have engaged your customers and stakeholders, and how you have taken account of their views and requirements in developing your level of service.

If you are a NAV entirely supplied by bulk supplies you should reflect your incumbent's levels of service.

For companies in England

You should plan so that your system is resilient to a 0.2% annual chance[footnote 10] of failure caused by drought, where failure is defined as implementing an emergency drought order. This is described as '1 in 500 year' level of resilience in this guideline. You should aim to achieve this level of resilience by 2039 (see section 4 'Pathway to resilience' of the supplementary guidance 'Planning to be resilient to a 1 in 500 drought').

You should determine an optimum timing for achieving this through the regional groups, considering the costs and benefits of alternative approaches. Your preferred timescale should consider:

- a balance of customer and environmental resilience
- the affordability of the programme (along with distributional impacts)
- deliverability

In delivering this level of resilience, you should consider how you can use innovative technology, such as smart networks, and planned operational interventions, to avoid the risk of developing large infrastructure which is used infrequently.

Some flexibility in the timescales for achieving a resilience of ‘1 in 500 year’ is possible, where costs are exceptionally high locally in comparison to benefits. For example, at a water resource zone level. Where more flexibility is considered appropriate, you should present meeting a ‘1 in 500 year’ by 2050 scenario. You should clearly identify the changes to your preferred programme and the level of service during this time. You should have a robust drought plan in place to protect those customers where this is the case.

In the short term, you could consider the increased use of drought management options to achieve the expected level of final plan resilience and, or consider reducing your level of service in the interim.

Your increased resilience in the medium and longer term should not rely on the increased use of drought measures to boost supplies. For example, by allowing additional abstraction during drought, where this is environmentally damaging. You should plan, where appropriate, to use drought permits and orders less frequently in future, particularly in sensitive areas. You should use your understanding of the environmental risks associated with each permit in order to inform your planned frequency of use. You should also indicate, through the relevant tables, the likely order and frequency of use of your drought permits and drought orders. The assumptions should be consistent with your drought plan.

The supplementary guidance ‘Planning to be resilient to a 1 in 500 drought’ provides further guidance on planning for this level of resilience.

For companies in Wales

You should set out the levels of service you plan to provide for your customers over the planning period. You should describe the frequency that you plan to restrict water supplies for your household and non-household customers using temporary use bans, non-essential use bans and emergency drought orders. Your level of service should be supported by the use of appropriate and evidence based assumptions and methodologies and be consistent with your drought plan.

You should describe how you have engaged your customers and stakeholders and taken account of their views when developing your level of

service. You should consider the costs and benefits of changing your level of service. When considering how to communicate resilience with your customers, you should consider UKWIR's Risk-based planning report (https://ukwir.org/146387?object=151120) and developing resilience metrics.

If you are a Welsh company planning a new transfer with an English company, you should plan to be resilient to any drought of an approximate return period of once in 500 years (0.2% per annum failure probability) by the implementation of the transfer, for those zones affected by those trading options. The principle should be that a new transfer from Wales should only be considered, if the level of service in the Welsh resource zone (and any other zones in Wales affected by this) is equivalent or higher than the recipient resource zone.

4.8. Planning assumptions

Your plan should be based on a baseline scenario which considers the supply-demand balance when your supplies are low and your demand is high. This is your design scenario.

You should assess whether you need to include in your plan, a 'dry year critical period' scenario, or scenarios, to show how you will plan for a period of peak strain on your system. For example, high seasonal demand such as during a heatwave (for example 2018, 2020 and 2022), winter leakage, or when holiday-makers increase demand significantly during the summer. You could consider a critical period which includes a combination of pressures.

Where these types of peak strain have a much shorter duration or localised impact than is considered in a WRMP, you should address them as part of your business plan.

Your baseline water resources planning scenarios should include the following assumptions:

- leakage remaining static from the first year of your plan (2025/26) throughout your whole planning period (unless otherwise agreed by regulators)[footnote 11]
- your forecast of customer consumption without any further water company intervention. You should assume you end your water efficiency programmes and metering programmes after what you have been funded to deliver in AMP7. This should not include any relevant government interventions (that is, mandatory water labelling) which should instead be reflected through options and through your final plan
- existing transfers to the extent of the agreed bulk supply agreements or other arrangements

- include sustainability reductions (see sub-section 5.5 for further details)
- the benefits of non-supply-demand balance solutions such as capital maintenance
- risks to groundwater and surface water sources due to declining water quality. These should be captured in your baseline so that the measures to address them can be properly explored and set out in your plan. If there is significant uncertainty you can include this risk in headroom
- should not include the contributions from any demand or supply drought measures[footnote 12]
- benefits of schemes that have met one and, or more of the following conditions:
  - have planning permission to go ahead
  - a funding allowance made by Ofwat in a business plan or other funding mechanisms such as Green Recovery for delivery of the scheme. You should clearly show and explain how the benefit of funded schemes have been factored into your supply demand balance
  - other necessary permissions such as abstraction licences or environmental permits

You should discuss and agree these assumptions with the regulators at the pre-consultation stage.

You should include forecasts for non-potable water demand and supply as additional lines in the water resources planning tables where relevant.

You should report data at a water resource zone level using the water resources planning tables. Your preferred plan should address any deficits in your dry year annual average and critical period scenarios.

England

If you are in England, you should also present your assessment, for each resource zone, of the demand you might expect during a 1 in 500 year drought event.

If you are in England you should base your design scenario on the following.

Supply forecast

Your estimate of supplies which are available in a drought-caused failure[footnote 13] of a likelihood of once in 500 years or 0.2% in any one year. This should be consistent throughout the planning period, even if your planned levels of service vary. If this is not consistent, it should be explained and justified. See Section 5 and the supplementary guidance ‘Planning to be resilient to a 1 in 500 drought’ for further details

Demand forecast

Your forecast dry year annual average demand, when demand for water is at its highest before temporary use bans are imposed. If you have evidence that suggests that demand in a 1 in 500 year drought with drought measures in place, is higher than your dry year annual average demand you can consider using this as an alternative. You should present your evidence and discuss this approach with regulators. If agreed, you will also need to report an unrestricted dry year per capita consumption (PCC) and a dry year annual average supply balance

Wales

If you are in Wales, your baseline planning design scenario should include:

- a baseline supply forecast including your assessment of water available for use (WAFU) from current sources. You should base this on supplies that can be maintained through a design drought considered appropriate for your resource zone or company area. The dry year annual average demand and the design droughts should link with your drought plan and consider government expectations
- where you are planning a new transfer to England or to modify an existing transfer, you should reflect your assumptions for your baseline supply and demand forecasts for the affected zones with the relevant regional plan
- a baseline demand forecast covering what people and businesses need, what you expect to lose through leakage and what you may use in operating your system. You should base this on forecast dry year annual average demand, when demand for water is at its highest before water use restrictions are imposed
- an allowance for uncertainty relating to your supply and demand forecasts depending on your chosen methods

You should discuss what scenarios should be presented in your plan with Natural Resources Wales.

Section 5 – Developing your supply forecast

In your WRMP you should set out how much water you have in your base year and how your forecast for this will change throughout the planning period. You should clearly reflect data in the pre-plan years from your base year onwards as part of your tables submission. You should demonstrate that you understand how your sources respond to droughts, the current constraints and potential future changes to your sources of water.

5.1 How to develop your supply forecast

You should assess how much water is available to supply your customers in each of your water resource zones. For companies in England, your baseline supplies should be available in a 0.2% annual chance of failure caused by drought.

The water available in each resource zone will be dependent on the water available from each source and how you will use those sources in conjunction. For companies in England, and for Wales in relevant resource zones,[footnote 14] you should use a system response deployable output. [footnote 15]

You should discuss your approach to developing your supply forecast with the Environment Agency or Natural Resources Wales (as appropriate) as early as possible.

When developing your supply forecast, you should account for the impact of the following pressures on your sources:

- changes to your abstraction licences to ensure sustainability and meet your long term environmental destination (See sub-sections 5.4 and 5.5)
- the impact of the changing climate (See sub-section 5.6)
- issues arising from pollution or contamination of sources
- issues arising from development and new infrastructure
- changes in contractual or other arrangements, for example, with transfers of water between companies

If you are in England (and Wales where relevant) you should consider supplementary guidance 'Planning to be resilient to a 1 in 500 drought'. This explains how you should define a '1 in 500 year' planning scenario and the assumptions you should use.

5.2 What to include in your baseline supply forecast

You should base your baseline supply forecast on the response of your system. Using your system response is preferable to rainfall or effective rainfall. This is because of the problems in presenting duration, rainfall patterns and start and finish months when evaluating the return period. Using a system response means that your supply forecast will adequately capture your system constraints, conjunctive use capability and operational response.

If you abstract water in your water resource zone, you should produce a breakdown of your supply forecast that includes:

- the deployable output for each source (or group of sources)
- future changes to deployable output from sustainability changes, including your long term environmental destination, a changing climate and any other changes you expect
- existing transfers and schemes where planning permission is already in place
- an allowance for short term losses of supply and source vulnerability, known as outage
- any operational use of water or loss of water through the abstraction-treatment process
- a supply forecast that combines all the elements described into WAFU

The water resources planning table instructions define the individual components of your supply forecast and how you should define them.

If you require a critical period scenario or scenarios you should provide supply-demand forecasts for them in addition to the baseline scenario.

If your water resource zone receives all of its water via transfers or third parties, your supply forecast should only reflect your contractual arrangements. However, you should confirm that the supplier company has made the necessary assessments to meet the statutory and policy obligations, for example climate change assessments. You should also confirm that it will be able to supply you with water during your design scenario and that you can meet your level of service. Your level of service should reflect the incumbent’s level of service.

5.3 What to cover in your deployable output assessment

If your source of water is not solely provided by a transfer, you should assess and report your deployable output. For companies in England you should determine using a system response deployable output so that your system is resilient to a 0.2% annual chance of failure caused by a drought. Deployable output is the yield of a commissioned source, or group of sources constrained by:

- hydrological yield
- licensed quantities
- environment (represented through licence constraints)
- pumping plant and well and aquifer properties
- raw water mains and aqueducts
- transfer and output restrictions

- treatment
- water quality, including any risks to your groundwater and surface water sources due to declining water quality or saline intrusion

You should consider the risks of non-renewal for time-limited licences that are due to expire during the period covered by the plan. You should review whether these licences are sustainable and that their use does not cause environmental deterioration. If there are risks with renewal you should describe how you will manage these in your plan.

Your deployable output should not include the contributions from any demand or supply drought measures[footnote 16] such as drought permits or orders.

You should clearly explain in your plan which factors constrain deployable output. To calculate your deployable output, you should use:

- UKWIR (2014) Handbook of source yield methodologies (https://ukwir.org/reports/14-WR-27-7/67208/Handbook-of-Source-Yield-Methodologies)
- UKWIR (2016) WRMP19 methods – risk-based planning (https://ukwir.org/146387?object=151120)

Given the complex nature of deployable output calculations in the context of stochastically generated droughts, you should talk to the Environment Agency and, or Natural Resources Wales when developing your plan. You should also refer to the supplementary guidance 'Planning to be resilient to a 1 in 500 drought (England)' and 'Stochastics'.

5.4 Your role in achieving sustainable abstraction

Sustainable abstraction is essential to support healthy ecology and the natural resilience of our rivers, wetlands and aquifers. Your plan should protect and improve the environment, considering both current and future challenges. This might mean, for example, tighter environmental protection for some sensitive habitats and vulnerable rivers, such as chalk rivers. This is to enable these rivers, wetlands and aquifers to meet environmental objectives in the future. Your plan should demonstrate that your abstraction is sustainable now and over the long term.

Where your existing abstraction is not sustainable, your plan should address the problem as soon as possible. Where your abstraction is contributing to a current environmental problem or poses a deterioration risk in the near future, you should prioritise action for AMP 8. Where that is not possible, you should plan to deliver the required abstraction reduction by

the earliest feasible AMP and identify improvements that could be delivered in the interim to improve resilience.

Companies in England or affecting England should refer to the supplementary guidance ‘actions required to prevent deterioration - England’. The supplementary guidance sets out how the Environment Agency will change abstraction licences to prevent deterioration. You must plan for these changes and take action to ensure that your abstractions do not cause deterioration. Where your abstractions interact with European sites, you must ensure that your plan meets requirements for protected areas. If your existing abstractions are within or affecting sites in Wales, you should consult Natural Resources Wales.

Your plan:

- must deliver the regulatory actions required to avoid deterioration
- must meet requirements for European site protected areas as soon as practicable. Our guidance for PR24 explains what water companies should do to establish the need for and timing of action
- must deliver actions required to achieve environmental objectives as defined in Regulation 13 of the WFD Regulations and to the timescales set out in the WFD Regulations unless one or more of the exemptions are applicable. If the statutory environmental objectives in the RBMPs cannot be met, the regional plans (where applicable) and WRMPs should justify why the solution at a licence level cannot be delivered by the required deadline. If a delay can be justified, delivery of the solution should be planned for the earliest feasible and affordable delivery date
- should take account of government and regulators’ objectives for the environment
- should include the measures in the Water Industry National Environment Programme (WINEP) and the National Environment Programme (NEP) (where applicable)
- should include your long term environmental destination, clearly setting out the actions you will take in the short, medium and long term to achieve it. You should distinguish between actions that are required to meet current regulatory requirements, for example:
  - actions that address risk of deterioration caused by abstraction
  - actions to improve a water body where your abstraction is contributing to the water body not achieving good status or potential as set out in RBMPs
  - actions that form part of your longer term destination (see 5.4.2)
  - where where abstraction related issues are known now to be currently affecting the environment, they should be dealt with as soon as is feasible, not delayed

If the actions to achieve the long term environmental destination are not known at this stage, you should identify what further work is needed to understand the actions that are required to deliver your environmental destination. You should fully reflect and support the achievement of the regional long term environmental destination (where one applies) and the achievement of your WRMP environmental destination.

5.4.1 Current statutory requirements and regulatory expectations

You have a duty to have regard to RBMPs when exercising your functions. You must assess all your current and future predicted abstractions to ensure they comply with and are consistent with the achievement of WFD Regulations requirements and the environmental objectives set out in the RBMPs. This includes European site protected area objectives.

You must also consider any other environmental obligations, including obligations towards SSSIs covered by the Wildlife and Countryside Act 1981, sites designated under the Conservation of Habitats and Species Regulations 2017 duties under section 40 Natural Environment and Rural Communities Act 2006 and section 3 and 4 Water Industry Act 1991 and any international agreements. If you are a water company within or affecting Wales you must also consider the habitats and species listed under section 7 of the Environment (Wales) Act 2016.

You should also determine any changes needed to your abstractions to protect or improve locally important sites (undesignated sites), including those supporting priority habitats and species.

The Environment Agency and Natural Resources Wales set out measures in the WINEP or NEP for you to investigate or deliver. You should include any sustainability changes identified in your WINEP or NEP in the regional plan (where applicable) and in your WRMP.

The Environment Agency or Natural Resources Wales will also identify other measures in the WINEP and NEP. This could include:

- protecting eels under the Eels (England and Wales) Regulations
- improving fish passage under the Salmon and Freshwater Fisheries Act and WFD regulations
- protecting raw drinking water supplies

You should assess the effect that these and other measures will have on your supply forecast.

You should not retain unused water on your licences that poses a risk of deterioration and is not justified by your water resources management plan. If you have any licences that fall in this category, you should plan to give them up. For companies in England or affecting England, see the

supplementary guidance 'actions required to prevent deterioration - England' for further information. Where companies have any licences within Wales, you should consult Natural Resources Wales.

Your plan should set out how you will manage the risk of deterioration caused by your abstractions. Along with assessing any options that would be required to maintain the security of your supply-demand balance if the risk is significant.

Where licence change is necessary to prevent deterioration in England, an appropriate change such as a reduction in licensed quantity will be applied to licences. Where licences are capped at maximum peak abstraction, this will give you some flexibility to meet short-term peaks in demand. However, you must not plan to service future growth in demand through unsustainable increases in abstraction under licences that fall into this category. Demand management measures, nature-based solutions, hydro-morphological rehabilitation and the Catchment Based Approach may also have a complementary role to play in mitigating potential deterioration.

You must ensure that abstraction reductions are not double counted when licence changes to prevent deterioration are combined with environmental destination scenarios. and The detail on assurance and engagement on near term risk of licence changes must be provided in your plan.

5.4.2 Developing your long term environmental destination

To deliver long term sustainability and environmental resilience, you should develop a proposed long term environmental destination. You must take account of current statutory and regulatory requirements for abstraction (as set out in section 5.4.1) and should plan to deliver environmental improvements to meet future needs. Your environmental destination should describe how you will achieve and maintain sustainable abstraction to 2050 (and beyond), taking into account climate change impacts and future demand. This expectation is in addition to those described in sub-section 5.4.1. Water companies and regional groups should use the following guidance to define and justify the environmental destination:

- If you are a company in England or affecting England, you should refer to the Environment Agency's 'Long term water resources environmental destination: Guidance for regional groups and water companies'. This document has been provided to regional groups and water companies and is available on request from the contact details provided in Section 1
- If you are a company within or affecting Wales, you should refer to Natural Resources Wales' document 'Setting an environmental destination for water resources: Enhancing ecosystems in Wales. This document has been provided to regional groups and water companies and is available on request from the contact details provided in Section 1

For England, regional groups will identify catchments where there are issues to address. The regional plan will develop a proposed long term environmental destination and the actions to achieve it. In developing the long term environmental destination the regional group, and where applicable the water company, should:

- be ambitious
- deliver improved protection for the environment, in order to meet, and continue to meet, environmental objectives both now and the future
- not be constrained by previous decisions, although you will need to understand their context
- consider the timing of achieving your environmental improvements. For example, how the programme changes if the timetable for implementation is adjusted. You should also consider how your programmes affect the wider environment (such as carbon impact) and affordability for your customers
- support nature recovery and achieve sustainable abstraction across the planning period
- consider if implementing an adaptive planning approach can better manage long-term uncertainty

In England, you should use the regional long term environmental destination as the base for your long term environmental destination for your WRMP. The regional long term environmental destination may not address all the abstraction related issues that relate to your abstractions because of the strategic nature of the regional plan. You therefore may need to build on the long term environmental destination set out in the regional plan to address local concerns in your area or where improvements required relate solely to your abstractions.

In Wales, where applicable, you should use the regional long term environmental destination as the base for your long term environmental destination for your WRMP. For other resource zones that are not affected by a regional plan, you should consider how you could enhance ecosystems within them and set environmental destination within your plan.

You should test your proposed WRMP long term environmental destination with regulators and agree abstraction changes (if applicable) that will need to be included in plans.

You will need to use an appropriate level of evidence to justify your decisions and your level of ambition. This should include evidence of customer and stakeholder support for your destination and the ambitions of the 25 Year Environment Plan (England) or the Water Strategy for Wales and its objectives. In doing so you should embrace the catchment approach, working with natural processes to develop new ways of managing water,

supporting nature-recovery and contributing to natural capital where possible.

You should work with regulators and other regional and local partners as you develop your environmental destination. Doing this will allow you to identify the best ways to manage water resources over the long term, delivering better outcomes and better value for society as a whole.

The Environment Agency or Natural Resources Wales will support and help shape your environmental destination by sharing information and local knowledge to feed into your discussions as you develop it.

You should clearly set out in your plan the abstraction changes and consequent licence changes that are needed to achieve your environmental destination (where applicable). These should be included in your baseline supply forecast. You should also set out any short, medium and long term investigations and actions other than abstraction reductions that you intend to take to achieve your environmental destination. For example, in Wales this may include investigations and actions for achieving principles of ‘sustainable management of natural resources’ (SMNR) and delivery of the well-being goals.

Your plan should show that these proposed actions:

- are cost-effective
- provide overall environmental improvement
- provide good value to the environment and your customers

5.5 How to include changes to your abstraction licences in your plan

You should incorporate the implications of the following into your forecast supply:

- the impact of any confirmed and likely sustainability changes as identified in the PR24 WINEP in England and NEP in Wales, for implementation in AMP8. The Environment Agency or Natural Resources Wales will formally notify water companies and Ofwat of the confirmed, likely and unconfirmed sustainability changes required in AMP8 to meet environmental obligations, through the PR24 WINEP and the Welsh NEP
- the impact of other licence changes required across the planning period as set out in your long term environmental destination, and any consequent reduction in deployable output from future changes to abstraction licences

You should present these 2 types of sustainability reduction separately in your water resources planning tables. However, both should be included within your baseline.

For each sustainability reduction in your plan narrative, you should provide:

- a description of the change being made, including the licence and deployable output changes
- the timing of the reduction
- the location
- the reason for the reduction, for example to prevent deterioration, or to achieve protected area or WFD Regulations water body objectives by 2027

We expect sustainability changes to be implemented as soon as possible. You should discuss appropriate timescales to implement these sustainability changes with the Environment Agency or Natural Resources Wales. This is to make sure you achieve an efficient, sustainable and secure supply of water that protects the environment effectively. You should consider and plan for permanent licence changes needed to address any remaining seriously damaging abstractions early in the planning period. If sustainability changes mean that the source and, or the blend of water supplied to customers changes in composition, you should discuss with DWI at an early stage, before sustainability changes take effect.

You should also consider scenarios in your plan to show the impact of:

- unconfirmed sustainability changes that may be required in the short term
- different levels of long term environmental destination, including tighter levels of protection for the environment to achieve and maintain sustainable abstraction

You should consider whether there are implications to your resource zone integrity as a result of sustainability reductions.

You should not include any uncertainty in target headroom for sustainability changes within your plan. You can consider any uncertainty through scenario testing and potentially adaptive planning.

You should assess whether any increase in flows or groundwater from sustainability reductions will benefit other abstractions, for example, increasing the deployable output of a downstream source, or may have adverse impacts such as flooding. You should liaise with neighbouring companies where appropriate.

5.6 Climate change

Our climate has changed and will continue to change. Your plan should assess the risk and possible impact of climate change and report the likely implications for deployable output of current and future sources of water.

You could consider the findings set out in Updated projections of future water availability for the third UK climate change risk assessment (https://www.ukclimaterisk.org/wp-content/uploads/2020/07/Updated-projections-of-future-water-availability_HRW.pdf) to help demonstrate the robustness of your assessment.

When deciding on your preferred approach you should use the supplementary guidance 'Climate change'. Water companies in Wales should also refer to the 'Addendum on UKCP18 scenarios for use in WRMP 24 (Wales)'.

You should discuss your preferred approach with the Environment Agency and, or Natural Resources Wales and regional planning groups (if appropriate) at an early stage of developing your plan. You should do this before you analyse the impact of climate change on water availability. Your plan should:

- clearly state the vulnerability to climate change for each water resource zone
- describe the risk and vulnerability to the range of climate change impacts on your sources
- state why you have chosen your method and assumptions when presenting the results including, if appropriate, links to regional plans
- explain which scaling method you have used to factor in any climate change that has already happened
- clearly explain how climate change uncertainty has been included in the plan

5.7 Water transfers

You should clearly describe all your existing raw and potable water imports and exports; both internally between water resource zones and externally between you and neighbouring companies. You should include details in the relevant sections of the water resources planning tables. The volumes and timings should be consistent between your plan and any donor or recipient companies. You should provide information on the:

- agreed limits between supplier and recipient companies and ensure consistent reporting in the relevant plans. This should be described for

both normal operation and your design event. For England this is a '1 in 500 year' drought
- total volume available for each year of your plan (excluding any water that cannot be transferred due to operational or infrastructure constraints)
- variations related to contractual or other arrangements such as decreases in transfers due to drought, responding to operational incidents or pain-share agreements
- direction of flow and whether it is uni- or bi-directional
- (if it is a new or increased transfer, or if the source of the water is changing) the chemical quality of water being transferred and the impacts on the receiving area water quality (even within a water resource zone)

5.8 Outage

You should include an allowance to cover the risk of temporary or short term losses of supply. This is called your outage allowance. The allowance should include both unplanned and appropriate planned outage as defined in the supplementary guidance 'Outage'.

When determining your outage allowance, you should use the following guidance:

- UKWIR (1995) Outage allowances for water resources planning (https://ukwir.org/eng/reports/95-WR-01-3/67188/Outage-Allowances-For-Water-Resource-Planning)
- UKWIR (2016) WRMP19 methods – risk-based planning (https://ukwir.org/146387?object=151120)
- EA (2020) supplementary guidance 'Outage'

You should describe in your plan:

- how you selected your outage method
- how you estimated your outage allowance
- the sensitivity of the assessment

If you report a forecast of zero outage, you should clearly explain how you will achieve this.

You should consider options to reduce your outage, particularly where your outage allowance contributes to a potential deficit in the planning period.

You should also assess whether you need to improve your data collation, assessment and estimation of outage.

5.9 Losses from processing and treatment

You are expected to operate your network efficiently and should look to reduce losses where possible. For example, catchment options to reduce your treatment works losses, while still complying with drinking water regulations. You should identify these types of options in your feasible options list and appraise them through your decision-making.

In your plan you should provide the values for:

- raw water losses
- raw water operational use
- treatment works losses
- treatment works operational uses

Your plan should consider whether your operations could be more efficient and whether these losses could be reduced. You can consider these opportunities as options in your plan. If you are unable to accurately estimate these, you should look to install meters at the inlets of treatment works.

5.10 Water available for use

In your plan, you should clearly state the total WAFU in each water resource zone taking account of any changes to deployable output, transfers, operational use and outage.

5.11 Drinking water protected areas

You must show how your plan will support the objectives for drinking water protected areas. Supporting these objectives may have benefits of maintaining or increasing deployable output. Your plan should consider:

- protecting drinking water protected areas so that your treated drinking water meets the standards of the Water Supply (Water Quality) Regulations (England) 2016 (as amended) or Water Supply (Water Quality) Regulations (Wales) 2018
- the necessary protection is in place to prevent deterioration in the water quality in the protected area, with a view to reducing the level of treatment required

In your plan you should:

- describe treatment works losses and operational use in each resource zone and show how these have been calculated
- where requested by regulators in pre-consultation, provide diagrams and other supporting evidence for complex major works
- consider options to reduce losses where there is a supply-demand balance deficit or where it makes sense to do so
- consider catchment options to reduce the treatment process while still complying with the requirements of any drinking water regulations
- consider measures to protect your supply against long term risks of pollution
- ensure all groundwater sources identified in your plan and drought plan have delineated source protection zones, and where appropriate, safeguard zones. The Environment Agency and Natural Resources Wales can work with you in the delineation of these zones
- ensure you have been consistent in your approach across all your water resource zones

5.12 Drinking water quality

The regulatory framework for drinking water quality and sufficiency of supplies is established in the Water Industry Act 1991. You must ensure that your plan takes account of:

- Section 86 which relates to the appointment and delegated powers of the Chief Inspector of Drinking Water. It includes reference to "such other powers and duties in relation to the quality and sufficiency of water supplied". This is particularly relevant to powers and duties relating to the protection of public health, and to resilience and contingency planning
- Section 68 of the Act, the duty to supply wholesome water.[footnote 17] This section states: "It shall be the duty of a water undertaker…so far as reasonably practicable, to ensure, in relation to each source or combination of sources from which water is so supplied, that there is, in general, no deterioration in the quality of the water which is supplied from time to time from that source or combination of sources". This primary duty may have implications for how you develop your plans, especially in relation to resilience and contingency planning

You must review these duties when you include any transfers of water for supply (raw or treated) or in the development of new sources. Further guidance is provided in Resilience of water supplies in Water Resource Planning - guidance note. (https://dwi-content.s3.eu-west-2.amazonaws.com/wp-content/uploads/2021/09/06102953/Resilience_in_WRP.pdf)

5.13 Environmental Permitting Regulations

In 2023, English and Welsh governments plan to move the abstraction and impoundment licensing regime into the Environmental Permitting Regulations. This will bring it in line with our other permitting regimes, and lead to a more modern and consistent regulatory framework.

It is not expected that this will impact water company licences. However if you believe it will, you should discuss any concerns with the Environment Agency or Natural Resources Wales.

In England, a formal consultation was launched by Defra in September 2021 for 12 weeks which ended on the 22 December 2021. You can view the consultation on the Defra consultation hub (https://consult.defra.gov.uk/water/abstraction-impounding-epr-consultation/). Defra plan to implement the proposed changes in 2023.

In Wales, Natural Resources Wales has been working closely with Welsh Government on moving abstraction and impoundment licensing into the Environmental Permitting Regulations. Please contact NRW or the Welsh Government for the latest updates on timescales for consultation and implementation.

5.14 Invasive non-native species

Aquatic and riparian invasive non-native species (INNS) have significant adverse social, economic and environmental impacts. They can cause the ecological status of Water Framework Directive waterbodies to deteriorate or fail to achieve their ecological objectives. You must review whether your current abstraction operations and future solutions will risk spreading INNS or create pathways which increase the risk of spreading INNS. Where there is increased risk you must propose measures to manage that risk in your plan.

You may need to contact the Environment Agency or Natural Resources Wales to discuss these issues on a case-by-case basis. For more details on INNS and their impacts, visit the non-native species secretariat website (http://www.nonnativespecies.org/home/index.cfm).

England

If you are considering transfers of raw water between catchments in England you should refer to the position statement. The statement sets out the Environment Agency's position regarding managing the risk of the spreading INNS through raw water transfers. The position statement is

supported by a short risk assessment guidance note and a map which states which catchments are considered isolated.

If you propose a new scheme that creates a hydrological connection between locations not already connected, you will be required to have mitigation measures in place to ensure INNS cannot be spread by the new transfer. If you propose a new scheme that will create a hydrological connection between locations that have an existing hydrological link, you will need to undertake an assessment of the increased risk that their scheme poses.

The Environment Agency will decide whether mitigation will be necessary for schemes on a case-by-case basis to ensure they do not significantly increase the risk of INNS transfers.

The Environment Agency has developed an INNS risk assessment tool. The tool provides a consistent approach to assessing INNS risks across water supply options and is available for use to assess INNS risks for Strategic Resource Options and other WRMP options.[footnote 18]

Wales

You should carry out an assessment of the risk of spreading INNS between catchments in Wales, and discuss this with Natural Resources Wales.

Section 6 – Developing your demand forecast

Your plan should demonstrate the demand for water in your base year and your forecast across your planning period. Base data should be clearly reflected in the pre-plan years of your tables submission. Your demand includes all the water which is required beyond the treatment works. It therefore includes leakage from your supply pipes, customers' supply pipes and the consumption of water by the people and businesses you supply.

Government and regulators expect that all parts of demand are managed and (where possible) reduced, while acknowledging that your demand is also influenced by your customers' behaviour.

You should reflect the forecasts of the regional plans for the customers you supply, where applicable. You should demonstrate how you have collaborated at a regional level with neighbouring water companies and non-public water supply abstractors to generate your forecasts. You should show how you made use of best available data and information.

6.1 How to develop your demand forecast

You should produce a baseline and final plan demand forecast for your entire planning period. These forecasts should include your estimates of demand from:

- household customers
- non-household customers
- water that leaks from your network of pipes and that of your customers
- any other losses or uses of water such as water taken unbilled

You should use the following guidance to develop your dry year annual average and critical period forecasts:

- UKWIR (2016) WRMP19 methods – household consumption forecasting (https://ukwir.org/reports/15-WR-02-9/150172/WRMP19-Methods--Household-Consumption-Forecasting)
- UKWIR (2016) Population, household property and occupancy forecasting (https://ukwir.org/eng/reports/15-WR-02-8/150150/WRMP19--Methods--Population-Household-Property-and-Occupancy-Forecasting)
- UKWIR (2006) Peak water demand forecasting methodology (https://ukwir.org/eng/reports/06-WR-01-7/67192/Peak-Water-Demand-Forecasting-Methodology)

You should also refer to other relevant reports such as:

- the water industry project on 'Water Demand Insights from 2018 (Artesia 2020)'
- the collaborative research report 'The impact of COVID-19 on water consumption during February to October 2020' (Artesia 2021)
- the joint study 'Understanding changes in domestic water consumption associated with COVID-19 in England and Wales' (Artesia 2020)

When developing your demand forecast, you should consider any relevant influences including:

- housing development and population changes, including changes in occupancy
- non-household demand
- the impact of prolonged high demand and the strain this can put on your network
- changes in water use behaviour and distribution of demand (in both household and non-household users). You should consider the impact of coronavirus on your demand from the start of the planning period. For example, changing working patterns and the impact this might have on household and non-household demand. You should also consider how

your customers' water use is affected by hot dry weather such as the heat waves experienced in 2018, 2020 and 2022
- metering and smart metering
- changes in government policy and expectations, for example water efficiency standards in new homes and water labelling
- changing water efficiency and sustainable water use practices
- changing design standards of devices that use water such as more efficient washing machines and toilets
- changes in technology and practices for leakage detection and repair
- a changing climate
- weather patterns
- potential changes in demand from the energy sector as it moves to low carbon technology
- changes in government policy and expectations

In England, you should specifically consider:

- your contribution to the Environment Act 2021 water demand target (https://consult.defra.gov.uk/natural-environment-policy/consultation-on-environmental-targets/supporting_documents/Water%20targets%20%20Detailed%20Evidence%20report.pdf) and the associated Environmental Improvement Plan (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1133967/environmental-improvement-plan-2023.pdf)
- metering and smart metering
- mandatory water labelling as set out in the recent Defra consultation (https://consult.defra.gov.uk/water-efficiency-labelling/water-efficiency-labelling/) assuming implementation from 2025 to 2026
- the water efficiency proposed actions for new developments and retrofit set out in section 3 of the Environmental Improvement Plan (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1133967/environmental-improvement-plan-2023.pdf) the Water UK leakage route map

You should set out any benefits you assume from government intervention through your options and clearly in your plan narrative. The benefits should be realistic and phased over time. We would expect minimal benefits in the first 5 years of the planning period. You should clearly demonstrate and justify any assumptions you have made in your plan.

6.2 Baseline demand forecast

Your baseline demand forecast should include the following.

Baseline dry year annual average

From 2025 to 2026 your baseline customer demand should take account of:

- customer demand without any further water efficiency or metering intervention from yourselves
- forecast population growth
- change in household size
- changes in property numbers
- the impact of climate change on customers' behaviour

From 2025 to 2026 leakage in your baseline should remain static from the start of your plan to the end of the planning period. If there is significant growth planned in a resource zone you should discuss and agree your approach with regulators.

The starting position for the WRMP24 supply and demand balance needs to be clearly and robustly justified. Any significant difference at the beginning of the WRMP24 planning period to the final plan WRMP19 2024 to 2025 year figure should be explained.

Baseline critical period or periods

If baseline critical period or periods are applicable – see sub-section 4.5.

Normal year demand forecast (reflects the demand in an average year)

In this scenario you should provide:

- distribution input
- household and non-household demand
- leakage and PCC

You should provide this for the first 5 years of your plan (to align with the business planning period) and then at 5-year intervals until the end of your planning period. You should present the data alongside your dry year forecast so that a clear comparison can be made. Regulators will use this information when considering your plan alongside your business plan submissions and annual reviews.

Assumptions and supporting information

You should clearly describe the assumptions and supporting information you have used to develop your plan. You are encouraged to discuss these with the Environment Agency or Natural Resources Wales as early as possible. As a minimum you should:

- use the UKWIR's Consistency of reporting performance measures (https://ukwir.org/eng/consistency-of-reporting-performance-measures-0) and

Ofwat's Reporting guidance – leakage (https://www.ofwat.gov.uk/wp-content/uploads/2018/03/Reporting-guidance-leakage.pdf)

- explain how your current best estimates of demand have been reconciled with other parts of the water balance
- estimate future demand, describe the method you have used and shown you understand what is driving any changes
- use dry year annual average unrestricted demand in developing your demand forecast. If you believe an alternative is appropriate you should discuss and agree this with regulators. You will still need to provide an unrestricted dry year annual average demand
- clearly state which data you have used as the base for your forecasts and reflect this in the pre-plan years of your tables submission. You should base your base year on your actual data as far as possible, adjusted to dry year if appropriate. If you need to extrapolate, you should use the data you think is most appropriate and justify why. If your position is significantly different from your previous plan forecasts you should discuss and agree your approach with regulators. Regulators will expect you to achieve your WRMP19 commitments.[footnote 19] If you are using regional planning data, you should ensure that there have been no significant changes since it was produced. If there are, you should update your plan accordingly
- ensure your forecasts are aligned, where appropriate, with neighbouring companies, regional water resources groups and regional plans and provide a comparison with other demand forecasts, including the population forecast and scenarios developed at a regional level where this is relevant

England

For companies in England, the national framework provided information on the demands of other sectors, which the regional groups will have developed further. Regional plans consider multi-sector needs. Your plan should take into account regional and local multi-sector demand when it is relevant to your supply-demand balance. For example, customers you supply directly or indirectly or options you are building jointly with other sectors.

Wales

You should consider local multi-sector needs and include them within your supply-demand balance if you are directly supplying them. You should also consider within your forecasts those customers, such as agriculture, who have the ability to switch to your supply during peak periods.

You should consider your policies for supporting other water users who are not connected to your water supply systems, (for example private water supplies) in circumstances where they are seeking 'alternative water

supplies', such as droughts. This should include your ability to supply other water users.

When forming your policies, you should consider whether they overlap with any of the work carried out by government, regulators or other stakeholders, to understand any mutually beneficial solutions. You should discuss your approach for your plan with Natural Resources Wales.

If you have resource zones in England, you should consider any information on the demands of other sectors provided by regional groups and the national framework.

6.3 Forecast population, properties and occupancy

England

Your planned property and population forecasts, and resulting supply, must not constrain planned growth. For companies supplying customers in England you should base your forecast population and property figures on local plans published by the local council or unitary authority. Local authorities will be at different stages of publication of their local plans. You can find the latest list of local plans (https://www.gov.uk/guidance/local-plans) on GOV.UK.

Local plans are likely to cover the first 10 to 15 years of the planning period. You will need to check the duration of, and timescale for, producing plans with your local council and use the latest information up to 3 months before the publication of the plan. In some cases you may need to use your own property forecasts.

If your local council has:

- a published adopted plan that is not being revised – you should take account of the planned property forecast. You will need to ensure your planned property forecast, and resulting supply, does not constrain the planned growth by local councils and strategic housing developments. If you adjust the planned property forecast and select a higher or lower number you will need to justify why you have selected a higher forecast and provide evidence
- published a draft plan, but it has not yet been adopted – you should take account of and use this as the base for your forecast. You should discuss with your local council whether it expects to make changes to the forecast for the adopted plan
- not started or published a draft plan – you should use alternative methods such as household projections from the Office for National Statistics

(ONS) or derive your own analysis using methodologies outlined in the UKWIR (2016) report Population, household property and occupancy forecasting (https://ukwir.org/eng/reports/15-WR-02-8/150150/WRMP19--Methods--Population-Household-Property-and-Occupancy-Forecasting)

Where your area includes major strategic housing and growth developments such as the Oxcam Arc or Garden Communities, you should include an estimate of the planned growth in the baseline. You should contact the relevant local authorities to obtain data on planned property and population numbers.

Where relevant, you should also work with your regional water resources groups to assess and test the impact of these developments and possible scenarios on your plans. You should consider the uncertainty around these forecasts in scenarios. An adaptive plan might be useful to manage significant uncertainty.

Local authorities in England are now required to use local housing need (https://www.gov.uk/guidance/housing-and-economic-development-needs-assessments) calculations to inform their local plans as they are revised and updated. This assessment may indicate that the number of properties could be higher or lower than the forecasts in current adopted local plans. If there is a significant difference between the local plan and the local housing needs numbers you should contact the relevant authority to discuss the implications of this for future plans.

ONS also produces population projections (https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationprojections) and household projections (https://www.ons.gov.uk/releases/householdprojectionsforengland2018based). Population projections provide an indication of the future size and age structure of the population based on mid-year population estimates and a set of assumptions of future fertility, mortality and migration. However, it is worth noting that these projections have limitations as they are based on recent trends in data that can be influenced by recent economic, political and natural situations. Therefore, it is appropriate to test the impact of alternative population and household growth scenarios on your plan. You should consider an adaptive plan where there is a significant difference in projections, particularly where this might affect your investment decisions in the first half of your plan. You should make sure your plan does not lead to over-investment or constrain planned growth.

You should set out how you have developed and used alternative scenarios in your plan and the impact they have had on your plan. You should explain any uncharacteristic changes in projected properties or population in your forecasts.

You should work with regional groups and neighbouring companies to make sure you develop consistent planning scenarios where relevant. This

includes regional groups adjacent to your own.

Wales

For companies supplying customers in Wales, you will need to base your forecast population and property figures on the latest local authority population and property projections published by the Welsh Government. The projections are trend based and use the ONS population estimates. You will need to explain the methods you have used to forecast population and property figures beyond the period covered by the projections published by the Welsh Government. You can find the Welsh Government's latest local authority population and property projections at:

- subnational population projections for Wales (https://gov.wales/subnational-population-projections)
- subnational household projections for Wales (https://gov.wales/subnational-household-projections-2018-based)

When looking at the projected population of Wales as a whole, the national population projection for Wales (https://gov.wales/national-population-projections-2018-based) produced by ONS should be used instead of adding up the local authority population projections. You should also engage with the local planning authorities in Wales to consider the local development plans in your supply area to inform your analysis of the uncertainties in your forecast population and property figures.

England and Wales

In your plan you should:

- clearly describe the assumptions and supporting information used to develop population, property and occupancy forecasts. You should demonstrate how you have incorporated local authority information (particularly in relation to their published adopted local plans), neighbourhood plans and housing need in England and whether this is the latest information available up to 3 months before the plan
- explain the methods you have used to forecast property figures after the planning period used by local councils (for example from years 15 to 25 in the planning period)
- demonstrate how you have included other information sources and amended your forecast accordingly
- clearly describe any limitations in your forecasts
- demonstrate that you understand the uncertainty associated with your forecasts and how you will manage it
- clearly describe how you have worked with regional groups (where applicable), neighbouring companies and those involved with strategic water resource solutions to align your forecasts

- explain the assumptions about how you have derived any population that is not accounted for in the sources you have used to estimate population
- describe how you have allocated populations to water resource zones, such as using neighbourhood plans or census data to further subdivide the populations
- use improved and updated population and household data in your final WRMP if it is available and describe how you will do this in your draft plan. This should be consistent with that used in your business plan
- clearly explain the assumptions, risks and uncertainties associated with the results

If you are using a planning period beyond 25 years and are basing decisions on this forecast, you should explain the range of uncertainties this long range forecast will have. You should explain in your plan how you will manage this uncertainty.

6.4 Forecasting your customers' demand for water

You should select baseline demand forecasting methods appropriate to the data available and the supply-demand situation in individual water resource zones. You should consider using the problem characterisation as described in the UKWIR Decision making process guidance (https://ukwir.org/WRMP-2019-Methods-Decision-Making-Process-Guidance). You should develop your forecasts with neighbouring companies and, where relevant, your regional group. This is ensure you understand and can explain any significant differences in demand and use patterns such as PCC. Your forecasts should also reflect the improvements in your understanding of water consumption as a result of metering programmes and recent research.

You should produce a forecast demand for a dry year annual average scenario, normal year and critical period or periods (if required) scenarios. You should present this data in the corresponding water resources planning tables at a resource zone level and a break-down into micro-components at a company level. You will find information on how to do this in the instructions for the water resources planning tables.

Your plan should show your normal year PCC for the first 5 years of your plan (to align with the business planning and price review period) and every 5 years until the end of the planning period. You should present the data alongside your dry year forecast so that a clear comparison can be made.

Your demand forecast should include your estimate of any changes in water use behaviour and distribution of demand during the planning period as a result of coronavirus. For example, from changing working patterns. Given

the uncertainty in these estimates, you may wish to explore different scenarios in your plan.

6.4.1 Data and methodologies

You should collect good quality, recent data about your customers' water use to produce your baseline demand forecast. To help determine future forecasts you should understand current behaviours and attitudes to water use and report this through use of micro-components in the water resources planning tables. You should provide micro-components at a company level, unless you are aware of significant differences between your resource zones which makes reporting separately appropriate.

You should use this guidance on demand forecasting:

- UKWIR (2016) WRMP19 methods – household demand forecasting (https://ukwir.org/reports/15-WR-02-9/150172/WRMP19-Methods--Household-Consumption-Forecasting)
- UKWIR (2016) WRMP19 methods – risk-based planning (https://ukwir.org/146387?object=151120)
- UKWIR (2016) Integration of behavioural change into demand forecasting and water efficiency practices (https://ukwir.org/Integration-of-behavioural-change-into-demand-forecasting-and-water-efficiency-practices)
- UKWIR (2012) Customer behaviour and water use – a good practice manual and roadmap for household consumption forecasting (https://ukwir.org/eng/reports/12-CU-02-11/66670/Customer-Behaviour-and-Water-Use--A-good-practice-manual-and-roadmap-for-household-consumption-forecasting)

You should state:

- why you have chosen a particular method
- the assumptions you have made
- the uncertainty associated with your demand forecasts

You should also show how you have allowed for the uncertainty in your plan.

Your demand forecast should consider the impacts of prolonged dry weather and droughts and the resulting high demand where it affects the supply-demand balance. You should consider whether there are alternative methods to define dry year demand. You should do this in a way that takes account of your specific situation and lessons learned from the high demands experienced in recent hot dry weather.

Your plan should also consider the results of water industry project on 'Water Demand Insights from 2018' (Artesia 2020). You should consider, for example, how prolonged dry weather could affect your customers' demand.

Also whether your planning scenario adequately considers short and long term peaks in demand that you have experienced and the impact on your networks.

If your plan includes a critical period of high demand, it should be informed by recent peak demand years, including 2018 and 2020. It should include: weather dependent demand, seasonal population changes and other factors as appropriate. You could also consider:

- the combined effects of hot dry weather and coronavirus on demand, including the distribution and the duration of the peak
- whether high demand could be as a result of other extreme weather such as a significant freeze-thaw event

It is important that you are able to maintain supply during peaks of demand, without the need to abstract outside the conditions of your licences.

6.4.2 Base year customer demand forecast

You should clearly state which data you have used as the base for your forecasts and whether you have used reported actual data or your planned position as set out in your 2019 plan. You should base the base year on your actual data as far as possible, adjusted to dry year where appropriate. If you need to extrapolate, you should use the data you think is most appropriate and justify why. For example, allowing for the impacts of coronavirus and the dry weather in 2020.

If you are using regional planning data, you should ensure there have been no significant changes since the forecasts were produced. If there are, you should update your plan accordingly.

If your position is significantly different from your previous plan forecast you should discuss and agree your approach with regulators. Regulators expect you to achieve your previous WRMP commitments. If your approach to calculating base year and forecast PCC leads to significant uncertainty or changes in your base year or projected consumption compared to your previous plan, such as may be caused by the impacts of coronavirus, you should:

- assess the impacts on the water balance (such as non-household use)
- describe how this affects the options you have considered in your plan and consider scenario testing or adaptive planning (see Section 10)
- explain the reasons for the change
- explain any uncertainty in PCC levels
- describe how this affects your ability to meet any relevant planning assumptions in the national framework, regional plans and government aspirations to reduce PCC over the planning period

- use improved and updated PCC data if it is available in your final WRMP, and describe how you will do this in your draft plan. This should be consistent with that used in your business plan (PR24)
- set out how you will review your forecasts during the planning period to monitor any short or long term changes and the impacts this could have on your plan

6.4.3 Baseline customer demand forecast

Your baseline forecast should reflect your forecast of customer consumption without any further water efficiency or metering activity from you from the start of the planning period. The baseline should still include an assessment of how many of your customers will opt for a meter, without any encouragement from you.

6.5 Forecasting your non-household consumption

You should produce a forecast of your non-household demand. This is the demand for water being used by non-household premises (such as businesses and industrial premises) and for the population living in communal establishments (for instance hospitals, prisons and educational establishments).

Your forecasts of non-household use should be based on principal use. This should be in line with Ofwat's:

- eligibility guidance on whether non-household customers in England and Wales are eligible to switch their retailer (https://www.ofwat.gov.uk/wp-content/uploads/2016/07/Eligibility-Guidance.pdf)
- supplementary guidance on assessing whether non-household customers in England and Wales are eligible to switch their water and wastewater retailer (http://www.ofwat.gov.uk/wp-content/uploads/2016/03/pap_gud201607suppretaileligibility.pdf)

You should explain if following Ofwat's guidance leads to significant change in your projections of household or non-household water use, in relation to previous plans.

You should also work with non-household customers to improve water efficiency where you believe there are savings to be made. You should clearly demonstrate how you will deliver non-household water efficiency. Your final plan should see an overall reduction in non-household consumption.

In England, you should set out how it contributes to Defra's water demand target and associated Environmental Improvement Plan, which seeks a 9% reduction of non-household water consumption by 2037 to 2038, from a 2019 to 2020 baseline, as part of the delivery of the distribution input per person reduction. You should explain why your plan does not show an overall reduction in non-household water consumption if this is the case, for example because of a large commercial development.

It is your role to engage with the retailer and the retailer's role to engage with their customers. If there is any engagement with non-household customers, it should be with the agreement of the retailer or retailers to avoid confusion. You should engage with the retailers early on in the process.

In Wales you should engage with retailers for those non-household customers eligible under restricted retail authorisation.

You should provide evidence of your engagement with retailers in your plan. You should also explain the implications of your chosen drought management actions (such as non-essential use bans) on non-household customers.

Your forecasts should reflect the outputs of regional plans (if appropriate) for the customers you supply.

Your forecasts should include an assessment of the demand for water from new customers switching to public water supplies, from other sources of abstraction such as agriculture in a significant drought. This allowance can be on top of your dry year annual average demand for non-household customers. You should include it as a separate line in the water resources planning tables to differentiate it from the dry year forecast.

You should also consider whether there are any implications from private water supplies failing and therefore calling on you as a supplier of last resort. If so, you could consider an allowance for this demand in your non-household demand. If you do this, you should explain how you have assessed this demand and the evidence you have used.

England

For companies in England, a joint regulators letter (https://www.ofwat.gov.uk/publication/a-joint-ofwat-and-environment-agency-open-letter-from-rachel-fletcher-and-harvey-bradshaw-delivering-greater-water-efficiency-in-the-business-sector/) was issued to retailers and wholesalers in March 2020. It sets out what you and retailers should be doing to meet your water efficiency obligations.[footnote 19] This letter asked retailers and wholesalers to submit a joint action plan by September 2020 outlining the actions that both wholesalers and retailers need to complete to increase water efficiency. The action plan comprises 5 key headline actions and supporting

actions designed to identify and tackle barriers to improved water efficiency in the sector, together with a timetable for achieving progress. This includes measures to understand non-household demand and water efficiency potential.

6.5.1 Retailers

In England, all eligible business customers and public sector, charitable and not-for-profit organisations are able to choose their water supplier (retailer).

In Wales, only non-household customers who meet the 50 megalitres a year threshold requirement are able to choose a different supplier for water retail services. Non-households under this threshold are direct customers of the incumbent water company.

You (the incumbent water supplier or wholesaler) are still responsible for delivering the water to the customer, and should continue to plan for non-household customer demand in your area. You should ensure there is no double counting in your plan between this forecast and any bulk supply to an incumbent. The general duty to promote the efficient use of water under section 93A of the Water Industry Act 1991 applies to both the wholesaler and the retailer.

When you prepare your plan you can work closely with any applicable retailers through the national retailer and wholesalers WRMP24 working group, which will be set up as part of the joint action plan. This will allow retailers to provide information and data in a timely manner as you prepare or revise your plan. You should continue to work with the retailers, including through the process of completing the action plan, to ensure the promotion of water efficiency and demand management with all customers. You should outline details of this joint planned work in your plan as a discreet section.

We recommend that you refer to and use the supplementary guidance on 'retailer involvement in water resources planning'. The retail and wholesale water efficiency subgroup produced this to help working together with retailers on the production of your WRMP.

6.5.2 Information you should provide in your plan

You should work with retailers and through regional groups (where applicable) to share appropriate information, data and expertise to ensure your forecasts and solutions are robust. You should make sure that:

- your plan contains an estimated demand forecast for non-households
- you describe how you have derived the figures and assumptions you have made
- you make use of the market operator of the non-household water market (MOSL)[footnote 20] system that stores retail company data as needed

- you describe the make-up of non-household demand in different sectors either by using the service and non-service split (identifying the main sectors), or by using Standard Industrial Classification (SIC) categories published by the ONS. MOSL is working with non-household trading parties to produce a proposed plan for non-household industry segmentation based on SIC categories but down to division level. You should use this when it is available
- you clearly explain the existing water efficiency initiatives planned by both the wholesaler and retailer or retailers. Your baseline should reflect non-household demand without any further intervention. Your final planning scenario should include any forecast savings from water efficiency programmes
- you consider non household water efficiency as an option to manage the supply-demand balance and meet government policy or targets on water consumption
- you consider any uncertainty associated with reducing demand and show how you will monitor the water efficiency programme and how the plan can be adapted if required
- you have collaborated at a regional level, and engaged with non-public water supply abstractors or relevant organisations to produce your forecasts
- the planned level of service provided to customers is clear and you set out if you will give a different level of service to particular non-household customers
- you have considered the potential demand for other sources such as agriculture and those on private water supply in a significant drought
- you deliver the relevant actions in the wholesaler and retailer action plan

6.6 Forecasting leakage

Reducing leakage is an essential part of reducing the demand for water. Not least because many customers are more responsive to reducing their own water use if water companies reduce their leakage.

Reducing leakage is important for the efficient use of resources, improving resilience and reducing the environmental impact. Leaking water costs you as you pump, abstract and treat the water. You should therefore show leadership by making sure you keep leakage under control. You should follow government policy and regulators and customers' expectations to continue to reduce water loss through leaks.

You should demonstrate how your leakage proposals build on your work to manage leakage to date and form part of a long term approach to demand management.

You should determine your leakage using the approach outlined in Leakage reporting guidance (Ofwat and Water UK, March 2018) (https://www.ofwat.gov.uk/wp-content/uploads/2018/03/Reporting-guidance-leakage.pdf)

Companies in England should take account of the supplementary guidance 'Leakage'. You should also refer to Water UK's leakage routemap (https://www.water.org.uk/publication/a-leakage-routemap-to-2050/).

6.6.1 Base year leakage

You should clearly state which data you based your base year forecasts on. You should state whether you have used reported actual data or your planned leakage from your 2019 WRMP or the PR19 final determination. Your base year should be based on your actual data as far as possible, adjusted to dry year if appropriate. If you need to extrapolate, you should use the data you think is most appropriate and justify why. If your forecast first year of plan (2025/26) leakage is significantly different from your previous plan forecast you should discuss and agree your approach with regulators.

If your approach to calculating base year and forecast leakage has significant uncertainty around it, or is significantly different from your previous plan, you should use scenarios to:

- assess the impacts on the water balance (such as PCC and non-household use)
- describe how this affects the options you have considered in your plan
- explain the reasons for the change
- explain any uncertainty in leakage levels

You should also:

- describe how this uncertainty affects your ability to meet planning assumptions as set out in your previous plan, the national framework, regional plans and government aspirations to reduce leakage over the planning period
- use improved and updated leakage data in your final WRMP and describe how you will do this in your draft plan. This should be consistent with that used in your business plan
- clearly state your policy for repairing customer supply pipes in your plan
- discuss the changes that result from the revised approach to calculating leakage and the impacts with regulators
- set out how you will address any performance issues experienced undertaking planned leakage programme during the 2020 to 2025 period.

6.6.2 Baseline leakage forecast

Your baseline leakage forecast should remain static from the first year of your planning period. If you have significant growth in a resource zone you should discuss and agree your approach with regulators.

6.7 Other components of demand

You should describe how other components of demand (such as water taken unbilled) have been assessed in your plan. You should demonstrate what assumptions you have made when assessing them and what data sources you have based your assessment on.

6.8 Impacts of climate change on demand

The impact of a changing climate on water consumption is uncertain. You can make an allowance for the impact of climate change on the demand for water. In most cases the expected impact is likely to be no more than 1% over the planning period and should not be more than 3% unless you can clearly demonstrate an exception. You should provide details of the allowance and the assumptions you make. You should refer to:

- UKWIR (2009) Assessment of the significance to water resources management plans of the UK climate projections 2009 (https://ukwir.org/eng/reports/09-CL-04-11/66612/Assessment-of-the-Significance-to-Water-Resource-Management-Plans-of-the-UK-Climate-Projections-2009)
- UKWIR (2013) Impact of climate change on water demand (https://ukwir.org/eng/forefront-report-page?object=66621)

Section 7 – Allowing for uncertainty

You should use the most up-to-date and appropriate tools, methods and data available to produce your supply and demand forecasts. However there is uncertainty in all forecasts. Given there is uncertainty in all forecasts you should include an uncertainty allowance relating to your supply and demand forecasts depending on your chosen methods.

You should analyse the sources of uncertainty around the components of your supply-demand balance and the range of uncertainty around these variables. The following documents set out different approaches to assessing uncertainty:

- UKWIR (2016) Risk-based planning (https://ukwir.org/146387?object=151120)
- UKWIR (2016) Decision making process guidance (https://ukwir.org/WRMP-2019-Methods-Decision-Making-Process-Guidance)
- UKWIR (2002) An improved methodology for assessing headroom (https://ukwir.org/eng/reports/02-WR-13-2/67204/An-Improved-Methodology-for-Assessing-Headroom)

If you use risk-based planning tools or a decision-making tool to assess uncertainty and variability you may not need to calculate target headroom. Alternatively you may need to exclude some target headroom components. If so, you will need to explain the methods and assumptions you have used and demonstrate that you have not double counted or omitted uncertainties. It is recommended however, that you provide a headroom value which represents uncertainty. This is so that the uncertainties in your plan are explicit, even if you are using more advanced methodologies.

You should consider the appropriate level of risk for your plan. If target headroom is too large it may drive unnecessary expenditure. If it is too small, you may not be able to meet your planned level of service. You should accept a higher level of risk further into the future. This is because as time progresses the uncertainties will reduce and you have time to adapt to any changes.

You should provide a clear justification of the assumptions and the information you use to assess your uncertainties. You should assess the relative contributions of uncertainty, showing which uncertainties have the biggest impact in each water resource zone. You should communicate this clearly so that regulators, customers and interested parties can understand it easily. You should also consider whether there are any steps you could take to reduce uncertainty during the planning period.

You should ensure your plans can adequately adapt to over or under-achievement of demand management activity. You should use scenario testing to examine the potential uncertainty of any future demand forecasts.

You should not include uncertainty related to non-replacement of time-limited licences on current terms. If there are risks to supply because your licences may not be renewed, you should address this uncertainty directly in your plan through investigations and planning alternative supplies as necessary.

You should work with the Environment Agency or Natural Resources Wales, and regional groups (where applicable) to discuss how to consider possible future sustainability changes. Longer term potential sustainability changes can be explored through the environment destination work carried out locally and at a regional level. You should not include any allowance for uncertainty related to sustainability changes to permanent licences, as the

Environment Agency or Natural Resources Wales will work with you to ensure that these do not impact your security of supply.

Your final plan headroom should reflect the preferred options in your final plan.

If you have uncertainty you should consider whether an adaptive planning approach would be beneficial. For further details see Section 10 of this guideline and the supplementary guidance ‘Adaptive planning’. When you use adaptive planning, you should consider what implications this will have for your management of uncertainty, for example target headroom.

If you are a company in Wales you should discuss your adaptive planning approach with Natural Resource Wales.

Section 8 – Identifying possible options

You should identify possible options in your regional plan (if applicable) and WRMP for one or more of the following reasons:

- you have a deficit in your supply-demand balance
- to supply potential regional or national needs, or supply other sectors
- to address government expectations, concerns of your customers or local stakeholders
- to ensure the efficient use of water

You should produce your list of options to appraise.

1. Identify an unconstrained list of all possible options (sub-section 8.1).
2. Develop a feasible list (sub-section 8.2). Sub-section 8.3 lists the information you should provide for your feasible options.

You should consider a wide range of options (both at the unconstrained and feasible list stages). Your range of options should:

- demonstrate that real choices are possible in the selection of your preferred programme
- enable you to meet your identified objectives for your plan
- provide confidence to regulators, stakeholders and customers that your preferred programme represents best value across the planning period

You must assess whether your plan and the options in your plan are subject to a SEA and HRA. You must also ensure that you have complied with any other statutory requirements and legal directions. You may wish to refer to:

- UKWIR (2021) Environmental assessments for water resources planning (https://ukwir.org/objectname-209)
- Office of the Deputy Prime Minister (2005) A practical guide to the Strategic Environmental Assessment Directive (https://www.gov.uk/government/publications/strategic-environmental-assessment-directive-guidance)
- Welsh Government, Strategic environmental assessment in Wales (https://gov.wales/strategic-environmental-assessment)

If you have options within or that affect sites in Wales, you must also consider the requirements of the Environment (Wales) Act (https://gov.wales/environment-wales-act-2016-sustainable-management-natural-resources) and Wellbeing of Future Generations Act (https://www.futuregenerations.wales/about-us/future-generations-act/).

8.1 Unconstrained list

You should compile a list of all possible options that could reasonably be used in your plan. This unconstrained list should be developed from a generic list of option types. The UKWIR Water resources planning tools 2012: summary report (https://ukwir.org/reports/12-WR-27-6/67207/Water-Resources-Planning-Tools-2012-Summary-Report) produced a comprehensive list of water management option types which you can consider. You are encouraged to use this list as a base from which you can add or subtract. As a minimum, the unconstrained list should include all the options considered in the previous planning round, as well as any options that have been identified since. You should include supply-side and demand-side options, as well as making efficiencies in your network such as removing network constraints where they contribute to the supply-demand balance. In forming your list of options, you should explore those presented by regional groups, including regionally scaled and joint-company options (see Section 2). For England, you should also identify other potential transfers from neighbouring water companies and consider third party options (see sub-section 8.1.1).

An unconstrained option may not be completely free from restrictions, such as environmental or planning issues, but should be technically feasible. You should provide an indicative deployable output or range for your unconstrained options.

8.1.1 Third party options

England

You should identify whether third parties could provide viable options or if there are opportunities for collaboration to develop supply or demand options. You should consider third party options in the widest sense, for example:

- a transfer of water between water companies – including developing options to support transfers
- a water efficiency scheme provided by a third party
- a water trade with a third party
- provision by a third party of reclaimed water

You should identify these opportunities through your regional group (if applicable), and before your pre-consultation. Your regional group may have identified options delivered partly, or wholly, by third parties. You should appraise these options against the same criteria as you use for assessment of your own options. Options for identifying and inviting third parties include (but are not limited to) contacting neighbouring water companies and other abstractors, or advertising. It is up to you to determine the most appropriate method for your circumstances.

You should actively engage with third parties who could provide options to you at a lower cost, or provide additional benefits than your own options. The information that you publish on your website to meet Ofwat's water resources market information requirements will aid third parties in developing bids by making water resource data more accessible. Bids could include services such as the provision of water, leakage detection and demand management options. You should support third parties in their provision of information and analysis as part of the development of third party options.

In your plan you should show evidence that:

- third parties have been able to propose options for appraisal
- you have used a set of screening criteria for third party options which is consistent with those applied to your own options
- you have appraised third party options in line with your published bid assessment framework

Wales

You are encouraged to engage with third parties who could provide solutions to you at a better value than your own options. These options should not reduce the scope for you to provide innovative solutions, especially if they deliver wider benefits, such as green infrastructure. In determining value, your consideration of costs and benefits should take into account environmental, economic and wellbeing costs as well as financial costs, including natural accounting principles.

The information that you publish on your website to meet Ofwat's water resources market information requirements will aid third parties in developing bids by making water resource data more accessible.

If you include an option to transfer water from a water resource zone of a Welsh water company, you should discuss these options with the Welsh Ministers and Natural Resources Wales.

8.2 Feasible list

You should develop your feasible list of options from your unconstrained list of options. The feasible list is a set of options that you consider to be suitable to assess for inclusion in your preferred programme of options. As such, it should not include options with unalterable constraints that make them unsuitable for promotion. For example, unacceptable environmental impacts that cannot be overcome or options which have a high risk of failure. For example, WFD regulations and habitats regulations constraints.

You should discuss your feasible options with the Environment Agency or Natural Resources Wales as early as possible. You should also discuss feasible options with relevant non-statutory consultees as early as possible, for example engaging Forestry Commission in England where options may affect woodland.

You have the flexibility to decide on the most appropriate screening method for your situation. You should clearly show the criteria you have used to select feasible options. You should clearly state the reasons for rejecting any options.

You can present options that do not provide specific supply-demand balance benefits but offer wider resilience benefits or meet specific legislative requirements that form part of your best value plan. These options can be presented as part of your WRMP, however will need to be discussed with Ofwat for inclusion in the business plan process. For catchment schemes without supply demand balance benefits, the resilience investment category as part of enhancement funding could be considered as a funding route. This is detailed in section 3.4.3 of the PR24 final methodology Appendix 9. (https://www.ofwat.gov.uk/wp-content/uploads/2022/12/PR24_final_methodology_Appendix_9_Setting_Expenditure_Allowances.pdf) This sets out what evidence and considerations need to be included in investment plans for the resilience enhancement schemes. Examples of these options could be catchment schemes to provide Biodiversity net gain (England) or biodiversity and resilience of ecosystems duty (Wales). To be considered for supply demand balance enhancement funding, a scheme should have some benefit to one or more components of

the supply-demand balance. For example, through providing deployable output or reducing outage.

England

Your feasible list should also include any demand-side options such as changes to temporary use bans and non-essential use bans as well as drought permits and orders. This is so they can be clearly appraised alongside other options. Your options list should include any impact of drought measures which you removed from deployable output.

Wales

Your feasible list should include demand side options. You can include drought permits and options in your feasible list that supply events of a severity of more than 1 in 200.

You can use your understanding of your drought plan to assess any environmental risks for drought permits or orders. However, this information, can only be used where:

- no material information has emerged that means it is out of date
- the underpinning analysis is sufficiently rigorous and robust

8.2.1 Further screening

If you have a large feasible list, you can consider further screening to produce a more manageable number of options to assess for inclusion in your preferred plan. Your refined feasible list should still contain sufficient options to allow real choices when assessing the preferred programme. This is in terms of both numbers, type and size of options. You should ensure that the process for further screening does not contain any undue bias. You should discuss your approach with regulators.

8.2.2 Assessing environmental constraints

A. River basin management plan and WFD regulations

RBMPs and WFD regulations environmental objectives are a constraint on your options. You should screen out any options that have unacceptable environmental impacts that cannot be overcome.

You should ensure that there is no risk of deterioration from a potential new abstraction or from increased abstraction at an existing source before you consider it as a feasible option. Alternatively if investigations are yet to be completed, you should set out what your alternative options would be should those investigations demonstrate that there will be an unacceptable environmental impact.

You should also assess new supply options against the RBMP measures and objectives for each water body and meet your obligations to avoid future deterioration. You should ensure that your feasible options do not compromise the achievement of RBMP objectives.

You should talk to the Environment Agency or Natural Resources Wales about any intended actions that may:

- cause deterioration of status (or potential)
- prevent the achievement of the water body status objectives in RBMPs
- prevent the achievement of water body status (or potential) for new modifications

You should do this as soon as possible before developing your plan. You should make a clear statement in your plan about any potential impacts.

B. Habitats Regulations (Conservation of Habitats and Species Regulations, 2017)

Your plan, including any options within it, should support the achievement of favourable conservation status of habitats and species identified by the regulations. They should also not prevent the achievement of favourable condition of sites designated under the regulations. You should assess if there are any likely significant effects on designated sites from any of your options (such as a potential new abstraction or from increased abstraction at an existing source) before you consider them as feasible options. Where you cannot conclude 'no likely significant effects', an 'appropriate assessment' is required to establish if the option can be delivered without having an adverse effect on the integrity of a designated site.

You should talk to Natural England or Natural Resources Wales about any intended actions that may cause adverse effects to designated sites within England and Wales, respectively. You should do this as soon as possible before developing your plan, and you should make a clear statement in your plan about any potential impacts. You should refer to the information on the HRA provided in Section 9.

The need to do a HRA should not be a reason on its own to screen out an option. This is because a HRA screening may conclude that there are 'no likely significant effects'. Alternatively an appropriate assessment may conclude 'no adverse effects on integrity.' Either of which may allow the option to be retained within the plan.

8.2.3 Climate change adaptation

Your plan should take a proactive approach to mitigating (see 8.3.2) and adapting to climate change. Adaptation to future challenges is fundamental to WRMPs and many options will help climate adaptation. For example,

demand reduction that leaves more water for nature during low flows, or development of new sources that increase resilience to drought. You should embrace opportunities to make nature more resilient to climate change in feasible options. For companies in England or affecting England, you could use Natural England's 'Climate Change Adaptation Manual' (second volume) to help plan for biodiversity enhancements.

8.3 Information you should provide for each option

You should provide the information set out in this section for each of your feasible options (or refined feasible list), including third party and partnership options.

You should clearly set out the evidence that has informed the assumed benefits of your supply and demand options.

If you have developed a refined feasible list you should discuss with regulators how much information you should provide for feasible options which are not on the refined feasible list.

Supply and transfer options

You should include in your plan a description of the option including an appropriate schematic map and, or conceptual diagram showing:

- the source of supply
- the main operational features
- the areas over which the option is to be implemented
- any links or dependencies to other options

Demand management options

You should include in your plan a description of how the option being described differs from baseline activities.

All options

You should provide the following:

(a) A profile of the deployable output, contribution to the supply-demand balance or demand saving (based on the capacity of the option) or water saved over 80 years. For a supply option, the deployable output should be based on the same assumptions as your baseline options. The yield of a demand side option should be based on a dry year (see sub-section 4.6).

These option benefits must not be double-counted, and you should clearly describe any interdependencies between options.

(b) An estimate of the lead-in time needed to investigate and implement the option, including the earliest date the option could put water into supply or reduce demand.

(c) An assessment of the risks and uncertainty associated with the option, including the likelihood and impact on yield of climate change, environmental constraints or customer behaviour (for demand options). You should include an assessment of INNS (where relevant).

(d) A drinking water safety plan assessing the risks to drinking water quality. If there is a risk to wholesomeness, (such as discolouration, nitrates, pesticides) or a risk of deterioration in the quality of supply, the option will not be permitted until steps to mitigate those risks are in place (see Resilience of water supplies in Water Resource Planning - guidance note (https://dwi-content.s3.eu-west-2.amazonaws.com/wp-content/uploads/2021/09/06102953/Resilience_in_WRP.pdf)).

(e) An explanation of whether the option depends on an existing scheme or a proposed option, or is mutually exclusive with another option.

(f) Any constraints specific to the option.

(g) An assessment of your customers' support for the option.

(h) An assessment of the flexibility of the option to adapt to future uncertainty.

(i) A description of how the option will be utilised and the impact on operating costs and carbon costs.

The description should include:

- quantitative presentation of anticipated utilisation rates for the preferred plan determined from company and, or regional modelling
- utilisation rates for dry year annual average operation, for events such as 1:500 year droughts, peak demand or as part of emergency response, in addition to standby, or normal-year operation
- where uncertainty exists in utilisation rates, a range of potential utilisation rates presented, evidenced with modelled calculations and descriptions of scenarios considered
- third party options explored to increase utilisation and value from solution supply

(j) An assessment of the environmental and social impacts of the option, including any SEA at an option level, an evaluation of the impacts on RBMP

objectives, nature recovery objectives (England), Ecosystem resilience biodiversity duty (Wales) and well-being goals (Wales).

(k) A HRA, if the option could affect any designated habitats site

(l) (for supply and transfer options) a natural capital assessment including an assessment of the predicted impact of the option on natural assets and service flows.[footnote 21]

(m) (England only) an assessment of the contribution of the option to the conservation and enhancement of biodiversity and a high-level assessment of biodiversity net gain (if the option requires planning permission).[footnote 22]

(n) Cost information (see sub-section 8.3.1).

(o) Greenhouse gas emissions (see sub-section 8.3.2).

(p) Other information relating to metrics developed to inform selection of your preferred programme (see Section 10).

8.3.1 Cost information

All cost information should be maintained in a price base of 2020 to 2021 throughout your draft plan, final plan and all tables.

The cost of an option should represent the cost of a deliverable solution which includes any mitigation or design changes for environmental or drinking water quality issues. The cost of an option should be the full cost to realise the gain in WAFU or demand reduction. For example, including associated treatment process, pumping or pipework connection costs.

The costs of delivering 10% biodiversity net gain in England (to gain planning permission where this is necessary) should be included in option costs prior to your option appraisal. Biodiversity net gain may be delivered through the option itself at no additional cost, onsite provision or offsite as part of a wider Catchment & Nature Based Solutions (section 4.1.1 and supplementary guidance ‘Environment and society in decision-making (England)’ section 2.3.2).

Catchment & Nature Based Solutions addressing another primary driver relating to company activity (for example, Biodiversity & Ecosystem resilience duty (Wales) or improving water quality) should be presented in appropriate enhancement lines in the business plan. These can be set out within the narrative of your plan.

Sub zonal schemes (not impacting your supply) can also be set out within the narrative of your WRMP. However, these schemes should be presented for funding with your business plan rather than your WRMP (as covered in

8.2). Interconnection required to deliver full WAFU benefit of the option can be included as part of WRMP option level cost and benefit.

Your cost information should be set out in the water resources planning tables and you should follow the water resources planning table instructions. You should provide the following cost information, where necessary for each option:

(a) Option costs should be split into total pre-benefit costs and post-delivery annual costs (including operational, maintenance, replacement) with both costs being reported in terms of totex.

(b) The total net present cost and net present benefits. You should calculate the net present costs and benefits using the Treasury standard declining long-term discount rate as set out in the HM Treasury 'Green Book (HM Treasury 2020)'. The appraisal period should at least cover the lifetime of the longest lasting asset under consideration. Your appraisal period should be consistent within your regional group, where applicable. You should calculate finance costs as a stream of annual costs over the life of the option, where the annual cost is the cost of financing the net book value of assets that contribute to the Regulatory Capital Value, adjusted for straight line depreciation, using the assumed average cost of capital (the wholesale weighted cost of capital in PR19 final determinations) [footnote 23].

(c) The average incremental cost (AIC) of the option based on the NPV of its costs and outputs. Note: you no longer need to provide average incremental social cost (AISC).

(d) Environmental and social monetised cost impacts should be presented against natural capital services where applicable [footnote 24].

(e) Total carbon cost impacts (see section 8.3.2).

We do not expect you to present the detailed calculations used to derive the total net present costs for all options. However, you should clearly identify the assumptions used to calculate net present costs, net present benefits, and AIC. You should present worked examples for preferred demand-side and supply-side (where selected) options showing the profile of annual costs. Although you do not need to present as part of your draft plan, regulators may request these calculations for other preferred options.

The costs you use in your planning should be robust and efficient, [footnote 25] with evidence to support this, and you should provide evidence for how the costs are calculated. You should benchmark key activities. The costing approach and calculations you use should be a fundamental component of the evidence that your Board considers in giving its assurance statement. We expect the approach to costing resultant option costs, assured by your Board, to not vary significantly between WRMP and business plan submissions. Where variances occur, we expect you to well evidenced them

and to have reassessed the impact of the variance on the optimisation of the plan.

Costs presented within the final plan (WRMP24) are expected to be consistent with those submitted in your business plan at PR24. Given the short time between the final plan and PR24 submissions this should be achievable. If there are any significant changes in your plan post draft WRMP24 (in particular the plan's costs, expected benefits and impact on the environment), you should consider how these will be managed through your:

- statement of response
- final plan
- timeline for submission of your business plan (section 3.3)

8.3.2 Accounting for and reducing greenhouse gas emissions

The environment and society are facing a climate emergency. The water sector, in conjunction with the product (and how its used) and the services it provides is a significant contributor to greenhouse gas emissions. Government has committed to reducing greenhouse gas emissions to net zero by 2050. The water sector, through Water UK, has committed to net zero operational carbon by 2030. You should therefore consider carbon through your options appraisal. You should also consider how your plan can contribute to the sector, company, and government commitments to net zero. We expect you to take a whole life carbon approach.

Wales has statutory targets to reduce greenhouse gases. Proposals should therefore include an assessment of their carbon impact in Wales from the outset. You should email enquiries to decarbonisationmailbox.@gov.wales.

You should consider the environmental impact of other greenhouse gases across the whole life cycle of an asset; including operation, and give due consideration to the 6 main greenhouse gases.

We expect companies to be clear on their plans to monitor and evaluate the outcome of their decisions on carbon. They should make sure that they can alter actions so that predictions of carbon emissions become increasingly accurate.

Your plan should contain evidence of policies, frameworks and approaches you are following to drive down whole life carbon in option choices and within solution design. Options should embrace innovative designs and opportunities to generate or be powered by renewable energy or sequester carbon (or both).

We expect the level of uncertainty associated with the option carbon assessments to reduce as options are developed and mature.

In your plan, you should assess the carbon cost of both the construction and operation of your options, along with the impact of land use change on carbon sequestration.

You should use the carbon costs as given in the latest government guidance and present these costs together with your options cost. You should use the central series of values for modelling and carry out sensitivity analysis using the high and low series. You should also present the tonnes of carbon you will emit from the construction and operation of your preferred options.

When you assess the carbon impacts of your options, you should take into account any mitigation. For example using renewable energy or carbon off-setting. Carbon off-setting can contribute to wider environmental benefits such as tree planting or upland and peatland restoration, if there is no alternative to reducing emissions.

For options where land use change is relevant you should use a natural capital approach as described in supplementary guidance 'Environment and society in decision-making'. This provides a methodology for how you should consider the value of the carbon associated with a change of land use.

You should consider the following guidance:

- UKWIR (2012) Framework for accounting for embodied carbon in water industry assets (https://ukwir.org/reports/12-CL-01-15/66617/A-Framework-for-Accounting-for-Embodied-Carbon-in-Water-Industry-Assets) (12/CL/01/15)
- UKWIR (2022) Calculating whole life/TOTEX carbon (https://ukwir.org/water-research-reports-publications-viewer/a43c5946-a61a-4a42-82fa-7f849df94e2e) (22/CL/01/32)
- for carbon costs associated with the projected emissions you should use the latest government guidance on the cost of carbon (https://www.gov.uk/government/collections/carbon-valuation--2). In particular you should consider the Green Book Supplementary Guidance (https://www.gov.uk/government/publications/valuation-of-energy-use-and-greenhouse-gas-emissions-for-appraisal)
- The Carbon Accounting (Wales) Regulations 2018 (http://www.legislation.gov.uk/wsi/2018/1301/made)
- Environmental reporting guidelines: including streamlined energy and carbon reporting guidance (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/850130/Env-reporting-guidance_inc_SECR_31March.pdf)
- PAS 2080: Carbon management in infrastructure (https://shop.bsigroup.com/ProductDetail?pid=000000000030323493&_ga=2.209164497.2130379306.1594634019-287888288.1591630925)

- HM Treasury infrastructure carbon review (https://www.gov.uk/government/publications/infrastructure-carbon-review)
- Towards a science-based approach to climate neutrality in the corporate sector (https://sciencebasedtargets.org/wp-content/uploads/2019/10/Towards-a-science-based-approach-to-climate-neutrality-in-the-corporate-sector-Draft-for-comments.pdf)

Section 9 – Aspects to consider in compiling a best value plan

This section:

- explains what a best value plan is – sub-section 9.1
- explains the factors that should be taken into account in compiling your best value plan – sub-section 9.2
- sets out government and regulator policy that you will need to take into account in developing your plan – sub-section 9.3
- provides an overview of how you should ensure environment and society are properly considered in your decision-making – sub-section 9.4

Section 10 sets out how you should compile your best value plan.

9.1 What is a best value plan?

The aim of a regional plan and your WRMP is to present a best value plan, across the planning period, both in the short term and the long term. Your WRMP must ensure a secure supply of wholesome drinking water for your customers and protect and enhance the environment.

A best value plan is one that considers factors alongside economic cost and seeks to achieve an outcome that increases the overall benefit to customers, the wider environment and overall society.[footnote 26]

A best value plan should be efficient and affordable to deliver, legally compliant and account for the range of legislation that applies to it.

9.2 What you should consider in compiling your best value plan

In compiling your best value plan, you should consider all the most appropriate options for your system (regionally and nationally where appropriate) taking into account the following factors:

- government policy and regulator expectations (see sub-section 9.3)
- regional plans (see Section 2)
- any schemes approved for acceleration through transitional funding in advance of AMP8
- customers' preferences
- protecting and meeting the needs of vulnerable customers
- environmental improvements
- biodiversity
- costs
- benefits (both monetary and non-monetary) for customers, environment and society (such as public health, well-being, and recreation) and how these are distributed spatially and over time
- natural capital
- both short and long term risks and benefits, including delivery risk
- the flexibility and adaptability of your options to meet future uncertainties
- the resilience of your network and supplies (see sub-section 9.5)
- the regional and national need and the needs of other sectors
- the impact of your preferred programme on the affordability of your customers' bills
- the level of uncertainty and sensitivity of your assessment of best value
- non-drought resilience such as water supply system resilience
- economic factors such as affordability, distributional impacts, local regeneration and economic growth
- achieving net zero and the climate emergency
- (England) your objectives to further biodiversity and enhance the natural environment by providing opportunities for biodiversity net gain where planning permission will be needed and other measures to conserve and enhance biodiversity consistent with actions you can properly take
- (Wales) the biodiversity and resilience of ecosystems duty and well-being goals

A best value plan should be efficient and affordable with distributional impacts, societal equity and intergenerational equity considerations transparently discussed. It should be clear that the additional benefits identified could not be delivered more efficiently through other means.

9.3 Government and regulator policy

Your best value plan should be shaped by government and regulator policies and ambitions. You should account for future demand reduction planning assumptions and targets set out in the national framework (England only) or set through government policy including the recently passed Environment Act 2021.

You should consider which policy aims and aspirations should be set as minimum criteria for your plan, and which will be balanced against other objectives.

You should consider at what point in time you will achieve your policy objectives. You should consider a suitable range of scenarios around the policy objectives to enable you to produce an optimised plan.[footnote 27] You should consider how your application of policy expectations affects costs, affordability, deliverability and intergenerational equity.

9.3.1 Your planned level of leakage

In your final plan forecast you should consider current government policy and assess all options to reduce leakage further, alongside other feasible options. You should consider the value that your customers place on reducing leakage and the benefits this will bring to your customers' willingness to participate in demand management, as well as other benefits to the environment.

Previously, companies have used the sustainable economic level of leakage method to determine levels of leakage. However, this is no longer acceptable for use in WRMPs and you should consider instead government's, regulators' and customers' views when deciding on your planned level of leakage.

You should explore the use of innovative approaches to achieve leakage reductions in line with leading companies.

When selecting your final plan leakage forecast, you should clearly explain the different activities that contribute to this level, including the costs and volumetric benefits that contribute to the supply-demand balance.

Government and regulators expect you to achieve the leakage reductions in your preferred programme, particularly in the short term. You should consider and manage the uncertainty around your leakage programme and the implications for security of supply if your planned level is not met.

Regulators will expect you to deliver the leakage commitments set out in your WRMP. Any changes to your final plan WRMP leakage programme may be considered as a material change in circumstance and you may be directed to re-consult on your plan. You should therefore, set out ambitious, but realistic plans for leakage within your WRMP. Unrealistic ambitions may

cause confusion with your customers and you may be required to make a public statement if you fail to achieve your planned leakage.

You should (as a minimum), plan to meet Water UK's commitment, on behalf of the industry, to reduce leakage by 50% by 2050 (from actual 2017 levels). In addition you should plan to meet any leakage targets set out in Ofwat's price review methodology or by government. You may wish to consider setting more challenging targets for reducing leakage than these, if you can demonstrate you have support from your customers.

In the medium to longer term, it is recognised that reducing leakage by 50% will require innovation and you may not know how you are going to achieve these levels. If this is the case, you should demonstrate that you are actively investigating how to achieve your ambitions. Your leakage forecasts should be consistent with the data you include in the business plan you provide to Ofwat as part of its price review process.

See also the supplementary guidance 'Leakage'.

9.3.2 Your planned level of metering

England

You should follow the requirements set out in the current legislation for the provision of information and appraisal of household metering and report it in the relevant water resources planning tables. You should clearly state in your plan your current and future metering policy and how you will protect vulnerable customers.

Your plan should evaluate charging by volume based on universal metering for areas determined to be in areas of serious water stress or if compulsory metering would be one of your preferred options. You should also consider smart metering, metering on change of occupier and metering street-by-street with comparative billing as options in your plan.

You should fully consider the benefits of increasing meter penetration, including the installation of smart meters. You should consider a range of scenarios as part of your decision-making, including one that assumes roll-out as fast as possible. You should consider the multiple benefits of metering (and smart metering) which include reducing leakage in your network and on customers' own properties such as supply pipes. You should also consider the additional costs and deliverability and uncertainty of achieving the assumed benefits.

You should learn from the good practice of some companies that have achieved high levels of meter penetration. For example, some companies have used enhanced or progressive approaches to install meters and have encouraged their customers to switch to being charged according to the

volume they use. You should evaluate these enhanced approaches in your options appraisal. You should also consider the option of selective metering where there is high discretionary use. Your assessment should include the wider benefits of these options, including:

- understanding and managing the demand for water
- improving customer engagement
- protecting vulnerable customers
- reducing leakage

Wales

Your final plan forecast should follow the government policy and assess options for further metering beyond the baseline. You should provide details in the relevant sections of the water resources planning tables.

9.3.3 Your planned programme of water efficiency

You have a duty to promote the efficient use of water to your customers. Your WRMP should set out how you will meet this obligation.

Your plan should demonstrate your approach to home and business visits, and customer engagement, to help reduce demand. As a minimum you should consider visits to vulnerable customers, the biggest water users and where the biggest water and financial savings can be made.

You should work with retailers to ensure non-household customers receive the best advice for improving their water efficiency. Water companies in Wales will need to work directly with customers unless they are supplied by a retailer.

You should consider how appropriate the use of different tariffs and incentives is to your company, and you should assess this as part of any options appraisal.

9.3.4 Your planned per capita consumption

Your preferred programme PCC should take into account any relevant future demand reduction planning assumptions set out in the national framework, regional plans and targets set by government or regulators. It should also allow for ambitions that may be set through government policy in future. Specifically, if you are a water company in England your preferred programme should deliver a PCC of 110 litres per person per day by 2050 under your dry year annual average scenario. Companies in Wales should also set out your target PCC under this scenario.

We acknowledge that achieving 110 litres per person per day could be a challenge for some companies given current levels and customer base. We

would not want companies to plan for unrealistic forecasts that could jeopardise future water security. By exception, if you determine that you cannot fully deliver this you must provide clear evidence and justification to customers and stakeholders through your plan, explaining why it is not possible. Justification may also draw on the options and level of investment that would otherwise be required to meet the target.

Your forecasts of PCC should be consistent with the data you include in the business plan (PR24) that you provide to Ofwat as part of its price review process. You should refer to Ofwat's consistent reporting guidance (https://www.ofwat.gov.uk/publication/reporting-guidance-per-capita-consumption/) when producing your forecasts. If the level of PCC and demand reduction set out in your WRMP is greater than that allowed for in your business plan or final determination, you should still meet your commitments in your WRMP.

9.3.5 Drought permits and orders

England

You should plan, where appropriate, to use drought permits and orders less frequently in future, particularly in sensitive areas. You should use your understanding of the environmental risks associated with each permit, to inform your planned use of drought permits and orders. Where drought permits and orders are assessed and included through best value plans, the utilisation of other available sources of supply and transfer should be prioritised first.

Wales

You should only consider supply drought measures as options where they have no significant environmental impacts associated with them.

9.4 Environment and society

It is important the environment and society are properly considered in your decision-making. Your plan should deliver a protected and improved environment and provide benefit to society. You should demonstrate that your plan provides overall positive environmental benefit. For example, you should ensure that the options you are putting in place have less impact on the environment than any environmental problems you are trying to solve.

There are a number of ways in which the environment and society can be considered in decision-making. In England, you should use your SEA, biodiversity net gain and natural capital assessments to inform your

decision-making. If you are a water company within or affecting England, the supplementary guidance 'Environment and society in decision-making' sets out how you might consider these approaches. You can also consider alternative approaches if you believe them to be more appropriate. If so, you should discuss your approach with the relevant regulator.

If you are a company within or affecting Wales, the supplementary guidance 'Environment and society in decision-making (Wales)' sets out how you might consider these approaches. You can also use alternative approaches if you consider them to be more appropriate. If so, you should discuss your approach with Natural Resources Wales.

9.4.1 Natural capital

Natural capital is defined in the 25 Year Environment Plan (England) as 'the elements of nature that either directly or indirectly provide value to people'. You should use a natural capital approach as part of your decision-making.

As a new and emerging approach, natural capital incorporates methodologies and approaches (such as ecosystem services) to understand the value that the natural assets provide. For the water industry, these can be substantial. Some water companies have begun to make decisions on smaller scales using various different natural capital approaches.

The supplementary guidance 'Environment and society in decision-making' (England and Welsh versions) sets out the services you should consider and the data sources available.

In Wales, the water strategy (https://gov.wales/water-strategy) outlines how the Welsh Government wants people to value and identify with water, and take responsibility for the supporting the management of natural capital. You should discuss your approach to natural capital with Natural Resources Wales.

9.4.2 Strategic Environmental Assessment

The Environmental Assessment of Plans and Programmes Regulations 2004 require a formal environmental assessment of certain categories of plans and programmes which are likely to have significant effects on the environment. You will need to assess whether your plan, or options in your plan, are subject to SEA. You may wish to refer to:

- UKWIR (2021) Environmental assessments for water resources planning (https://ukwir.org/objectname-209)
- Office of the Deputy Prime Minister (2005) A practical guide to the Strategic Environmental Assessment Directive (https://www.gov.uk/government/publications/strategic-environmental-assessment-directive-guidance)

- The Welsh Government has transposed the Directive into appropriate Regulations: The Environmental assessment of plans and programmes (Wales) Regulations 2004 (http://www.legislation.gov.uk/wsi/2004/1656/contents)

The stages in the SEA process are the following.

1. Screening to determine if SEA required.
2. Setting the context and objectives, establishing the baseline and deciding the scope (and consulting on it).
3. Developing and refining alternatives and assessing effects.
4. Preparing the SEA environmental report.
5. Consulting on the draft plan or programme and the environmental report.
6. Monitoring the significant impacts of implementing the plans or programmes on the environment.

All the stages of SEA are likely to be required where your environmental assessment indicates that the plan is likely to result in significant impacts on the environment.

You must consult with Natural Resources Wales and Cadw if the SEA affects Wales. You must consult with the Environment Agency and Natural England if your plan affects England. You must also consult any other statutory consultees.

9.4.3 Habitats regulations

You must ensure that your WRMP meets the requirements of the Conservation of Habitats and Species Regulations 2017 (the habitats regulations), and must undertake a HRA. You must assess the effects of the plan or project alone, or in combination with, other plans or projects, for example, the effects of supply options on European sites.

HRA refers to the assessment of the likely or potential effects of a plan or project on one or more European sites

- namely designated SACs and SPAs
- candidate SACs (those submitted formally but not yet adopted or designated)
- proposed SPAs and SACs (sites subject to consultation on whether they should be designated)
- proposed and designated Ramsar sites, which are not designated under the Habitats Regulations but under government policy should have the same level of protection as SACs and SPAs

Find more information on designated sites in England (https://designatedsites.naturalengland.org.uk/) and protected areas of land and

sea in Wales (https://naturalresources.wales/guidance-and-advice/environmental-topics/wildlife-and-biodiversity/protected-areas-of-land-and-seas/find-protected-areas-of-land-and-sea/?lang=en).

A plan or project cannot normally be enacted or adopted unless it can be shown that it would not have a likely significant effect on or an adverse effect on the integrity of a European site, alone or in-combination with other plans or projects. In exceptional cases, a plan or project can be authorised or adopted despite having an adverse effect on the integrity of a European site, but only when the following apply:

- there are no alternative solutions to delivering the objectives of the plan or project
- there are Imperative Reasons of Overriding Public Interest
- compensatory measures are secured to maintain the overall coherence of the National Site network

Therefore, it is important that your HRA is started as early as possible during preparation of your plan. This will give the HRA the greatest opportunity to influence the plan and therefore avoid or minimise impacts on European sites. HRA should be seen as an iterative process throughout the plan's development. When impacts are identified you should consider how you can change your plan and projects, before reassessing them. You should not screen out a potential option just because you need to undertake a HRA.

Deferring the Appropriate Assessment for options identified in the HRA as having a 'likely significant effect' may be acceptable in a WRMP context only when all the following criteria have been satisfied:

- where, due to scientific uncertainty of a novel or complex process and a need for more research, information cannot reasonably be gathered at this draft WRMP24 plan stage
- options are proposed for delivery late on in the plan (post 2035 for draft WRMP24) ensuring that there is time to allow for assessment and delivery of alternatives if necessary
- alternatives are included in the plan at company and, or regional level where the avoidance of an adverse effect on integrity of European sites is certain, and these are available, feasible and deliverable
- a commitment is made to pursue alternatives if an adverse effect on integrity of a European site cannot be avoided for the preferred options set

For further information see guidance on HRA assessment and derogation' (https://www.gov.uk/guidance/habitats-regulations-assessments-protecting-a-european-site#derogation).

The main stages in the HRA process are the following.

1. Screening stage, including the test of likely significant effect.
2. Appropriate assessment stage, including deciding the scope and method used for this assessment.
3. Consultation and assessment of effects on integrity of the sites.

You must take account of the effects of the plan or project alone or in combination with other plans or projects.

Natural Resources Wales and Natural England are statutory consultees for the HRA process and you should consult them (as appropriate) at an early stage and particularly during the screening stage. It is a legal duty to have regard to their advice at the appropriate assessment stage. You should also consult the Environment Agency.

9.4.4 Biodiversity gain (England)

The government's 25 Year Environment Plan places great importance on enhancing biodiversity. Your plan should look to contribute to, and enhance, the natural environment by providing opportunities for biodiversity gain and enhancement.

You should consider what actions you can take in your plan to conserve and enhance biodiversity. You should set objectives to further biodiversity and these should influence your decision-making. You should clearly set out in your plan how your WRMP is contributing to enhancing biodiversity and how you are leaving the natural environment in a measurably better state that it is currently. If you conclude that you cannot take any actions to enhance biodiversity you should justify this in your plan.

For schemes that require planning permission, it is likely that you will need to legally provide biodiversity net gain.[footnote 28] You should consider your obligations in the Environment Act 2021. You should consider going beyond what might be required by the Environment Act 2021 to provide an ambitious level of measurable biodiversity net gain. You should incorporate biodiversity gain into the design of your supply and transfer options where reasonable. If this is not possible, you are likely to be obliged to provide this equivalent off-site.

If significant biodiversity gain could be achieved, but at significant additional cost, this can be included as a separate option. You can then consider it in your options appraisal as part of your best value plan.

9.4.5 WFD regulations

You must take account of the requirements of the WFD regulations when considering your preferred plan. This includes the legally binding environmental objectives in the RBMPs.

Drinking Water Protected areas are defined by the WFD regulations with the aim of avoiding deterioration in the quality of raw water sources. This is to reduce the level of purification treatment required in producing drinking water. Water companies should work with others to reduce the level of purification treatment and deliver these requirements in a cost-effective way.

Your plans should include targeted and cost-effective implementation of restoration measures required at the catchment scale, either working solely or in partnership with other catchment based organisations. Catchment and nature based solution options can be presented in your plan and where they have a WAFU benefit to supply-demand balance, they should feature in your WRMP data tables.

Given the uncertainty over the level of confidence you should consider the principles of adaptive management, with associated pre- and post-project monitoring.

9.4.6 Well-being of Future Generations (Wales) Act 2015

If your plan is within or affects Wales you will need to consider your contribution to the well-being goals under the Well-being of Future Generations Act. The well-being act embeds the sustainable development principle into Welsh legislation. Sustainable development is defined as the process of improving the economic, social, environmental and cultural well-being of Wales. This needs to be done by taking action in accordance with the sustainable development principle so that the well-being goals are achieved. You should apply the ways of working as set out within the sustainable development principle in order to maximise your contribution to the well-being goals. The Well-being of Future Generations (Wales) Act (2015) includes a goal to develop a more resilient Wales, which is described as:

> “ a nation which maintains and enhances a biodiverse natural environment with healthy functioning ecosystems that support social, economic and ecological resilience and the capacity to adapt to change (for example climate change).”

9.4.7 Environment (Wales) Act 2016

If your plan is within or affects Wales, you must have regard to the Environment (Wales) Act 2016 in your assessment of the environment.

The State of Natural Resources Report (SoNaRR) highlights the extent and condition of the natural resources in Wales and the challenges they face. It provides more information and examples of its use to assess ecosystem resilience, and opportunities to build resilience in Wales. SoNaRR also includes water efficiency measures.

Other locally designated sites (such as local nature reserves) may be considered lower risk, but you may need to give specific consideration to particular features.

- **Principles of SMNR** – you should embed the principles of SMNR within your plan with the objective of maintaining and enhancing ecosystems. Doing this will also contribute to the well-being goals. You should clearly show that these principles have been truly embedded within your thinking and decision-making.
- **Section 6 – Biodiversity and resilience of ecosystems duty** – you must seek to maintain and enhance biodiversity so far as is consistent with the proper exercise of your functions and in so doing promote the resilience of ecosystems.
- **Section 7 – biodiversity lists** – you must ensure that you take all reasonable steps to maintain and enhance the species and habitats included within the section 7 biodiversity lists and should consider the Nature recovery action plan for Wales.
- **Area statements and Natural Resources Policy** – you should consider how your plan (where it affects Wales) contributes to the priorities set out in the Natural Resources Policy (NRP). Area statements are the place-based implementation of the NRP. You should consider the priorities, risks and opportunities highlighted within any area statement relevant to your plan and how collaborative actions linked to these could result in improved outcomes for people and the environment.
- **Carbon reduction** – your plan (where it affects Wales) should support a policy of reducing the carbon footprint associated with the abstraction, storage, treatment and provision of water. Your plan should support the reduction in greenhouse gas emissions at least in line with the latest Welsh Government carbon budget.

9.4.8 Other considerations

You should seek to ensure any development delivers wider environmental gains relevant to the local area, such as reduced flood risk, improvements to air or water quality, or increased access to natural greenspace.

9.5 Resilience

Your final plan should improve the resilience of your supplies, particularly where your drought vulnerability assessment indicated that you were vulnerable to droughts of a particular severity or magnitude. You should also ensure that the options you select are resilient to droughts and other hazards such as weather extremes. You could use drought vulnerability framework or equivalent approach to do this.

If your preferred programme provides wider resilience benefits, you should clearly set out what risks you are addressing and how the options will reduce these risks. You should clearly set out the additional resilience benefits expected from any schemes you are accelerating through transitional funding in advance of AMP8. You should explain how the risks you are addressing in your plan sit within the wider risk faced by your company and region.

Your preferred plan should not include any final planning deficits. Achieving resilience to a 1 in 500 year drought (where applicable) could leave you with some initial deficits at the beginning of the planning period while you implement your preferred best-value solutions. If this is the case you should show the additional drought measures you would use to reach this level of resilience in the interim. Alternatively you should demonstrate your reduced level of service, as a selected option, for this interim period and present this in your planning tables.

If you have large strategic schemes, you can use the drought vulnerability framework to assess their contribution to your resilience. Alternatively you could use the drought vulnerability assessment to demonstrate the improved resilience of your final plan.

9.5.1 Lessons from 2022 Drought

The 2022 prolonged dry weather and drought demonstrated weaknesses in resilience to managing customer demands during hot weather. This should be reviewed and addressed in both the WRMP update and the next drought plan.

Your plan should clearly include an appendix to demonstrate how experiences from 2022 have been considered. You should set out any lessons you have identified through the 2022 prolonged dry weather and drought event and actions you are taking. This should include changes you have made to your plan as a result and further work you are planning to undertake.

Your review should reflect knowledge gained from the event and the implications to your plan, such as:

- considering how you can improve the resilience of your supply system to similar events
- considering whether any new temporary schemes implemented during the drought could be made permanent, ensuring they are assessed as an option in your plan
- including any newly identified drought permits as an option in your plan
- ensuring the assumed benefits in your options list for drought interventions (such as drought permits/orders and Temporary Use Bans) implemented this year reflect your latest understanding

- reviewing your planned level of service
- updating deployable outputs where you have gained an improved understanding of how your sources respond to drought
- ensuring your planning assumptions for dead storage and emergency storage are accurate
- reviewing your demand forecast assumptions, following your experience of the impact of 2022 drought and heatwaves on household and non-household customer demand, including the extent and duration of peak demands
- whether you should introduce dry year critical period scenarios if you do not currently use them
- ensuring you consider high demand (leakage) resulting from all extreme weather - including heat waves, as well as freeze-thaw events
- considering whether you need to include any schemes as part of your business plan to improve connectivity and zone integrity
- reflecting any updates to bulk supply agreements, including pain-share agreements discussed during the drought
- reviewing your forecast outage, as this is particularly important in acute drought events

Section 10 – How to compile your best value plan

This section describes how you should compile your best value plan. The following terminology is used in this section:

- outcome – achieving a best value plan as described within this document
- objectives – high level deliverables such as ‘increasing resilience’
- metrics – measurable indices for best value which relate to the objectives

You should undertake the following as you develop your best value plan, with reference to the considerations set out in Section 9:

- set clear objectives for your plan (sub-section 10.2)
- identify and consider best value metrics (sub-section 10.3)
- identify your least-cost plan to provide a benchmark for your other programmes (sub-section 10.4)
- develop a decision-making approach (sub-section 10.5)
- appraise and compare different programmes (sub-section 10.6)
- undertake effective engagement (sub-section 10.7)
- consider whether an adaptive plan is appropriate (sub-section 10.8)

- test your plan (sub-section 10.9)
- present and justify your preferred plan clearly (sub-section 10.10)

10.1 Methodologies

You should consider the following methodologies in your decision-making:

- UKWIR (2002) Economics of balancing supply and demand (EBSD) (https://ukwir.org/reports/02-WR-27-4/67206/The-Economics-of-Balancing-Supply--Demand-EBSD-Guidelines)
- UKWIR (2016) WRMP 2019 methods – decision making process guidance (https://ukwir.org/WRMP-2019-Methods-Decision-Making-Process-Guidance)
- UKWIR (2020) Deriving a best value water resources management plan (https://ukwir.org/view/$KZrW2YG!/)

Your problem characterisation assessment should inform your decision-making method. Any specific complexities can be examined through the UKWIR guidance on risk-based planning (https://ukwir.org/146387?object=151120) (2016) and through appropriate sensitivity analysis.

You should refer to the UKWIR Economics of balancing supply and demand (ESBD) (https://ukwir.org/reports/02-WR-27-4/67206/The-Economics-of-Balancing-Supply--Demand-EBSD-Guidelines) when you produce a least cost plan as a benchmark to appraise your other programmes against.

The UKWIR decision making process (https://ukwir.org/WRMP-2019-Methods-Decision-Making-Process-Guidance) guidance describes decision-making tools and supporting methods available to you as an alternative to EBSD. You should can also consider whether an adaptive plan would be appropriate.

You may find the UKWIR Deriving a best value water resources management plan (https://ukwir.org/view/$KZrW2YG!/) helpful in developing your best value planning approach but you do not have to use it. The guidance in this section sets out the expectations of regulators.

You should also consider the following supplementary guidance:

- adaptive planning (see also sub-section 10.6)
- environment and society in decision-making (England)
- environment and society in decision-making (Wales)

10.2 Set clear objectives for your plan

Your plan should clearly set out the objectives you aim to achieve in your best value WRMP or the regional plan. You should discuss these objectives with regulators and stakeholders during the pre-consultation of your plan. These objectives should be defined at the start of the planning process and be used consistently throughout the programme appraisal. You should explain your reasons for selecting your objectives. Your objectives should be informed by government and regulator policy and the aspirations of your company, customers and stakeholders. Your objectives may also be informed by the regional plan objectives, where applicable.

You can refine and update your objectives during the process of preparing your plan, but should clearly explain your reason for any changes and the subsequent impact on the preferred programme.

Your plan should explain how your preferred programme delivers the outcome and meets your objectives.

10.3 Metrics

You should consider a broad range of best value metrics, monetised where possible for use in your decision-making, informed by your objectives. You can consider the list of factors in sub-section 9.2 when compiling your metrics, although this list is not exhaustive and you can consider others.

Your metrics should be determined prior to beginning assessment of feasible options. You should consider the level at which it is appropriate to apply these metrics, for example at the individual option or programme level.

If your plan is affected by a regional plan which has specific metrics, you should use the same metrics in your WRMP, for transparency. You should consider whether any additional metrics are required in your WRMP. Using the same metrics is only relevant to those parts of your plan directly affected by a regional plan.

You are encouraged to consider a wide a range of metrics, risks and values, which should be supported by robust data and analysis. This will ensure that the delivery of long term outcomes and objectives for regional and company plans can be measured over time. These objectives may be used to monitor your performance against the plan, where appropriate.

Your selected metrics should inform a programme that can deliver net benefits or value beyond meeting the minimum supply duty requirements in

a least-cost manner. You should develop your portfolio of metrics over several planning cycles as better information becomes available.

In the selection and application of your best value metrics you should clearly identify where there is potential risk of double counting of benefits and how you have accounted for this in your plan development. If you apply weightings to your best value metrics you should provide appropriate justification for the approach used to determine these. You should apply additional scrutiny to any metrics that you assess using a subjective approach to ensure they are robust and do not introduce any bias. The accuracy, uncertainty and sensitivity of the costs and metrics used should be clearly outlined. You should re-optimise the preferred programme if changes are made to the objectives or metrics.

Tables 4 and 5b include columns for you to report against metrics as values and profiles respectively. You should report against best value metrics used to assess options here. You should clearly define the units you have used, including monetised where possible.

Not all elements of decision-making can be adequately captured through metrics. Where this is the case you should ensure you set out how you will appraise these and capture them in your decision-making. You should also clearly set out any uncertainty or assumptions related to your chosen metrics. You could consider sensitivity analysis around your metrics when they are uncertain or subjective.

10.4 Least cost programme

You should produce a least cost programme as a benchmark to appraise your other programmes against.

The least cost plan should meet your statutory requirements and be informed by your SEA and HRA. The least cost plan should include policy expectations around demand management.

10.5 Your decision-making approach

You should develop a decision making approach to appraise and select options for inclusion in the preferred programme in your best value plan.

You decision-making approach should be clear and transparent and set out in your plan and should take account of the aspects of best value set out in Section 9.

Your plan should present clearly, robustly and transparently how your best value metrics have been considered and applied in the selection of the preferred programme to deliver your set objectives.

You should demonstrate your decision-making approach is consistent with other areas of your business planning to ensure that all long term decision making takes place through a consistent approach. Customers, interested parties and regulators should be able to understand how and why you have decided on your preferred programme and why you have discounted other solutions.

Whichever decision-making method you choose, your final set of options should be justified economically, socially and environmentally. You should clearly describe how the decision on a preferred programme has been reached and how you engaged the Board with the process. You should consider the aspects of the best value plan set out in Section 9.

10.6 Programme appraisal

You should undertake an appraisal of alternative programmes to justify your chosen preferred programme. You should carefully compile and consider a range of programmes that demonstrate real differences in focus, but which still deliver your objectives.

You should undertake sensitivity testing and scenario testing of your programmes to understand any tipping points which might affect your decision-making and programme content. It is important you undertake a thorough programme appraisal and clearly own and justify the decisions regarding your preferred programme.

In your programme appraisal, you should consider the least-cost programme (sub-section 10.4) and a ‘best environment and society’ programme as alternative programmes as a minimum. The ‘best environment and society’ programme should be one that is formed using the relevant environment and society supplementary guidance and therefore takes into account the SEA and HRA, biodiversity net gain and natural capital where appropriate. The number of alternative programmes you should consider will depend on the complexity of your problem and the options available to solve it.

You should consider the following when undertaking your programme appraisal:

- review your programmes against your objectives, your best value metrics, government policy and ambitions and other considerations set out in Section 9

- describe the impacts of programmes and clearly set out the costs and benefits of each programme. This should include the following:
  - a list of the options selected in the programme
  - monetised, quantitative and qualitative descriptions of the impacts of the programme
  - analysis and description of the significance of impacts
  - a total delivery cost of each programme including a profile of costs against time
- detail of the programmes including all costs and benefits. If you have used metrics to help you define programmes, you should look at the supporting data that informed these metrics. For example if you have an environmental and social metric, you should consider the actual environmental and social costs and benefits of each programme, not just the metric in your programme appraisal. A carbon cost impact should be provided for each programme.

You should provide a summary table of the programmes you have considered which includes the cost and the result of assessing the options and programmes against each best value metric you have applied in your decision-making. This summary of programmes should be accessible for customers, stakeholders and regulators and enable them to understand your decision-making process.

The costs and benefits of your best value plan, least-cost programme and the other programmes you appraise, should be clearly identified and comparable. Where you are considering multiple benefits, you should be clear in your best value plan that these additional benefits identified could not be delivered more efficiently through other means.

10.7 Effective engagement

Your plan should demonstrate effective engagement with regulators, stakeholders and customers at key stages throughout the development of the plan. Your proposed approach to best value planning should be part of the information you present at the pre-consultation phase. You should continue your engagement through the development of your plan.

The costs and benefits of the preferred programme and alternatives, including comparison to the least cost programme benchmark must be clearly presented to regulators, stakeholders and customers. It should be clear how this engagement has informed the decisions made within the plan.

10.8 Adaptive planning

An adaptive plan is a framework which allows you to consider multiple preferred programmes or options. The adaptive plan should set out how you will make decisions within this framework.

You should consider an adaptive plan if you have:

- significant uncertainty at any stage in the planning period, particularly in the first 5 to 10 years of your plan
- a strategic decision in the plan's medium term, which has a long lead-in time
- large long term uncertainty which might lead you to consider different preferred options

You should consider how your adaptive plan will affect your headroom allowance. You must make sure you are not double-counting uncertainty. You should make the differences between the costs, benefits and choice of solution choice and your adaptive pathways clear. The plan should identify the key scenarios (including any scenarios required for PR24) that you have tested (see section 10.9) and how the pathways best adapt to these. This includes the following.

Single pathway

You can present a single pathway in detail aligned to the most likely scenario or set of scenarios (your preferred plan). The adaptive pathways are then those changes in the future that move away from this most likely scenario which are linked to clear triggers.

Core pathway

You must present a core pathway that includes activities no- and low-regrets activities, as described by Ofwat (including delivery of additional option value, to allow further flexibility in the future). It must show investments that are likely to deliver outcomes efficiently under a wide range of plausible future scenarios. You should provide it in sufficient detail to show understanding of needs, triggers and investments that make up this pathway. You should describe the differences between the most likely and core pathways in the selected options identified. This will help with PR24 requirements. .

10.9 Testing your plan

While your preferred plan should set out the decisions you will take based on your best understanding of the future; the future is uncertain. Therefore you should also clearly describe the biggest areas of uncertainty and define which could have the biggest influence on your plan. You should undertake scenario testing to demonstrate:

- the resilience of your plan to a range of risks including known risks to option yield and deliverability
- that you have considered these risks in developing your plan and the possible timings of these impacts, including possible future sustainability changes
- the plan is resilient to minor changes to supply and demand forecasts in the near future and moderate changes as the plan progresses

You should, as a minimum, test the sensitivity of your plan to changes in:

- population growth
- climate change
- sustainability changes
- resilience
- year in which the 1 in 500 level of drought resilience (where applicable) is achieved to identify if any cost savings could be achieved or whether earlier delivery could provide better overall value
- risk profile
- delivery of your preferred programme – both demand management and supply options

You should use scenario testing to help validate your preferred programme or to assess whether alternative programmes would be more appropriate. It could also inform whether an adaptive plan might be appropriate. Scenario testing could help to:

- justify a flexible or fixed approach
- justify an adaptive plan
- demonstrate when important decisions should be made
- identify what you should monitor to manage risk
- identify alternatives or how the plan may change in the future in response to new evidence

10.10 Presenting and justifying your plan

Your preferred best value programme should be robustly and transparently justified. You should clearly describe how the decision on a preferred

programme has been reached, how you have reflected the regional plan (if applicable), and how you engaged the Board with the process.

You should provide evidence that you have accounted for the impact of uncertainty and undertaken sensitivity analysis. You should consider ways to present information clearly so that regulators, stakeholders and customers can understand how the programmes compare.

Your plan should be efficient and affordable with distributional impacts, societal equity and intergenerational equity considerations transparently discussed.

You should provide a separate assessment of the costs and benefits and impacts of your long term environmental destination. You should discuss this with regulators through the regional plan development (where applicable) and you should consult on it with stakeholders before it is presented in your WRMP.

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1. Please note that the Environment Act 2021 may amend this legislation. The UK and Welsh Governments will notify you of any changes by amending this guidance if requirements change during the preparation of your plan.
2. Regional plans are a requirement by Defra for 5 regional groups within England. Some parts of Wales may be included in a regional plan.
3. The next methodology for Ofwat's price review 2024 (PR24) (https://www.ofwat.gov.uk/regulated-companies/price-review/2024-price-review) is due to be finalised in 2022.
4. Distributional impacts relate to cost and performance impacts on different customer types at company level and different companies at regional plan level.
5. Regional plans are a requirement by Defra for five regional groups within England.
6. The Environment Act 2021 strengthened this obligation to one of conserve and enhance biodiversity. It also requires 'Public Authorities' to determine policies and specific objectives as appropriate to further the biodiversity objective and identify actions they can properly take.
7. NAV appointments are made under the Water Industry Act 1991 (Sections 7 and 8) and enable Ofwat to replace the existing water supply and/or sewerage undertaker for another for a specific area. NAVs undertake much of the same duties and responsibilities as the previous statutory company, including the requirement to produce WRMPs.
8. This is available on request from the contact details set out in Section 1.
9. Also referred to as '1 in 500 year'.

10. This approach is used for simplicity for calculating the supply-demand balance in the baseline scenario. This is unrelated to any funding decisions that Ofwat may take for the price review in 2024 (PR24).
11. Supply drought measures are those that increase available supplies during a drought, for example drought permits, drought orders and re-commissioning sources. Demand-side measures would include temporary use bans and non-essential use bans.
12. The point of failure is defined as using exceptional demand restrictions associated with emergency drought orders, such as standpipes.
13. Relevant is where there is a new planned transfer from Wales to England or where you have justified the need to plan for a level of 1 in 500 year drought within a zone.
14. For further information on the system response deployable output see the supplementary guidance ‘Planning to be resilient to a 1 in 500 drought’.
15. Supply drought measures are those that increase available supplies during a drought, for example drought permits, drought orders and re-commissioning sources.
16. The representative period is usually the 6-year period used to define the no deterioration baseline in the river basin management plans.
17. Wholesomeness requirements are set out in the Water Supply (Water Quality) Regulations 2016 (as amended) (in England) and the Water Supply (Water Quality) Regulations 2018 (in Wales), and associated amendments.
18. The documents mentioned in this paragraph are available on request from the contact details set out in Section 1.
19. These commitments should be reflected in the baseline up until 2024/25. Beyond this you should assume static leakage. Your final plan however should assume or exceed your WRMP19 leakage commitments. See sub-section 9.3.1 for further details about the expectations for your final plan level of leakage.
20. Available on request from the contact details set out in Section 1.
21. MOSL is the market operator of the non-household water market
22. See supplementary guidance ‘Environment and society in decision-making’ for further details (English and Welsh versions).
23. See supplementary guidance ‘Environment and society in decision-making’ for further details (English and Welsh versions).
24. See Ofwat’s 2019 price review final determinations (https://www.ofwat.gov.uk/regulated-companies/price-review/2019-price-review/final-determinations/).
25. See supplementary guidance ‘Environment and society in decision-making’ for further details (English and Welsh versions).

26. This means any options you plan to deliver should be delivered in a cost effective way.
27. The outcome of increased benefits will be typically measured relative to the 'least cost' programme that delivers the minimum requirements to meet supply duties.
28. For example, if a leakage reduction of 20% was required by 2030, then level of leakage reduction should be a plan metric, with a minimum of 20% by 2030 set as an optimisation criteria and suitable range of leakage options with varying benefits and lead times considered in producing an optimal plan. When considering other metrics it may be best value or indeed lowest cost to deliver a 25% reduction by 2030. This would be missed if reduction by 20% by 2030 was pre-selected as an option.

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NATURAL ENGLAND

Natural England's Position Statement for Applications within the Sussex North Water Supply Zone

September 2021 – Interim Approach

Please take the following as Natural England's substantive advice for all applications which fall within Sussex North's Water Supply Zone.

Sussex North Water Supply Zone

Arun Valley SPA, SAC and Ramsar Site- Sussex North Water Supply Zone

The Sussex North Water Supply Zone includes supplies from a groundwater abstraction which cannot, with certainty, conclude no adverse effect on the integrity of;

- Arun Valley Special Area Conservation (SAC)
- Arun Valley Special Protection Area (SPA)
- Arun Valley Ramsar Site.

As it cannot be concluded that the existing abstraction within Sussex North Water Supply Zone is not having an impact on the Arun Valley site, we advise that developments within this zone must not add to this impact. This is required by recent caselaw, Case C-323/17 People over wind and Sweetman. Ruling of CJEU (often referred to as sweetman II) and Coöperatie Mobilisation for the Environment and Vereniging Leefmilieu Case C-293/17 (often referred to as the Dutch Nitrogen cases).

Between them these cases require Plans and Projects affecting sites where an existing adverse effect is known (i.e. the site is failing its conservation objectives), to demonstrate certainty that they will not contribute further to the existing adverse effect or go through to the latter stages of the Regulations (no alternatives IROPI etc).

Developments within Sussex North must therefore must not add to this impact and one way of achieving this is to demonstrate water neutrality.

In addition, the Gatwick Sub regional Water Cycle Study concluded that water neutrality is required for Sussex North to enable sufficient water to be available to the region.

The definition of water neutrality is the use of water in the supply area before the development is the same or lower after the development is in place.

Strategic approach

Natural England has advised that this matter should be resolved in partnership through Local Plans across the affected authorities, where policy and assessment can be agreed and secured to ensure water use is offset for all new developments within Sussex North. To achieve this Natural England is working in partnership with all the relevant authorities to secure water neutrality collectively through a water neutrality strategy.

Whilst the strategy is evolving, Natural England advises that decisions on planning applications should await its completion. However, if there are applications which a planning authority deems critical to proceed in the absence of the strategy, then Natural England advises that any application needs to demonstrate water neutrality. We have provided the following agreed interim approach for demonstrating water neutrality;

Minimising water use of new builds.

- Complete a water budget (based on occupancy)
- All new builds to demonstrate that they can achieve strict water targets (e.g., 85L/pp/day*)

  This can be achieved by measures such as:

- Grey water recycling (advantage of being reliable in hot dry weather);
- Rainwater harvesting;
- Water efficient fixings (such as shower aerators) to demonstrably reduce demand-this would need to be suitably certain.

In addition, water offsetting is required

- One way to achieve this is retrofitting of council owned properties/commercial buildings-located within Sussex North. Examples include:

- Grey water recycling- (for example there are clear opportunities for commercial properties).
- Rainwater harvesting of commercial settings;
- Installation of water reduction fittings in Council-owned buildings.

These measures need to be implemented until such time as a more sustainable water supply has been secured.

It will also need to be ensured that measures are not already proposed (for example in Southern Water's Management Plan) to avoid double-counting.

Any mitigation must be suitably certain in order to comply with the Habitats Regulations and Caselaw.

If the application cannot demonstrate, through an appropriate assessment, the required water neutrality, we advise that it is either revised to achieve this in line with the above or awaits completion of the strategic approach.

The securing of water neutrality is a matter which needs to be resolved at a strategic level and Natural England is working with the relevant authorities and the water company to achieve this. In light of this, Natural England will not be engaging with individual planning applications whilst the strategy is evolving.

***This this is the reasonably achievable figure with the above measures based on the early data from the strategic solution and may be subject to change as the strategic solution evolves.**

Town and Country Planning Act 1990 c. 8
s. 78 Right to appeal against planning decisions and failure to take such decisions.

Law In Force With Amendments Pending

Version 17 of 18

12 February 2024 - Present

Subjects
Planning

England

[

78.— Right to appeal against planning decisions and failure to take such decisions.

(1) Where a local planning authority—

(a) refuse an application for planning permission or grant it subject to conditions;

[

(aa) refuse an application for permission in principle;

] [1]

(b) refuse an application for any consent, agreement or approval of that authority required by a condition imposed on a grant of planning permission or grant it subject to conditions; or

(c) refuse an application for any approval of that authority required under a development order [, a local development order [, a Mayoral development order] [3] or a neighbourhood development order] [2] or grant it subject to conditions,

the applicant may by notice appeal to the Secretary of State.

(2) A person who has made such an application [to the local planning authority] [4] may also appeal to the Secretary of State if the local planning authority have done none of the following—

(a) given notice to the applicant of their decision on the application;

(aa) given notice to the applicant that they have exercised their power under [section 70A or 70B or 70C] [7] to decline to determine the application;

(b) given notice to him that the application has been referred to the Secretary of State in accordance with directions given under section 77,

within such period as may be prescribed by the development order [or in relation to a biodiversity gain plan specified in regulations under paragraph 16(a) of Schedule 7A (biodiversity gain in England: regulations about determinations)] [8] or within such extended period as may at any time be agreed upon in writing between the applicant and the authority.

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(3) Any appeal under this section shall be made by notice served within such time and in such manner as may be prescribed by a development order [or, in relation to a biodiversity gain plan specified in regulations under paragraph 16(a) of Schedule 7A] [9] .

(4) The time prescribed for the service of such a notice must not be less than—

(a) 28 days from the date of notification of the decision; or

(b) in the case of an appeal under subsection (2), 28 days from the end of the period prescribed as mentioned in subsection (2) or, as the case may be, the extended period mentioned in that subsection.

(4A) A notice of appeal under this section must be accompanied by such information as may be prescribed by a development order.

(4B) The power to make a development order under subsection (4A) is exercisable by—

(a) the Secretary of State, in relation to England;

(b) the Welsh Ministers, in relation to Wales.

(4C) Section 333(5) does not apply in relation to a development order under subsection (4A) made by the Welsh Ministers.

(4D) A development order under subsection (4A) made by the Welsh Ministers is subject to annulment in pursuance of a resolution of the National Assembly for Wales.

(5) For the purposes of the application of [sections 79(1) and (3), 253(2)(c), 266(1)(b), 288(10)(b), 319A(7)(b) and 319B(7)(b)] [14] in relation to an appeal under subsection (2), it shall be assumed that the authority decided to refuse the application in question.

] [15]

Wales

78.— Right to appeal against planning decisions and failure to take such decisions.

(1) Where a local planning authority—

(a) refuse an application for planning permission or grant it subject to conditions;

[

(aa) refuse an application for permission in principle;

] [1]

(b) refuse an application for any consent, agreement or approval of that authority required by a condition imposed on a grant of planning permission or grant it subject to conditions; or

(c) refuse an application for any approval of that authority required under a development order [, a local development order [, a Mayoral development order] [3] or a neighbourhood development order] [2] or grant it subject to conditions,

the applicant may by notice appeal to the Secretary of State.

(2) A person who has made such an application [to the local planning authority] [4] may also appeal to the Secretary of State if the local planning authority have [done none of the following] [5] —

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(a) given notice to the applicant of their decision on the application; [...] [6]

[

(aa) given notice to the applicant that they have exercised their power under [section 70A or 70C] [7] to decline to determine the application;

] [6]

(b) given notice to him that the application has been referred to the Secretary of State in accordance with directions given under section 77,

within such period as may be prescribed by the development order [or in relation to a biodiversity gain plan specified in regulations under paragraph 16(a) of Schedule 7A (biodiversity gain in England: regulations about determinations)] [8] or within such extended period as may at any time be agreed upon in writing between the applicant and the authority.

(3) Any appeal under this section shall be made by notice served within such time and in such manner as may be prescribed by a development order [or, in relation to a biodiversity gain plan specified in regulations under paragraph 16(a) of Schedule 7A] [9] .

(4) The time prescribed for the service of such a notice must not be less than—

(a) 28 days from the date of notification of the decision; or

(b) in the case of an appeal under subsection (2), 28 days from the end of the period prescribed as mentioned in subsection (2) or, as the case may be, the extended period mentioned in that subsection.

[

(4A) A notice of appeal under this section must be accompanied by such information as may be prescribed by a development order.

[

(4AA) An appeal under this section may not be brought or continued against the refusal of an application for planning permission if—

(a) the land to which the application relates is in Wales,

(b) granting the application would involve granting planning permission in respect of matters specified in an enforcement notice as constituting a breach of planning control, and

(c) on the determination of an appeal against that notice under section 174, planning permission for those matters was not granted under section 177.

(4AB) An appeal under this section may not be brought or continued against the grant of an application for planning permission subject to a condition, if—

(a) the land to which the application relates is in Wales,

(b) an appeal against an enforcement notice has been brought under section 174 on the ground that the condition ought to be discharged, and

(c) on the determination of that appeal, the condition was not discharged under section 177.

] [11] [...] [12] [

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(4BA) Once notice of an appeal under this section to the Welsh Ministers has been served, the application to which it relates may not be varied, except in such circumstances as may be prescribed by a development order.

(4BB) A development order which makes provision under subsection (4BA) must provide for an application which is varied to be subject to such further consultation as the Welsh Ministers consider appropriate.

][13]][10]

(5) For the purposes of the application of [sections 79(1) and (3), 253(2)(c), 266(1)(b), 288(10)(b), 319A(7)(b) and 319B(7)(b)][14] in relation to an appeal under subsection (2), it shall be assumed that the authority decided to refuse the application in question.

Notes

1 Added by Housing and Planning Act 2016 c. 22 Sch.12 para.21 (July 13, 2016)

2 Substituted by Localism Act 2011 c. 20 Sch.12 para.11 (November 15, 2011 for the purpose specified in 2011 c.20 s.240(5)(j); January 15, 2012 for purposes specified in SI 2012/57 art.4(1)(h) subject to transitional and savings provisions specified in SI 2012/57 arts 6, 7, 9, 10 and 11; April 6, 2012 otherwise subject to SI 2012/628 arts 9, 12, 13, 16 and 18-20)

3 Words inserted by Infrastructure Act 2015 c. 7 Sch.4(2) para.12 (February 12, 2015 in so far as it confers power to make provision by regulations or development order within the meaning of 1990 c.8; not yet in force otherwise)

4 Words inserted by Growth and Infrastructure Act 2013 c. 27 Sch.1 para.8 (May 9, 2013 for the power to make regulations or orders as specified in SI 2013/1124 art.2; October 1, 2013 except as specified in SI 2013/2143 art.2(1)(a); October 1, 2014 otherwise)

5 Words substituted by Planning and Compensation Act 1991 c. 34 Pt I s.17(2) (September 25, 1991)

6 S.78(2)(aa) substituted for words by Planning and Compensation Act 1991 c. 34 Pt I s.17(2) (September 25, 1991)

7 Words inserted by Localism Act 2011 c. 20 Pt 6 c.5 s.123(3) (April 6, 2012 subject to SI 2012/628 arts 9, 12, 13, 16 and 18-20)

8 Words inserted by Biodiversity Gain (Town and Country Planning) (Consequential Amendments) Regulations 2024/49 Pt 4 reg.8(a) (February 12, 2024 the day on which 2021 c.30 Sch.14 Pt 2 para.3 comes into force)

9 Words inserted by Biodiversity Gain (Town and Country Planning) (Consequential Amendments) Regulations 2024/49 Pt 4 reg.8(b) (February 12, 2024 the day on which 2021 c.30 Sch.14 Pt 2 para.3 comes into force)

10 Added by Planning Act 2008 c. 29 Sch.11 para.2 (November 26, 2008 for purposes specified in 2008 c.29 s.241(1)(a); April 6, 2009 in relation to England; April 30, 2012 otherwise)

11 Added by Planning (Wales) Act 2015 anaw. 4 Pt 7 s.45 (September 6, 2015 for the purposes of enabling the Welsh Ministers to exercise any function of making regulations or orders by statutory instrument under any enactment as amended by 2015 anaw 4 Pts 3-8; March 16, 2016 subject to transitional provisions specified in SI 2016/52 art.15 otherwise)

12 Repealed by Planning (Wales) Act 2015 anaw. 4 Sch.7 para.7(2) (September 6, 2015)

13 Added by Planning (Wales) Act 2015 anaw. 4 Pt 7 s.47(1) (September 6, 2015 for the purposes of enabling the Welsh Ministers to exercise any function of making regulations or orders by statutory instrument under any enactment as amended by 2015 anaw 4 Pts 3-8; May 5, 2017 subject to transitional provisions specified in SI 2017/546 art.4 otherwise)

14 Words substituted by Town and Country Planning (Determination of Procedure) (Wales) Order 2014/2773 Sch.1 para.3 (November 11, 2014)

15 Words inserted by Planning and Compulsory Purchase Act 2004 c. 5 Pt 4 s.43(2) (April 6, 2009 as SI 2009/384)

Part III CONTROL OVER DEVELOPMENT > Secretary of State's powers as respects planning applications and decisions > s. 78 Right to appeal against planning decisions and failure to take such decisions.

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s. 288 Proceedings for questioning the validity of other orders, decisions and directions.

Law In Force

Version 4 of 4

1 March 2016 - Present

Subjects
Planning

Keywords
Appointments; Decisions; High Court; Judicial review; Nationally significant infrastructure projects; Planning applications; Ultra vires; Validity; Wales; Welsh ministers

288.— Proceedings for questioning the validity of other orders, decisions and directions.

(1) If any person—

(a) is aggrieved by any order to which this section applies and wishes to question the validity of that order on the grounds—

(i) that the order is not within the powers of this Act, or

(ii) that any of the relevant requirements have not been complied with in relation to that order; or

(b) is aggrieved by any action on the part of the Secretary of State [or the Welsh Ministers] [1] to which this section applies and wishes to question the validity of that action on the grounds—

(i) that the action is not within the powers of this Act, or

(ii) that any of the relevant requirements have not been complied with in relation to that action,

he may make an application to the High Court under this section.

[

(1A) If a person is aggrieved by a relevant costs order made in connection with an order or action to which this section applies and wishes to question its validity, the person may make an application to the High Court under this section (whether or not as part of an application made by virtue of subsection (1)) on the grounds—

(a) that the relevant costs order is not within the powers of this Act, or

(b) that any of the relevant requirements have not been complied with in relation to the order.

] [2]

(2) Without prejudice to subsection (1) [or (1A)] [3] , if the authority directly concerned with any order to which this section applies, or with any action on the part of the Secretary of State [or the Welsh Ministers] [4] to which this section applies, [or with any relevant costs order,] [5] wish to question the validity of that order or action on any of the grounds mentioned in subsection (1) [or (1A) (as the case may be)] [6] , the authority may make an application to the High Court under this section.

[...] [7]

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(4) This section applies to any such order as is mentioned in subsection (2) of section 284 and to any such action on the part of the Secretary of State [or the Welsh Ministers] [8] as is mentioned in subsection (3) of that section.

[

(4A) An application under this section may not be made without the leave of the High Court.

(4B) An application for leave for the purposes of subsection (4A) must be made before the end of the period of six weeks beginning with the day after—

(a) in the case of an application relating to an order under section 97 that takes effect under section 99 without confirmation, the date on which the order takes effect;

(b) in the case of an application relating to any other order to which this section applies, the date on which the order is confirmed;

(c) in the case of an application relating to an action to which this section applies, the date on which the action is taken;

(d) in the case of an application relating to a relevant costs order, the date on which the order is made.

(4C) When considering whether to grant leave for the purposes of subsection (4A), the High Court may, subject to subsection (6), make an interim order suspending the operation of any order or action the validity of which the person or authority concerned wishes to question, until the final determination of—

(a) the question of whether leave should be granted, or

(b) where leave is granted, the proceedings on any application under this section made with such leave.

] [9]

(5) On any application under this section the High Court—

(a) may, subject to subsection (6), by interim order suspend the operation of [any order or action] [10] , the validity of which is questioned by the application, until the final determination of the proceedings;

(b) if satisfied that [any such order or action] [11] is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that order or action.

[

(6) The High Court may not suspend a tree preservation order under subsection (4C) or (5)(a).

] [12]

(7) In relation to a tree preservation order, or to an order made in pursuance of section 221(5) , the powers conferred on the High Court by subsection [(4C) or] [13] (5) shall be exercisable by way of quashing or (where applicable) suspending the operation of the order either in whole or in part, as the court may determine.

(8) References in this section to the confirmation of an order include the confirmation of an order subject to modifications as well as the confirmation of an order in the form in which it was made.

[

(9) In this section—

"relevant costs order" has the same meaning as in section 284;

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"the relevant requirements" —

(a) in relation to any order or action to which this section applies, means any requirements of this Act or of the Tribunals and Inquiries Act 1992, or of any order, regulations or rules made under either of those Acts, which are applicable to that order or action;

(b) in relation to a relevant costs order, means any requirements of this Act, of the Local Government Act 1972 or of the Tribunals and Inquiries Act 1992, or of any order, regulations or rules made under any of those Acts, which are applicable to the relevant costs order.

] [14]

(10) Any reference in this section to the authority directly concerned with any order or action to which this section applies—

(a) in relation to any such decision as is mentioned in section 284(3)(f) , is a reference to the council on whom the notice in question was served and, in a case where the Secretary of State has modified [or the Welsh Ministers have modified] [15] such a notice, wholly or in part, by substituting another local authority or statutory undertakers for that council, includes a reference to that local authority or those statutory undertakers;

(b) in any other case, is a reference to the authority who made the order in question or made the decision or served the notice to which the proceedings in question relate, or who referred the matter to the Secretary of State [or the Welsh Ministers] [16] , or, where the order or notice in question was made or served by [the Secretary of State or the Welsh Ministers] [17] , the authority named in the order or notice.

[

(11) References in this Act to an application under this section do not include an application for leave for the purposes of subsection (4A).

] [18]

Notes

1 Words inserted by Planning (Wales) Act 2015 anaw. 4 Sch.4 para.16(2) (March 1, 2016 in relation to developments of national significance and secondary consents; not yet in force otherwise)

2 Added by Criminal Justice and Courts Act 2015 c. 2 Sch.16 para.4(2) (October 26, 2015: insertion has effect subject to transitional provisions specified in SI 2015/1778 art.4(a))

3 Words inserted by Criminal Justice and Courts Act 2015 c. 2 Sch.16 para.4(3)(a) (October 26, 2015: insertion has effect subject to transitional provisions specified in SI 2015/1778 art.4(a))

4 Words inserted by Planning (Wales) Act 2015 anaw. 4 Sch.4 para.16(3) (March 1, 2016 in relation to developments of national significance and secondary consents; not yet in force otherwise)

5 Words inserted by Criminal Justice and Courts Act 2015 c. 2 Sch.16 para.4(3)(b) (October 26, 2015: insertion has effect subject to transitional provisions specified in SI 2015/1778 art.4(a))

6 Words inserted by Criminal Justice and Courts Act 2015 c. 2 Sch.16 para.4(3)(c) (October 26, 2015: insertion has effect subject to transitional provisions specified in SI 2015/1778 art.4(a))

7 Repealed by Criminal Justice and Courts Act 2015 c. 2 Sch.16 para.4(4) (October 26, 2015: repeal has effect subject to transitional provisions specified in SI 2015/1778 art.4(a))

8 Words inserted by Planning (Wales) Act 2015 anaw. 4 Sch.4 para.16(4) (March 1, 2016 in relation to developments of national significance and secondary consents; not yet in force otherwise)

9 Added by Criminal Justice and Courts Act 2015 c. 2 Sch.16 para.4(5) (October 26, 2015: insertion has effect subject to transitional provisions specified in SI 2015/1778 art.4(a))

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Notes

10 Words substituted by Criminal Justice and Courts Act 2015 c. 2 Sch.16 para.4(6)(a) (October 26, 2015: substitution has effect subject to transitional provisions specified in SI 2015/1778 art.4(a))
11 Words substituted by Criminal Justice and Courts Act 2015 c. 2 Sch.16 para.4(6)(b) (October 26, 2015: substitution has effect subject to transitional provisions specified in SI 2015/1778 art.4(a))
12 Substituted by Criminal Justice and Courts Act 2015 c. 2 Sch.16 para.4(7) (October 26, 2015: substitution has effect subject to transitional provisions specified in SI 2015/1778 art.4(a))
13 Words inserted by Criminal Justice and Courts Act 2015 c. 2 Sch.16 para.4(8) (October 26, 2015: insertion has effect subject to transitional provisions specified in SI 2015/1778 art.4(a))
14 Substituted by Criminal Justice and Courts Act 2015 c. 2 Sch.16 para.4(9) (October 26, 2015: substitution has effect subject to transitional provisions specified in SI 2015/1778 art.4(a))
15 Words substituted by Planning (Wales) Act 2015 anaw. 4 Sch.4 para.16(5)(a) (March 1, 2016 in relation to developments of national significance and secondary consents; not yet in force otherwise)
16 Words inserted by Planning (Wales) Act 2015 anaw. 4 Sch.4 para.16(5)(b)(i) (March 1, 2016 in relation to developments of national significance and secondary consents; not yet in force otherwise)
17 Word substituted by Planning (Wales) Act 2015 anaw. 4 Sch.4 para.16(5)(b)(ii) (March 1, 2016 in relation to developments of national significance and secondary consents; not yet in force otherwise)
18 Added by Criminal Justice and Courts Act 2015 c. 2 Sch.16 para.4(10) (October 26, 2015: insertion has effect subject to transitional provisions specified in SI 2015/1778 art.4(a))

Part XII VALIDITY > s. 288 Proceedings for questioning the validity of other orders, decisions and directions.

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Water Industry Act 1991 c. 56
s. 37 General duty to maintain water supply system etc.

Version 2 of 2

1 April 2006 - Present

Subjects
Utilities

Keywords
Enforcement; Powers rights and duties; Water companies; Water supply

37.— General duty to maintain water supply system etc.

(1) It shall be the duty of every water undertaker to develop and maintain an efficient and economical system of water supply within its area and to ensure that all such arrangements have been made—

(a) for providing supplies of water to premises in that area and for making such supplies available to persons who demand them; and

(b) for maintaining, improving and extending the water undertaker's water mains and other pipes,

as are necessary for securing that the undertaker is and continues to be able to meet its obligations under this Part.

(2) The duty of a water undertaker under this section shall be enforceable under section 18 above—

(a) by the Secretary of State; or

(b) with the consent of or in accordance with a general authorisation given by the Secretary of State, by [the Authority] [1] .

(3) The obligations imposed on a water undertaker by the following Chapters of this Part, and the remedies available in respect of contraventions of those obligations, shall be in addition to any duty imposed or remedy available by virtue of any provision of this section or section 38 below and shall not be in any way qualified by any such provision.

Notes

1 Words substituted by Water Act 2003 c. 37 Pt 2 s.36(2) (April 1, 2006)

Part III WATER SUPPLY > Chapter I GENERAL DUTIES OF WATER UNDERTAKERS ETC > s. 37 General duty to maintain water supply system etc.

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s. 37A Water resources management plans: preparation and review

Law In Force With Amendments Pending

Version 4 of 5

1 April 2016 - Present

Subjects
Utilities

Keywords
Consultation; Ministerial directions; Powers rights and duties; Water companies; Water resources management plans
[

37A Water resources management plans: preparation and review

(1) It shall be the duty of each water undertaker to prepare [, publish] [2] and maintain a water resources management plan.

(2) A water resources management plan is a plan for how the water undertaker will manage and develop water resources so as to be able, and continue to be able, to meet its obligations under this Part.

(3) A water resources management plan shall address in particular–

(a) the water undertaker's estimate of the quantities of water required to meet those obligations;

(b) the measures which the water undertaker intends to take or continue for the purpose set out in subsection (2) above (also taking into account for that purpose the introduction of water into the undertaker's supply system by or on behalf of [water supply licensees] [3]);

(c) the likely sequence and timing for implementing those measures; and

(d) such other matters as the Secretary of State may specify in directions [(and see also section 37AA)] [4] .

(4) The procedure for preparing [and publishing] [5] a water resources management plan (including a revised plan) is set out in section 37B below.

(5) Before each anniversary of the date when its plan (or revised plan) was last published, the water undertaker shall–

(a) review its plan; and

(b) send a statement of the conclusions of its review to the Secretary of State.

(6) The water undertaker shall prepare [and publish] [6] a revised plan in each of the following cases–

(a) following conclusion of its annual review, if the review indicated a material change of circumstances;

(b) if directed to do so by the Secretary of State;

(c) in any event, not later than the end of the period of five years beginning with the date when the plan (or revised plan) was last published,

and shall follow the procedure in section 37B below (whether or not the revised plan prepared by the undertaker includes any proposed alterations to the previous plan).

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(7) The Secretary of State may give directions specifying–

(a) the form which a water resources management plan must take;

(b) the planning period to which a water resources management plan must relate.

(8) Before preparing its water resources management plan (including a revised plan), the water undertaker shall consult–

(a) the Environment Agency [, if the plan (or revised plan) would affect water resources in England] [7] ;

[

(aa) the NRBW, if the plan (or revised plan) would affect water resources in Wales;

] [8]

(b) the Authority;

(c) the Secretary of State; and

(d) any [water supply licensee] [9] which supplies water to premises in the undertaker's area via the undertaker's supply system.

[

(9) Before giving a direction under subsection (6)(b), the Secretary of State shall consult—

(a) the Environment Agency, if the revised plan would affect water resources in England, and

(b) the NRBW, if the revised plan would affect water resources in Wales.

(9A) Before giving a direction under subsection (6)(b), the Welsh Ministers shall consult—

(a) the NRBW, if the revised plan would affect water resources in Wales, and

(b) the Environment Agency, if the revised plan would affect water resources in England.

] [10]

(10) In this section, in relation to a water resources management plan, *“published”* means published in accordance with section 37B(8)(a) below.

] [1]

Notes

1 Inserted subject to transitional provisions and savings specified in SI 2006/984 Sch.1 para.8 by Water Act 2003 c. 37 Pt 3 s.62 (October 1, 2004: insertion has effect subject to transitional provisions and savings specified in SI 2006/984 Sch.1 para.8)

2 Words inserted by Water Act 2014 c. 21 Pt 1 c.3 s.28(2)(a) (July 14, 2014)

3 Words substituted by Water Act 2014 c. 21 Sch.7 para.47(a) (April 1, 2016)

4 Words inserted by Water Act 2014 c. 21 Pt 1 c.3 s.27(2) (July 14, 2014)

5 Words inserted by Water Act 2014 c. 21 Pt 1 c.3 s.28(2)(b) (July 14, 2014)

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Notes

6 Words inserted by Water Act 2014 c. 21 Pt 1 c.3 s.28(2)(c) (July 14, 2014)
7 Words inserted by Natural Resources Body for Wales (Functions) Order 2013/755 Sch.2(1) para.229(2)(a) (April 1, 2013: insertion has effect subject to transitional provisions and savings specified in art.10 and Sch.7)
8 Added by Natural Resources Body for Wales (Functions) Order 2013/755 Sch.2(1) para.229(2)(b) (April 1, 2013: insertion has effect subject to transitional provisions and savings specified in art.10 and Sch.7)
9 Words substituted by Water Act 2014 c. 21 Sch.7 para.47(b) (April 1, 2016)
10 S.37A(9) and (9A) substituted for s.37A(9) by Natural Resources Body for Wales (Functions) Order 2013/755 Sch.2(1) para.229(3) (April 1, 2013: substitution has effect subject to transitional provisions and savings specified in art.10 and Sch.7)

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s. 37AA Water resources management plans for England: resilience

Version 1 of 1

14 July 2014 - Present

Subjects
Utilities

Keywords
Consultation; Ministerial directions; Powers rights and duties; Water companies; Water resources management plans
[

37AA Water resources management plans for England: resilience

(1) The Secretary of State may give a direction about the basis on which a water resources management plan for England is to be prepared.

(2) A direction under this section may be given only where the Secretary of State considers it appropriate to do so with a view to securing that a water undertaker is able to meet the need for the supply of water to consumers in particular circumstances.

(3) A direction under this section may, in particular, require a plan to be prepared on the basis of a specified assumption, including—

(a) an assumption as to whether, and how often, specified circumstances are likely to arise;

(b) an assumption that a specified power would or would not be exercised by the water undertaker or another person in specified circumstances.

(4) Before giving a direction under this section, the Secretary of State must consult—

(a) the Authority,

(b) the Welsh Ministers,

(c) each water undertaker to which the direction would apply,

(d) the Environment Agency,

(e) the NRBW, and

(f) such other persons as the Secretary of State considers appropriate.

(5) In this section—

"specified" means specified in a direction under this section;

"water resources management plan for England" means a water resources management plan prepared by a water undertaker whose area is wholly or mainly in England.

][1]

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Notes

1 Added by Water Act 2014 c. 21 Pt 1 c.3 s.27(3) (July 14, 2014)

Part III WATER SUPPLY > Chapter I GENERAL DUTIES OF WATER UNDERTAKERS ETC > s. 37AA Water resources management plans for England: resilience

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s. 37B Water resources management plans: publication and representations

Law In Force With Amendments Pending

Version 1 of 2

1 October 2004 - Present

Subjects
Utilities

Keywords
Confidential information; Ministers' powers and duties; Powers rights and duties; Publication; Water companies; Water resources management plans
[

37B Water resources management plans: publication and representations

(1) A water undertaker shall–

(a) send a draft water resources management plan to the Secretary of State;

(b) state whether it appears to the undertaker that any information contained in that plan is or might be commercially confidential (as regards itself or another person); and

(c) give the Secretary of State the name of each such other person and his address for service of a notice under subsection (2)(a) below.

(2) If the water undertaker states that it so appears in relation to any such information, the Secretary of State shall–

(a) if the person to whom or to whose business the information relates is not the water undertaker, give that person notice that the information is included in a draft water resources management plan and, unless subsection (10) below applies, is required to be published under this section; and

(b) give each person (including the water undertaker) to whom any such information relates a reasonable opportunity–

(i) of objecting to the publication of the information relating to him on the ground that it is commercially confidential; and

(ii) of making representations to the Secretary of State for the purpose of justifying any such objection,

and shall determine, taking any objections and representations under paragraph (b) into account, whether the information is or is not commercially confidential.

(3) A water undertaker shall–

(a) (subject to subsection (10) below) publish the draft water resources management plan in the prescribed way or, if no way is prescribed, in a way calculated to bring it to the attention of persons likely to be affected by it;

(b) publish with it a statement–

(i) whether any information has been excluded from the published draft plan by virtue of subsection (10) below and, if it has, the general nature of that information; and

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(ii) that any person may make representations in writing about the plan to the Secretary of State before the end of a period specified in the statement; and

(c) send a copy of the published draft plan and accompanying statement to such persons (if any) as may be prescribed.

(4) The Secretary of State shall send to the water undertaker a copy of any representations he receives following publication of the draft plan under subsection (3) above and shall give it a reasonable period of time within which to comment on the representations.

(5) The Secretary of State may in regulations prescribe how such representations and any comments by the water undertaker on them are to be dealt with.

(6) Regulations under subsection (5) above–

(a) may provide for the Secretary of State to cause an inquiry or other hearing to be held in connection with the draft water resources management plan; and

(b) if they do so provide, may provide for subsections (2) to (5) of section 250 of the Local Government Act 1972 (local inquiries: evidence and costs) to apply with prescribed modifications to such an inquiry or hearing as they apply to inquiries under that section.

(7) The Secretary of State may direct a water undertaker that its water resources management plan must differ from the draft sent to him under subsection (1) above in ways specified in his direction, and (subject to subsection (9) below) it shall be the duty of the water undertaker to comply with the direction.

(8) The water undertaker shall–

(a) (subject to subsection (10) below) publish the water resources management plan in the prescribed way or, if no way is prescribed, in a way calculated to bring it to the attention of persons likely to be affected by it; and

(b) publish with it a statement whether any information has been excluded from the published plan by virtue of subsection (10) below and, if it has, the general nature of that information.

(9) If the water undertaker considers that publishing a water resources management plan complying with a direction under subsection (7) above would mean including in the published plan any information (other than any information in relation to which the Secretary of State has already made a determination under subsection (2) above) which might be commercially confidential (as regards itself or another person)–

(a) the water undertaker shall send the Secretary of State a notice saying so, and giving the Secretary of State the name of any such other person and his address for service of a notice under subsection (2)(a) above as applied by paragraph (b) below; and

(b) subsection (2) above shall apply in relation to that information as it applies in relation to the information referred to there;

and the Secretary of State may either confirm his direction under subsection (7) above (which is to be treated as a new direction under subsection (7)) or revoke the previous such direction (or the previous one so treated) and give a new one.

(10) The published version of a draft water resources management plan published under subsection (3)(a) above, and a water resources management plan published under subsection (8)(a) above, shall exclude any information which the Secretary of State–

(a) has determined under subsection (2) above (or that subsection as applied by subsection (9) above) is commercially confidential; or

(b) directs the water undertaker to exclude on the ground that it appears to him that its publication would be contrary to the interests of national security.

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(11) Any steps to be taken by a water undertaker under this section shall be completed by such time or within such period as the Secretary of State may direct.

][1]

Notes

1 Inserted subject to transitional provisions and savings specified in SI 2006/984 Sch.1 para.8 by Water Act 2003 c. 37 Pt 3 s.62 (October 1, 2004: insertion has effect subject to transitional provisions and savings specified in SI 2006/984 Sch.1 para.8)

Part III WATER SUPPLY > Chapter I GENERAL DUTIES OF WATER UNDERTAKERS ETC > s. 37B Water resources management plans: publication and representations

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s. 37C Water resources management plans: provision of information

Law In Force With Amendments Pending

Version 2 of 3

1 April 2016 - Present

Subjects
Utilities

Keywords
Licensees; Powers rights and duties; Provision of information; Water companies; Water resources management plans; Water supply
[

37C Water resources management plans: provision of information

(1) It shall be the duty of each [water supply licensee][2] to provide the water undertaker with such information as the water undertaker may reasonably request for the purposes of preparing or revising its water resources management plan.

(2) In the event of any dispute between a water undertaker and a [water supply licensee][2] as to the reasonableness of the water undertaker's request under subsection (1) above, either party may refer the matter for determination by the Secretary of State, and any such determination shall be final.

(3) For the purposes of paragraph (b) of section 37B(1) above, the water undertaker shall identify in its statement under that paragraph any information–

(a) provided by a [water supply licensee][2] pursuant to subsection (1) above; and

(b) contained in the water undertaker's draft water resources management plan,

which the [water supply licensee][2] has (at the time of providing it to the water undertaker) specifically identified as being, in the [water supply licensee's][3] opinion, commercially confidential.

(4) The water undertaker shall not use any unpublished information save for the purpose of facilitating the performance by it of any of the duties imposed on it by or under this Act, any of the other consolidation Acts or the Water Act 1989.

(5) In subsection (4) above–

(a) *"unpublished information"* means confidential information which–

(i) is provided to the water undertaker by a [water supply licensee][2] under this section;

(ii) relates to the affairs of any individual or to any particular business; and

(iii) by virtue of section 37B above, is not published;

(b) *"the other consolidation Acts"* has the same meaning as in section 206 below.

][1]

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Notes

1 Inserted subject to transitional provisions and savings specified in SI 2006/984 Sch.1 para.8 by Water Act 2003 c. 37 Pt 3 s.62 (October 1, 2004: insertion has effect subject to transitional provisions and savings specified in SI 2006/984 Sch.1 para.8)

2 Words substituted by Water Act 2014 c. 21 Sch.7 para.48(a) (April 1, 2016)

3 Words substituted by Water Act 2014 c. 21 Sch.7 para.48(b) (April 1, 2016)

Part III WATER SUPPLY > Chapter I GENERAL DUTIES OF WATER UNDERTAKERS ETC > s. 37C Water resources management plans: provision of information

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s. 37D Water resources management plans: supplementary

Law In Force With Amendments Pending

Version 3 of 4

1 April 2016 - Present

Subjects
Utilities

Keywords
Licensees; Ministerial directions; Powers rights and duties; Revocation; Statutory instruments; Water companies; Water resources management plans; Water supply
[

37D Water resources management plans: supplementary

(1) Directions given under [section 37A, 37AA or 37B] [2] above may be–

(a) general directions applying to all water undertakers; or

(b) directions applying only to one or more water undertakers specified in the directions,

and shall be given by an instrument in writing.

(2) It shall be the duty of each water undertaker to whom directions apply to comply with the directions.

(3) The duties of–

(a) a water undertaker under sections 37A to 37C above and under this section; and

(b) a [water supply licensee] [3] under section 37C above,

shall be enforceable by the Secretary of State under section 18 above.

[

(4) The Minister may by order made by statutory instrument amend the period for the time being specified in section 37A(6)(c).

(5) In subsection (4), *"the Minister"* means—

(a) the Secretary of State, in relation to an order applying to water undertakers whose areas are wholly or mainly in England, and

(b) the Welsh Ministers, in relation to an order applying to water undertakers whose areas are wholly or mainly in Wales.

(6) A statutory instrument containing an order made by the Secretary of State under subsection (4) is subject to annulment in pursuance of a resolution of either House of Parliament.

(7) A statutory instrument containing an order made by the Welsh Ministers under subsection (4) is subject to annulment in pursuance of a resolution of the Assembly.

(8) Subsection (9) applies in relation to a statutory instrument containing both—

(a) an order made by the Secretary of State under subsection (4), and

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(b) an order made by the Welsh Ministers under subsection (4).

(9) If in accordance with subsection (6) or (7) (negative resolution procedure)—

(a) either House of Parliament resolves that an address be presented to Her Majesty praying that an instrument containing an order made by the Secretary of State be annulled, or

(b) the Assembly resolves that an instrument containing an order made by the Welsh Ministers be annulled,

the instrument is to have no further effect and Her Majesty may by Order in Council revoke the instrument.

][4]][1]

Notes

1 Inserted subject to transitional provisions and savings specified in SI 2006/984 Sch.1 para.8 by Water Act 2003 c. 37 Pt 3 s.62 (October 1, 2004: insertion has effect subject to transitional provisions and savings specified in SI 2006/984 Sch.1 para.8)

2 Words inserted by Water Act 2014 c. 21 Pt 1 c.3 s.27(4) (July 14, 2014)

3 Words substituted by Water Act 2014 c. 21 Sch.7 para.49 (April 1, 2016)

4 Added by Water Act 2014 c. 21 Pt 1 c.3 s.28(3) (July 14, 2014)

Part III WATER SUPPLY > Chapter I GENERAL DUTIES OF WATER UNDERTAKERS ETC > s. 37D Water resources management plans: supplementary

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Water Resources Act 1991 c. 57

s. 52 Proposals for modification at instance of the appropriate agency or Secretary of State.

Law In Force

Version 4 of 4

1 April 2013 - Present

Subjects
Water law

Keywords
Abstraction licences; Environment Agency; Impoundment licences; Notices; Proposals; Revocation; Secretaries of State; Variation

52.— Proposals for modification at instance of the [appropriate agency] [1] or Secretary of State.

(1) Where it appears to the [appropriate agency] [1] that a licence under this Chapter should be revoked or varied, the [appropriate agency] [1] may formulate proposals for revoking or varying the licence.

[

(1A) In the case of a licence to obstruct or impede any inland waters, a variation may take the form of a requirement that the impounding works be modified in ways specified in the proposed new provision of the licence.

] [2]

(2) Where—

(a) it appears to the Secretary of State (either in consequence of representations made to the Secretary of State or otherwise) that a licence under this Chapter ought to be reviewed; but

(b) no proposals for revoking or varying the licence have been formulated by the [appropriate agency] [1] under subsection (1) above,

the Secretary of State may, as he may consider appropriate in the circumstances, give the [appropriate agency] [1] a direction under subsection (3) below.

(3) A direction under this subsection may—

(a) direct the [appropriate agency] [1] to formulate proposals for revoking the licence in question; or

(b) direct the [appropriate agency] [1] to formulate proposals for varying that licence in such manner as may be specified in the direction.

(4) Notice in the prescribed form of any proposals formulated under this section with respect to any licence shall—

(a) be served on the holder of the licence; and

[

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(b) be published in the prescribed way or (if no way is prescribed) in a way calculated to bring it to the attention of persons likely to be affected if the licence were revoked or varied as proposed.

][3]

(5) If—

(a) a licence with respect to which any proposals are formulated under this section relates to any inland waters; and

(b) the proposals provide for variation of that licence,

a copy of the notice for the purposes of subsection (4) above shall, not later than the date on which it is first published [as mentioned in subsection (4)(b) above][4] , be served on any navigation authority, harbour authority or conservancy authority having functions in relation to those waters at a place where the licence, if varied in accordance with the proposals, would authorise water to be abstracted or impounded.

[

(6) A notice for the purposes of subsection (4) above shall–

(a) include any prescribed matters; and

(b) state that, before the end of a period specified in the notice–

(i) the holder of the licence may give notice in writing to the [appropriate agency][1] objecting to the proposals; and

(ii) any other person may make representations in writing to the [appropriate agency][1] with respect to the proposals.

][5] [

(7) The period referred to in subsection (6)(b) above–

(a) begins on the date the notice referred to in subsection (4) above is first published as mentioned there; and

(b) shall not end before the end of the period of twenty-eight days beginning with that date.

][6] [...][7]

Notes

1 Word substituted by Natural Resources Body for Wales (Functions) Order 2013/755 Sch.2(1) para.270(i) (April 1, 2013: substitution has effect subject to transitional provisions and savings specified in SI 2013/755 art.10 and Sch.7)
2 Added by Water Act 2003 c. 37 Pt 1 s.22(2) (April 1, 2006)
3 Substituted by Water Act 2003 c. 37 Pt 1 s.22(3) (April 1, 2006)
4 Words substituted by Water Act 2003 c. 37 Pt 1 s.22(4) (April 1, 2006)
5 Substituted by Water Act 2003 c. 37 Pt 1 s.22(5) (April 1, 2006)
6 Substituted by Water Act 2003 c. 37 Pt 1 s.22(6) (April 1, 2006)
7 Repealed by Water Act 2003 c. 37 Sch.9(1) para.1 (April 1, 2006 as SI 2006/984)

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Part II WATER RESOURCES MANAGEMENT > Chapter II ABSTRACTION AND IMPOUNDING > Modification of licences > s. 52 Proposals for modification at instance of the appropriate agency or Secretary of State.

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Conservation of Habitats and Species Regulations 2017/1012
reg. 7 Competent authorities

Law In Force

Version 1 of 1

30 November 2017 - Present

Subjects
Environment

7.— Competent authorities

(1) For the purposes of these Regulations, *"competent authority"* includes—

(a) any Minister of the Crown (as defined in the Ministers of the Crown Act 1975), government department, statutory undertaker, public body of any description or person holding a public office;

(b) the Welsh Ministers; and

(c) any person exercising any function of a person mentioned in sub-paragraph (a) or (b).

(2) In the following provisions (and as provided in regulation 69(3)(a)), *"competent authority"* includes the Scottish Ministers—

(a) regulation 70(2), in so far as that paragraph relates to a deemed grant of planning permission under—

(i) section 57(2), (2A) and (2ZA) of the Town and Country Planning (Scotland) Act 1997 [1] , to which regulation 70(1)(e)(ii) and (f) relate; or

(ii) section 5(1) of the Pipe-lines Act 1962 [2] , to which regulation 70(1)(e)(iii) relates;

(b) Chapters 4 and 5 of Part 6.

(3) In paragraph (1)—

"public body" includes—

(a) the Broads Authority [3] ;

(b) a joint planning board within the meaning of section 2 of the TCPA 1990 (joint planning boards) [4] ;

(c) a joint committee appointed under section 102(1)(b) of the Local Government Act 1972 (appointment of committees) [5] ;

(d) a National Park authority; or

(e) a local authority, which in this regulation means—

(i) in relation to England, a county council, a district council, a parish council, a London borough council, the Common Council of the City of London, the sub-treasurer of the Inner Temple or the under treasurer of the Middle Temple;

(ii) in relation to Wales, a county council, a county borough council or a community council;

"public office" means—

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(a) an office under the Crown,

(b) an office created or continued in existence by a public general Act or by legislation passed by the National Assembly for Wales, or

(c) an office the remuneration in respect of which is paid out of money provided by Parliament or the National Assembly for Wales.

Notes

1 Section 57(2) was substituted, and section 57(2ZA) was inserted, by the Growth and Infrastructure Act 2013 (c. 27), section 21(5).

2 Section 5(1) was amended by S.I. 1999/742.

3 The Broads Authority was established by section 1 of the Norfolk and Suffolk Broads Act 1988 (c. 4).

4 Section 2 was amended by the Local Government (Wales) Act 1994 (c. 19), section 19(1) and (4) and Schedule 18; and by the Environment Act 1995 (c. 25), Schedule 10, paragraph 32.

5 1972 c. 70. Section 102(1) was amended by the Health and Social Services and Social Security Adjudications Act 1983 (c. 41), Schedule 9, paragraph 16; and the Children Act 1989 (c. 41), Schedule 13, paragraph 31. It is prospectively amended by the Local Government and Housing Act 1989 (c. 42), Schedule 11, paragraph 25(a), from a date to be appointed.

Part 1 Introductory and General Provisions > reg. 7 Competent authorities

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reg. 9 Duties relating to compliance with the Directives

Law In Force

Version 2 of 2

31 December 2020 - Present

Subjects
Environment

9.— Duties relating to compliance with the Directives

(1) The appropriate authority, the nature conservation bodies and, in relation to the marine area, a competent authority must exercise their functions which are relevant to nature conservation, including marine conservation, so as to secure compliance with the requirements of the Directives.

(2) Paragraph (1) applies, in particular, to functions under these Regulations and functions under the following enactments—

(a) the Dockyard Ports Regulation Act 1865;

(b) section 2(2) of the Military Lands Act 1900 (provision as to byelaws relating to the sea, tidal water or shore) [1] ;

(c) Part 3 of the 1949 Act (nature conservation);

(d) the Harbours Act 1964;

(e) section 15 of the Countryside Act 1968 (areas of special scientific interest) [2] ;

(f) Part 2 of the Control of Pollution Act 1974 (pollution of water) [3] ;

(g) Part 1 (wildlife) and sections 28 to 28S and 31 to 35A of the WCA 1981 (which relate to sites of special scientific interest) [4] ;

(h) the Water Resources Act 1991;

(i) the Land Drainage Act 1991;

(j) the Sea Fisheries Acts within the meaning of section 1 of the Sea Fisheries (Wildlife Conservation) Act 1992 (conservation in the exercise of sea fisheries functions) [5] ;

(k) the Natural Environment and Rural Communities Act 2006;

(l) the Planning Act 2008;

(m) the Marine Act, in particular any functions under Parts 3, 4, 5 and 6 of that Act (marine planning, marine licensing, nature conservation and management of inshore fisheries, respectively); and

(n) the Natural Resources Body for Wales (Establishment) Order 2012 [6] , where the functions are exercised for purposes related to nature conservation.

(3) Without prejudice to the preceding provisions, a competent authority, in exercising any of its functions, must have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions.

(4) The reference in paragraph (1) to the appropriate authority—

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(a) to the extent that that paragraph applies in relation to Scotland, includes the Secretary of State exercising functions in relation to Scotland; and

(b) to the extent that that paragraph applies in relation to Northern Ireland, includes the Secretary of State exercising functions in relation to Northern Ireland.

[

(4A) In complying with their duties under paragraphs (1) and (3), the nature conservation body and a competent authority must have regard to any guidance issued under regulation 3A(4)—

(a) by the Secretary of State, in relation to England; or

(b) by the Welsh Ministers, in relation to Wales.

][7]

(5) In paragraph (1), *"marine area"* includes—

(a) the Northern Ireland inshore region; and

(b) the Scottish inshore region.

Notes

1 1900 c. 56. Section 2(2) was amended by the Armed Forces Act 2011 (c. 18), section 24(1); and by S.R. & O. 1924/1370. The functions of the Commissioners of Woods are now exercisable by the Crown Estate Commissioners: SR & O 1924/1370; the Crown Estate Act 1956 (c. 73), section 1(1); and the Crown Estate Act 1961 (c. 55), section 1(1).

2 1968 c. 41. Section 15 was amended by the WCA 1981, section 72(8); the Environmental Protection Act 1990 (c. 43), Schedule 9, paragraph 4(2) and Schedule 16, Part 6; the Countryside and Rights of Way Act 2000 (c. 37), section 75(3); the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5), Schedule 12, paragraph 29(1) and (2); the Natural Environment and Rural Communities Act 2006 (c. 16), Schedule 11, paragraph 48; the Environment (Wales) Act 2016 (anaw 3), Schedule 2, paragraph 2(1) and (3); and S.I. 2013/755 (W. 90).

3 1974 c. 40.

4 Section 28 was substituted, and sections 28A to 28C and 28D to 28R were inserted, by the Countryside and Rights of Way Act 2000 ("the 2000 Act"), Schedule 9, paragraph 1 and Schedule 10, paragraph 1. Sections 28, 31 and 34 were repealed as regards Scotland by the Nature Conservation (Scotland) Act 2004 (asp 6), Schedule 7, paragraph 4, and sections 28A to 28S do not extend to Scotland. Sections 28 to 28C and 28D to 28R were amended by the Natural Environment and Rural Communities Act 2006 ("the 2006 Act"), Schedule 11, paragraph 79. Sections 28, 28A, 28B and 28C were amended by the Marine Act, Schedule 13, paragraphs 2, 3, 5 and 6. Sections 28CA and 28CB were inserted by the Marine Act, Schedule 13, paragraphs 7 and 8. Section 28D was amended by the 2006 Act, section 56; and the Marine Act, Schedule 13, paragraph 9. Section 28E was amended by the 2006 Act, Schedule 11, paragraph 80; and the Environment (Wales) Act 2016, Schedule 2, paragraph 3(2). Section 28F was amended by the Planning (Wales) Act 2015 (anaw 4), Schedule 5, paragraph 5. Section 28G was amended by the 2006 Act, Schedule 11, paragraph 81. Section 28J was amended by the Environment (Wales) Act 2016, Schedule 2, paragraph 3(3). Section 28L was amended by the Planning (Wales) Act 2015, Schedule 5, paragraph 6. Section 28P was amended by the 2006 Act, section 55; and S.I. 2015/664. Section 28S was inserted by the 2006 Act, section 58(1). Section 31 was amended by the Criminal Justice Act 1982 (c. 48), sections 37 and 46; the 2000 Act, Schedule 9, paragraph 3; the Constitutional Reform Act 2005 (c. 4), Schedule 9, paragraph 37; and the 2006 Act, section 55(5) and Schedule 11, paragraph 79. Section 32 was amended by the Agriculture Act 1986 (c. 49), section 20(1) to (3); the 2000 Act, Schedule 9, paragraph 4 and Schedule 16, Part 3; the 2006 Act, Schedule 11, paragraph 79; the Environment (Wales) Act 2016 (anaw 3), Schedule 2, paragraph 3(4); and S.I. 2011/1043. Section 33 was amended by the 2006 Act, Schedule 11, paragraph 82. Section

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Notes

34 was amended by the Local Government Act 1985 (c. 51), Schedule 3, paragraph 7; the Planning (Consequential Provisions) Act 1990 (c. 11), Schedule 2, paragraph 54(1); the Local Government (Wales) Act 1994 (c. 19), Schedule 16, paragraph 65(3); the 2000 Act, section 78; the 2006 Act, Schedule 11, paragraph 83; and S.I. 2015/664. Section 34A was inserted by the 2006 Act, Schedule 11, paragraph 84, and was amended by S.I. 2013/755 (W. 90). Section 35 was amended by the 2006 Act, Schedule 11, paragraph 85; and the Marine Act, Schedule 13, paragraph 10. Section 35A was inserted by the Marine Act, Schedule 13, paragraph 11.

5 1992 c. 36. Section 1 was amended by the Marine Act, section 11 and Schedule 22, Part 4; and by S.I. 1999/1820.

6 To which there are amendments not relevant to these Regulations.

7 Added by Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019/579 Pt 3 reg.7 (December 31, 2020: shall come into force on IP completion day not exit day as specified in 2020 c.1 s.39(1) and Sch.5 para.1(1))

Part 1 Introductory and General Provisions > reg. 9 Duties relating to compliance with the Directives

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reg. 63 Assessment of implications for European sites and European offshore marine sites

Law In Force

Version 3 of 3

31 December 2020 - Present

Subjects
Environment

63.— Assessment of implications for European sites and European offshore marine sites

(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—

(a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and

(b) is not directly connected with or necessary to the management of that site,

must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives.

(2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable it to determine whether an appropriate assessment is required.

(3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specifies.

(4) It must also, if it considers it appropriate, take the opinion of the general public, and if it does so, it must take such steps for that purpose as it considers appropriate.

(5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).

(6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given.

(7) This regulation does not apply in relation to—[...] [1]

(c) a plan or project to which any of the following apply—

(i) the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001 [2] (in so far as this regulation is not disapplied by regulation 4 (plans or projects relating to offshore marine area or offshore marine installations) in relation to plans or projects to which those Regulations apply);

(ii) the Environmental Impact Assessment (Agriculture) (England) (No. 2) Regulations 2006 [3];

(iii) the Environmental Impact Assessment (Agriculture) (Wales) Regulations 2017; or

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(iv) [the Merchant Shipping (Ship-to-Ship Transfers) Regulations 2020] [4] .

(8) Where a plan or project requires an appropriate assessment both under this regulation and under the Offshore Marine Conservation Regulations, the assessment required by this regulation need not identify those effects of the plan or project that are specifically attributable to that part of it that is to be carried out in the United Kingdom, provided that an assessment made for the purpose of this regulation and the Offshore Marine Conservation Regulations assesses the effects of the plan or project as a whole.

(9) In paragraph (1) the reference to the competent authority deciding to undertake a plan or project includes the competent authority deciding to vary any plan or project undertaken or to be undertaken.

Notes

1 Revoked by Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019/579 Pt 3 reg.24 (December 31, 2020: shall come into force on IP completion day not exit day as specified in 2020 c.1 s.39(1) and Sch.5 para.1(1))

2 Amended by S.I. 2007/77, 1842, 2010/1513, 2015/1431, 2016/529, 912, 1042 and 2017/582.

3 Amended by S.I. 2009/1307, 3264, 2010/1159, 2011/1043, 1824 and 2017/593.

4 Words substituted by Merchant Shipping (Ship-to-Ship Transfers) Regulations 2020/94 reg.13 (February 26, 2020)

Part 6 Assessment of plans and projects > Part 1 General provisions > General provisions for protection of European sites and European offshore marine sites > reg. 63 Assessment of implications for European sites and European offshore marine sites

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reg. 64 Considerations of overriding public interest

Law In Force

Version 2 of 2

31 December 2020 - Present

Subjects
Environment

64.— Considerations of overriding public interest

(1) If the competent authority is satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest (which, subject to paragraph (2), may be of a social or economic nature), it may agree to the plan or project notwithstanding a negative assessment of the implications for the European site or the European offshore marine site (as the case may be).

(2) Where the site concerned hosts a priority natural habitat type or a priority species, the reasons referred to in paragraph (1) must be either—

(a) reasons relating to human health, public safety or beneficial consequences of primary importance to the environment; or

(b) any other reasons which the competent authority, having due regard to the opinion of the [appropriate authority] [1] , considers to be imperative reasons of overriding public interest.

(3) Where a competent authority other than the Secretary of State or the Welsh Ministers desires to obtain the opinion of the [appropriate authority] [1] as to whether reasons are to be considered imperative reasons of overriding public interest, it may submit a written request to the appropriate authority—

(a) identifying the matter on which an opinion is sought; and

(b) accompanied by any documents or information which may be required.

[

(4) In giving its opinion as to whether the reasons are imperative reasons of overriding public interest, the appropriate authority must have regard to the national interest, and provide its opinion to the competent authority.

] [2] [

(4A) Before giving its opinion as to whether the reasons are imperative reasons of overriding public interest, the appropriate authority must consult the following, and have regard to their opinion—

(a) the Joint Nature Conservation Committee;

(b) where the appropriate authority is the Secretary of State, the devolved administrations;

(c) where the appropriate authority is the Welsh Ministers, the Secretary of State, and the other devolved administrations; and

(d) any other person the appropriate authority considers appropriate.

] [3]

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(5) Where a competent authority other than the Secretary of State or the Welsh Ministers proposes to agree to a plan or project under this regulation notwithstanding a negative assessment of the implications for the site concerned—

(a) it must notify the appropriate authority; and

(b) it must not agree to the plan or project before the end of the period of 21 days beginning with the day notified by the appropriate authority as that on which its notification was received, unless the appropriate authority notifies it that it may do so.

(6) Without prejudice to any other power, the appropriate authority may give directions to the competent authority in any such case prohibiting it from agreeing to the plan or project, either indefinitely or during such period as may be specified in the direction.

Notes

1 Words substituted by Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019/579 Pt 3 reg.25(2) (December 31, 2020: shall come into force on IP completion day not exit day as specified in 2020 c.1 s.39(1) and Sch.5 para.1(1))

2 Substituted by Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019/579 Pt 3 reg.25(3) (December 31, 2020: shall come into force on IP completion day not exit day as specified in 2020 c.1 s.39(1) and Sch.5 para.1(1))

3 Added by Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019/579 Pt 3 reg.25(4) (December 31, 2020: shall come into force on IP completion day not exit day as specified in 2020 c.1 s.39(1) and Sch.5 para.1(1))

Part 6 Assessment of plans and projects > Part 1 General provisions > General provisions for protection of European sites and European offshore marine sites > reg. 64 Considerations of overriding public interest

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A Court of Appeal

Regina (An Taisce (The National Trust for Ireland)) *v* Secretary of State for Energy and Climate Change

[2014] EWCA Civ 1111

B 2014 July 15, 16; Aug 1 Longmore, Sullivan, Gloster LJJ

Planning — Development — Consent order — Secretary of State granting development consent order for nuclear power station — Whether transboundary consultation with Republic of Ireland necessary — Whether development "likely to have significant effects on environment" in Republic of Ireland — Whether C *Secretary of State erring in failing to consult Irish Republic — Parliament and Council Directive 2011/92/EU, art 7*

Article 7(1) of Parliament and Council Directive 2011/92/EU[1] on the assessment of the effects of certain public and private projects on the environment ("the Environmental Impact Assessment Directive") required that where a member state was aware that a project was "likely to have significant effects on the environment in D another member state" the affected member ought to be consulted. The defendant Secretary of State granted a development consent order for a new nuclear power station at Hinkley Point in Somerset which was a project falling within Annex I to the Environmental Impact Assessment Directive. The required environmental impact assessment was carried out, and the necessary public consultation was undertaken within the United Kingdom, in accordance with articles 4–6 of the Directive. A transboundary screening assessment having been conducted, the Secretary of State E did not carry out transboundary consultation in accordance with article 7 as he did not consider that the project was "likely to have significant effects on the environment in another member state", the probability of a severe nuclear accident being very low. The claimant, whose objectives included the protection of Ireland's built and natural environment, sought judicial review of the Secretary of State's decision on the ground that the defendant had failed to comply with article 7 of the Directive and that transboundary consultation should have been undertaken with the Irish people. The judge refused both permission to proceed with the claim and to make a reference F to the Court of Justice of the European Union as to the meaning of the words "likely to have significant effects on the environment" in article 7. The Court of Appeal granted the claimant permission to proceed with the claim and determined to hear it.

On the claim—

Held, dismissing the claim, that the words "likely to have significant effects on the environment" in article 7(1) of Directive 2011/92/EU did not require the application G of a "zero risk" approach to the likelihood of significant effect on the environment when considering whether there was an obligation to notify affected parties; that the likelihood of a significant adverse transboundary environmental impact might be so low that it could be excluded for the purpose of transboundary consultation under article 7; that since the risk of a severe nuclear accident was not merely unlikely, but extremely remote, the defendant was not required by article 7(1) of the Directive to conduct a transboundary consultation with the Republic of Ireland before granting H the development consent order to construct the nuclear power station; and that it was not necessary to refer to the Court of Justice questions on the meaning of the relevant words in article 7 of the Directive (post, paras 33, 35, 38, 39, 40, 42, 43, 45, 54–55, 56, 57).

[1] Parliament and Council Directive 2011/92/EU, art 7: see post, para 4.

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Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij (coöperatieve producentenorganisatie van de nerderlandse kokkelvisserij UA intervening) (Case C-127/02) [2005] All ER (EC) 353, ECJ considered.

The following cases are referred to in the judgment of Sullivan LJ:

CILFIT Srl v Ministero della Sanita (Case C-283/81) EU:C:1982:335; [1982] ECR 3415, ECJ
Gateshead Metropolitan Borough Council v Secretary of State for the Environment [1995] Env LR 50
Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij (coöperatieve producentenorganisatie van de nerderlandse kokkelvisserij UA intervening) (Case C-127/02) EU:C:2004:482; [2005] All ER (EC) 353; [2004] ECR I-7405, ECJ
R (Bateman) v South Cambridgeshire District Council [2011] EWCA Civ 157, CA
R (Evans) v Secretary of State for Communities and Local Government [2013] EWCA Civ 114; [2013] JPL 1027, CA
R (Jones) v Mansfield District Council [2003] EWCA Civ 1408; [2004] Env LR 391, CA
R (Loader) v Secretary of State for Communities and Local Government [2012] EWCA Civ 869; [2013] PTSR 406; [2012] LGR 862, CA
R (Miller) v North Yorkshire County Council [2009] EWHC 2172 (Admin)
R (Morge) v Hampshire County Council [2010] EWCA Civ 608; [2010] PTSR 1882; [2010] LGR 961, CA
Syllogos Ellinon Poleodomon kai Chorotakton v Ypourgos Perivallontos, Chorotaxias & Dimosion Ergon (Case C-177/11) EU:C:2012:378; 21 June 2012, ECJ
United Kingdom v Commission of the European Communities (Case C-180/96) EU:C:1998:192; [1998] ECR I-2265, CA
World Wildlife Fund (WWF) v Autonome Provinz Bozen (Case C-435/97) EU:C:1999:418; [1999] ECR I-5613, ECJ

No additional cases were cited in argument.

The following additional cases, although not cited, were referred to in the skeleton arguments:

Aannamaersbedrijf PK Kraaijveld BV v Gedeputeerde Staten van Zuid-Holland (Case C-72/95) EU:C:1996:404; [1997] All ER (EC) 134; [1996] ECR I-5403, ECJ
Atkinson v Secretary of State for Transport [2006] EWHC 995 (Admin); [2007] Env LR 61
Berkeley v Secretary of State for the Environment, Transport and the Regions [2001] 2 AC 603; [2000] 3 WLR 420; [2000] 3 All ER 897, HL(E)
Commission of the European Communities v Portugal (Case C-117/02) EU:C:2004:266; [2004] ECR I-5517, ECJ
European Commission v Ireland (Case C-50/09) EU:C:2011:109; [2011] PTSR 1122; [2011] ECR I-873, ECJ
Gillespie v First Secretary of State [2003] EWCA Civ 400; [2003] Env LR 663, CA
Hauptzollamt Mainz v CA Kupferberg & Cie KG aA (Case 104/81) EU:C:1982:362; [1982] ECR 3641, ECJ
Litster v Forth Dry Dock & Engineering Co Ltd [1990] 1 AC 546; [1989] 2 WLR 634; [1989] ICR 341; [1989] 1 All ER 1134, HL(Sc)
Nomarchiaki Aftodioikisi Aitoloakarnanias v Ipourgos Perivallontos, Khorotaxias kai Dimosion Ergon (Case C-43/10) EU:C:2012:560; [2013] Env LR 453, ECJ

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A *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd , Ex p Else (1982) Ltd* [1993] QB 534; [1993] 2 WLR 70; [1993] 1 All ER 420, CA

R (Adan (Lul Omar)) v Secretary of State for the Home Department [2001] 2 AC 477; [2001] 2 WLR 143; [2001] 1 All ER 593, HL(E)

R (Birch) v Barnsley Metropolitan Borough Council [2010] EWCA Civ 1180; [2011] Env LR 282, CA

B *R (Blewett) v Derbyshire County Council* [2003] EWHC 2775 (Admin); [2004] Env LR 569

R (Buckinghamshire County Council) v Secretary of State for Transport [2014] UKSC 3; [2014] PTSR 182; [2014] 1 WLR 324; [2014] 2 All ER 109, SC(E)

R (Catt) v Brighton and Hove City Council [2007] EWCA Civ 298; [2007] LGR 331, CA

R (Edwards) v Environment Agency [2010] UKSC 57; [2011] 1 WLR 79; [2011] 1 All ER 785, SC(E)

C *Rockfon A/S v Specialarbejderforbundet i Danmark* (Case C-449/93) EU:C:1995:420; [1995] ECR I-4291; [1996] ICR 673, ECJ

Ryanair Holdings plc v Office of Fair Trading [2011] CAT 23; [2011] Comp AR 621, CAT

Sweetman v An Bord Pleanala (Galway County Council intervening) (Case C-258/11) EU:C:2013:220; [2014] PTSR 1092, ECJ

D

CLAIM for judicial review

The claimant, An Taisce (The National Trust for Ireland), sought judicial review of a decision of the defendant, the Secretary of State for Energy and Climate Change, of 19 March 2013, granting to the interested party, NNB Generation Co Ltd, a development consent order for a new nuclear power station at Hinkley Point C in Somerset, on the ground that the defendant had E failed to comply with regulation 24 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (SI 2009/2263) and/or article 7 of Parliament and Council Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L26, p 1) in considering whether the proposed power station was "likely to have significant effects on F the environment" of the Republic of Ireland, another member state. The claimant contended that the transboundary consultation should have been undertaken with the Irish people. By a decision dated 20 December 2013 Patterson J [2013] EWHC 4161 (Admin) refused permission to proceed with the claim.

By an appellant's notice dated 24 December 2013 the claimant sought G permission to appeal the refusal of permission to proceed with the claim on the grounds that the judge had erred by failing to rule: (1) that the defendant had misdirected himself as to the meaning of "likely" in article 7 of the 2011 Directive by "scoping out" severe nuclear accidents on the basis that they were very unlikely; and (2) that even if the defendant had been correct as to the meaning of the word "likely", he had nevertheless erred in relying on the existence of the United Kingdom nuclear regulatory regime to fill gaps H in current knowledge when reaching his conclusion as to the likelihood of nuclear accidents. On 27 March 2014 [2014] EWCA Civ 666, the Court of Appeal (Sullivan LJ) granted the claimant permission to proceed with the claim for judicial review and ordered that the claim be retained in the Court of Appeal.

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A

The claimant also sought a reference to the Court of Justice of the European Union of a question seeking clarification of the construction of the applicable wording within article 7 of the 2011 Directive.

The facts are stated in the judgment of Sullivan LJ, post, paras 1–3, 5–7.

David Wolfe QC, *John Kenny* and *Blinne Ni Ghralaigh* (instructed by *Leigh Day Solicitors*) for the claimant.

B

Jonathan Swift QC, *Rupert Warren QC* and *Jonathan Moffett* (instructed by *Treasury Solicitor*) for the Secretary of State.

Nathalie Lieven QC and *Hereward Phillpot* (instructed by *Herbert Smith Freehills LLP*) for the interested party.

The court took time for consideration.

C

1 August 2014. The following judgments were handed down.

SULLIVAN LJ

Introduction

D

1 In this claim for judicial review the claimant challenges the decision dated 19 March 2013 of the defendant to make an order granting development consent for the construction of a European pressurised reactor ("EPR") nuclear power station at Hinkley Point in Somerset ("HPC").

Background

E

2 The background to the claim is explained in considerable detail in the judgment of Patterson J [2013] EWHC 4161 (Admin) dismissing the claimant's application for permission to apply for judicial review following a "rolled up" hearing. On 27 March 2014 [2014] EWCA Civ 666 I granted the claimant permission to apply for judicial review and ordered that the application should be retained in the Court of Appeal.

F

3 The judge set out the factual background in paras 5–62 of her judgment. There was no challenge to this aspect of her judgment, and I gratefully adopt, and will not repeat, all of the detail that is contained in those paragraphs.

G

4 There is no dispute as to the legal framework, which the judge set out in paras 63–79 of her judgment. Article 7 of Parliament and Council Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L26, p 1) ("the Environmental Impact Assessment Directive"/"the EIA Directive") is of central importance in this claim, and for convenience I set out the material paragraphs:

H

"1. Where a member state is aware that a project is likely to have significant effects on the environment in another member state or where a member state likely to be significantly affected so requests, the member state in whose territory the project is intended to be carried out shall send to the affected member state as soon as possible and no later than when informing its own public, inter alia: (a) a description of the project, together with any available information on its possible transboundary impact; (b) information on the nature of the decision which may be taken.

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A The member state in whose territory the project is intended to be carried out shall give the other member state a reasonable time in which to indicate whether it wishes to participate in the environmental decision-making procedures referred to in article 2(2), and may include the information referred to in paragraph 2 of this article.

"2. If a member state which receives information pursuant to paragraph 1 indicates that it intends to participate in the environmental decision-making procedures referred to in article 2(2), the member state in whose territory the project is intended to be carried out shall, if it has not already done so, send to the affected member state the information required to be given pursuant to article 6(2) and made available pursuant to points (a) and (b) of article 6(3).

"3. The member states concerned, each in so far as it is concerned, shall also: (a) arrange for the information referred to in paragraphs 1 and 2 to be made available, within a reasonable time, to the authorities referred to in article 6(1) and the public concerned in the territory of the member state likely to be significantly affected; and (b) ensure that the authorities referred to in article 6(1) and the public concerned are given an opportunity, before development consent for the project is granted, to forward their opinion within a reasonable time on the information supplied to the competent authority in the member state in whose territory the project is intended to be carried out."

5 It is common ground that the construction of HPC is a project which falls within Annex I to the EIA Directive. An environmental impact assessment was required and was carried out, and the necessary public consultation was undertaken within the United Kingdom, in accordance with articles 4–6 of the EIA Directive.

6 The defendant did not carry out transboundary consultation in accordance with article 7 because he did not consider that the HPC project was "likely to have significant effects on the environment in another member state." A transboundary screening assessment carried out by the planning inspectorate ("PINS") on the defendant's behalf, having referred to Appendix 7E to volume 1 of the interested party's environmental statement, which contained an assessment of potential transboundary effects, said: "On the basis that licensing and monitoring conditions are effective, impacts will not be significant." The screening assessment also said, when dealing with the "probability":

"The probability of a radiological impact is considered to be low on the basis of the regulatory regimes in place. There could be direct impacts related to the discharge of water during normal operational conditions. However, the discharge of water is expected to be controlled by appropriate licensing conditions and regular monitoring, and hence the probability of any adverse impacts is likely to be low. The developer has indicated that information is included in the Government's submission to the European Commission under article 37 of the Euratom Treaty to show that transboundary impacts from accidents during operation or decommissioning will be so low as to be exempt from regulatory control."

7 The Austrian Government wrote to the Department of Energy and Climate Change indicating that it wished to participate in the process of

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considering the application for the order. It was sent a copy of the application, and its response included an expert report. The decision letter dated 19 March 2013 summarised the expert report, and the defendant's response thereto, in paras 6.6.2(ii) and (iii):

> "6.6.2(ii) The expert report focuses on nuclear safety issues and as such has been reviewed by the Office of Nuclear Regulation ('ONR'). It draws heavily on documents published by the ONR during the Generic Design Assessment of the EPR. Although broadly technically sound, it tends to overemphasise the significance of those areas where ONR has in any event determined that more work needs to be done during any subsequent construction and commissioning of a power station based on the EPR (i e such as at Hinkley Point) as part of its own regulatory processes.
>
> "6.6.2(iii) The Austrian expert contends that in assessing the likely environmental effects of HPC project, I should take into account the effects of very low probability, extreme (or severe) accidents. Effectively the report says that unless it can be demonstrated that a severe accident (involving significant radiological release) cannot occur, then no matter how unlikely it is, I must consider its consequences as part of the development consent process, having regard, in particular, to the possible deleterious effects on Austria. However, in my view such accidents are so unlikely to occur that it would not be reasonable to 'scope in' such an issue for environmental impact assessment purposes."

8 The claimant contends that there was a failure to comply with article 7 of the EIA Directive. The defendant failed to consult the public in the Republic of Ireland in accordance with article 7 because: (1) he misdirected himself as to the meaning of "likely" within article 7 by "scoping out" severe nuclear accidents on the basis that they were very unlikely (ground 1; "likelihood"); and (2) even if he was correct as to the meaning of "likely", the defendant erred in relying on the existence of the United Kingdom nuclear regulatory regime to fill gaps in current knowledge when reaching his conclusion as to the likelihood of nuclear accidents (ground 2; "regulatory regime").

9 Before considering these two grounds, it is necessary to understand the reference in the decision letter to "very low probability" severe accidents. The Austrian expert report had said that severe accidents with high releases of caesium-37 cannot be excluded, and there would be a need for official intervention in Austria after such an accident, but the report recognised that the calculated probability of such an accident is below 1E-7/a, which means that such an accident would not be expected to occur more frequently than once in every 10 million years of reactor operation: see para 53 of Patterson J's judgment.

Discussion

Ground 1: Likelihood

10 The words "likely to have significant effects on the environment" occur in a number of places in the EIA Directive: in recitals (7) and (9), in articles 1(1), 2(1) and 7(1), and in a slightly different formulation—"likely significant effects of the proposed project on the environment"—in Annex IV. In similar vein, an environmental statement must include "the data

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A required to identify and assess the main effects which the project is likely to have on the environment": see article 5(3).

11 Two points should be made at the outset of any consideration of what is meant by "likely" in article 7(1). It is now common ground that: (1) the words "likely to have significant effects on the environment" must have the same meaning throughout the EIA Directive (not least because the B environmental information to be supplied to the authorities and the public in the other member state under article 7 is the information that must be provided under article 6 to the public in the member state in which the project is located); and (2) whatever that meaning might be, in the context of the EIA Directive the word "likely" does not mean, as an English lawyer might suppose, more probable than not.

12 The Court of Justice of the European Union has not ruled on the C meaning of "likely to have significant effects on the environment" in the EIA Directive. The domestic authorities were considered by Patterson J in paras 123–126 of her judgment. None of those authorities is binding on this court. In *R (Morge) v Hampshire County Council* [2010] PTSR 1882 Ward LJ recorded the parties' agreement that "likely" connotes real risk and not probability (para 80). In *R (Bateman) v South Cambridgeshire District* D *Council* [2011] EWCA Civ 157 at [17] Moore-Bick LJ expressed the view: "something more than a bare possibility is probably required, though any serious possibility would suffice", but he did not find it necessary to reach a final decision on the question (para 19).

13 The claimant's submission that a project is "likely to have significant effects on the environment" if such effects "cannot be excluded on the basis of objective information" is founded on the decision of the Grand Chamber E of the Court of Justice in *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Landbouw, Nat uurbeheer en Visserij (coöperatieve producentenorganisatie van de nerderlandse kokkelvisserij UA, intervening)* (Case C-127/02) [2005] All ER (EC) 353, para 44; [2004] ECR I-7405. The *Waddenzee* case was concerned with the Habitats Directive (Council Directive 92/43/EEC of 21 May 1992 on the conservation F of natural habitats and of wild fauna and flora (OJ 1992 L206, p 7), article 6 of which materially provides:

> "1. For special areas of conservation, member states shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or G contractual measures which correspond to the ecological requirements of the natural habitat types in Annex 1 and the species in Annex II present on the sites.
>
> "2. Member states shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in H relation to the objectives of this Directive.
>
> "3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of

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the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, *the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned* and, if appropriate, after having obtained the opinion of the general public." (Emphasis added.) A

14 In paras 42–45 of its judgment the Grand Chamber said: B

"42. As regards article 2(1) of Directive 85/337 [now article 2(1) of the EIA Directive], the text of which, essentially similar to article 6(3) of the Habitats Directive, provides that 'member states shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment . . . are made subject to an assessment with regard to their effects', the court has held that these are projects which are likely to have significant effects on the environment (see to that effect *Commission of the European Communities v Portugal* (Case C-117/02) [2004] ECR I-5517, para 85). C

"43. It follows that the first sentence of article 6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability *or a risk* that the latter will have significant effects on the site concerned. D

"44. In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first sub-paragraph of article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, *such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects* on the site concerned (see, by analogy, inter alia *United Kingdom v Commission of the European Communities* (Case C-180/96) [1998] ECR I-2265, paras 50, 105 and 107). Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the Preamble to the Habitats Directive and article 2(1) thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora. E F G

"45. In the light of the foregoing, the answer to question 3(a) must be that the first sentence of article 6(3) of the Habitats Directive must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives *if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site*, either individually or in combination with other plans or projects." (Emphasis added.) H

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A **15** On behalf of the claimant, Mr David Wolfe QC understandably placed much emphasis on the Grand Chamber's interpretation of the "essentially similar" text of article 6(3) of the Habitats Directive; and the fact that the Grand Chamber had drawn an analogy with the judgment in *United Kingdom v Commission of the European Communities* (Case C-180/96) [1998] ECR I-2265 in which the court was considering the meaning of likelihood in a very different context: the United Kingdom's B response to the BSE crisis, and a Directive which required notification of "any zoonoses, diseases or other cause likely to constitute a serious hazard to animals or to human health." This demonstrated, he submitted, that the Grand Chamber's approach to the likelihood of significant harm in any context where environmental concerns, including the protection of human health, were in issue was based on first principles, and was not confined to C the specific characteristics of the Habitats Directive.

16 While the text of article 2(1) of the EIA Directive and article 6(3) of the Habitats Directive is essentially similar, and both Directives are concerned with environmental protection, there is in my view a clear distinction between the two Directives. The scope of the EIA Directive is wide-ranging, it ensures that any project which is likely to have significant D effects on the environment is subject to a process of environmental impact assessment. The EIA Directive does not prescribe what decision must be taken by the competent authority—to permit or to refuse—if the environmental impact assessment concludes that the proposal is likely to have significant effects on the environment. The Habitats Directive is more focused, it protects particular areas of Community importance, which have been defined as "special areas of conservation", and which must be E maintained at, or restored to, "favourable conservation status": see articles 2 and 3. In order to achieve this aim article 6(3) provides that, subject only to "imperative reasons of overriding public interest" (see article 6(4)), where there has been an "appropriate assessment": "the competent authorities shall agree to the plan or project *only after having ascertained that it will not adversely affect the integrity of the site concerned*." (Emphasis added.)

F **17** Thus, where there has been an "appropriate assessment" article 6(3) imposes a very strict test for approval. The Grand Chamber said that competent authorities may approve a plan or project, at paras 55–59:

> "55. . . . only after having made sure that it will not adversely affect the integrity of the site.
>
> "56. It is therefore apparent that the plan or project in question may be G granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned.
>
> "57. So, where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation.
>
> H "58. In this respect it is clear that the authorisation criterion laid down in the second sentence of article 6(3) of the Habitats Directive integrates the precautionary principle (see *R v Ministry of Agriculture, Fisheries and Food, Ex p National Farmers' Union* (Case C-157/96) [1998] ECR I-2211, para 63) and makes it possible effectively to prevent adverse effects on the integrity of protected sites as the result of the plans or

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projects being considered. A less stringent authorisation criterion than that in question could not as effectively ensure the fulfilment of the objective of site protection intended under that provision. A

"59. Therefore, pursuant to article 6(3) of the Habitats Directive, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned, in the light of the site's conservation objectives, are to authorise such activity *only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects* (see, by analogy, *Monsanto Agricoltura Italia SpA v Presidenza del Consiglio dei Ministri* (Case C-236/01) [2003] ECR I-8105, paras 106 and 113)." (Emphasis added.) B

18 In order to achieve this very high level of protection for special areas of conservation an equally stringent approach is required at the screening stage when the competent authority is deciding whether an "appropriate assessment" is required: see point 70 of the opinion of Advocate General Kokott in the *Waddenzee* case [2005] All ER (EC) 353. It is for this reason that in a case falling within the Habitats Directive an "appropriate assessment" must be carried out unless the risk of significant effects on the site concerned can be "excluded on the basis of objective information." Reading the *Waddenzee* judgment as a whole, it is clear that significant effects can be excluded on the basis of objective evidence if "no reasonable scientific doubt remains as to the absence of such effects." C D

19 Standing back from a detailed analysis of the text of the two Directives, there is no obvious reason why such a strict approach should apply to the screening stage in the EIA Directive, which merely seeks to ensure that any likely significant effects on the environment are identified and properly taken into account in the decision-making process. Even if significant environmental effects are identified, and are not merely likely, but are certain to occur, the EIA Directive does not require that approval for an EIA project within either Annex I or II of the EIA Directive must be refused in the absence of some overriding public interest. The Grand Chamber referred to the precautionary principle in the decision in *Waddenzee* (see para 44), but it was applying that principle in the context of the Habitats Directive, where the objective is the protection of the integrity of particular sites designated for their conservation importance. In the wider context of environmental protection a "real risk" test embodies the precautionary principle: see *R (Evans) v Secretary of State for Communities and Local Government* [2013] JPL 1027, para 21, per Beatson LJ. E F G

20 I have already mentioned the fact that, by contrast with the Habitats Directive, the EIA Directive has a broad scope: it applies to all "projects which are likely to have significant effects on the environment" (article 1); and the environmental statements prepared for all such projects must include information about all of the likely significant effects (article 5), and must be subject to public consultation (article 6). While the claimant stresses the need for any likely environmental effect to be "significant", it seems to me that adopting the claimant's approach to the meaning of likelihood—that a significant environmental effect is "likely" if it cannot be excluded on the basis of objective evidence—would inevitably have the effect of both H

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A (a) materially increasing the number of projects within Annex II which would have to be the subject of an EIA; and (b) increasing the number of "likely" significant effects that would have to be included in all environmental statements, and consulted upon.

21 Many environmental statements for major projects which are now prepared on a "real risk" basis are already very lengthy. If, in addition to being required for more Annex II projects, environmental statements had to B deal with every possible significant environmental effect, however unlikely, unless it could be excluded on the basis of objective evidence, there is a real danger that both the public when consulted and decision-takers would "lose the wood for the trees", thereby causing the EIA process to become less effective as an aid to good environmental decision-making: see *R (Loader) v Secretary of State for Communities and Local Government* [2013] PTSR C 406, para 46, per Pill LJ ; and the decision in *Bateman's* case [2011] EWCA Civ 157 at [19], per Moore-Bick LJ.

22 In addition to these wider policy considerations, it is necessary to consider the text of the EIA Directive as a whole. I accept the submission of Mr Jonathan Swift QC on behalf of the defendant that the claimant's approach to likelihood is inconsistent with the selection criteria that are set out in Annex III, which must be taken into account when a decision is being D taken as to whether an Annex II project shall be made subject to an environmental impact assessment, i e whether it is likely to have significant effects on the environment. The selection criteria include, at point 3, "Characteristics of the potential impact":

> "The potential significant effects of projects must be considered in E relation to the criteria set out in points 1 and 2 [the characteristics and the location of projects] and having regard in particular to: (a) the extent of the impact (geographical area and size of the affected population); (b) the transfrontier nature of the impact; (c) the magnitude and complexity of the impact; (d) *the probability of the impact*; (e) the duration, frequency and reversibility of the impact." (Emphasis added.)

F Mr Swift submits, rightly in my view, that the need to have regard to "the probability of the impact" would be redundant if the test of likelihood was whether the risk of any impact, however improbable, could be excluded on the basis of objective evidence.

23 For these reasons, I consider that the differences between the scope, purpose and text of the two environmental Directives are such that it is unduly simplistic to say that, because one part of the text in both Directives G is "essentially similar", the meaning of that part of the text in the context of article 6(3) of the Habitats Directive as determined by the Grand Chamber in the *Waddenzee* case [2005] All ER (EC) 353 can simply be carried over into the EIA Directive. The "real risk" test adopted in the domestic authorities (above) incorporates the protective principle in the context of the EIA Directive.

H **24** Mr Wolfe submitted that, even if we were minded to conclude that the defendant had not erred in his approach to likelihood for the purposes of article 7, a reference to the Court of Justice was required because this court could not be convinced that applying the "real risk" test in the context of the EIA Directive would be correct as a matter of EU law: see *CILFIT Srl v Ministero della Sanita* (Case C-283/81) [1982] ECR 3415, paras 16–20.

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In support of that submission he relied, in addition to the Grand Chamber's judgment in the *Waddenzee* case, on five considerations: (a) the German text of article 7(1); (b) the Russian text of the Convention on Environmental Impact Assessment in a Transboundary Context (OJ 1992 C104, p 7) ("the Espoo Convention"); (c) the interpretation of the Espoo Convention by that Convention's Implementation Committee; (d) the Aarhus Convention (OJ 2005 L125, p 4); and (e) Parliament and Council Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ 2001 L197, p 30) ("the SEA Directive").

25 While both (a) and (b) support the proposition that "likely" in article 7(1) has a broader meaning than "more likely than not", they do not support the claimant's proposition that "likely" in article 7(1) means "cannot be excluded no matter how unlikely." In the decision in the *Waddenzee* case [2005] All ER (EC) 353 Advocate General Kokott explained in point 69 of her opinion:

> "As regards the degree of probability of significant adverse effect, the wording of various language versions is not unequivocal. The German version appears to be the broadest since it uses the subjunctive 'könnte' (could). This indicates that the relevant criterion is the mere possibility of an adverse effect. On the other hand, the English version uses what is probably the narrowest term, namely 'likely', which would suggest a strong possibility. The other language versions appear to lie somewhere between these two poles. Therefore, according to the wording it is not necessary that an adverse effect will certainly occur but that the necessary degree of probability remains unclear."

26 There is no dispute that article 7 of the EIA Directive gives effect to the Espoo Convention: see recital (15) to the EIA Directive. The English language version of the Convention uses the word "likely". The claimant obtained a translation of the Russian version of the Espoo Convention (of which there are three authentic texts, English, French and Russian). The translator states that the word "may" in the expression "may cause a significant adverse transboundary impact", "fails to convey the meaning of likelihood and expresses a mere possibility which can be either high or low." In a further statement, the translator explains that the Russian word for "may" "includes something which cannot be excluded or ruled out." It seems that the Russian word for "may" conveys a flexible concept of possibility which ranges from a high possibility at one end of the spectrum to a possibility which cannot be excluded. As with the German text of the EIA Directive, the Russian text would not constrain the Court of Justice to adopt the lowest level of possibility inherent in the Russian version of the Espoo Convention. I will deal with the view expressed by the Implementation Committee after I have considered whether any assistance can be obtained from the Aarhus Convention and the SEA Directive.

27 There is no dispute that the EIA Directive must be construed so as to give effect to the Aarhus Convention. Recital (20) to the EIA Directive records the fact:

> "Article 6 of the Aarhus Convention provides for public consultation in decisions on the specific activities listed in Annex I thereto and on

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A activities not so listed which *may* have a significant effect on the environment." (Emphasis added.)

In broad terms, Annex I to the Aarhus Convention lists the kinds of projects that are listed in Annex I to the EIA Directive, while Annex II projects in the EIA Directive may fall within the second part of article 6(1) of the Aarhus Convention. While the word "may" indicates a lower threshold than B "likely" (used in the sense of more likely than not), it does not indicate that the test for public consultation across the board—for all activities which may have a significant effect on the environment—is so low as to include any activity where a significant effect on the environment, however unlikely, cannot be excluded.

28 Article 3(2) of the SEA Directive requires an environmental assessment for all plans and programmes (a) which are prepared for certain C purposes and which set the framework for future development consent of projects listed in Annexes I and II to the EIA Directive; and (b) "which in view of the likely effect on sites [special areas of conservation] have been determined to require an [appropriate] assessment pursuant to article 6 or 7 of [the Habitats Directive]." In the latter case, the Court of Justice has held that an environmental assessment is required if a significant effect on the site D cannot be excluded: see *Syllogos Ellinon Poleodomon kai Chorotacton v Ypourgos Perivallontos, Chorotaxias & Dimosion Ergon* (Case C-177/11) EU:C:2012:378; 21 June 2012. This decision of the Court of Justice merely applies the *Waddenzee* approach to plans or programmes which are likely to have a significant effect on sites of Community importance, which have been designated as special areas of conservation by the member states: see E paras 19–23 of the judgment. It does not address the issue in the present case: whether the *Waddenzee* approach to likelihood should be carried over into the EIA Directive.

29 For these reasons, I am not persuaded that any of these considerations assists the claimant's case. Against this background, I turn to the views expressed by the Implementation Committee ("the committee"). The judge dealt with this issue in her judgment [2013] EWHC 4161 (Admin) F at [132]–[142]. In summary, the claimant had relied on the endorsement by the parties to the Espoo Convention at their fourth meeting of the findings of the committee in annex I that Ukraine had not complied with the Convention in what for convenience I will call the "Danube Black Sea" case (decision IV/2, annex I; ECE/MP.EIA/10). In para 54 in Part III of annex I to the committee's report "Consideration and Evaluation", preceding its "Findings" in Part IV, the committee said:

G

"Article 3, paragraph 1 of the Convention stipulates that parties shall notify any party of a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact. The committee is of the opinion that, while the Convention's primary aim, as stipulated in article 2, paragraph 1, is to 'prevent, reduce and control significant H adverse transboundary environmental impact from proposed activities', even a low likelihood of such an impact should trigger the obligation to notify affected parties in accordance with article 3. This would be in accordance with the *Guidance on the practical application of the Espoo Convention*, para 28, as endorsed by decision III/4 (ECE/MP.EIA/6 annex IV). *This means that notification is always necessary, unless significant*

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adverse transboundary impact can be excluded with certainty. This interpretation is based on the precautionary and prevention principles." (Emphasis added.)

30 The judge concluded that the meeting of the parties was not purporting to determine the legal position under the Convention, but was setting out a pragmatic approach for the parties to follow, and also said that the committee had no status to give a legal ruling: see para 135 of the judgment. At the fourth meeting, the parties also asked the committee: "To promote and support compliance with the Convention including to provide assistance in this respect, as necessary." In response to that request the committee published its opinions, as expressed in the reports of its sessions, from 2001 to 2010. Those opinions included its views expressed in para 54 of annex I to decision IV/2 (above).

31 In 2013 the European Commission published *Guidance on the application of the environmental impact assessment procedure for large-scale transboundary projects*. Under the heading "Need for notification" the European Commission's guidance says:

"The Espoo Convention requires that the party of origin notifies affected parties about projects listed in Appendix 1 and likely to cause a significant adverse transboundary impact (article 3(2)). The notification triggers the transboundary EIA procedure. The Espoo Convention's primary aim is to '*prevent reduce and control significant adverse transboundary environmental impact from proposed activities*' (article 2(1)), but in fact the party of origin is obliged to notify affected parties (in accordance with article 3 of the Espoo Convention) even if there is only a low likelihood of such impact. *This means that notification is always necessary, unless significant adverse transboundary impact can be excluded with certainty. [Footnote] 17. This interpretation is based on the precautionary and prevention principles*." (Emphasis added.)

Footnote 17 cross-refers to para 54 of decision IV/2 (above).

32 As I explained when granting permission to appeal (27 March 2014; [2014] EWCA Civ 666), the chair of the committee wrote a letter dated 14 March 2004 to the United Kingdom Government. The committee had requested a copy of Patterson J's judgment, and had considered the matter between 25 and 27 February 2014 at its thirtieth session held in Geneva. The committee's letter dated 14 March 2014 expressly endorsed the view that it had expressed in the Danube Black Sea case, as to the circumstances in which transboundary consultation was required by the Convention: "This means that notification is necessary unless a significant adverse transboundary impact can be excluded (decision IV/2, annex I, para 54)." The letter continued:

"On the above grounds, the committee found that there was a profound suspicion of non-compliance and decided to begin a committee initiative further to para 6 of the committee's structure and functions. In line with para 9 of the committee's structure and functions, the committee decided that the United Kingdom should be invited to the committee's thirty-second session (9–11 December 2014) to participate in the discussion and to present information and opinions on the matter under consideration."

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A 33 Having read the committee's letter, I was satisfied that there was a compelling reason for granting permission to appeal. There was a need for this court to decide whether it was possible to give a definitive ruling as to the approach to likelihood in the EIA Directive, or whether there should be a reference of that question to the Court of Justice. I have explained in paras 16–23 (above) why I consider that the defendant was not required to apply the *Waddenzee* approach to the likelihood of significant B transboundary environmental effects under article 7 of the EIA Directive. This is not a court of final appeal. If we had to apply the decision in the *CILFIT* case [1982] ECR 3415 I could not say that I was convinced that the other member states and the Court of Justice would necessarily conclude that the "real risk" approach is the correct approach to the likelihood of significant effects on the environment for the purposes of the EIA Directive. C Does this mean that a reference to the Court of Justice is necessary for the purpose of deciding this claim?

34 Mr Swift acknowledged that the threshold for the likelihood of significant effects on the environment for the purposes of the EIA Directive is a very important issue, with EU-wide implications. However, both he and Miss Nathalie Lieven QC on behalf of the interested party submitted that a reference to the Court of Justice was not necessary for the purpose of D determining this claim for judicial review, because no matter how low the threshold for a likely significant effect on the environment might be set by the Court of Justice, the defendant's decision dated 19 March 2013 would still be lawful.

35 I accept that submission. There is an artificiality in the claimant's claim. The defendant was not writing an academic dissertation on the E concept of likelihood in the EIA Directive, he was deciding whether to grant development consent for a particular project: the construction of an EPR nuclear power station, HPC. In its submissions, the claimant posited a stark contrast between the "real risk" and the "cannot be excluded on the basis of objective information" approaches to the issue of likelihood in the EIA Directive. The distinction between these two approaches to likelihood is clear as a matter of abstract legal analysis, but the defendant, unsurprisingly F in the context of a proposal for the construction of a nuclear power station, did not purport to apply a "real risk" approach. The disagreement between the approach adopted by the defendant and the approach advocated in the Austrian expert report was not a disagreement as to whether the "real risk" approach or the "cannot be excluded on the basis of objective evidence" approach should be applied to the risk of a serious nuclear accident. It was a G disagreement as to the point at which the significant environmental effects of a severe nuclear accident could properly be "excluded on the basis of objective evidence." Was that point reached only when it had been demonstrated that the probability of such a severe accident was zero; or was the defendant entitled to conclude that that point had been reached in this case because the probability of a severe accident was very remote indeed—in circumstances where the Austrian expert report had calculated the H probability of such an accident to be as low as 1 in 10 million years of reactor operation?

36 The true nature of the dispute in this case—whether the exclusion of a significant environmental effect from the EIA process is permissible only if it has been demonstrated that there is no risk whatsoever of it occurring, or if

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exclusion is permissible where it has been demonstrated that the risk is extremely remote—emerges most clearly from the response of the Department of Energy and Climate to the letter dated 14 March 2014 from the Espoo Convention Implementation Committee (para 32 above). In its letter dated 19 June 2014 the department maintained that the present case was very different from the Danube Black Sea case in which there was no doubt that the Convention was engaged:

> "On any analysis, the risk of an accident occurring from the proposed new nuclear development at Hinkley Point C is extremely low. Given the very remote nature of the risk, it is difficult to quantify, and the estimates produced will depend to some extent on the accident scenarios considered. However, the literature on this issue is summarised in the European Commission's 2005 report 'Externe—The Externalities of Energy, Methodology 2005 Update', which points to a probability of major accidents (core meltdown plus containment failure) in the UK of 4x10–9. This suggests that the potential for a major accident in the UK—the meltdown of the reactor's core along with failure of the containment structure—is one in 2·4 billion per reactor year; by comparison, it is thought that the risks of a meteorite over a kilometre hitting the earth, which could have significant global environmental impacts, could be one in 0·5 million per year. The Austrian Government also commissioned its own expert analysis of the risks of an accident from a new nuclear development at Hinkley Point C, which expressed the risk of an accident as being not expected to occur more frequently than once in every ten million years of reactor operation. On no natural understanding of the term could such a remote risk be considered be constitute a 'likely significant effect'."

37 The claimant's challenge to the defendant's decision in this case does not simply depend on the proposition that the Grand Chamber's approach in the *Waddenzee* case [2005] All ER (EC) 353 to the meaning of "likely to have a significant effect" in the Habitats Directive should be carried over into the EIA Directive, it also depends on a very literal meaning being given to the Grand Chamber's words "*cannot be excluded* on the basis of objective information" in its judgment in the *Waddenzee* case. If a remote risk can properly be excluded, the claimant does not challenge the defendant's assessment that the remoteness of the risk in this case was such that it could be excluded. In order to succeed in this claim the claimant has to establish that *any* risk, no matter how remote, cannot be excluded unless it has been demonstrated that there is *no* possibility of its occurring. It is, in effect a "zero risk" approach to the likelihood of significant environmental effects.

38 It would be surprising if the Grand Chamber had intended to impose such a high and inflexible threshold for "appropriate assessment", even in the context of the Habitats Directive. However purposive the interpretation of the Habitats Directive, its text cannot be ignored. The word "likely", and the concept of likelihood, implies at least some degree of flexibility. There comes a point when the probability (to use the word in Annex III to the EIA Directive) of a significant effect is so remote that it ceases to be "likely", however broad the concept of likelihood. In the decision in the *Waddenzee* case the Grand Chamber said that, following an appropriate assessment, a project could be authorised only if the competent authority "have made

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A certain that it will not adversely affect the integrity of that site. That is the case where *no reasonable scientific doubt* remains as to the absence of such effects . . ." (see para 17 above). Thus, certainty was equated with the absence of reasonable scientific doubt.

39 Even if the *Waddenzee* approach to likelihood is carried over into the EIA Directive, it must be open to a competent authority to conclude that the risk of a significant adverse effect on the environment is so remote (e g if it is B more remote than the risk of a meteorite of over a kilometre hitting the earth) that there is "no reasonable scientific doubt" as to the absence of that adverse effect for the purpose of the EIA Directive. The competent authority does not have to be satisfied that there is no risk, however remote, that a severe nuclear accident will occur in order to be satisfied that there is "no reasonable scientific doubt" that such an accident will not occur. This C approach is consistent with the guidance that is contained in the Planning Inspectorate's *Advice note 12: Development with significant transboundary impacts consultation* (IPC; June 2011).

40 I do not accept Mr Wolfe's submission that the defendant failed to follow this advice from the Planning Inspectorate. When dealing with "Screening", and with those cases in which it is necessary for the defendant to determine whether or not a proposed development is likely to have significant D effects on the environment in another EEA state, the advice note say:

> "In reaching a view, the precautionary approach will be applied and following the court's reasoning in the *Waddenzee* case such that 'likely to have significant effects' will be taken as meaning that there is a probability or risk that the development will have an effect, and not that a development will definitely have an effect . . ."

E

Mr Wolfe emphasised the reference to the Court of Justice's reasoning in the decision in the *Waddenzee* case; but the advice note continues:

> "As a rule of thumb (taking the precautionary approach), unless there is compelling evidence to suggest otherwise, it is likely that the Planning Inspectorate may consider the following [nationally significant F infrastructure projects] as likely to have significant transboundary impacts: nuclear power stations; and offshore generating stations in a renewable energy zone."

I accept Mr Swift's submission that evidence that the risk of a severe nuclear accident is not merely unlikely, but extremely remote, is capable of being "compelling evidence" that a proposed nuclear power station is not likely to G have significant transboundary effects, since it is common ground that such effects would be likely to occur only if there was such an accident.

41 The contrast between the evidential basis for the low level of risk in the present case and the extent of the scientific uncertainty in the *United Kingdom* case [1998] ECR I-2265 to which the Court of Justice referred by way of analogy in its judgment in the *Waddenzee* case [2005] All ER (EC) 353 (see para 14 above) is instructive. In the *United Kingdom* case the Spongiform H Encephalopathy Advisory Committee had said that "it was not in a position to confirm whether or not there was a causal link between BSE and the recently discovered variant of Creutzfeldt-Jakob disease, a question which required further scientific research" (para 14). A similar position had been adopted by the Scientific Veterinary Committee of the European Union: while it was not

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possible on the available data to prove that BSE was transmissible to humans, in view of the possibility of such transmission, which the committee had always considered, it had recommended certain precautionary measures and that research on the question of transmissibility of BSE to humans be continued (para 13). The recitals to the Directive that was challenged by the United Kingdom reflected the extent of the scientific uncertainty:

> "Whereas under current circumstances, a definitive stance on the transmissibility of BSE to humans is not possible; whereas a risk of transmission cannot be excluded; whereas the resulting uncertainty has created serious concern among consumers . . ."

42 In the present case, it is common ground that the probability of a severe nuclear accident is very low indeed. There may be an issue as to just how low that probability is (see the correspondence with the Implementation Committee, para 36 above) but there is no doubt that the defendant was entitled to describe it in his decision as a "very low probability". The issue, therefore, is whether the risk of a significant effect on the environment can properly be excluded on the basis of a very low probability, or only on the basis of a zero probability. In this case we are concerned with a proposal for a nuclear power station, and the environmental consequences of a severe nuclear accident. In that context, for obvious reasons, "very low probability" means very low probability indeed, far below the levels of probability (or "risk") that might be regarded as acceptable in the context of other developments. Although Annex I to the EIA Directive includes other inherently dangerous projects, e g chemical installations for the production of explosives, where only the remotest of risks will be acceptable, the Directive covers a very wide range of projects in Annexes I and II. In the context of very many, if not most, of the projects listed in the Directive, it is difficult to see how it could seriously be contended that a significant effect on the environment which would not be expected to occur more frequently than once in every ten million years could not properly be excluded from environmental impact assessment on the basis of objective information.

43 Annex III requires the member states to consider both the magnitude and complexity of an environmental impact and the probability of such an impact when deciding whether an Annex II project is likely to have significant effect on the environment: see para 22 above. As a matter of common sense, the greater the potential impact, the lower will be the level of probability at which the competent authority will decide that it should be subjected to the environmental impact assessment process: see *R (Miller) v North Yorkshire County Council* [2009] EWHC 2172 (Admin) at [31]–[32], per Hickinbottom J. This leaves an area of judgment for the competent authority—balancing the severity of any potential environmental harm against the probability of it occurring. It recognises the fact that some significant effects on the environment, e g a significant radiological impact, are much more significant than others. Given the wide range of projects covered by the EIA Directive and the express requirement to consider the probability of any impact, I am satisfied that, even if it is appropriate to apply the "cannot be excluded on the basis of objective evidence" approach to the likelihood of significant effects on the environment in the EIA Directive, there is no realistic prospect of the claimant's "zero risk" approach being adopted by the Court of Justice. I would add that our attention was not drawn to any

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A decision of a court in which the claimant's approach to exclusion has been adopted. However purposive the interpretation of the EIA Directive, a "zero risk" approach to likelihood would be an interpretative step too far and would frustrate, rather than further the purpose of the Directive.

44 In reaching that conclusion, I have not ignored the views expressed by the committee in its letter dated 14 March 2014. They provide the only possible support for a "zero risk" approach to the point at which a serious B environmental impact may be excluded from the EIA process. While I respect the committee's view, it is not the function of the committee to give an authoritative legal interpretation of the Convention. The correspondence with the committee makes it clear that there is a dispute as to the proper interpretation of the Convention. Article 15 makes provision for the settlement of such disputes. If the dispute cannot be resolved by negotiation C between the parties it may be either submitted to the International Court of Justice, or referred to arbitration in accordance with the procedure set out in Appendix VII to the Convention.

45 The committee does have an important role in promoting best practice under the Convention, and it is noteworthy that its conclusion in para 54 of annex I to decision IV/2—that even a low likelihood of a D significant adverse transboundary environmental impact would trigger the obligation to notify affected parties in accordance with article 3 of the Convention (article 7 of the EIA Directive)—is expressly based on its *Guidance on the practical application of the Espoo Convention*, as endorsed by decision III/4. Thus, it would appear that the views expressed by the committee are based on a combination of its advice as to what would be best practice, and its view as to what is the legal position, under the Convention. E I intend no criticism of the committee when I say that, in so far as its decision in para 54 of annex I to decision IV/2 moves from advice as to what would be best practice to a statement of what the legal position is, it is not based on any legal analysis (that is not surprising, the committee is not a legally qualified body). Even if a "low likelihood" of a significant transboundary effect not merely should (as a matter of good practice), but does (as a matter of law) F trigger the obligation to notify any affected party, the committee will still have to consider the issue raised in this case: whether a "likelihood" may be so very low that it can be excluded for the purpose of transboundary consultation, or whether exclusion is permissible only when all risk has been eliminated. Of critical importance for present purposes, the committee understandably focuses simply on the terms of the Espoo Convention, and does not consider the need for the words "likely to have significant effects on G the environment" to have a consistent meaning throughout the EIA Directive. For these reasons, the views expressed by the committee in its letter dated 14 March 2014 do not persuade me that it is necessary for this court to make a reference to the Court of Justice in order to determine this claim.

Ground 2

H **46** The judge dealt with this issue in [2013] EWHC 4161 (Admin) at [177]–[193]. She concluded, at para 193:

> "In my judgment there is no reason that precludes the [defendant] from being able to have regard to, and rely upon, the existence of a stringently operated regulatory regime for future control. Because of its existence, he

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> was satisfied, on a reasonable basis, that he had sufficient information to enable him to come to a final decision on the development consent application. In short, the [defendant] had sufficient information at the time of making his decision to amount to a comprehensive assessment for the purposes of the Directive. The fact that there were some matters still to be determined by other regulatory bodies does not affect that finding. Those matters outstanding were within the expertise and jurisdiction of the relevant regulatory bodies which the defendant was entitled to rely upon."

I agree with the judge. Had this ground of challenge stood alone I would not have granted the claimant permission to apply for judicial review.

47 There is no dispute that the defendant was in principle entitled to have regard to the UK nuclear regulatory regime when reaching a conclusion as to the likelihood of nuclear accidents: see *Gateshead Metropolitan Borough Council v Secretary of State for the Environment* [1995] Env LR 50.

48 Many major developments, particularly the kind of projects that are listed in Annex I to the EIA Directive, are not designed to the last detail at the environmental impact assessment stage. There will, almost inevitably in any major project, be gaps and uncertainties as to the detail, and the competent authority will have to form a judgment as to whether those gaps and uncertainties mean that there is a likelihood of significant environmental effects, or whether there is no such likelihood because it can be confident that the remaining details will be addressed in the relevant regulatory regime. In para 38 (quoted at para 20 of his judgment) in *R (Jones) v Mansfield District Council* [2004] Env LR 391, Dyson LJ adopted paras 51 and 52 of the judgment of Richards J which included the following passage:

> "It is for the authority to judge whether a development would be likely to have significant effects. The authority must make an informed judgment, on the basis of the information available to it and having regard to any gaps in that information and to any uncertainties that may exist, as to the likelihood of significant environmental effects . . . Everything depends on the circumstances of the individual case."

49 This is precisely what happened on the facts of the present case. The elaborate regulatory regime for nuclear power stations is described in the witness statements filed on behalf of the defendant and the interested party. For present purposes, it is sufficient to note that by the time the defendant made his decision dated 19 March 2013 the Office for Nuclear Regulation ("ONR") had issued a nuclear site licence, and both the ONR and the Environment Agency had completed the Generic Design Assessment ("GDA") process, including a severe accident analysis, for the EPR, the type of reactor to be used at HPC. All of the GDA issues had been addressed, and the ONR had issued a Design Acceptance Confirmation ("DAC"). The ONR had said that it was confident that the design was "capable of being built and operated in the UK, on a site bounded by the generic site envelope, in a way that is safe and secure". Site specific matters not covered by the GDA process would still need to be considered, but the ONR was confident that they could, and would, be addressed under the site licence conditions. As the ONR explained:

> "Whilst the GDA process, leading to the issue of a DAC, is not part of the licensing assessment, the successful completion of GDA does provide

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A confidence that ONR will be able to give permission for the construction, commissioning and operation of a nuclear power station based on that generic design."

50 In view of this factual background, it might be thought that this case was the paradigm of a case in which a planning decision-taker could reasonably conclude that there was no likelihood of significant B environmental effects because any remaining gaps in the details of the project would be addressed by the relevant regulatory regime. Undaunted, Mr Wolfe submitted that there was a distinction between reliance on a pollution regulator applying controls "which it has *already* identified in the light of assessments which it has *already* undertaken on the basis of a scheme which has *already* been designed", which he said was permissible, and C reliance on "*current*" gaps in knowledge "being filled by the fact of the *existence* of the pollution regulator [who] will make *future* assessments . . . on elements of the project still subject to design changes", which was not.

51 There is no basis for this distinction, which is both unrealistic and unsupported by any authority. The distinction is unrealistic because elements of many major development projects, particularly the kind of projects within Annex I to the EIA Directive, will still be subject to design changes, and D applying Mr Wolfe's approach those projects will not have "already been designed" at the time when an environmental impact has to be carried out. The detailed design of many Annex I projects, in particular nuclear power stations, is an immensely complex, lengthy and expensive process. To require the elimination of the prospect of all design changes before the environmental assessment of major projects could proceed would be self-defeating. E The promoters of such projects would be unlikely to incur the, in some cases, very considerable expense, not to mention delay, in resolving all the outstanding design issues, without the assurance of a planning permission. If the environmental impact assessment process is not to be an obstacle to major developments, the planning authority (in this case the defendant) must be able to grant planning permission so as to give the necessary assurance if it is satisfied that the outstanding design issues—which may include detailed F design changes—can and will be addressed by the regulatory process.

52 In support of his submission Mr Wolfe relied on the decision of the Court of Justice in *World Wildlife Fund (WWF) v Autonome Provinz Bozen* (Case C-435/97) [1999] ECR I-5613. The *Bozen* case was concerned with whether there was a power under article 4(2) of the EIA Directive to exclude from the environmental impact assessment process, from the outset and in G their entirety, certain classes of projects falling within Annex II (para 35). Unsurprisingly, the Court of Justice decided that it was not permissible to exempt whole classes of projects in advance from the obligation to carry out a screening exercise. The criteria and/or the thresholds mentioned in article 4(2) must "facilitate examination of *the actual characteristics* of any given project" (para 37; emphasis added). No project should be exempt from environmental assessment "unless the specific project excluded could H *on the basis of a comprehensive assessment* be regarded as not being likely to have [significant effects on the environment]." (Para 45; emphasis added.)

53 The *Bozen* case was not concerned with the level of detail that is required about a project if, as in the present case, an environmental assessment is carried out. The Court of Justice was not asked to, and did not,

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address the issue raised by ground 2 in the present case: at what point may the competent planning authority conclude that it has sufficient information about the "actual characteristics" of a project, and/or that the environmental assessment is sufficiently "comprehensive", to enable it to decide that a significant environmental effect is not likely because any outstanding details will be satisfactorily addressed by the relevant pollution regulator?

54 I have considered ground 2 on the basis that, as submitted by the claimant, it has a life of its own even if ground 1 is rejected. In the abstract, the claimant's submission is correct—the circumstances in which a planning authority may rely on a pollution regulator is a separate issue—but on the facts of this case ground 2 has no substance if ground 1 is rejected. The claimant does not contend that the defendant's decision that severe nuclear accidents were very unlikely to occur was unreasonable. There has been no suggestion by any member state, or any recognised scientific body, that such accidents are anything other than very unlikely. If ground 1 is rejected, and it is concluded that the claimant's "zero risk" approach is not well founded, there is nothing to suggest that the defendant's assessment of the degree of unlikelihood of the risk of such accidents was erroneous. The views expressed by the ONR, the European Commission, the Austrian expert report and the Radiological Protection Institute of Ireland, were all to the same effect: that the risk of a severe nuclear accident is very low indeed. If the defendant was not required to adopt a "zero risk" approach there is no basis for a submission that he should not have concluded that the risk was so unlikely that the environmental effects of such an accident should not be "scoped in" (i e should be excluded) for environmental impact assessment purposes.

Conclusion

55 A reference to the Court of Justice is not necessary. I would dismiss this application.

GLOSTER LJ

56 I agree.

LONGMORE LJ

57 I also agree.

Claim dismissed.
Application for reference to the Court of Justice of the European Union refused.

11 December 2014. The Supreme Court (Lord Kerr of Tonaghmore, Lord Carnwath and Lord Hodge JJSC) dismissed an application by the claimant for permission to appeal.

MATTHEW BROTHERTON, Barrister

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A Queen's Bench Division

Regina (Harris and another) *v* Environment Agency

[2022] EWHC 2264 (Admin)

B 2022 July 7, 8; Sept 6 Johnson J

Environment — Natural habitats — Conservation of wild fauna and flora — Environment Agency responsible for grant of licences for abstraction of ground water — Agency commencing investigation into effect of licences on three of number of sites of special scientific interest in special area of conservation — C *Whether agency obliged to consider impact of licences across entirety of area — Whether breaching obligation under EU law to avoid deterioration of protected habitats and disturbance of protected species — Whether domestic law duty to "have regard" to EU obligation mandating compliance with that obligation — Whether agency acting irrationally — Environment Act 1995 (c 25), s 6(1)(b)[1] — European Union (Withdrawal) Act 2018 (c 16), ss 4(2)(b), 6[2] — Conservation* D *of Habitats and Species Regulations 2017 (SI 2017/1012), reg 9(3)[3] — Council Directive 92/43/EEC, art 6(2)[4]*

The statutory duties of the Environment Agency included, by section 6(1)(b) of the Environment Act 1995, the promotion of the conservation of flora and fauna which were dependent on an aquatic environment and the grant, variation and revocation of licences for the abstraction of water. Certain water abstraction licences granted by the E agency affected sites within the Broads Special Area of Conservation ("SAC"), which comprised 28 designated sites of special scientific interest ("SSSIs") in the Norfolk Broads. The SAC was a "European site" within the meaning of the Conservation of Habitats and Species Regulations 2017 implementing Council Directive 92/43/EEC. Between 2002 and 2010 the agency carried out a "review of consents" process, which involved reviewing all licences for the abstraction of water that had been granted before 30 October 1994 and which were likely to have a significant effect on any F European site. That review resulted in licences being affirmed, amended or revoked, as appropriate. Thereafter, the agency commenced a new investigation as part of its "Restoring Sustainable Abstraction" ("RSA") programme to identify, investigate and resolve environmental damage caused by unsustainable water abstraction. In 2018 Natural England, which had statutory responsibility for providing advice to the agency, produced a site improvement plan for the Broads SAC which advised that G there was a need to investigate and restore sustainable abstraction at sites where abstraction might be impacting on a particular site and to review licences in the

[1] Environment Act 1995, s 6(1)(b): "It shall be the duty of an appropriate agency, to such extent as it considers desirable, generally to promote … (b) the conservation of flora and fauna which are dependent on an aquatic environment …"

[2] European Union (Withdrawal) Act 2018, s 4: see post, para 58.
H S 6(3): "Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after IP completion day and so far as they are relevant to it— (a) in accordance with any retained case law and any retained general principles of EU law …"

[3] Conservation of Habitats and Species Regulations 2017, reg 9: see post, para 52.

[4] Council Directive 92/43/EEC, art 6(2): see post, para 46.

context of a changing climate. Following external consultation the agency decided that its RSA investigation should be limited to the impact of 240 licences on three specific SSSIs within the Broads SAC. However, the modelling that was conducted for the investigation showed that there were risks to other sites within the SAC beyond those three SSSIs. In 2020 Natural England further advised that, as knowledge had evolved since the earlier review of consents had been carried out, it was necessary to consider water supply in the SAC and to take any necessary action to restore ground and surface water levels. The claimants, who lived within the area of the SAC, sought judicial review challenging the lawfulness of the decision to limit the RSA investigation to the three SSSIs on the ground, inter alia, that it was a breach of an obligation under article 6(2) of Directive 92/43 to avoid the deterioration of protected habitats and disturbance of protected species, which obligation had effect in domestic law by reason of regulation 9(3) of the 2017 Regulations which required the agency to "have regard" to the Directive. The claimants contended that once the agency had decided to review the 240 abstraction licences it had been required to consider their impact across the entirety of the SAC, and that, having become aware through the RSA programme of potential risks to other sites, it had been obliged to address those risks.

On the claim—

Held, allowing the claim, (1) that, since the Conservation of Habitats and Species Regulations 2017 were retained EU law under the European Union (Withdrawal) Act 2018, by section 6(3) of that Act they had to be interpreted in accordance with retained EU case law and retained principles of EU law including the precautionary principle; and that, further, irrespective of regulation 9(3) of the 2017 Regulations, since the obligations under article 6(2) of Council Directive 92/43/EEC were of a kind recognised by the Court of Justice of the European Union in a case decided before 11 pm on 31 December 2020, and also by a domestic decision which had recognised and enforced the precautionary principle inherent in article 6(2), by virtue of section 4 of the 2018 Act article 6(2) continued to be recognised and available in domestic law and was to be enforced accordingly (post, paras 51, 59, 89, 91–94, 112).

Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij (Case C-127/02) [2005] All ER (EC) 353, ECJ (GC) and *Natural England v Warren* [2020] PTSR 565, UT considered.

(2) That the obligation under regulation 9(3) of the 2017 Regulations to "have regard to" the requirements of article 6(2) of Directive 92/43 was not the same as a duty to secure compliance with those requirements; that, however, where the object of the "have regard" duty was the requirements set out in mandatory terms in a Directive which the 2017 Regulations themselves transposed, rather than non-binding advice or guidance, the scope for departure ordinarily inherent in the words "have regard to" was considerably narrowed; that the wording of the obligation in those terms did not implicitly permit the Environment Agency, having had regard to the requirements of the Directive, deliberately to decide to act in a way that was inconsistent with those requirements, but rather recognised that the agency was one part of a complex regulatory structure and that, depending on the issue, it might have a greater or lesser role to play; that in the present context the agency was effectively the sole, and certainly the principal, public body responsible for determining whether abstraction licences ought to be granted, varied or revoked, with no other body being capable of filling the gap if it did not secure the requirements of article 6(2) of the Directive in respect of those decisions; and that, in that context, the duty to have regard to the requirements of Directive 92/43 meant that the agency had to take those requirements

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A into account and, to the extent that it was the relevant public body with responsibility for fulfilling those requirements, had to discharge them or be in a position to justify any departure from them (post, paras 73, 75, 81–87, 112).

R (Friends of the Earth Ltd) v Environment Agency [2004] Env LR 31 considered.

(3) That the proactive preventive requirement imposed by article 6(2) of Directive 92/43 meant that compliance could not be achieved simply by reacting to demonstrable deterioration but, rather, anticipatory measures were required to B prevent deterioration before it occurred, that being an aspect of the precautionary principle enshrined in EU environmental law; that, therefore, while there was no general obligation under article 6(2) proactively to review a licence unless there was some reason to do so, where there was reason to believe that there was a risk of damage it was necessary to take remedial steps; that the mere fact that the Environment Agency had reviewed the impact of abstraction on three sites did not mean that it had been obliged to review the impact on all sites; that, however, having C regard to the precautionary principle, the article 6(2) duty had been triggered by various factors which showed that the earlier review of consents process had not been effective in ensuring that abstraction did not cause damage to protected sites and that there remained a generalised risk from abstraction (particularly abstraction under permanent licences) across the entire SAC; that those factors included advances in the science of understanding the impact on SSSIs with it becoming clear, as a result of D the evolving knowledge gained from the RSA programme, that the review of consents had been flawed, and also that Natural England had identified the need to review licences in the context of a changing climate; that the agency had provided no basis for disagreeing with its advice that further assessment work was needed; and that, in those circumstances, the Environment Agency was obliged to take steps which were sufficiently robust to guarantee that abstraction of water did not cause damage to ecosystems that were protected under Directive 92/43 (post, paras 48, 49, 50, E 95–100).

Commission of the European Communities v Ireland (Case C-418/04) [2007] ECR I-10947, ECJ and *Grüne Liga Sachsen eV v Freistaat Sachsen* (Case C-399/14) [2016] PTSR 1240, ECJ applied.

(4) That the court would be slow to question the agency's expert assessment as to the steps which should be taken to achieve that end; that, in that respect, the Environment Agency had a broad discretion and was entitled to exercise its scientific F expertise and take into account factors such as the degree of risk, the extent to which the risk was already being addressed and the availability of resources; that, however, the deficiencies in the review of consent process with regard to permanent licences, and the agency's recognition of the risks of damage to protected sites by water abstraction, meant that some form of review was required; that, further, the test which the agency applied before an adjustment was made to a licence (namely, that G the licence was shown to be "seriously damaging") was contrary to the precautionary principle, which required the agency to act unless it was satisfied that there was no risk of significant damage; that, as the only authority (albeit with advice from Natural England) which could vary or revoke permanent licences, the agency could not absolve itself of compliance with article 6 by pointing to work done by other public authorities; that while it had been open to the agency, within the bounds of rational decision-making, to focus the RSA programme on a small number of sites, H so long as adequate steps were being taken outside the RSA programme to address the risks to other sites, the agency had not undertaken any sufficient analysis of the steps needed to address the impact of abstraction in accordance with permanent licences or justified its failure to take steps in respect of the risks posed, particularly by abstraction in accordance with such licences; that it was therefore in breach of article 6(2) of Directive 92/43 and its obligation under regulation 9(3) of the 2017

Regulations; and that the agency's decision was also flawed on common law grounds since, having committed itself to discharging the article 6(2) obligation, it had been irrational for the agency not to expand the RSA programme without having any alternative mechanism in place which could ensure compliance (post, paras 101, 103–106, 109, 113, 114). A

The following cases are referred to in the judgment: B

Commission of the European Communities v Ireland (Case C-418/04) EU:C:2007:780; [2007] ECR I-10947, ECJ
Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland (Case C-6/04) EU:C:2005:626; [2005] ECR I-9017, ECJ
Grüne Liga Sachsen eV v Freistaat Sachsen (Case C-399/14) EU:C:2016:10; [2016] PTSR 1240, ECJ
Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (Case C-127/02) EU:C:2004:482; [2005] All ER (EC) 353; [2004] ECR I-7405, ECJ (GC) C
Natural England v Warren [2019] UKUT 300 (AAC); [2020] PTSR 565, UT
R (Boggis) v Natural England [2009] EWCA Civ 1061; [2010] PTSR 725; [2010] 1 All ER 159, CA
R (Friends of the Earth Ltd) v Environment Agency [2003] EWHC 3193 (Admin); [2004] Env LR 31 D
R (London Oratory School) v Schools Adjudicator [2015] EWHC 1012 (Admin); [2015] ELR 335
R (Mott) v Environment Agency [2016] EWCA Civ 564; [2016] 1 WLR 4338, CA

The following additional cases were cited in argument or referred to in the skeleton arguments:

Aannamaersbedrijf PK Kraaijveld BV v Gedeputeerde Staten van Zuid-Holland (Case C-72/95) EU:C:1996:404; [1997] All ER (EC) 134; [1996] ECR I-5403, ECJ E
Chelluri v Air India Ltd [2021] EWCA Civ 1953; [2022] Bus LR 286; [2022] 2 All ER (Comm) 172, CA
Commission of the European Communities v French Republic (Case C-166/97) EU:C:1999:149, ECJ
Commission of the European Communities v Hellenic Republic (Case C-259/94) EU:C:1995:228; [1995] ECR 1-1947, ECJ F
Commission of the European Communities v Ireland (Case C-117/00) EU:C:2002:366; [2002] ECR I-5335, ECJ
Commission of the European Communities v Kingdom of Spain (Case C-214/96); EU:C:1998:565; [1998] ECR I-7661, ECJ
Commission of the European Communities v Kingdom of Spain (Case C-404/09) EU:C:2011:768; [2011] ECR I-11853, ECJ
Coöperatie Mobilisation for the Environment UA v College van gedeputeerde staten van Limburg (Joined Cases C-293/17 and C-294/17) EU:C:2018:882; [2019] Env LR 27, ECJ G
Marleasing SA v La Comercial Internacional de Alimentación SA (Case C-106/89) EU:C:1990:395; [1990] ECR I-4135, ECJ
People Over Wind v Coillte Teoranta (Case C-323/17) EU:C:2018:244; [2018] PTSR 1668, ECJ
R v East Sussex County Council, Ex p Tandy [1998] AC 714; [1998] 2 WLR 884; [1998] 2 All ER 769, HL(E) H
R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence [2003] EWCA Civ 473; [2003] QB 1397; [2003] 3 WLR 80, CA
R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs (No 2) [2016] EWHC 2740 (Admin); [2017] PTSR 203

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A *R (Drexler) v Leicestershire County Council* [2019] EWHC 1934 (Admin); [2019] ELR 142; [2020] EWCA Civ 502; [2020] ELR 399, CA
R (Friends of the Earth) v Secretary of State for Business, Enterprise and Regulatory Reform [2008] EWHC 2518 (Admin); [2009] PTSR 529
R (Health and Safety Executive) v Wolverhampton City Council [2012] UKSC 34; [2012] PTSR 1362; [2012] 1 WLR 2264; [2012] 4 All ER 429; [2012] LGR 843, SC(E)
B *R (Morge) v Hampshire County Council* [2011] UKSC 2; [2011] PTSR 337; [2011] 1 WLR 268; [2011] 1 All ER 744; [2011] LGR 271, SC(E)
R (N) v North Tyneside Borough Council [2010] EWCA Civ 135; [2010] ELR 312, CA
R (Prideaux) v Buckinghamshire County Council [2013] EWHC 1054 (Admin); [2013] PTSR D39; [2013] Env LR 32
R (WWF-UK) v Secretary of State for Environment, Food and Rural Affairs [2021] EWHC 1870 (Admin); [2022] PTSR 1006
C *R (Wilkinson) v South Hams District Council* [2016] EWHC 1860 (Admin)
Sweetman v An Bord Pleanála (Case C-258/11) EU:C:2013:220; [2014] PTSR 1092, ECJ
Van Duyn v Home Office (Case 41/74) EU:C:1974:133; [1975] Ch 358; [1975] 2 WLR 760; [1975] 3 All ER 190; [1974] ECR 1337, ECJ

D **CLAIM** for judicial review

By a claim form, and with permission to proceed granted by Chamberlain J [2022] EWHC 508 (Admin) on 10 March 2022, the claimants, Timothy Charles Harris and Angelika Harris, sought judicial review challenging the lawfulness of the decision of the defendant, the Environment Agency, in 2018 to limit an investigation into the impact of 240 licences for water abstraction under its "Restoring Sustainable E Abstraction" ("RSA") programme so as to consider the impact on just three out of 28 sites of special scientific interest ("SSSIs") which made up the Broads Special Area of Conservation ("SAC"). The claimants sought an order requiring the agency to undertake a further RSA report forthwith. The grounds of challenge were that the agency had erred in law by: (i) acting in breach of an obligation under article 6(2) of Council Directive 92/43/EEC F to avoid the deterioration of protected habitats and disturbance of protected species, which obligation had effect in domestic law by reason of regulation 9(3) of the Conservation of Habitats and Species Regulations 2017 which required the agency to "have regard" to the Directive; (ii) perversely failing to consider the impacts of the 240 licences scrutinised in its RSA report on all areas of the Broads European site and any further European sites; and G (iii) perversely extending its consideration of the effect of the 240 licensed abstractions to Alderfen Broad SSSI and Broad Fen, Dilham SSSI but no further.

The facts are stated in the judgment, post, paras 1, 6–40.

Richard Wald QC (instructed by *Freeths LLP*) for the claimants.

Matthew Dale-Harris (instructed by *Environment Agency*) for the H agency.

The court took time for consideration.

6 September 2022. **JOHNSON J** handed down the following judgment. *A*

1 The claimants, Angelika and Timothy Harris, live in the Norfolk Broads. They are concerned that water abstraction is causing irremediable damage to the environment, including ecosystems that are legally protected. Their intervention was instrumental in the decision of the defendant, the Environment Agency, not to renew two abstraction licences. The claimants *B* believe that the Environment Agency ought to review more broadly the impact of water abstraction to decide whether other licences should also be withdrawn or altered. They challenge, by judicial review, the Environment Agency's refusal to expand the scope of an investigation that it conducted into the effect of 240 licences for abstraction. That investigation concerned the effect of abstraction on just three sites of special scientific interest ("the three SSSIs"). *C*

2 The claimants' case is that:

(1) The Environment Agency is in breach of an obligation under article 6(2) of Council Directive 92/43/EEC ("the Habitats Directive") to avoid the deterioration of protected habitats and disturbance of protected species.

(2) The obligation under article 6(2) of the Habitats Directive has effect *D* in domestic law by reason of regulation 9(3) of the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations") which requires the Environment Agency to "have regard" to the Habitats Directive.

(3) Irrespective of the effect of regulation 9(3) of the Habitats Regulations, article 6(2) of the Habitats Directive is enforceable by the domestic courts.

(4) The Environment Agency's decision not to conduct a more expansive investigation into the impact of licensed water abstraction is irrational. *E*

3 The Environment Agency accepts that it must have regard to article 6(2) of the Habitats Directive. It maintains that it has done so and that it has, after taking it into account, reasonably decided to limit its investigation of the impact of the 240 licences to the three SSSIs. It disputes that article 6(2) has direct effect in domestic law beyond the obligation to "have regard" to it. In any event, it maintains that it is acting compatibly with the requirements *F* of article 6(2).

4 Permission to claim judicial review was granted by Chamberlain J [2022] EWHC 508 (Admin). The parties have co-operated closely in identifying areas of agreement and dispute and focusing argument on the latter. They agree that the outcome of the claim depends on the resolution of the following issues:

(1) The ambit of the obligation, under regulation 9(3) of the Habitats *G* Regulations, to "have regard" to the requirements of the Habitats Directive, including whether that mandates compliance with article 6(2) of the Habitats Directive (paras 73–88 below).

(2) Whether article 6(2) of the Habitats Directive imposes an obligation of a kind recognised by the Court of Justice of the European Union ("CJEU") or any court or tribunal in the United Kingdom in a case decided before 2021 *H* (paras 89–94 below).

(3) Whether the Environment Agency has breached article 6(2) of the Habitats Directive by limiting its investigation of water abstraction to the three SSSIs (paras 95–106 below).

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A (4) Whether the Environment Agency acted irrationally by limiting its investigation of water abstraction to the three SSSIs (paras 107–109 below).

5 There is also a dispute between the parties as to the relevance (when determining issues (3) and (4)) of (a) funding constraints on the Environment Agency and (b) the possibility that it might undertake further work in respect of the impact of water abstraction, outside the ambit of the programme that examined the three SSSIs.

B

The factual background

The parties

6 The Environment Agency was established by section 1 of the Environment Act 1995. By section 6(1)(b) of the 1995 Act, its duties include C the promotion of the conservation of flora and fauna which are dependent on an aquatic environment. It is responsible for the grant (and variation and revocation) of licences for the abstraction of water.

7 The claimants own and reside at Catfield Hall, Norfolk. That is within the area of Catfield Fen which is, itself, within the area of the 240 licences that were considered in the Environment Agency's investigation. The claimants also own land in Hickling and Potter Heigham, which is also within the area D covered by the 240 licences. They have been concerned for many years about the condition of fenland in the area where they live and own land. They are particularly concerned about the impact of the abstraction of groundwater for agricultural and other purposes. They have been raising those concerns with the Environment Agency for well over a decade. They successfully supported the Environment Agency's decision to vary two licences when that E decision was challenged on appeal.

Impact of water abstraction on ecosystems

8 Groundwater is water that is present in the ground. Many ecosystems are dependent on a supply of groundwater. Groundwater may be abstracted (in the Norfolk Broads, from either the chalk, the crag, or the Sandringham F sands) for use by the public water supply, industry, and agriculture. A licence is required to extract groundwater. Such licences may either be permanent (with no requirement to renew) or time limited (with the possibility of periodic renewal). The Environment Agency has power to revoke abstraction licences: sections 52 and 53 of the Water Resources Act 1991 (see para 41 below).

G **9** The abstraction of groundwater has an impact on the supply of water to wetland habitats. The precise mechanism is complex. There are many unknowns, particularly in respect of the pathways by which water travels between the aquifer (underground permeable rock, from which abstraction generally takes place) and the shallow water table (from which it is accessed by flora). Changes to groundwater flows can also influence the chemistry within the ground and this can impact on the surface ecology. This all means H that it is difficult to predict the locations where water abstraction from a particular area might have an impact or to predict what the impact might be. It is known that there can be an impact over a considerable distance: abstraction from one location may affect an ecosystem several kilometres away. It is also known that it can take many years for the impact of abstraction to become fully apparent. Changes to ecosystems can, initially,

be too subtle to be detected by routine monitoring (for example, loss of specialist invertebrates or plants that only naturally occur in low densities). Once changes to an ecosystem are apparent it may be too late to put matters right; by that stage, irremediable damage may have occurred.

10 For this reason, the interested party ("Natural England") (which has statutory responsibility for providing advice to the Environment Agency and others), advised the Environment Agency in October 2020 that it was necessary to consider water supply in the Norfolk Broads and to take any necessary action to restore ground and surface water levels. For the same reason, the Environment Agency itself recognises an obligation to apply a "precautionary approach to dealing with adverse effects" such that it must take appropriate and proportionate action to ensure that licensed water abstraction does not lead to adverse effects.

The Norfolk Broadland river valleys

11 The Norfolk Broads is, in terms of rainfall, one of the driest parts of the country. Long-term average annual rainfall is between 600 millimetres and 730 millimetres. The low rainfall is exacerbated by periods of drought. The Broads also lie within an area where a great deal of irrigated fruit and vegetable production takes place. This is reliant on water abstraction. In the Bure and Thurne reporting area alone, more than 60 million litres of groundwater and surface water are abstracted each day. So, there is a relatively small amount of rainfall but a considerable amount of water is taken from the ground.

12 The exceptional biodiversity in the Norfolk Broads has resulted in it having the highest level of national and international nature conservation protection. There are 28 individual SSSIs which, together, make up the Broads Special Area of Conservation ("SAC"). There are 25 SSSIs that make up the Broadlands Special Protection Area for birds ("SPA").

13 The SAC and SPA are each designated as a "European site" protected under article 6 of the Habitats Directive, as is the Broadland Ramsar site, which is designated under the Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat (1971). The area supports water and wetland habitats which host the most diverse areas of fen vegetation in Western Europe. They support many rare animal and plant species. The features of the SAC which give rise to its status include types of calcareous fens and alluvial forests which are priority natural species and habitats respectively (listed in Annex 1 and Annex II to the Habitats Directive). The SPA's qualifying features include the great bittern, the ruff and the Eurasian marsh harrier. The claimants' case applies to the entirety of all three European sites, but it is sufficient to focus on the SAC in order to resolve the claim.

14 The 28 SSSIs within the SAC include the Ant Broads and Marshes SSSI, Alderfen Broad SSSI, and Broad Fen, Dilham SSSI. These are the three SSSIs which were the subject of the Environment Agency's investigation.

15 There has been a measurable decline in some habitats in the SAC over recent decades. The Environment Agency believes that the abstraction of water has contributed to this decline. For example, the Ant Broads and Marshes hosts the largest population of fen orchid in England but there has been a decline in the habitats that it needs to thrive. This is due to water abstraction.

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A **16** In 2019 Natural England provided the following advice to the Environment Agency:

> "Given that the Broads is the major site in the UK for some of the Annex 1 habitats classified as Endangered and Vulnerable within Europe, the importance of maintaining the existing habitat extent and improving the integrity of supporting processes (eg the supply of low-
> B nutrient base-rich water) cannot be [overstated]."
>
> "Experimental work on abstraction effects on calcareous fens (Johansen et al 2011) clearly shows abstraction has impacts on water flows through a fen at distances of kilometres from the abstraction point. This effect occurs even whilst water level changes are indistinguishable from natural level variations. Water source and flows are intrinsic
> C features of the hydrological regime of all wetland sites. As a result hydrological modelling of flows through sites is necessary to determine effects of abstraction."

The review of consents

17 Regulation 50 of the Conservation (Natural Habitats etc) Regulations
D 1994 (SI 1994/2716) ("the 1994 Habitats Regulations") required the Environment Agency to review, as soon as reasonably practicable, all licences for the abstraction of water that were granted before 30 October 1994 and which were likely to have a significant effect on any European site. In order to discharge that obligation, the Environment Agency reviewed those licences between 2002 and 2010. This resulted in licences being affirmed, amended,
E or revoked, as appropriate.

18 The review identified four SSSIs in the Norfolk Broads where it was assessed that the risk associated with water abstraction was unacceptable. Licence changes were implemented to address the risks. The Environment Agency concluded that abstraction at other SSSIs (including the three SSSIs) was sustainable and that no further licence changes were required.

19 Following the completion of the review of consents programme,
F a "renewals communiqué" process was established between the Environment Agency and Natural England. This enables Natural England to indicate any concerns in relation to the renewal of particular licences. In a number of cases Natural England has expressed concerns about the renewal of licences which were approved during the Review of Consents.

G *Restoring Sustainable Abstraction ("RSA") programme*

20 The RSA programme began in 1999. Its purpose is to identify, investigate, and resolve environmental damage caused by unsustainable water abstraction. The focus was on sites, with each RSA investigation addressing the impact of abstraction on a particular site, area, or river (by contrast, the review of consents had focused on abstraction licences).

H **21** The RSA programme began with the identification of sites at potential risk. Once a site was identified as being at risk from abstraction the Environment Agency appraised the options. These included using statutory powers under the 1991 Act to vary or revoke abstraction licences.

22 By 2012, approximately 500 sites had been identified throughout England as being at risk. Most of these were SSSIs. In 2012 a decision was

made to close the programme to new sites. This enabled the Environment Agency to plan the workload, timescales, and costs to complete the programme. The Environment Agency stresses that its decision did not mean that no new sites could be investigated, just that any further investigation would not take place under the RSA programme and would instead take place through the Environment Agency's "River Basin Management Plans". Conversely, the Environment Agency does not suggest that all sites at risk were captured by the RSA programme. It recognises that further sites are likely to be at risk.

Ant Broads and Marshes RSA investigation

23 At a meeting with the Environment Agency in 2010 the claimants expressed concern about the impact of abstraction on Catfield Fen and the Environment Agency's "apparent lethargy and indifference". For example, they said that milkweed (which is an important food source for the swallowtail butterfly) was suffering due to lack of groundwater. They made particular reference to abstraction at Plumsgate Road. They said that work undertaken by the Environment Agency indicated that abstraction at Plumsgate Road was having an effect more than a kilometre to the west, beyond Catfield Fen. They asked the Environment Agency to "stop the abstraction" (ie to revoke the licence).

24 The Environment Agency initiated a new investigation under the RSA programme, partly as a result of the information provided by the claimants. Initially, the investigation was focused on the evidence that had been presented in respect of Catfield Fen but it also covered the Ant Broads and Marshes SSSI. In 2011, Natural England and the claimants compiled and presented a compendium of evidence documenting changes to the ecology of Catfield Fen which were caused by changes in the hydrological regime. The Environment Agency responded by commissioning a report on Catfield Fen's hydrology and hydrogeology. The report did not identify any definitive impact from abstraction, but there was broad agreement that abstraction, in combination with other factors, might be the cause of observable ecological changes. Modelling assessments were undertaken in 2014. These indicated that abstraction was reducing the upward flow of groundwater to the shallow surface water table. This had an impact on surface water levels.

25 In July 2017 an interim investigation report was produced. This raised concerns about changes to (and risk to) certain flora, including the calcareous fen habitat and the fen orchid populations. It summarised the work that had been undertaken by the RSA programme.

The Plumsgate Road and Ludham Road licences

26 Licences for the abstraction of water from sites at Plumsgate Road and Ludham Road (which are close to Catfield Fen) were granted in the late 1980s. They were subject to periodical renewal. They each permitted the abstraction of water from the crag aquifer for spray irrigation, with annual limits of 68,000 cubic metres and 22,700 cubic metres respectively. The licences continued to be renewed after the review of consents.

27 In May 2015 the Environment Agency refused to renew these two licences, in part because of the potential impact on flora at Catfield Fen

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A which had been demonstrated by the RSA investigation and by the evidence produced by Natural England, the Royal Society for the Protection of Birds ("RSPB"), and the claimants. The Environment Agency was particularly concerned about the impact on calcareous fen and the fen orchid. The Environment Agency's decision was upheld on appeal by Elizabeth Hill, a planning inspector appointed by the Secretary of State. In her decision of 16 September 2016, Ms Hill charts the evidence of ecological change at B Catfield Fen. The RSPB measured a 50% decline of calcareous fen between 1991 and 2015. This was corroborated by other evidence. There were also increasing acidity values and greater evidence of drier conditions across Catfield Fen. There was also evidence of a one third reduction of the population of fen orchid. Ms Hill concluded that the possibility that this was due to water abstraction pursuant to the two licences could not be ruled out.

C **28** At the end of her written decision, Ms Hill said:

> "I … acknowledge that Mr and Mrs Harris have committed their time and resources into managing [part of Catfield Fen] in accordance with the [Higher Land Stewardship scheme] to maintain and improve its conservation value. Mr and Mrs Harris have … said that the outcome of D the appeals should influence the EA's RSA programme more generally. However, that is a matter for the EA and these decisions cover only the submitted appeals."

29 This claim picks up where Ms Hill left off.

E *Natural England's site improvement plan*

30 On 8 March 2018 Natural England provided the second version of a site improvement plan for the SAC. It identified the risk of water abstraction as "a key issue potentially affecting the full range of Broads' habitats and species". It said that there was a need to "[investigate] and restore sustainable abstraction" at sites where abstraction might be impacting on a particular F site, and "to review licences in the context of a changing climate". Nothing within the site improvement plan suggests that the need for such action was limited to the three SSSIs.

Limitation of Ant Broads and Marshes RSA to the three SSSIs

G **31** In 2018, the Environment Agency conducted an external consultation. Consultees suggested extending the Ant Broads and Marshes RSA investigation so as to cover other SSSIs. The Environment Agency initially rejected the suggestion because the RSA programme was closed to the addition of new sites. However, it then decided to add two further sites immediately adjacent to the Ant Broads and Marshes SSSI—Broad Fen, Dilham SSSI and Alderfen Broad SSSI.

H **32** It is the decision to limit the investigation to the three SSSIs and not to expand the coverage of the RSA investigation to other SSSIs within the SAC which is the decision under challenge in these proceedings.

33 Ian Pearson, the Environment Agency's lead officer for the Ant Broads and Marshes RSA investigation, explains the reasons for the decision in his witness evidence. They are that:

A

(1) The RSA programme was closed to new sites.
(2) The Environment Agency's limited resources did not enable it to embark on further investigations.
(3) However, Broad Fen, Dilham SSSI and Alderfen Broad SSSI could be added without incurring significant additional expense.
(4) Those two sites were the most immediately adjacent to the Ant Broads and Marshes SSSI and supported similar SAC habitats.

B

(5) The inclusion of these two sites would inform pending licence renewal applications.
(6) There were no new concerns at these two sites which had not already been recognised and addressed through the review of consents process.

34 In so far as Natural England had identified concerns in relation to other sites, the Environment Agency indicated that additional modelling work would be undertaken outside the RSA programme.

C

Natural England's October 2020 advice

35 On 28 October 2020 Natural England advised the Environment Agency on the assessment of abstraction licences. It said that knowledge had evolved since the review of consents process. This evolving knowledge needed to inform the approach. The Environment Agency should, when determining licences for other protected sites, act consistently with the approach taken in the Ant Broads and Marshes and should conduct a "systematic assessment of the evidence of ecosystem dependence on the supporting groundwater body or surface water system and the level of impact on these water bodies and systems".

D

E

The Ant Broads and Marshes RSA report

36 The Ant Broads and Marshes RSA report was published on 14 June 2021. It addresses in considerable detail (and on the basis of extensive modelling and other work) the effect on the three SSSIs of abstractions under 240 licences in a screening area which covered, and extended well beyond, those SSSIs. It does not consider the effect of abstraction on other SSSIs within or adjacent to the screening area.

F

37 The report concludes that it is not possible to rule out abstraction of water as a cause for adverse effects across the Broads SAC. It recognises that the Habitats Regulations require it to apply a precautionary approach and to take action to reduce abstraction where there was a risk that abstraction might cause such adverse effects. It identifies a number of options to achieve sustainable levels of abstraction so far as the three SSSIs are concerned. The preferred option entails the revocation or modification of 21 permanent abstraction licences, the expiry (without further renewal) of ten time-limited licences and the refusal of four further pending licence applications.

G

38 The modelling that was conducted for the RSA investigation shows that there are risks to other sites within the SAC, beyond the three SSSIs which were the focus of the investigation. Advice from Natural England is that seemingly small changes in the proportion of water supply and consequential effects on water chemistry can be significant enough to cause adverse effects to the habitats and species for which the SAC is recognised. The Environment Agency applies a threshold for water flow of a 5% deviation from that which would occur under natural conditions (i e without

H

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A abstraction). It can only safely be concluded that abstraction has no adverse effect on site integrity if that threshold is not breached. The modelling shows that this threshold is exceeded in many areas across the SAC, including (but not limited to) the three SSSIs.

Further work following the RSA report

B

39 The work undertaken by the Environment Agency as part of its RSA programme was valuable in identifying new assessment tools and refinements to existing models. These are documented in a technical report. The Environment Agency accepts that the application of these new tools and refined models may demonstrate that there is a risk of harm to other sites. It is, accordingly, conducting further work. This includes work on the C implications of the conclusions of the technical report for three further SSSIs. Preliminary indications are that the hydrological criteria that were used in the Ant Broads and Marshes RSA report are not currently met at two of those three further SSSIs (but there is an outstanding question as to whether those criteria are appropriate for the three further SSSIs). The Environment Agency is also using the new tools and refined models when considering applications for new licences and applications to renew existing licences.

D

40 Natural England has indicated that "further work is needed to assess the impacts of water supply on protected sites and priority habitats outwith the Ant Valley and action taken as necessary". The Environment Agency emphasise that Natural England has not said, in terms, that this work is required "urgently" or "without delay".

E *Legal framework*

Water Resources Act 1991

41 Chapter 2 of Part 2 of the Water Resources Act 1991 regulates the licensing of water abstraction. Section 24 prohibits water abstraction without a licence. Section 38 makes provision for the Environment Agency F to determine licence applications (requiring that it has regard to all relevant circumstances). Section 52 permits the Environment Agency to formulate proposals for revoking or varying existing licences. Section 53 permits the Environment Agency to revoke or vary a licence pursuant to such proposals.

The precautionary principle

G

42 Article 191(2) of the Treaty on the Functioning of the European Union provides that Union policy on the environment shall aim at a high level of protection and shall be based on the precautionary principle, and on the principle that preventive action should be taken, and that environmental damage should, as a priority, be rectified at source.

H

Habitats Directive

43 The Habitats Directive concerns the conservation of natural habitats and wild fauna and flora. Its aim is to contribute to biodiversity in member states through the conservation of natural habitats, wild fauna and flora: article 2.

44 It defines "natural habitat types of Community interest" to include those that present outstanding examples of typical characteristics of the Continental region and are listed in Annex 1. It defines "priority natural habitat types" to mean natural habitat types that are in danger of disappearance (where certain other conditions are also fulfilled). Again, they are listed in Annex 1. They include calcareous fens with Cladium mariscus and species of the Caricion davallianae, and alluvial forests with Alnus glutinosa and Fraxinus excelsior. It defines "special area of conservation" to mean a site that is designated by the member state where conservation measures are applied for the maintenance or restoration of the natural habitats or species for which the site is designated. It defines "species of Community interest" to include species that are endangered, vulnerable, rare, or endemic and requiring particular attention. They are listed in Annex II. They include fen orchid Liparis loeselii.

45 Article 4 prescribes a process for designating a site as a special area of conservation. It requires member states to establish priorities for the maintenance or restoration of those habitats listed in Annex 1, and those species listed in Annex II, in the light of any threats of degradation or destruction to which those sites are exposed.

46 Article 6 states:

> "2. Member states shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.
>
> "3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

47 In *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (Case C-127/02) [2005] All ER (EC) 353; [2004] ECR I-7405, the Grand Chamber of the Court of Justice of the European Communities addressed the relationship between articles 6(2) and 6(3), in the context of the grant of annual licences for mechanical cockle fishing. The following principles emerge from the judgment:

(1) The Habitats Directive must be interpreted in accordance with the precautionary principle: para 44.

(2) An activity such as mechanical fishing is within the concept of a "plan or project" within the meaning of article 6(3): para 27.

(3) Each annual grant of a licence is properly considered as a "plan or project" within the meaning of article 6(3): para 28.

(4) Where a licence has been granted in a manner compatible with article 6(3) (so only after ascertaining that it will not adversely affect the

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A integrity of the site concerned, and consequently not likely to give rise to deterioration or significant disturbance) article 6(2) is (at that point) superfluous: paras 35–36.

(5) But if the plan or project subsequently proves likely to give rise to deterioration of habitats or significant disturbance of species, article 6(2) provides a mechanism for ensuring the conservation of natural habitats and fauna and flora: para 37.

B (6) Thus, article 6(3) ensures, prospectively, that a relevant plan or project is authorised only if it will not adversely affect the integrity of the site, whereas article 6(2) imposes a general protection obligation to avoid deterioration and significant disturbance: para 38.

48 Article 6(2) therefore imposes a proactive preventive requirement: Commission notice (C(2018) 7621) "Managing Natura 2000 sites: The C provisions of article 6 of the Habitats' Directive 92/43/EEC", paras 3.2 and 4.5.1. Compliance with article 6(2) cannot be achieved by reacting to demonstrable deterioration. Anticipatory measures are required to prevent deterioration before it occurs: *Commission of the European Communities v Ireland* (Case C-418/04) [2007] ECR I-10947, paras 207–208. This is an aspect of the precautionary principle.

D **49** Thus, where it appears that there is a risk of deterioration of a protected habitat, article 6(2) of the Habitats Directive requires that "appropriate steps" are taken to avoid that deterioration: *Grüne Liga Sachsen eV v Freistaat Sachsen* (Case C-399/14) [2016] PTSR 1240, paras 41–44.

50 This means that where it becomes apparent that there may be a risk to a protected habitat or species as a result of the licensed abstraction of water, E article 6(2) imposes an obligation to review the applicable licences: *Grüne Liga*, para 44. The review must be sufficiently robust to guarantee that the abstraction of water will not cause significant damage to ecosystems that are protected under the Habitats Directive: *Grüne Liga*, para 53.

Habitats Regulations

F **51** The 1994 Habitats Regulations transposed the Habitats Directive in England and Wales. They were consolidated and updated by the Conservation of Habitats and Species Regulations 2010 (SI 2010/490) which, in turn, were consolidated and updated by the Conservation of Habitats and Species Regulations 2017. As explained below, the Habitats Regulations continue to have effect in domestic law because they are EU-G derived domestic legislation: sections 1B(7) and 2(1) of the European Union (Withdrawal) Act 2018. The Habitats Regulations are thus retained EU law: section 6(7) of the 2018 Act. It follows that they must be interpreted in accordance with retained EU case law and retained principles of EU law: section 6(3) of the 2018 Act.

52 Regulation 9 of the Habitats Regulations states:

H "9 *Duties relating to compliance with the Directives*

"(1) The appropriate authority, the nature conservation bodies and, in relation to the marine area, a competent authority must exercise their functions which are relevant to nature conservation, including marine conservation, so as to secure compliance with the requirements of the Directives."

"(3) Without prejudice to the preceding provisions, a competent authority, in exercising any of its functions, must have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions."

53 The "appropriate authority" means the Secretary of State; the "nature conservation bodies" means (in relation to England) Natural England; a "competent authority" includes any public body (and so, in particular, includes the Environment Agency); the "Directives" include the Habitats Directive: regulation 3.

54 Regulation 65(1), read with regulation 102(5) and (6), requires that when a site which has a water abstraction licence becomes a European site, the Environment Agency must, as soon as is reasonably practicable, undertake a review of the licence (and, if necessary, vary or revoke the licence following the review).

Withdrawal from European Union: The European Union (Withdrawal) Act 2018

55 The 2018 Act repeals the European Communities Act 1972 and converts EU law, as it stood at the end of 2020, into domestic law.

56 Legislation (such as the Habitats Regulations) passed under section 2(2) of the 1972 Act is EU-derived domestic legislation and continues to have effect in domestic law: section 2(1).

57 Section 3 provides that "direct EU legislation" forms part of domestic law. The Habitats Directive is not direct EU legislation (see section 3(2) and the definition of "EU tertiary legislation" in section 20, which excludes EU Directives).

58 Section 4 (as amended by the European Union (Withdrawal) Act 2020) states:

"4 *Savings for rights etc under section 2(1) of the ECA*

"(1) Any … obligations … which, immediately before IP completion day— (a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and (b) are enforced … accordingly, continue on and after IP completion day to be recognised and available in domestic law (and to be enforced … accordingly).

"(2) Subsection (1) does not apply to any … obligations … so far as they— … (b) arise under an EU Directive (including as applied by the EEA agreement) and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before IP completion day (whether or not as an essential part of the decision in the case)."

59 Questions as to the meaning and effect of retained EU law (so, including the Habitats Regulations and the obligation under article 6(2) which continues to have effect under section 4) must be decided in accordance with retained general principles of EU law: section 6(3)(a). The precautionary principle is a retained general principle of EU law: section 6(7).

60 IP completion day is 11 pm on 31 December 2020: section 1A(6) of the 2018 Act and section 39(1) of the 2020 Act.

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A *The claim for judicial review*

61 The claimants say that, so far as the three SSSIs are concerned, the Environment Agency has acted lawfully and in accordance with article 6 of the Habitats Directive. The work done by the Environment Agency (and the resultant licensing changes) will ensure that there is no prospect that water B abstraction will cause deterioration of the habitats or significant disturbance of the species at the three SSSIs. The claimants are not critical of the RSA investigation or report so far as it addresses the three SSSIs.

62 The claimants' case is that the Environment Agency acted unlawfully by limiting its investigation to the three SSSIs. They say that once it decided to review the 240 abstraction licences it was required to consider their impact across the entirety of the SAC. Further, once the Environment Agency C was aware of potential risks to other sites, it was obliged to address those potential risks.

63 The legal foundation for the claimants' claim is article 6(2) of the Habitats Directive. Their submission is that article 6(2) has effect in domestic law by virtue of regulation 9(3) of the Habitats Regulations. Although that regulation imposes an obligation only to "have regard" to the D requirements of the Habitats Directive, in context, this requires compliance with the Habitats Directive. This (say the claimants) was the finding of Sullivan J in *R (Friends of the Earth) v Environment Agency* [2004] Env LR 31, para 57. This interpretation is also mandated by a concession made by the Government in *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* (Case C-6/04) [2005] ECR I-9017. Further, the claimants rely on the fact that regulation 9(1) imposes E an obligation on Natural England to secure compliance with the Habitats Directive, together with the fact that the Environment Agency acts on advice from Natural England. This means, they say, that the Environment Agency thereby itself comes under an obligation to secure compliance with the Directive.

64 Irrespective of the correct application of regulation 9(3), the claimants F contend that article 6(2) is enforceable in domestic legal proceedings. That is because article 6 was recognised as having direct application in domestic law by the European Court of Justice in *Waddenzee* [2005] All ER (EC) 353 and by the Upper Tribunal (Administrative Appeals Chamber) in *Natural England v Warren* [2020] PTSR 565, and because section 4(2)(b) of the 2018 Act preserves that recognition.

G **65** The claimants' substantive case is that the decision to limit the RSA investigation to the three SSSIs was in breach of article 6(2) and was irrational.

66 The RSA programme amounts to the Environment Agency's purported compliance with article 6(2) in respect of the SAC. The "appropriate steps" comprise the review of the 240 licences in the screening area so as to ensure that abstraction does not give rise to a risk of deterioration or significant H disturbance. The problem is that the Environment Agency has not conducted the review across the entirety of the SAC but only in respect of three SSSIs. Further, the evidence shows that the review of consents was flawed. It can no longer be relied on as demonstrating that there is no risk to sites within the SAC. It is therefore necessary to conduct a review across the entirety of the SAC. The failure to do so amounts to a breach of article 6(2).

67 Irrespective of the question of the enforceability of article 6(2) in domestic proceedings, the Environment Agency has decided to comply with article 6(2) and has devised a programme of work to discharge that obligation. Its decision-making as to the work required was irrational because there was no good reason to limit the RSA investigation to just three SSSIs. The potential risks apply across all the SSSIs within the screening area. Alderfen Broad SSSI and Broad Fen Dilham SSSI were not, on the available evidence, at any greater risk than other SSSIs. The Environment Agency recognised that there are priority natural habitats, protected under Annex I to the Habitats Directive, at those two SSSIs. But the same priority habitats can be found within 16 further SSSIs which were not part of the RSA programme. It was therefore irrational to limit the investigation to the three SSSIs. The Environment Agency could not rationally conclude that it could comply with article 6(2) without conducting a broader investigation.

The Environment Agency's response to the claim

68 The Environment Agency contends that the claim is based on a misunderstanding as to the nature of the RSA programme. It was never intended that the programme would be a comprehensive assessment of the impact of abstraction across the entirety of all European sites. The Ant Broads and Marshes RSA investigation was not intended to review the impact of all 240 licences across every protected species and habitat in the SAC. The intention of the RSA programme was to focus only on sites that had been assessed to be at risk. The Ant Broads and Marshes investigation was initially concerned only with the Ant Broads and Marshes SSSI, but this was expanded to two further SSSIs as a result of public consultation and for the reasons that Mr Pearson explains (see para 33 above). The Environment Agency recognises that there may be risks to other sites but these can be addressed by additional work outside the scope of the RSA programme. This work is ongoing and iterative. The tools and modelling that were developed in the course of the RSA programme are being deployed when deciding whether new licence applications should be granted or whether time-limited licences should be renewed (and, in each case, what terms should be applied).

69 Regulation 9(3) of the Habitats Regulations requires only that the Environment Agency has "regard" to the Habitats Directive. It does not impose an obligation on the Environment Agency to comply with the Habitats Directive. If that had been the intention then regulation 9(3) would have been drafted in the same way as regulation 9(1), which imposes an obligation (but on the Secretary of State, not the Environment Agency) to secure compliance with the requirements of the Habitats Directive. The Environment Agency plainly had regard to the requirements of the Habitats Directive: the contemporaneous documentation, including the Ant Broads and Marshes RSA report, shows, in terms, that it took the requirements of the Habitats Directive into account at every stage of its decision-making.

70 Article 6(2) has not been recognised by the courts as having direct effect in domestic law. The decision in *Waddenzee* [2005] All ER (EC) 353 was concerned with article 6(3), not article 6(2), and the court explicitly did not address the question of whether article 6(2) has direct effect. The court in *Warren* [2020] PTSR 565 recognised that article 6(2) is binding, but that is a different matter. In any event, *Warren* was decided per incuriam because

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A the court had not appreciated that *Waddenzee* did not rule on the question of whether article 6(2) has direct effect in domestic law.

71 The Environment Agency contends that it has not been shown that it has breached article 6(2): "there is no proper evidence before the court to demonstrate that a specific risk has been established which is not being acted upon." As and when risks are identified they are appropriately addressed by the Environment Agency, acting on advice from Natural England. It was B reasonable to limit the Ant Broads and Marshes RSA investigation to the three SSSIs. It was not necessary, practicable or reasonable to expand it to cover all other SSSIs in the screening area. On the contrary, it was reasonable to close the RSA programme to new sites so as to allow the programme to be completed and for the lessons learned from the programme then to be applied to future work. Notwithstanding that the programme had, in C principle, been closed to new sites it was reasonable to expand it to cover the two additional sites, for the reasons given by Mr Pearson (see para 33 above). The Environment Agency has therefore acted rationally.

72 The decision as to how to discharge its statutory functions is for the Environment Agency, not the court: *R (Boggis) v Natural England* [2010] PTSR 725, para 37. The Environment Agency's judgement on questions of D scientific, technical, and predictive assessments can only be challenged on a *Wednesbury* basis, acknowledging that an enhanced margin of appreciation is to be applied: *R (Mott) v Environment Agency* [2016] 1 WLR 4338. Further, in determining the level of resources to deploy in investigating potential risks, the Environment Agency is entitled to take account of funding pressures and competing demands on resources.

E *Issue 1: The requirement to "have regard" to the Habitats Directive*

73 It is common ground that regulation 9(3) of the Habitats Regulations obliges the Environment Agency to have regard to the requirements of article 6(2) of the Habitats Directive.

74 The claimants argue that the obligation to "have regard" to article 6(2) amounts to an obligation to secure compliance with article 6(2). They rely on F what was said by Sullivan J in respect of regulation 3(4) of the 1994 Habitats Regulations (the predecessor of regulation 9(3) of the Habitats Regulations, and in materially identical terms) in *Friends of the Earth* [2004] Env LR 31, para 57:

> "Regulation 3(4) requires the agency … to have regard to [the requirements of the Habitats Directive] in so far as they are relevant … G when exercising any of its functions … Even if the meaning of regulation 3(4) was uncertain, which it is not, it would be necessary to construe it so as to impose such an obligation upon the agency in order to give effect to the Directive (Case C-106/89) *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135, p 4159, para 8."

75 I do not accept that this supports the claimant's argument. H Sullivan J does not, in this passage, suggest that the words "have regard to" mean "secure compliance with". Sullivan J instead points out that in order to give effect to the Habitats Directive it is necessary to construe regulation 3(4) in a way which requires the agency to "have regard" to the Habitats Directive when it exercises its functions (which is, anyway, what regulation 3(4) plainly requires). The claimants thus read far too much into this passage.

76 Even if the meaning of Sullivan J's observation (read in isolation) is uncertain, which it is not, it is necessary to consider it in context. The meaning is clear when the passage is considered in the context of the issue that he was addressing and the argument that was advanced. The case concerned a decision of the Environment Agency to modify a waste management licence. The Environment Agency and Friends of the Earth agreed that regulation 3(4) imposed an obligation on the Environment Agency to have regard to the requirements of the Habitats Directive when deciding whether the waste management licence should be modified: paras 41, 51. The beneficiary of the licence disagreed, contending that the word "they" in regulation 3(4) referred to "every competent authority" rather than the requirements of the Habitats Directive: para 55. Thus, the argument that was advanced was that the obligation to "have regard" to the Habitats Directive arose where a public authority might be affected by the exercise of its functions rather than where the requirements of the Directive might be affected by the exercise of the authority's functions. The passage quoted at para 74 above is immediately preceded by the sentence "FoE and the agency are plainly correct in submitting that 'they' is a reference to the requirements of the Habitats Directive". Thus, Sullivan J was not determining the meaning of the words "have regard to". He was instead determining the issue between the parties, namely which noun (as between "authority" and "Directive") was referenced by the pronoun "they".

77 The claimants further rely on an argument advanced by the Government in *Commission v United Kingdom* [2005] ECR I-9017. In that the case the Commission contended that the UK had not adequately transposed the Habitats Directive. In response, the Government submitted:

> "The relevant competent authorities are under a statutory obligation to exercise their functions so as to secure compliance with the Habitats Directive. This results ... from regulations 3(2) and (4) ..."

78 Again, I do not accept the claimants' argument. The Government's submission as to the effect of the regulations is not, in itself, an aid to interpretation. Further, the Government's submission was based on the combination of regulations 3(2) and 3(4), rather than the effect of regulation 3(4) in isolation. Regulation 3(2) (the predecessor of regulation 9(1) of the current Regulations) itself imposes an obligation "to secure compliance with the requirements of the [Habitats Directive]". The Government did not therefore submit that regulation 3(4) in isolation imposed an obligation to secure compliance with the Habitats Directive. Further, it may be noted that the court was not satisfied that regulation 3(4) was sufficient to "ensure that the provisions of the Habitats Directive ... are transposed satisfactorily": para 28.

79 The claimants are correct that regulation 9(1) imposes an obligation on Natural England to "secure compliance with the requirements of the Directives". They point out that the Environment Agency has not purported to depart from the advice that has been given by Natural England. They contend that it follows that the Environment Agency is itself under a legal obligation to secure compliance with the requirements of the Directives. I disagree. It does not follow. The claimants' argument assumes that the advice was a comprehensive distillation of the steps required to comply with the Directives. Even if that assumption is correct (and I do not think it is) it

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A further assumes, wrongly, that the Environment Agency's decision to accept the advice means that the Environment Agency itself falls under the same legal obligation as the author of the advice.

80 A statutory obligation to "have regard" to something arises in many different contexts. It is usually imposed in respect of advice or guidance or a code of practice. It means that the advice or guidance or code must be considered when exercising the function or making the decision in question.
B That does not mean that it must be "followed" or "slavishly obeyed"; a decision-maker may depart from such advice or guidance or code if there is good reason to do so—*R (London Oratory School) v Schools Adjudicator* [2015] ELR 335 per Cobb J, para 58.

81 The duty to "have regard" to X (where X is advice or guidance) is, therefore, different from a duty to act in accordance with X. In the present
C context, it is striking that the statutory language for the duties imposed by regulations 9(1) and 9(3) differ. Regulation 9(1) applies to the Secretary of State. It does not require the Secretary of State merely to have regard to the Habitats Directive. It requires the Secretary of State to secure compliance with the requirements of the Directive. Different statutory language is used in regulation 9(3). Instead of mandating compliance with the Directives it
D states only that regard must be had to their requirements. There is some force in Mr Matthew Dale-Harris's submission (for the Environment Agency) that this must impose a less onerous obligation than regulation 9(1).

82 Here, the natural and conventional approach to the "have regard" duty is that it means that the Environment Agency is obliged to take account of the requirements of the Habitats Directive but may depart from its requirements if there is good reason to do so. In other words, it must take
E account of the Habitats Directive but is entitled not itself to discharge all of the requirements of the Directive where that can be justified.

83 It is, however, relevant (when considering whether a departure can be justified) that the object of the "have regard" duty is "requirements", rather than advice or guidance. Advice or guidance is not, ordinarily, mandatory. "Requirements" more usually are mandatory. The "requirements" are set
F out, in mandatory terms, in a Directive which the Regulations themselves transposed. In this context, there is not the same broad scope for taking something into account, but then deciding for good reason to depart from it, as there is in the case of non-binding guidance.

84 There is an important part of the regulatory context which helps explain the different language as between regulations 9(1) and 9(3). Regulation 9(3) is concerned with a "competent authority". That has a broad
G meaning (including every public body). In some contexts different competent authorities may have overlapping roles that are relevant to the discharge of the requirements of the Habitats Directive. In such cases, it would not be meaningful or appropriate to impose on one single competent authority (or on every competent authority) an obligation to secure compliance with the Habitats Directive. Instead, what is required is that all competent authorities
H have regard to the Habitats Directive, so as to ensure that, in the result, compliance with the Directive is achieved.

85 Conversely, regulation 9(1) is concerned with the Secretary of State and the nature conservation bodies, who each have overarching responsibility for compliance with the Habitats Directive. That seems to me to explain the difference in language. This implies that the duty to "have

regard" here does not implicitly permit the Environment Agency to act in a way which is inconsistent with the Habitats Directive (in other words to have regard to the requirements of the Directive but then deliberately decide to act in a way that is inconsistent with those requirements). Rather, it recognises that the Environment Agency is one part of a complex regulatory structure and, depending on the issue, it may have a greater or lesser role to play.

86 In the present context the Environment Agency is, effectively, the sole (and certainly the principal) public body which is responsible for determining whether abstraction licences should be granted, varied, or revoked. If it does not secure the requirements of article 6(2) in respect of those decisions then no other public body is capable of filling the gap.

87 For these reasons, in this context, the duty on the Environment Agency to have regard to the requirements of the Habitats Directive means that the Environment Agency must take those requirements into account, and, in so far as it is (in a particular context) the relevant public body with responsibility for fulfilling those requirements, then it must discharge those requirements. In other words, the scope for departure that is ordinarily inherent in the words "have regard to" is considerably narrowed.

88 This is all entirely consistent with the approach that the Environment Agency has sought to take. It is clear from all of the contemporaneous evidence (including internal e-mails) that the Environment Agency has regarded itself as bound by the Habitats Directive and has sought to act in compliance with its requirements. Thus, in a "Q&A" document, prepared in 2021 and published as part of the RSA report, it states: "The Environment Agency has a legal obligation to … avoid adverse effects on habitats and species …" Whether or not it has succeeded in discharging the requirements of article 6(2) is the subject of issues 3 and 4.

Issue 2: Are the obligations under article 6(2) of a kind recognised by a court before 2021?

89 The parties agree that the question of whether article 6(2) is enforceable by a UK court (irrespective of regulation 9(3) of the Habitats Regulations) turns on the application of section 4(2)(b) of the 2018 Act, namely whether the obligations under article 6(2) are of a kind recognised by the European Court of Justice or any court or tribunal in the United Kingdom in a case decided before 11 pm on 31 December 2020.

90 In *Waddenzee* [2005] All ER (EC) 353, conservation bodies in the Netherlands challenged a government decision to issue licences for mechanical cockle fishing. The court made a reference to the European Court of Justice. One of the questions that was referred was whether article 6(2) and 6(3) of the Habitats Directive "have direct effect in the sense that individuals may rely on them in national courts and those courts must provide the protection afforded to individuals by the direct effect of Community law", para 18. In the light of the court's analysis of the relationship between article 6(2) and article 6(3) and its conclusion that only article 6(3) was relevant in the context of the reference it was not necessary for the court to consider the direct effect of article 6(2). It did not do so. It held that article 6(3) had direct effect. Its reasons for doing so were that it is binding (para 65), that its binding effect would be weakened if individuals could not rely on it before national courts (para 66), that it requires certainty that

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A there will be no adverse effect before a licence is granted (para 67), and it may therefore be taken into account where the national court is determining whether the grant of a licence has kept within the limits of article 6(3) (paras 69–70).

91 The court did not rule on the question of whether article 6(2) has direct effect. Section 4(3) does not, however, require that the particular provision in issue (here article 6(2)) has been held to have direct effect. It only requires B that it is "of a kind" that has been held to have direct effect. There is a close relationship between article 6(2) and 6(3). They both require the national authorities to take steps to achieve the aims of the Habitats Directive and, in particular, to avoid deterioration of habitats and significant disturbance of species in the special areas of conservation. Article 6(3) applies prospectively. Article 6(2) enables a retrospective check that the article 6(3) steps remain C adequate. Article 6(2) is thus "of a kind" that was recognised in *Waddenzee* as having direct effect.

92 Further, the question of whether article 6(2) has legal effect in domestic proceedings was addressed by the decision of the Upper Tribunal in *Warren* [2020] PTSR 565. Upper Tribunal Judge Markus QC held (in a judgment given on 2 October 2019), at para 88, that the duties on member states under D article 6(2) are binding on all public authorities of a member state, including the courts:

> "The tribunal was bound to act consistently with the precautionary principle because the duties on member states under article 6(2) are binding on all authorities of a member state including the courts …"

E **93** Judge Markus QC cited *Waddenzee* [2005] All ER (EC) 353, paras 65–66. Mr Dale-Harris argues that Judge Markus QC was saying only that article 6(2) was binding, without expressly stating, in terms, that it had direct effect in domestic law. That is correct, so far as it goes, but the effect of Judge Markus QC's judgment was to recognise and enforce the precautionary principle that is inherent in article 6(2). This is sufficient to satisfy the test in F section 4(3) of the 2018 Act. Mr Dale-Harris further argues that *Warren* was decided per incuriam because the judge had not appreciated that *Waddenzee* only decided that article 6(3) had direct effect and had made no such finding in respect of article 6(2). I disagree. There is no indication in *Warren* that Judge Markus QC had misunderstood the ambit of the court's finding in *Waddenzee*. Her citation of *Waddenzee* at paras 65–66, was entirely apt. G Although those passages only concern article 6(3), their rationale reads across to article 6(2). They therefore provide support for Judge Markus QC's conclusion. In addition, even if *Warren* was decided per incuriam, that is not relevant to the section 4(2) test. That test is satisfied once a case is identified that recognises article 6(2) as being enforceable in domestic proceedings. The statute expressly provides that it is not necessary for that to be an essential part of the court's decision. It is not relevant to the section 4(2) test to enquire H as to whether the case was correctly decided or was decided per incuriam. The position might be different if the decision had been overturned on appeal or later overruled but that is not the case here.

94 Accordingly, by reason of section 4 of the 2018 Act, article 6(2) continues to be recognised and available in domestic law and is to be enforced accordingly.

Issue 3: Has the Environment Agency breached article 6(2) of the Habitats Directive? A

95 The RSA investigation focuses on the impact of abstraction on specific sites, rather than the effect (across all sites) of specific licences. That answers the claimants' narrow argument that, having elected to investigate the effects of 240 abstraction licences it was not open to the Environment B Agency to limit that investigation to the impact on just three SSSIs. The narrow argument overlooks the fact that the RSA investigation was always intended to be focused on sites (and, in particular, sites which had been assessed as being at risk) rather than a comprehensive analysis of the impact of abstraction across every SSSI. The claimants have not identified any principled objection to the Environment Agency's decision to take a site-centric (rather than licence-centric) approach. C

96 All permanent licences were scrutinised during the review of consents process (see paras 17–19 above). *Waddenzee* recognises that (assuming the review is adequate) this satisfies article 6(3), and that article 6(2) has no role to play at that point (see para 47(4) above). All time-limited licences are scrutinised when they fall to be renewed. The evidence indicates that the lessons learned during the RSA programme, including the new assessment D tools and the refined models, are deployed when renewal decisions are made. Again, that process, in principle, satisfies article 6(3), and article 6(2) has no role to play at the point that licences are reviewed. This process is, in principle, capable of complying with the requirements of article 6.

97 Further, there is no general obligation proactively to review a licence unless there is some reason to do so. The fact that the Environment Agency E reviewed the impact of abstraction on three sites does not, in itself, mean that it was obliged to review the impact on all sites.

98 On the other hand, the authorities are clear that it is not sufficient to wait until damage to a site occurs before taking remedial action (see paras 47–48 above). If there is reason to believe that there is a risk of damage then it is necessary to take remedial steps: *Waddenzee* [2005] All ER (EC) 353, para 37, and *Grüne Liga* [2016] PTSR 1240, para 42. F

99 Here, the Environment Agency do not suggest that there is no risk of damage to other sites (besides the three SSSIs). They accept that there is a potential risk. The Environment Agency is right to make that concession:

(1) As the Environment Agency recognise in its RSA report, one of the key characteristics of the SAC is the through-flow of base-rich water that derives from the underlying aquifers. G

(2) Water abstraction involves the taking of water from the underlying aquifers and thereby potentially reduces the through-flow of base-rich water, which is a key characteristic of the SAC. It also potentially changes the ground chemistry, impacting on surface ecology.

(3) There is, therefore, the clear potential for water abstraction to cause damage to wetland ecosystems.

(4) It is thus necessary to address the question whether abstraction of H water in the area of a protected site is damaging to that site.

(5) This was done by the review of consents. That process was, in principle, capable of complying with the Environment Agency's obligations under article 6.

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A (6) However, as Mr Dale-Harris put it, the science of understanding the impact on SSSIs has "moved on". It has become clear, as a result of the evolving knowledge gained from the RSA programme, that the review of consents was flawed. It did not identify the risks posed by the Plumsgate Road and Ludham Road licences, which are explained in the decision of Ms Hill. Nor did it identify the risks posed to the three SSSIs. Those risks were identified subsequently, as a result of the more developed work that B was undertaken in the course of the RSA programme.

(7) The Environment Agency has itself recognised in a number of places that the review of consents has since been shown to be flawed. For example, in its pre-action protocol letter it accepted that by 2009/2010 there was credible evidence that abstraction could be having adverse effects on Catfield Fen (even though the review of consents had not identified that the Plumsgate C Road and Ludham Road licences posed any risks). The RSA report shows that there are other SSSIs where there are significant risks (see para 39 above).

(8) Moreover, the review of consents process took place more than a decade ago. Natural England has identified the need to review licences in the context of a changing climate.

(9) Natural England has advised that further assessment work is needed D (see para 40 above). The Environment Agency has not provided any basis for disagreeing with this advice.

(10) Natural England does not consider that the renewals communiqué process is sufficient to address the risks. Nikolas Bertholdt, a freshwater senior adviser with Natural England, has provided evidence that Natural England considers that a "more strategic approach is needed, and investigation and actions taken where there is a credible risk to sites". This E reflects the advice it provided in October 2020 (see para 35 above).

100 The Environment Agency may well be right that it is reacting appropriately where it becomes aware of evidence of a specific risk to a particular site. However, the factors set out in the previous paragraph show that the review of consents was not effective in ensuring that abstraction does not cause damage to protected sites and there thus remains a generalised risk F from abstraction (particularly abstraction under permanent licences) across the entire SAC. Having regard to the precautionary principle, that is sufficient to trigger the article 6(2) duty (see paras 42 and 48–49 above). It would be contrary to the precautionary principle and the reasoning in *Grüne Liga* [2016] PTSR 1240 if article 6(2) were not triggered by the factors set out in the previous paragraph and could only be triggered once it becomes clear that a particular site is at risk by an identified mechanism from abstraction at G a specific location. It is sufficient that a generalised risk has been established (as a result of the demonstration of flaws in the review of consents process) to require "appropriate steps" to be taken. What those steps might be depends on the particular circumstances, the expert advice of Natural England and the expert judgement of the Environment Agency. In some cases, very little may be necessary. For example, it might be possible to rule out any risk at a H particular site by showing that it is sufficiently far from any location where abstraction takes place under a permanent licence for abstraction to have any impact. Or it might be possible to rule out the prospect that abstraction at a particular location has any impact by applying the tools and models that were developed during the RSA programme. The steps taken must, however, be sufficiently robust to guarantee that abstraction of water does not cause

damage to ecosystems that are protected under the Habitats Directive: *Grüne Liga*, para 53.

101 Further, the Environment Agency has a broad discretion as to the steps that should be taken to achieve that end. The cost of different options is a relevant factor that can legitimately be considered. A court will be slow to question the Environment Agency's expert assessment as to the steps that should be taken. It is, however, not open to the Environment Agency to take no steps—that is a breach of article 6(2).

102 In respect of time limited licences, the renewals communiqué process (see para 19 above) together with the application of the lessons learned from the RSA programme when considering the renewal of licences, is, in principle, capable of securing compliance with article 6 of the Directive. The same applies to new licence applications.

103 That leaves over the question of permanent licences. In his witness statement, Mr Pearson says that the ongoing work includes "adjusting permanent licences shown to be seriously damaging, either through voluntary action or by using our powers provided under section 52 of the Water Resources Act 1991". This shows that there are significant limitations to the ongoing work that is being done in respect of permanent licences. First, Mr Pearson does not suggest that any systematic programme is in place to investigate permanent licences so as to establish whether abstraction under those licences is risking damage to protected sites. The deficiencies in the review of consent process, and the Environment Agency's recognition of the risks of such damage, means that some form of review is required. Absent such a review there is no secure basis for identifying a need for adjustments to licences. Second, the test that is applied before an adjustment is applied (that is, that the licence is shown to be "seriously damaging") is contrary to the precautionary principle. A much lower threshold for intervention is required. The Environment Agency must act unless it is satisfied that there is no risk of significant damage. Mr Pearson has, elsewhere, recognised that the flaws in the review of consents process necessitate further work to review permanent licences. In an internal e-mail, in May 2021, he said the assessments made during the review of consents were called into question by the subsequent work but that there was "no plan or resourcing to look at these sites again other than through the occasional licence renewals process, and the chances are that time-limited licences are not the main cause of any concerns".

104 It follows that the Environment Agency has not taken sufficient steps in respect of the risks to sites in the SAC (beyond the three SSSIs) posed by abstraction in accordance with permanent licences. It is only the Environment Agency (albeit with advice from Natural England) that may vary or revoke permanent licences. No other authority can do so. So, the Environment Agency cannot absolve itself from compliance with article 6 by pointing to work done by other public authorities. It has not, therefore, complied with article 6(2). Although it has taken account of article 6, it has not justified its failure to take steps in respect of the risks (particularly risks posed by abstraction in accordance with permanent licences) and it is, therefore, in breach of its obligation under regulation 9(3) of the Habitats Regulations. The claimed lack of resource does not justify these breaches. Resources may be relevant to the decision as to how to discharge the article 6(2)/regulation 9(3) obligations but they are not relevant to the question of whether to discharge those obligations. The Environment Agency

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A say that "other strands of work may be added ... in due course" but that is too vague and too late.

105 It was not essential for the risks to other sites to be addressed in the course of the RSA programme. It was open to the Environment Agency (within the bounds of rational decision-making) to focus the RSA programme on a small number of sites, so long as adequate steps were taken, outside the RSA programme, to address the risks to other sites. The Environment B Agency is entitled to exercise its scientific expertise in assessing what steps should be taken. I agree with the submission advanced on its behalf that relevant factors may include the degree of risk, the extent to which the risk is already being addressed and the availability of resources. It may also take account of technical constraints (so, for example, it is said that a single RSA programme could not practically address disparate European sites featuring C different habitat types). I also accept the submission that a court should be slow to second guess expert scientific and technical assessments that are made by the Environment Agency. So far, however, the Environment Agency has not undertaken any sufficient analysis of the steps needed to address the impact of abstraction in accordance with permanent licences.

106 The claimants have, therefore, demonstrated a breach of article 6(2) D of the Habitats Directive and a breach of regulation 9(3) of the Habitats Regulations.

Issue 4: Has the Environment Agency acted irrationally?

107 Mr Pearson has explained why the Environment Agency did not expand the RSA programme to cover additional sites. The explanation is E coherent. It amounts to a rational cost:benefit analysis. It was reasonable to close the RSA programme to new sites so as to enable the programme to be completed in a timely and planned manner. Likewise, it was reasonable, for the reasons Mr Pearson gives, to expand the programme (notwithstanding that it had been closed to new sites) to cover Broad Fen, Dilham SSSI and Alderfen Broad SSSI but not other sites. I do not accept the claimants' submission that having added those two additional sites it was irrational F not to extend the programme further. Although one or more of the reasons for including those sites also applied to other SSSIs, the full constellation of reasons did not do so. The whole point was that this was a limited exception to the principle that the programme had been closed to new sites. Any significant expansion of the programme would itself have been inconsistent with that rational and legitimate policy choice.

G **108** The decision not to expand the Ant Broads and Marshes investigation further was not necessarily inconsistent with article 6(2). I agree with the submission advanced by the Environment Agency that the RSA programme was not the only means by which the Environment Agency could legitimately discharge the obligations arising under article 6(2). In particular, I agree with the submission that it would be open to the RSA to discharge those obligations by reviewing individual licences, rather than by expanding the H RSA programme so that every site within the SAC was investigated.

109 The problem for the Environment Agency is that, for the reasons given above in connection with issue (3), its programme of works will not discharge the article 6(2) obligation. Having committed itself to discharge that obligation, it was irrational for the Environment Agency not to expand the RSA programme without having any alternative mechanism in place that

could ensure compliance with article 6(2). It follows that, even if (contrary to the findings I have made in respect of issues (1) and (2)) article 6(2) is not enforceable by the High Court, the Environment Agency's decision is flawed on common law grounds. On this basis, the claimants' rationality challenge also succeeds.

Relief

110 The claimants seek an order that requires the Environment Agency to undertake a further RSA report forthwith. The Environment Agency contends this is unworkable. In any event, the relief sought by the claimants is not consistent with my finding that the Environment Agency can, in principle, discharge its obligations under article 6(2) in other ways. The parties did not make any submissions as to the form of relief in the course of the hearing. They agree that the question of relief is best determined following judgment on the substantive claim. I will make directions accordingly.

Outcome

111 The claimants have shown that water abstraction may be causing deterioration of protected habitats or significant disturbance of protected species within the Broads Special Area of Conservation (see para 99 above).

112 The Environment Agency must (by reason of regulation 9(3) of the Habitats Regulations) have regard to the requirements of article 6(2) of the Habitats Directive. It must, therefore, be in a position to justify any departure from those requirements. The Environment Agency's obligation under article 6(2) continues to be enforceable in domestic law: section 4 of the 2018 Act. That obligation must continue to be interpreted in accordance with the precautionary principle: section 6 of the 2018 Act.

113 It follows that the Environment Agency must take appropriate steps to ensure that, in the SAC, there is no possibility of the deterioration of protected habitats or the significant disturbance of protected species as a result of licensed water abstraction. The Environment Agency has discharged that obligation in respect of three sites of special scientific interest but it has not done so in respect of all sites within the SAC. That is because its review of abstraction licences was flawed and (at least in relation to permanent licences) it has not conducted a sufficient further review to address those flaws. It is, therefore, in breach of regulation 9(3) of the Habitats Regulations and article 6(2) of the Habitats Directive.

114 In addition, having decided to comply with article 6(2), it was not rational for the Environment Agency to limit its investigation to just three sites without undertaking further work to ensure compliance with article 6(2) across the entire SAC.

115 The claim therefore succeeds.

Claim allowed.

CATHERINE MAY, Solicitor

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Court of Appeal

Regina (Wyatt) *v* Fareham Borough Council

[2022] EWCA Civ 983

2022 April 5, 6; July 15 — Sir Keith Lindblom SPT, Singh, Males LJJ

Environment — Natural habitats — Screening assessment — Outline planning application for housing development potentially increasing nitrogen levels in protected aquatic environment — Whether council failing to comply with duty to conduct "appropriate assessment" of implications of plan or project before granting permission — Whether appropriate nature conservation body's guidance note on achieving nutrient neutrality for new development unlawful — Whether council failing properly to comply with duty to determine application in accordance with development plan — Summary of principles relevant to "appropriate assessment" — Planning and Compulsory Purchase Act 2004 (c 5), s 38(6) — Conservation of Habitats and Species Regulations 2017 (SI 2017/1012), reg 63 — Council Directive 92/43/EEC, art 6(3)

The council's planning committee resolved to grant landowners outline planning permission for the demolition of existing redundant glasshouses and nursery buildings, the construction of eight detached dwellings containing four to five bedrooms and the creation of a paddock. The land in question was situated near a European protected site in the Solent which provided an aquatic habitat for many species of plants and birds that were vulnerable to excess deposition of nutrients, in particular nitrogen compounds in waste water. Before the required planning agreement had been entered into and a decision notice issued, Natural England, as the appropriate nature conservation body under the Conservation of Habitats and Species Regulations 2017[1] ("the Habitats Regulations"), published a technical guidance note on achieving nutrient neutrality for new development in the Solent region. Among other things, the advice note advocated the calculation of a "nutrient budget" for a proposed development and, if that showed that the development was likely to generate greater levels of nitrogen than would the existing lawful use, it advised that the local planning authority, when granting planning permission, would have to secure appropriate mitigation measures to avoid any residual increase in nutrient levels in the Solent. The technical guidance advocated a practical method for calculating how nutrient neutrality could be achieved, based on the "best scientific knowledge" but subject to revision as further evidence was obtained, recommending a waste water use of 110 litres per person per day, with a 20% precautionary buffer, and an average occupancy rate of 2.4 persons per dwelling but stating that competent authorities might choose to adopt a bespoke calculation tailored to the area or scheme, rather than using national population or occupancy assumptions, where they were satisfied that there was sufficient evidence to support that approach. The council, as the competent authority, was required by regulation 63 of the Habitats Regulations to undertake an "appropriate assessment" to ensure that the proposed development would not adversely affect the integrity of the protected site. In undertaking the assessment it had regard to Natural England's technical guidance. It used average land use figures in calculating the baseline nitrogen deposition from

[1] Conservation of Habitats and Species Regulations 2017, reg 63: see post, para 8.

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A the site, based its calculation of how much nitrogen the proposed development would produce on a national average occupancy rate for new dwellings of 2.4 persons per dwelling, and applied a 20% precautionary buffer. Natural England, as statutory consultee, took no issue with the figures used in the assessment. The assessment, later presented to the planning committee, concluded that although the development would have a likely significant effect on the protected site in the absence of avoidance and mitigation measures, taking those measures into account there would be no B adverse effect on the integrity of the site. In 2020 the planning application came back to the committee, by which time the application had been amended to include certain mitigation measures and Natural England had approved the council's nitrogen budget. The officer's report rejected the claimant's objection that a higher occupancy rate should be used having regard to the size of the proposed dwellings, stating that the Natural England methodology was already sufficiently precautionary and that there was no specific justification for applying anything other than the recommended C average occupancy rate of 2.4 persons per dwelling when considering the nutrient budget for the development. The council granted outline planning permission. The claimant, acting on behalf of local residents, sought judicial review of the council's decision, claiming that the council (i) had failed to comply with its duty as the competent authority to make an "appropriate assessment" under regulation 63 of the Habitats Regulations (transposing article 6(3) of Council Directive 92/43/EEC[2]), in D part because it had relied on the advice note, which was said to be legally flawed; and (ii) had failed to perform its duty as the local planning authority, under section 38(6) of the Planning and Compulsory Purchase Act 2004[3], to determine the application in accordance with the development plan unless material considerations indicated otherwise. The judge dismissed the claim, finding, inter alia, that while an occupancy rate of 3 would generally be appropriate for four and five-bedroom houses in the area, giving due deference to the decision-maker the council's use of the 2.4 occupancy E rate was sufficiently precautionary, that its use of the average land use figure was appropriate and that the 20% precautionary buffer, despite not being based on "any arithmetical calculation or other algorithm" was acceptable.

On the claimant's appeal—

Held, dismissing the appeal, (1) that, whatever the particular circumstances in a given case, the basic duty of the competent authority under regulation 63 of the Habitats Regulations was and remained to grant planning permission only if F satisfied that the proposed development "will not adversely affect the integrity" of the European protected site; that the duty of the court was and remained to ensure that the authority's evaluative judgment on that question had been lawfully exercised, keeping in mind the difference between evidence of what had been considered by a decision-making authority at the time of its decision and evidence put forward after the event to explain or justify that decision; that the council's conclusion on the crucial question under regulation 63(5) had been, ultimately, an evaluative G judgment for it to make as "competent authority" and the conclusion it had reached, as a matter of evaluative judgment, had been legally sound; that the judge had examined in appropriate depth and detail the evidence of the expert witnesses on either side on the soundness of the method used by the council in conducting the appropriate assessment, he had approached the evidence on occupancy rate with care, had considered the reasons for the use of the 20% precautionary buffer and had H concluded that in the light of that evidence that there was no justification for the court's intervention; that the judge had not adopted too lax an understanding of the precautionary principle; and that the judge had neither erred in his self-direction on

[2] Council Directive 92/43/EEC, art 6(3): see post, para 7.

[3] Planning and Compulsory Purchase Act 2004, s 38(6): see post, para 78.

the relevant legal principles nor applied them inappropriately but had adopted the correct approach in his consideration of the council's appropriate assessment as a whole (post, paras 45–46, 50, 52–54). A

Bayer CropScience v European Commission (Joined Cases T-429/13 and T-451/13) EU:T:2018:280, EGC and *R v Rochdale Metropolitan Borough Council, Ex p Milne (No 2)* (2001) 81 P & CR 27 considered.

(2) That there could not be any proper challenge in the present proceedings to the lawfulness of the advice given by Natural England in its technical guidance note; that the technical guidance did not create some additional legal requirement or test but was an advisory document which was neither mandatory in effect nor prescriptive of a single correct procedure to be followed, containing guidance whose purpose was to assist competent authorities in performing their functions under the habitats legislation; that it did not assert that the approach it suggested was the only means of conducting an appropriate assessment but expressly acknowledged that that approach was only "a means" or "one way" of undertaking that task; and that the appropriate question for the court was whether the policy in question authorised or approved unlawful conduct by those to whom it was directed (post, paras 55–57). B C

(3) That at the level of generality at which the technical guidance note was suggesting it, the use of an occupancy rate of 2.4 persons per dwelling could not be said to be unlawful on the ground that it was inconsistent with the "best scientific evidence"; that the technical guidance did not misstate the legal position under regulation 63, it did not authorise or approve, let alone prescribe, the use of that occupancy rate by all local planning authorities in every case regardless of the circumstances, nor remove or reduce the onus on those authorities to be sure beyond "all reasonable scientific doubt" that the integrity of the protected site would not be adversely affected; that, rejecting the criticism made of the council's use of an occupancy rate of 2.4 persons per dwelling in the particular circumstances of the case, although an appropriate assessment had to be based on "best scientific knowledge", the question for the court was not whether each individual figure used in it was intrinsically the "best scientific knowledge" when considered on its own, divorced from the full context in which it was used but, rather, the court had to take a "holistic" view on the question whether the assessment methodology as a whole represented "best scientific knowledge"; that it had been open to the council to rely on the precautionary nature of several factors in the nitrogen budget to ground its own judgment that the use of an occupancy rate of 2.4 persons per dwelling was consistent with a sufficiently precautionary approach; that the council had also been entitled to rely on the use of the 20% precautionary buffer applied at the end of the calculation to strengthen the conclusion that the use of the 2.4 occupancy rate was appropriate in the particular circumstances; and that the judge, while finding that, taken in isolation, an occupancy rate of 3 would generally be appropriate for four and five-bedroom houses in the area, had not erred in finding that the method used in the appropriate assessment, taken in its entirety and thus including the occupancy rate of 2.4, complied with the precautionary principle (post, paras 58–62, 65, 68). D E F G

(4) That there was no objection in principle to the use of average land use figures to calculate the baseline level of nitrate deposition from the site of the proposed development; that when concerned with the individual assessment of the particular effects of a specific project, the use of average figures was not in principle contrary to the requirement for the necessary degree of certainty; that the use of such figures might be conducive to sufficient certainty and whether that was so in a particular case would be a matter of judgment for the competent authority; and that nothing in the present case suggested that either Natural England or the council had misunderstood the degree of certainty required by the precautionary principle, nor was there any evidence to show some justiciable error in the conclusion reached, as a matter of H

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A judgment, that the use of average land use figures was suitable for the appropriate assessment and sufficiently robust (post, paras 70–73).

(5) That there could be no serious dispute that, in a particular case, the use of a 20% precautionary buffer in the nitrogen budget calculation could ensure that the appropriate assessment met the required standard of scientific certainty; that, while the 20% figure was not derived from any arithmetical calculation or other algorithm, there was no legal requirement that every element of an appropriate assessment be B based on arithmetic or algorithm; that if a precautionary buffer were employed, it should be set at a reasonable level, to help achieve adequate certainty that the high threshold in regulation 63 was crossed; but that to think that reasonable scientific judgments in undertaking an appropriate assessment could only be reached through arithmetical calculation would be to take too narrow a view of rational enquiry; that the fact that the 20% precautionary buffer was not the product of arithmetic, but of judgment, did not mean that it lacked an adequate basis; and that neither the C selection of that figure in Natural England's technical guidance note nor its use in the appropriate assessment undertaken by the council was open to attack on any legal grounds (post, paras 75–77).

(6) That the officer's assessment under section 38(6) of the Planning and Compulsory Purchase Act 2004, regarded with realism and common sense, was not flawed by any error of law; that the reality was that in the conscious performance D of the section 38(6) duty, he had undertaken every necessary exercise of planning judgment for that duty to be complied with, and none of those planning judgments had been infected by legal error; that, in substance, the officer's assessment, accepted by the members of the planning committee, had not been materially defective; and that for all the above reasons the appeal failed (post, paras 114, 115, 116, 117).

Summary of principles relevant to article 6(3) of Council Directive 92/43/EEC and regulation 63 of the Habitats Regulations (post, para 9).

E Decision of Jay J [2021] EWHC 1434 (Admin); [2022] Env LR 7 affirmed.

The following cases are referred to in the judgments:

Bayer CropScience v European Commission (Joined Cases T-429/13 and T-451/13) EU:T:2018:280, EGC

BDW Trading Ltd (trading as David Wilson Homes (Central, Mercia and West F *Midlands)) v Secretary of State for Communities and Local Government* [2016] EWCA Civ 493; [2017] PTSR 1337, CA

Braintree District Council v Secretary of State for Communities and Local Government [2018] EWCA Civ 610; [2018] 2 P & CR 9, CA

Compton Parish Council v Guildford Borough Council [2019] EWHC 3242 (Admin); [2020] JPL 661

Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu v College G *van Gedeputeerde staten van Limburg* (Case C-293/17) EU:C:2018:882; [2019] Env LR 27, ECJ

Craeynest v Brussels Hoofdstedelijk Gewest (Case C-723/17) EU:C:2019:533; [2020] Env LR 4, ECJ

Edinburgh Council (City of) v Secretary of State for Scotland [1997] 1 WLR 1447; [1998] 1 All ER 1174, HL(Sc)

Heard v Broadland District Council [2012] EWHC 344 (Admin); [2012] PTSR D25; H [2012] Env LR 23

Holohan v An Bord Pleanála (Case C-461/17) EU:C:2018:883; [2019] PTSR 1054, ECJ

Inclusion Housing Community Interest Co v Regulator of Social Housing [2020] EWHC 346 (Admin)

Kennedy v Charity Commission [2014] UKSC 20; [2015] AC 455; [2014] 2 WLR 808; [2014] 2 All ER 847, SC(E)

Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij (Case C-127/02) EU:C:2004:482; [2005] All ER (EC) 353; [2004] ECR I-7405, ECJ
People Over Wind v Coillte Teoranta (Case C-323/17) EU:C:2018:244; [2018] PTSR 1668, ECJ
R v Ministry of Defence, Ex p Smith [1996] QB 517; [1996] 2 WLR 305; [1996] ICR 740; [1996] 1 All ER 257, CA
R v Rochdale Metropolitan Borough Council, Ex p Milne (No 2) (2001) 81 P & CR 27
R v Westminster City Council, Ex p Ermakov [1996] 2 All ER 302; 95 LGR 119, CA
R (A) v Secretary of State for the Home Department [2021] UKSC 37; [2021] 1 WLR 3931; [2022] 1 All ER 177, SC(E)
R (BACI Bedfordshire) v Environment Agency [2019] EWCA Civ 1962; [2020] Env LR 16, CA
R (Champion) v North Norfolk District Council [2015] UKSC 52; [2015] 1 WLR 3710; [2015] 4 All ER 169; [2015] LGR 593, SC(E)
R (Corbett) v Cornwall Council [2020] EWCA Civ 508; [2020] JPL 1277, CA
R (Hampton Bishop Parish Council) v Herefordshire Council [2014] EWCA Civ 878; [2015] 1 WLR 2367, CA
R (McMorn) v Natural England [2015] EWHC 3297 (Admin); [2016] PTSR 750
R (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840; [2001] 1 FLR 756, CA
R (Mansell) v Tonbridge and Malling Borough Council [2017] EWCA Civ 1314; [2019] PTSR 1452, CA
R (Morge) v Hampshire County Council [2011] UKSC 2; [2011] PTSR 337; [2011] 1 WLR 268; [2011] 1 All ER 744; [2011] LGR 271, SC(E)
R (Mott) v Environment Agency [2016] EWCA Civ 564; [2016] 1 WLR 4338, CA
R (Pearce) v Parole Board [2022] EWCA Civ 4; [2022] 1 WLR 2216, CA
R (Preston) v Cumbria County Council [2019] EWHC 1362 (Admin); [2020] Env LR 3
R (Prideaux) v Buckinghamshire County Council [2013] EWHC 1054 (Admin); [2013] PTSR D39; [2013] Env LR 32
R (United Trade Action Group Ltd) v Transport for London [2021] EWCA Civ 1197; [2022] RTR 2, CA
St Modwen Developments Ltd v Secretary of State for Communities and Local Government (Practice Note) [2017] EWCA Civ 1643; [2018] PTSR 746, CA
Secretary of State for Communities and Local Government v Calderdale Metropolitan Borough Council [2010] EWCA Civ 1268; [2011] JPL 412, CA
Smyth v Secretary of State for Communities and Local Government [2015] EWCA Civ 174; [2015] PTSR 1417, CA
Spurrier v Secretary of State for Transport [2019] EWHC 1070 (Admin); [2020] PTSR 240, DC; sub nom *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214; [2020] PTSR 1446, CA; sub nom *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2020] UKSC 52; [2021] PTSR 190; [2021] 2 All ER 967, SC(E)
Sweetman v An Bord Pleanála (Case C-258/11) EU:C:2013:220; [2014] PTSR 1092, ECJ
Tesco Stores Ltd v Dundee City Council [2012] UKSC 13; [2012] PTSR 983; 2012 SC (UKSC) 278, SC(Sc)
Tiviot Way Investments Ltd v Secretary of State for Communities and Local Government [2015] EWHC 2489 (Admin); [2016] JPL 171

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A No additional cases were cited in argument.

The following additional cases, although not cited, were referred to in the skeleton arguments:

Flaxby Park Ltd v Harrogate Borough Council [2020] EWHC 3204 (Admin); [2021] JPL 833
R v Mendip District Council, Ex p Fabre [2017] PTSR 1112; (2000) 80 P & CR 500
B *R v Parliamentary Comr for Administration, Ex p Balchin* [1998] 1 PLR 1
R v Selby District Council, Ex p Oxton Farms [2017] PTSR 1103, CA
R (Butler) v East Dorset District Council [2016] EWHC 1527 (Admin)
R (CPRE Kent) v Dover District Council [2017] UKSC 79; [2018] 1 WLR 108; [2018] 2 All ER 121, SC(E)
R (Dolan) v Secretary of State for Health and Social Care [2020] EWCA Civ 1605; [2021] 1 WLR 2326; [2021] 1 All ER 780, CA
C *R (Finch) v Surrey County Council* [2020] EWHC 3559 (QB); [2021] PTSR 1160

APPEAL from Jay J

On 1 October 2020, having conducted an appropriate assessment pursuant to regulation 63 of the Conservation of Habitats and Species Regulations 2017, the defendant, Fareham Borough Council, granted outline planning permission for a development of eight detached houses on land at D Egmont Nurseries, Brook Avenue, Warsash, which was situated some 5.5 kilometres from the Solent and Southampton Water Special Protection Area, a European protected site.

By a claim form and with permission to proceed granted by Lang J, the claimant, Ronald Wyatt, as chairperson of Brook Avenue Residents Against Development and acting in a representative capacity, sought judicial review E of the council's decision on a number of grounds including: (1) that the use of the 2.4 person per dwelling occupancy rate in the council's nutrient budget for the development had been irrational, unreasoned and contrary to the precautionary principle (ground 1); (2) that the classification of part of the site as being in "lowland grazing" had been irrational, unreasoned and contrary to the precautionary principle (ground 2); (3) that reliance on an F advice note issued by the fourth interested party, Natural England, as the appropriate nature conservation body under the Conservation of Habitats and Species Regulations 2017 (*Advice on Achieving Nutrient Neutrality for New Development in the Solent Region* (Version 5 – June 2020)) had been contrary to the requirement in article 6(2) of Council Directive 92/43/EEC to take "appropriate steps" to avoid the deterioration or disturbance of protected species and habitat (ground 3); (4) that the methodology in the G advice note did not meet the required standard of certainty under regulation 63 of the Conservation of Habitats and Species Regulations 2017, read with article 6(3) of the Directive (ground 5); (5) that the council had erred in its approach to Policy DSP40 of the local development plan, which set out the criteria to be met in order for a housing development outside of the settlement boundary to be acceptable if a five-year housing land supply could not be H demonstrated (as was the case) (ground 7); and (6) that the council had erred in its approach to section 38(6) of the Planning and Compulsory Purchase Act 2004 (ground 8). The first to third interested parties, landowners Lorraine Louise Hanslip, Michael Hanslip and Thomas Lewis Hanslip, submitted detailed grounds of resistance but were not represented at the

hearing. By a judgment and order dated 28 May 2021 Jay J dismissed the claim [2021] EWHC 1434 (Admin); [2022] Env LR 7.

By an appellant's notice and with permission granted by the Court of Appeal (William Davis LJ) on 22 November 2021, the claimant appealed on the following grounds. (1) The judge had erred in his conclusion that the use of the 2.4 national average occupancy rate in the appropriate assessment had been lawful: having concluded that the use of the national average occupancy rate was not the "best available scientific evidence", it had not been open to him to conclude that it was nevertheless "sufficiently precautionary"; an appropriate assessment that was not based on the "best available scientific evidence" was unlawful, and the judge had been wrong to conclude otherwise. (2) The judge had erred in his conclusion that the use of average figures when calculating the amount of nitrogen that a site would contribute in the absence of planning permission was precautionary: the baseline nitrogen deposition from the site was calculated with reference to average land use figures. The judge had been wrong to conclude that those were sufficiently precautionary. Averaging things out by definition relied upon speculation as to what might happen in future developments which was contrary to the requirement of certainty at the point of consent. (3) Permission to appeal on ground 3 was refused. (4) The judge had erred in his conclusion that the 20% precautionary buffer was lawful: having concluded that the 20% buffer used in the nutrient budget calculation was "not derived from any arithmetical calculation or other algorithm", it had not been open to him to conclude that the buffer was, nevertheless, a rational response to recognised uncertainty. It was mere assertion unsupported by evidence. (5) The judge had erred in his conclusion that the decision-maker had complied with the duty contained in section 38(6) of the Planning and Compulsory Purchase Act 2004: there was considerable doubt as to what conclusion the decision-maker had reached about whether the proposed development was in accordance with the development plan, which was enough to render the decision unlawful.

The facts are stated in the judgment of Sir Keith Lindblom SPT.

Gregory Jones QC and *Conor Fegan* (instructed by *Fortune Green Legal Practice*) for the claimant.

Timothy Mould QC (instructed by *Southampton and Fareham Legal Services Partnership*) for the council.

David Elvin QC and *Luke Wilcox* (instructed by *Browne Jacobson LLP*) for Natural England.

The court took time for consideration.

15 July 2022. The following judgments were handed down.

SIR KEITH LINDBLOM SPT

Introduction

1 There are two basic questions in this case. First, was the duty to make an "appropriate assessment" under regulation 63 of the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations") lawfully performed by a local planning authority when it granted planning

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A permission for housing development on land near a European protected site in the Solent? Second, did the authority comply with its duty under section 38(6) of the Planning and Compulsory Purchase Act 2004 to determine the application in accordance with the development plan unless material considerations indicated otherwise? Neither question involves any novel issue of law. The relevant legal principles are well established and clear.

B 2 With permission granted by William Davis LJ, the appellant, Ronald Wyatt, as Chairperson of Brook Avenue Residents Against Development ("BARAD"), appeals against the order of Jay J dated 28 May 2021 dismissing his claim for judicial review of the decision of the respondent, Fareham Borough Council, on 1 October 2020 to grant outline planning permission for a development of eight detached houses on land at Egmont Nurseries, Brook Avenue, Warsash. The council is the local planning C authority, and the "competent authority" under regulation 7 of the Habitats Regulations. It has filed a respondent's notice. The fourth interested party is Natural England, the "appropriate nature conservation body" under regulation 5. It too has filed a respondent's notice. The first, second and third interested parties—Lorraine, Michael and Thomas Hanslip—are the landowners. They filed detailed grounds of resistance opposing the claim but D have played no part in the appeal.

The main issues in the appeal

3 The judge rejected Mr Wyatt's challenge on all eight grounds. Permission to appeal was granted on four of the five grounds in the appellant's notice (grounds 1, 2, 4 and 5). The issue arising from grounds 1, E 2 and 4 and the council's respondent's notice is whether the council failed to make a lawful "appropriate assessment" of the proposed development under regulation 63 of the Habitats Regulations, in part because it relied on the technical guidance note published by Natural England, entitled "Advice on Achieving Nutrient Neutrality for New Development in the Solent Region (Version 5 – June 2020)", which Mr Wyatt contends is legally flawed. The issue arising from ground 5 is whether the council failed lawfully to perform F its duty under section 38(6) of the 2004 Act. These two main issues are distinct and can be dealt with separately.

The application for planning permission and the council's decision

4 The site of the proposed development lies a little to the east of the mouth G of the River Hamble and about 5.5km from the Solent and Southampton Water Special Protection Area ("the SPA"), which is a European protected site. Aquatic habitats for many species of plants and birds within the protected site, including the Brent Goose, are vulnerable to the excess deposition of nutrients—in particular nitrogen compounds in wastewater, which cause algal growth. New housing development can thus harm the integrity of the protected site if suitable mitigation measures are not put in H place.

5 The application for outline planning permission was submitted in June 2018. The proposed development was the "[demolition] of existing buildings[, the construction] of eight detached houses [and the creation] of [a] paddock". The existing use was described as "[redundant] glasshouses and nursery buildings". The application form indicated that each dwelling

would have four or more bedrooms. When the council's Planning Committee considered the proposal in December 2018, it resolved that planning permission should be granted. Before the required section 106 agreement had been entered into and a decision notice issued, Natural England published its technical guidance note. The application came back to the committee on 19 August 2020. By then it had been amended to include mitigation measures, and Natural England had approved the nitrogen budget.

6 As competent authority, the council was required by regulation 63 of the Habitats Regulations to undertake an "appropriate assessment" to ensure that the development would not adversely affect the integrity of the protected site. In undertaking the "appropriate assessment" it had regard to Natural England's advice about "nutrient neutrality" in its technical guidance note. It used average land use figures in calculating the baseline nitrogen deposition from the site, based its calculation of how much nitrogen the proposed development would produce on a national average occupancy rate for new dwellings of 2.4 persons per dwelling, and applied a 20% "precautionary buffer".

The legislative provisions for "appropriate assessment"

7 Article 6(3) of Council Directive 92/43/EEC on the conservation of natural habitats and of wild flora and fauna ("the Habitats Directive") states:

> "3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

8 That provision was transposed into domestic law by regulation 63 of the Habitats Regulations, "Assessment of implications for European sites and European offshore marine sites", which states:

> "(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which— (a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and (b) is not directly connected with or necessary to the management of that site, must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives …
>
> "(3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specifies …
>
> "(5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project

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A only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).

(6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions B or restrictions subject to which it proposes that the consent, permission or other authorisation should be given."

An exception to the obligation in paragraph (5) arises under regulation 64, where the authority is satisfied that there are "no alternative solutions" and that there are "imperative reasons of overriding public interest" for the project to be carried out.

C **9** There is a wealth of case law relevant to article 6(3) and regulation 63, both in the Court of Justice of the European Union ("the CJEU") and in the domestic courts. Some basic points emerge:

(1) The duty imposed by article 6(3) of the Habitats Directive and regulation 63 of the Habitats Regulations rests with competent authorities, not with the courts. Whether a plan or project will adversely affect the D integrity of a European protected site under regulation 63(5) is always a matter of judgment for the competent authority itself (see the judgment of the CJEU in *Holohan v An Bord Pleanála* (Case C-461/17) [2019] PTSR 1054, at para 44). That is an evaluative judgment, which the court is neither entitled nor equipped to make for itself (see the judgment of Lord Carnwath JSC in *R (Champion) v North Norfolk District Council* [2015] UKSC 52; [2015] E 1 WLR 3710, at para 41, and the judgment of Sales LJ, as he then was, in *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174; [2015] PTSR 1417, at para 83). In a legal challenge to a competent authority's decision, the role of the court is not to undertake its own assessment, but to review the performance by the authority of its duty under regulation 63. The court's function is supervisory only. This has been emphasised often in the domestic cases (see, for example, the recent first F instance judgment in *Compton Parish Council v Guildford Borough Council* [2020] JPL 661, at para 207).

(2) In *Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu v College van Gedeputeerde Staten van Limburg* (Case C-293/17) [2019] Env LR 27 ("*Dutch Nitrogen*"), the CJEU said that it is "for the national courts to carry out a thorough and in-depth examination of the G scientific soundness of the 'appropriate assessment' …" (para 101 of the judgment), which "makes it possible to ensure that there is no reasonable scientific doubt as to the absence of adverse effects of each plan or project on the integrity of the site concerned, which it is for the national court to ascertain" (para 104). The force of these statements is that the court, for its part, must be wholly satisfied in the exercise of its supervisory jurisdiction that the competent authority's performance of its obligations H under article 6(3) was lawful. It must satisfy itself of the lawfulness of the authority's consideration of the scientific soundness of the appropriate assessment. But there is nothing in the CJEU's judgment to suggest that it intended to transform the respective roles of the competent authorities and the domestic courts by giving the court the job of undertaking an alternative appropriate assessment of its own.

A (3) When reviewing the performance by a competent authority of its duty under regulation 63, the court will apply ordinary public law principles, conscious of the nature of the subject-matter and the expertise of the competent authority itself. If the competent authority has properly understood its duty under regulation 63, the court will intervene only if there is some *Wednesbury* error in the performance of that duty (see the judgment of Sales LJ in *Smyth*, at para 80, and the judgment of this court in *Plan B Earth v Secretary of State for Transport* [2020] PTSR 1446, at paras 68 and 75 to 79, which were not doubted by the Supreme Court in the same proceedings (sub nom *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2021] PTSR 190)). When exercising its supervisory function, the court will apply the normal *Wednesbury* standard, not a heightened standard such as "anxious scrutiny" (cf *R v Ministry of Defence, Ex p Smith* [1996] QB 517, and *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840). It is well established that such a heightened standard will apply only where fundamental rights or constitutional principles are at stake (see the judgment of Lord Carnwath JSC in *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455 at para 245, and the first instance judgment in *R (McMorn) v Natural England* [2015] EWHC 3297 (Admin); [2016] PTSR 750, at paras 204 and 205). Given the demanding requirement inherent in regulation 63(5)—for the competent authority to ascertain that the project "will not adversely affect the integrity of the European site"—the court's examination of the authority's performance of its duty will be suitably exacting within the bounds of its jurisdiction. But it should be remembered that the autonomous approach of the domestic courts in judging the lawfulness of such action has been explicitly approved by the CJEU (see the judgment of this court in *Plan B Earth*, at paras 74, 75 and 137, discussing the CJEU's decision in *Craeynest v Brussels Hoofdstedelijk Gewest* (Case C-723/17) [2020] Env LR 4).

(4) A competent authority is entitled, and can be expected, to give significant weight to the advice of an "expert national agency" with relevant expertise in the sphere of nature conservation, such as Natural England (see the judgment of Sales LJ in *Smyth*, at para 84, and the first instance judgment in *R (Preston) v Cumbria County Council* [2019] EWHC 1362 (Admin); [2020] Env LR 3, at para 69). The authority may lawfully disagree with, and depart from, such advice. But if it does, it must have cogent reasons for doing so (see the judgment of Baroness Hale of Richmond JSC in *R (Morge) v Hampshire County Council* [2011] PTSR 337, at para 45, the judgment of Sales LJ in *Smyth*, at para 85, and the first instance judgment in *R (Prideaux) v Buckinghamshire County Council* [2013] PTSR D39; [2013] Env LR 32, at para 116). And the court for its part will give appropriate deference to the views of expert regulatory bodies (see, for example, the judgment of Beatson LJ in *R (Mott) v Environment Agency* [2016] 1 WLR 4338, at paras 69 to 77).

(5) When provided with expert evidence in a claim for judicial review, the court will not substitute its own opinion for that of the expert. As this court emphasised in *R (BACI Bedfordshire) v Environment Agency* [2020] Env LR 16, at para 87, "[unless] there is clear evidence revealing a failure of ... expertise—for example, some conspicuous factual or scientific error —the court is entitled to conclude there was no such failure". Experts may be expected to provide enough explanation to enable the court to decide

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A whether the views they have stated are based on a conspicuous error (see the judgment of Sales LJ in *Smyth*, at para 83). But the court will bear in mind that decisions which entail "scientific, technical and predictive assessments by those with appropriate expertise" and which are "highly dependent upon the assessment of a wide variety of complex technical matters by those who are expert in such matters and/or who are assigned to the task of assessment (ultimately by Parliament)" should be accorded a substantial margin of B appreciation (see the judgment of this court in *Plan B Earth*, at para 68, and, at first instance in the same case, *Spurrier v Secretary of State for Transport* [2020] PTSR 240, at paras 176 to 180).

(6) The requirement in the second sentence of article 6(3) of the Habitats Directive and in regulation 63(5) of the Habitats Regulations embodies the "precautionary principle, and makes it possible effectively to prevent adverse C effects on the integrity of protected sites as a result of the plans or projects being considered" (see the judgment of the CJEU in *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij* (Case C-127/02) [2005] All ER (EC) 353 ("*Waddenzee*"), at para 58). The "precautionary principle" requires a high standard of investigation (see the judgment in *Waddenzee*, at paras 44, 58, 59 and 61).

D (7) The duty placed on the competent authority by article 6(3) and regulation 63 is to ascertain that there will be no adverse effects on the integrity of the protected site, but that conclusion does not need to be established to the standard of "absolute certainty". Rather, the competent authority must be "satisfied that there is no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned" (paras 44, 58, 59, and 61 of the CJEU's judgment and paras 107 and 108 E of the Advocate General's opinion in *Waddenzee*, and the judgment in *Holohan*, at paras 33 to 37). In *Waddenzee* (at para 59), the CJEU emphasised the responsibility of the competent authority, having taken account of the conclusions of the appropriate assessment, to authorise the proposed development "only if [it] has made certain that it will not adversely affect the integrity of that site". That, it said, "is the case where F no reasonable scientific doubt remains as to the absence of such effects". But as Advocate General Kokott explained in *Waddenzee* (in paras 102 to 106 of her opinion), a requirement of "absolute certainty" would be "disproportionate". As she said (at para 107), "the necessary certainty cannot be construed as meaning absolute certainty ...", the conclusion of an appropriate assessment is, "of necessity, subjective in nature", and "competent authorities can, from their point of view, be certain that there G will be no adverse effects even though, from an objective point of view, there is no absolute certainty". Similar observations appear in the judgment itself (in paras 44, 58, 59 and 61). As the Supreme Court acknowledged in *Champion*, adopting the approach in *Waddenzee*, "while a high standard of investigation is demanded, the issue ultimately rests on the judgment of the authority" (see the judgment of Lord Carnwath JSC, at para 41). This H approach is, in essence, what the "precautionary principle" requires in the context of article 6(3) of the Habitats Directive and regulation 63 of the Habitats Regulations.

(8) The requirement that there be "no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned" does not mean that the "reasonable worst-case scenario" must always be assessed. In the

European Commission guidance document entitled "Communication on the precautionary principle" (2000) it is stated in Annex III that "[when] the available data are inadequate or non-conclusive, a prudent and cautious approach to environmental protection, health or safety could be to opt for the worst-case hypothesis". That guidance, however, is not law (see *Heard v Broadland District Council* [2012] PTSR D25; [2012] Env LR 23, at para 69, and *Prideaux*, at para 112), nor is it in mandatory terms. What is required in law is a sufficient degree of certainty to ensure that there is "no reasonable doubt" on the relevant question. It may sometimes be useful to consider a "reasonable worst-case scenario" when assessing whether the necessary degree of certainty has been achieved. But whether there are grounds for "reasonable doubt" will always be a matter of judgment in the particular case.

(9) An appropriate assessment must be based on the "best scientific knowledge in the field" (see *Holohan*, at para 33). Such knowledge must be both up-to-date and not merely an expert's bare assertion (see the judgment of Sales LJ in *Smyth*, at para 83). And the concept of "best scientific knowledge" is not a wholly free-standing requirement, separate from the precautionary principle itself. It is inherent in the precautionary principle, and in the concept of "no reasonable doubt".

(10) What is required of the competent authority, therefore, is a case-specific assessment in which the applicable science is brought to bear with sufficient rigour on the implications of the project for the protected site concerned. If an appropriate assessment is to comply with article 6(3) of the Habitats Directive it "cannot 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 works proposed on the protected site concerned" (see the judgment of the CJEU in *Sweetman v An Bord Pleanála* (Case C-258/11) [2014] PTSR 1092, at para 44, and its judgment in *People Over Wind v Coillte Teoranta* (Case C-323/17) [2018] PTSR 1668, at para 38).

Natural England's technical guidance note

10 Natural England's technical guidance note was issued under section 4 of the Natural Environment and Rural Communities Act 2006, which provides, in subsection (4), that "Natural England may give advice to any person on any matter relating to its general purpose ... (b) if [it] thinks it appropriate to do so, on its own initiative".

11 The technical guidance note advocated the calculation of a "nutrient budget" for a proposed development. If this showed that the development was likely to generate greater levels of nitrogen than would the existing lawful use of the site, the thrust of the advice given was that the local planning authority, when granting planning permission, would have to secure appropriate mitigation measures to avoid any residual increase in nutrient levels in the Solent.

12 In its opening paragraph the technical guidance note recognised that the water environment of the Solent is highly protected for its habitats and species of international importance. It acknowledged that the high levels of nitrogen input to this water environment were causing excessive plant growth—"eutrophication"—in the designated sites, and that the resulting

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A mats of green algae and other impacts on the marine ecology were affecting protected habitats and bird species (para 1.1). It referred to the "potential for future housing developments across the Solent region to exacerbate these impacts[, which] creates a risk to their potential future conservation status". It introduced "nutrient neutrality" as "a means of ensuring that development does not add to existing nutrient burdens", adding that "this provides certainty that the whole of the scheme is deliverable in line with B the requirements of [the Habitats Regulations]" (para 1.3). It advocated a practical method for calculating how nutrient neutrality could be achieved, based on "best scientific knowledge" but subject to revision as further evidence was obtained (para 1.4).

13 The "best available up-to-date evidence" indicated that some of the protected sites were "widely in unfavourable condition due to existing levels C of nutrients" and "at risk from additional nutrient inputs" (para 2.3). In Natural England's view, there were likely significant effects on several internationally designated sites "due to the increase in wastewater from the new developments coming forward" (para 2.4). Nutrient neutrality would allow local planning authorities to comply with their duties under regulation 63 (para 2.5), and provide "a means of ensuring that development does not D add to existing nutrient burdens" (para 2.6).

14 In section 4, "Nutrient Neutrality Approach for New Development", it was stated that "[achieving] nutrient neutrality is one way to address the existing uncertainty surrounding the impact of new development on designated sites", and that "[this] practical methodology provides advice on how to calculate nutrient budgets and options for mitigation, should this be necessary" (para 4.1). It suggested this approach to calculating "nutrient E budgets" (in paras 4.6 to 4.9):

> "4.6 For those developments that wish to pursue neutrality, Natural England advises that a nitrogen budget is calculated for new developments that have the potential to result in increases of nitrogen entering the international sites. A nutrient budget calculated according F to this methodology and demonstrating nutrient neutrality is, in our view, able to provide sufficient and reasonable certainty that the development does not adversely affect the integrity, by means of impacts from nutrients, on the relevant internationally designated sites. This approach must be tested through the 'appropriate assessment' stage of the Habitats Regulations Assessment. The information provided by the G applicant on the nutrient budget and any mitigation proposed will be used by the local planning authority, as competent authority, to make an appropriate assessment of the implications of the plan or project on the designated sites in question …
>
> "4.7 The nutrient neutrality calculation includes key inputs and assumptions that are based on the best-available scientific evidence and research. It has been developed as a pragmatic tool. However, H for each input there is a degree of uncertainty. For example, there is uncertainty associated with predicting occupancy levels and water use for each household in perpetuity. Also, identifying current land/ farm types and the associated nutrient inputs is based on best-available evidence, research and professional judgement and is again subject to a degree of uncertainty.

"4.8 It is our advice to local planning authorities to take a precautionary approach in line with existing legislation and case law when addressing uncertainty and calculating nutrient budgets. This should be achieved by ensuring nutrient budget calculations apply precautionary rates to variables and adding a precautionary buffer to the [total nitrogen] calculated for developments. A precautionary approach to the calculations and solutions helps the local planning authority and applicants to demonstrate the certainty needed for their assessments.

"4.9 By applying the nutrient neutrality methodology, with the precautionary buffer, to new development, the competent authority may be satisfied that, while margins of error will inevitably vary for each development, this approach will ensure that new development in combination will avoid significant increases of nitrogen load to enter the internationally designated sites."

15 For development which would drain to the mains network, the suggested method would involve four stages. In the first stage, which was to calculate the total nitrogen derived from the development which would leave wastewater treatment works, the first step was to "Calculate [the] additional population" arising from the development. Relevant here is the advice given on occupancy rates:

"4.18 New housing and overnight accommodation can increase the population as well as the housing stock within the catchment. This can cause an increase in nitrogen discharges. To determine the additional population that could arise from the proposed development, it is necessary that sufficiently evidenced occupancy rates are used. Natural England recommends that, as a starting point, local planning authorities should consider using the average national occupancy rate of 2.4, as calculated by the Office for National Statistics (ONS), as this can be consistently applied across all affected areas.

"4.19 However competent authorities may choose to adopt bespoke calculations tailored to the area or scheme, rather than using national population or occupancy assumptions, where they are satisfied that there is sufficient evidence to support this approach. Conclusions that inform the use of a bespoke calculation need to be capable of removing all reasonable scientific doubt as to the effect of the proposed development on the international sites concerned, based on complete, precise and definitive findings. The competent authority will need to explain clearly why the approach taken is considered to be appropriate. Calculations for occupancy rates will need to be consistent with others used in relation to the scheme (e g for calculating open space requirements), unless there is a clear justification for them to differ."

16 The second step in the first stage was to "Confirm water use". In Natural England's view, planning authorities ought to impose conditions for maximum water usage of "110 litres per person per day" on new developments (paras 4.11 and 4.22). The advice here was that "[the] water use figure is a proxy for the amount of wastewater that is generated by a household", that "[new] residential development may be able to achieve tighter water use figures" (para 4.23), and that "while new developments should be required to meet the 100 litres per person a day standard, the risk of

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A standards slipping over time and the uncertainty inherent in the relationship between water use and sewage volume should be addressed by the use in the calculation of 110 litres per person per day figure" (para 4.25).

17 The third step in the first stage involved identifying the "[wastewater] treatment works" into which water from the development would drain. Natural England adopted a precautionary approach, stating that "[where] there is a permit limit for Total Nitrogen, the load calculation will use a worst B case scenario that the [wastewater treatment works] operates at 90% of its permitted limit" (para 4.29).

18 The fourth step in the first stage was to "Calculate Total Nitrogen (TN) in Kg per annum that would exit the [wastewater treatment works] after treatment derived from the proposed development". It was noted that "[natural] reductions in nitrogen concentrations, mainly through de- C nitrification processes, also occur within watercourses". But there was "[insufficient] evidence … to properly evaluate de-nitrification rates within the greater Solent catchments"; so that factor was not included. Natural England took the view that this provided "an additional precautionary factor for the methodology" (para 4.42).

19 The second stage was to "Adjust nitrogen load to account for existing D nitrogen from current land use". This advice was given:

> "4.45 This next stage is to calculate the existing nitrogen losses from the current land use within the redline boundary of the scheme. The nitrogen loss from the current land use will be removed and replaced by that from the proposed development land use. The net change in land use will need to be subtracted from or added to the wastewater Total E Nitrogen load.
>
> "4.46 Nitrogen-nitrate loss from agricultural land can be modelled using the Farmscoper model …
>
> "4.47 If the development area covers agricultural land that clearly falls within a particular farm type used by the Farmscoper model then the modelled average nitrate-nitrogen loss from this farm type should be used. …
>
> F "…
>
> "4.51 It is important that farm type classification is appropriately precautionary. It is recommended that evidence is provided of the farm type for the last 10 years and professional judgement is used as to what the land would revert to in the absence of a planning application. In many cases, the local planning authority, as competent authority, will G have appropriate knowledge of existing land uses to help inform this process.
>
> "4.52 There may be areas of a greenfield development site that are not currently in agricultural use and have not been used as such for the last 10 years. In these areas as there is no agricultural input into the land a baseline nitrogen leaching value of 5 kg/ha should be used. This H figure covers nitrogen loading from atmospheric deposition, pet waste and nitrogen fixing legumes."

20 The third stage was to adjust the nitrogen load to account for land uses in the proposed development.

21 The fourth stage was to "Calculate the net change in the Total Nitrogen load that would result from the development". The advice was this:

"4.67 It is necessary to recognise that all the figures used in the calculation are based on scientific research, evidence and modelled catchments. These figures are the best available evidence but it is important that a precautionary buffer is used that recognises the uncertainty with these figures and in our view ensures the approach prevents, with reasonable certainty, that there will be no adverse effect on site integrity. Natural England therefore recommends that a 20% precautionary buffer is built into the calculation.

"4.68 There may be instances where it is the view of the competent authority that an alternative precautionary buffer should be used on a site-specific basis where sufficient evidence allows the legal tests to be met."

22 Since the judge's decision in the court below, Natural England has, in March 2022, issued further guidance. This does not bear on the claim with which we are concerned.

Natural England's response to consultation on the application for planning permission

23 On 9 June 2020, as statutory consultee under regulation 63(3), Natural England gave its advice to the council on "nutrient neutrality" for the proposed development. It did so in the light of the council's "Nitrogen Budget", dated 11 May 2020. The "Nitrogen Budget" was based on an occupancy rate of 2.4 persons per dwelling and included a precautionary buffer of 20%, both of which were subsequently used in the council's appropriate assessment. Natural England said that "[provided] the council, as the competent authority, [was] assured and satisfied [that] the site areas [were] correct and that the existing land uses [were] appropriately precautionary", it raised "no further concerns with regard to the nutrient budget". Nor did it raise concern about the use of average land use figures for calculating the baseline nitrogen deposition from the site, about the 2.4 occupancy rate, or about the 20% precautionary buffer applied.

Mr Wyatt's objection

24 Mr Wyatt and his wife submitted several letters of objection to the council. In his "further comments" dated 15 June 2020, Mr Wyatt addressed the use of the 20% precautionary buffer, arguing that it appeared "irrational" because there was "no evidential basis explaining why a 20% buffer has been used". He also expressed his concern about the use of the occupancy rate of 2.4 persons per dwelling. He noted that the council had used its "discretion to vary this figure" when considering a proposal of "16 age related apartments" in Station Road, Portchester, for which it had "used what [it] termed an overall "cautious average" occupancy rate of 2", which was "in line with the 2011 Census figure". He expected the council to be consistent. The 2011 Census gave an average occupancy rate of 3.4 persons per household for houses of the size proposed, which would be "a more appropriate figure". If the council was "consistent" and used "the correct land use figures and a more realistic occupancy rate", it would "reject the application on the grounds that it will be in deficit and therefore cannot meet the nitrate neutrality regulations".

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A *Natural England's further advice*

25 Natural England gave further advice to the council on 18 August 2020, now in the light of the council's draft appropriate assessment. It did not doubt the conclusions of the draft appropriate assessment or the likely efficacy of the proposed mitigation measures. Again, it raised no concerns about the use of average figures, the occupancy rate of 2.4 persons per dwelling, or the use B of the 20% precautionary buffer.

The appropriate assessment

26 In the appropriate assessment presented to the council's Planning Committee on 19 August 2020, it was acknowledged (on p 2) that "[all] new housing development within 5.6 km of the Solent SPAs is considered C to contribute towards an impact on the integrity of the Solent SPAs", and (on p 4) that "[the] proposed development is within 5.6 km of the Solent & Southampton Water SPA". The likely nitrogen output of the proposed development was identified, and the proposed mitigation measures described and considered. These conclusions were stated (on p 17):

> "The project being assessed will result in a positive nitrogen output D of 10.5 kg/TN/yr and therefore the waste water from the development will add to the nitrogen levels within the Solent … The pathway is via the wastewater treatment works. Therefore, the surplus in the nitrogen output would need to be mitigated … In order for the development proposal to demonstrate nitrogen neutrality, an on-site wetland will be created on site. The proposed wetland would remove nitrates from E surface water and roof water drainage through a combination of physical, chemical and biological processes via interactions between the water, substrate and micro-organisms such as algae. The wetland would in turn provide a reduction of 11.51 kg/N/yr meaning there would be an overall reduction in nitrates being discharged from the site. The mitigation will be secured through a Section 106 …"

F and (on p 18):

> "In conclusion, the application will have a likely significant effect in the absence of avoidance and mitigation measures on [the protected sites] … This represents the authority's Appropriate Assessment as Competent Authority in accordance with requirements under Regulation 63 of the [Habitats Regulations], [and] article 6(3) of the G Habitats Directive …
>
> "The authority has concluded that the adverse effects arising from the proposal are wholly consistent with, and inclusive of the effects detailed in the Solent Recreation Mitigation Strategy. The authority's assessment is that the proposed mitigation package complies with this Strategy and that it can therefore be concluded that there will be no adverse effect on H the integrity of the Solent and Southampton Water SPA."

The officer's advice on the appropriate assessment

27 In his report to the committee, the officer considered the possible impact of the development on the European protected sites in the Solent, under the requirements in regulation 63 of the Habitats Regulations and

in the light of the appropriate assessment. He reminded the members that "[regulation 63] provides that planning permission can only be granted by a 'competent authority' if it can be shown that the proposed development will either not have a likely significant effect on designated [protected sites] or, if it will have a likely significant effect, that effect can be mitigated so that it will not result in an adverse effect on the integrity of the designated [protected sites] …" (para 8.26). He referred to Natural England's advice, explaining the concept of "nutrient neutrality" and the need for local planning authorities to take a "precautionary approach" (paras 8.32 and 8.33); to the "nutrient budget" (para 8.34); and to the existing land use (paras 8.35 to 8.37).

28 He then came to the "assumed occupancy rate" (in paras 8.38 to 8.42):

> "8.38 Natural England recommends that, as a starting point, local planning authorities should consider using the average national occupancy rate of 2.4 persons per dwelling as calculated by the Office for National Statistics (ONS), as this can be consistently applied across all affected areas. However competent authorities may choose to adopt bespoke calculations where they are satisfied that there is sufficient evidence to support this approach.
>
> "8.39 Concern has been raised by third parties over the use of the average occupancy rate of 2.4 for this development of eight houses. Some have expressed the view that a higher occupancy rate ought to be applied since the houses are likely to be larger than average dwellings (although it should be noted that the application is in outline form and scale and layout of the development are reserved matters). Third parties have noted that the Council used bespoke calculations when determining a recent planning application for a sheltered housing development elsewhere in the Borough.
>
> "8.40 It is acknowledged that some houses will have more than the average number of occupants. It is also of course the case that some will have less. The figure of 2.4 is an average based on a well evidenced source (the ONS) and which has been shown to be consistent over the past ten years. As stated above the Natural England methodology allows bespoke occupancy rates however to date the Council has only done so to lower, not raise, the occupancy rate and where clear evidence has been provided to demonstrate that the proposed accommodation has an absolute maximum rate of occupancy. In the case of sheltered housing which is owned and managed by the Council for example it has been previously been considered appropriate to apply a reduced occupancy rate accordingly.
>
> "8.41 In all instances it is the case that the Natural England methodology is already sufficiently precautionary because it assumes that every occupant of every new dwelling (along with the occupants of any existing dwellings made available by house moves) is a new resident of the Borough of Fareham. There is also a precautionary buffer of 20% applied to the total nitrogen load that would result from the development as part of the overall nutrient budget exercise.
>
> "8.42 Taking the above matters into account, Officers do not consider there to be any specific justification for applying anything other than the recommended average occupancy rate of 2.4 persons per dwelling when considering the nutrient budget for the development."

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A *The evidence before the judge*

29 The judge had before him in evidence a witness statement, dated 25 February 2021, of Dr James O'Neill on behalf of Mr Wyatt, and three witness statements, dated 9 December 2020, 4 February 2021 and 12 April 2021, of Ms Allison Potts on behalf of Natural England. Dr O'Neill is B the Principal of James O'Neill Associates, an environmental consultancy. Ms Potts is the Acting Area Manager of Natural England's Thames Solent team.

30 In his witness statement, Dr O'Neill said that "[if] an incorrect occupancy rate is used then it will cause the total nitrogen figure … to be wrong", and lead to a figure "which has a real risk of significantly underestimating and therefore downplaying the actual nitrogen output of C the development in question". Natural England suggested that an occupancy rate of 2.4 persons per dwelling should be used as a starting point, but that a "bespoke calculation" would be appropriate in some cases (para 20). However, in Dr O'Neill's view, as the proposed dwellings would have four or five bedrooms, the national average occupancy rate would not represent best scientific evidence available. A "specific dataset for four to five bedroom D dwellings" was available for Fareham, which would have given an average occupancy rate of 3 for such dwellings, not 2.4, broadly in alignment with the national average of 3.14. The use of the national average was not, therefore, justifiable (paras 23 to 29).

31 On the "use of averages in the land classification", Dr O'Neill said the "selection of the correct land use for the site is a matter of judgement which [he was] not qualified to make an assessment of here" (para 36). But E he made four points: first, existing land use figures should be "sufficiently precautionary" (para 38); second, there was "reasonable doubt in respect of the land classification employed" in the appropriate assessment (para 39); third, the "Farmscoper model" relied on average data, rather than using site-specific data; and fourth, the inaccuracy introduced by the use of the 2.4 occupancy rate would be compounded by the use of average land use figures F (para 42).

32 Finally, he addressed the 20% precautionary buffer. He said that, "for such a buffer to be valid, the level of uncertainty associated with each step of the calculation must be known" (para 47). There was a range of statistical methods for quantifying that uncertainty, but "no evidence that they have been applied in respect of the impugned calculation". The buffer applied was G "insufficiently precautionary" (para 48).

33 Ms Potts did not agree with Dr O'Neill's opinion. In her evidence she said that his "focus on the 2.4 figure takes no account of the precaution that is built into the methodology as a whole" (third witness statement, para 5). Natural England had considered the available data and concluded that the national average occupancy rate was "the best available scientific evidence for use in the methodology when applied to development within the Solent H catchments." (Third witness statement, para 7.)

34 Seven reasons were given for that conclusion. First, the 2.4 figure was often used, and it would only be necessary for a local planning authority to adopt bespoke figures in an "extreme occupancy scenario". The fact that a development consisted of larger houses was not in itself enough to warrant the adoption of a bespoke rate (second witness statement, paras 23 to 25).

Second, Natural England had concluded that reliance on the "finer grain detail" would have introduced "unnecessary and unwieldy complication". It "would have required using 65 different occupancy rates across the area (13 ONS areas x 1–5+ bedroom rates)", and it would also have been "necessary to use a per bedroom water usage rate". These figures were "not easily obtainable" (third witness statement, para 8). Third, Natural England had assumed "100% inward migration", whereas in reality "some occupants of new dwellings will be moving within the affected catchments, so do not represent an entirely new burden" (second witness statement, para 31, and third witness statement, para 9). Fourth, "while larger properties tend towards having more occupants than smaller properties (but not in a linear relationship to the number of bedrooms), occupancy and dwelling size are not very highly correlated" (second witness statement, para 26). Fifth, the occupancy rate of 2.4 persons per dwelling was part of a broader "strategic solution", and a "standardised approach" (second witness statement, paras 32 and 33). Sixth, the data showed that houses with higher occupancy rates had significantly lower water use figures per occupant (second witness statement, para 27). And seventh, the data was "suggestive of a decline in average occupancy over time". The 2.4 occupancy rate was meant to account for "the nutrient impact arising from the proposed development in perpetuity" (second witness statement, paras 28 to 30).

35 Ms Potts drew attention to three "precautionary" elements in the method used for estimating "water use": first, "[the] water use figure used (110 l/p/d) is 10% higher than Southern Water's target required …"; second, "[all] new build development will have meters and water use in metered properties is significantly lower than non-metered properties"; and third, "[water] supply is less than water return to [wastewater treatment works] reflecting use of water to wash cars, water gardens". She also referred to two "precautionary" elements in the consideration of "Wastewater Treatment Work Operations": first, that it "[assumes wastewater treatment works with total nitrogen] permits operate at the maximum possible within legal limits", whereas the "Solent [wastewater treatment works] with [a total nitrogen] permit are currently on average performing 25% more effectively than [the] assumed level"; and second, that "[an] unknown proportion of nitrogen discharged seaward of the international sites will be lost to sea and will not affect the designated sites" (second witness statement, Table 1).

36 Ms Potts also referred to the 20% precautionary buffer, and explained in detail how the correct figure was arrived at. She said the development of the buffer had "involved consideration of the likelihood, severity, duration and tendency of potential impacts", and "in determining the level of the buffer, each component was assessed individually, as well as evaluating the relationships between each component, the risk of exceedances and the severity of such exceedance". Among the factors taken into account were "the degree of known variability for each component" and "the fact that not all risks are fully known". Ms Potts emphasised that defining the buffer had involved "expert judgement", and the choice of 20% as the appropriate figure was considered to be commensurate with "no reasonable doubt" about the absence of adverse effects on the integrity of the protected site (second witness statement, paras 56 to 64, and third witness statement, paras 19 to 21).

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A *The judge's conclusions on the "appropriate assessment" grounds*

37 Jay J was critical of the approach to occupancy rates in Natural England's technical guidance note, and of the council's use of an occupancy rate of 2.4 persons per dwelling in this case. But adopting the degree of deference he thought right in the circumstances, and approaching the matter on a *Wednesbury* basis, he concluded that the use of the 2.4 occupancy B rate was sufficiently precautionary. He concentrated, in particular, on two "precautionary elements" of the appropriate assessment that could "legitimately be brought into account": first, that "the relationship [between occupancy rates and water usage] is not one of direct proportionality", and second, that "the algorithm assumes 100% migration to the area" (para 84 of his judgment). He was "satisfied that there was an adequate precautionary C leeway afforded by [these] two key factors" (para 86). He added, however, that the technical guidance note would need to be reviewed in the light of his judgment (para 87).

38 The judge did not accept that the use of average land use figures was inappropriate, or that site specific measurements should have been taken. He thought that site specific measurements would provide "no more than a snapshot of existing land use", and it was not clear that "the overly rigorous D approach recommended by Dr O'Neill would in fact yield more protective data" (para 110).

39 On the use of the 20% precautionary buffer, the judge concluded that the lack of "any arithmetical calculation or other algorithm" in the calculation of the buffer was not fatal to it. He thought that there was "room for debate between reasonable scientists, using their judgment, expertise and E experience, as to whether the figure should be, say, 10%, 20% or 30%". And he found "no place for judicial intervention on any *Wednesbury* basis" (para 111).

40 Those were the judge's principal conclusions on this part of the case. I shall also refer to some other passages in his judgment when I come to the argument put forward on the first main issue.

F *Did the council fail to comply with regulation 63 of the Habitats Regulations?*

41 Mr Gregory Jones QC, for Mr Wyatt, submitted that the judge made two fundamental errors in his approach to the legal framework governing appropriate assessment. First, he accepted Ms Potts' evidence G on the soundness of the method used by the council in conducting the appropriate assessment. He ought to have looked at the underlying evidence and considered, for himself, whether the figures used were sound. This, submitted Mr Jones, follows from the CJEU's judgment in *Dutch Nitrogen*, in particular at para 101. He accepted that the court must adopt a *Wednesbury* approach, but he submitted that the approach should be more stringent given the high level of certainty required under regulation 63. Given that much of H the water environment in the Solent was in unfavourable or failing status, the level of certainty required was higher. A distinction must be made between evidence considered by decision-makers at the time, and expert evidence produced later in explanation. Secondly, the judge had erred in his approach to the "precautionary principle". He should have accepted that where data is uncertain, the "reasonable worst-case scenario" must be assessed. This

follows from the European Commission's guidance on the precautionary principle, cited with approval in *Bayer CropScience v European Commission* (Joined Cases T-429/13 and T-451/13) EU:T:2018:280, and it would be consistent with the approach taken in environmental impact assessment (see *R v Rochdale Metropolitan Borough Council, Ex p Milne (No 2)* (2001) 81 P & CR 27).

42 On ground 1 of the appeal Mr Jones argued that Natural England's technical guidance note invited error when it said local authorities "may choose to adopt bespoke calculations" for occupancy rates. In particular, he criticised the first sentence of para 4.7 of the technical guidance note, the first sentence of para 4.19, and para 4.42. It would never be permissible for an authority to adopt the national average occupancy rate unless it was the correct occupancy rate for the development proposed. Authorities must adopt bespoke calculations. Otherwise, their decisions will not be based on the "best scientific knowledge". The correct occupancy rate was not a matter of expert judgment; it was a simple and readily ascertainable fact. In this case it was common ground that the occupancy rate of 2.4 persons per dwelling was inaccurate, and that an occupancy rate of 3 would have been accurate for the four-bedroom houses proposed. The council's decision to adopt an occupancy rate of 2.4 was therefore wrong, and unlawful. Each factor in the calculation of the nitrogen budget had to be precautionary, and based on the best available evidence. It was not permissible to rely on the precautionary nature of other factors, or on the precautionary buffer applied at the end, to justify using an insufficiently precautionary occupancy rate. Once the judge had concluded that using an occupancy rate of 2.4 did not represent the "best scientific knowledge", he could not hold that its use was lawful (see *Holohan*, at para 33). He should not have found it sufficiently precautionary on the strength of the two factors mentioned by Ms Potts; there was no evidence that they would counteract the error. It was also inconsistent to conclude, as he did, that Natural England's technical guidance note would need to be reviewed in the light of his judgment but that the decision in this case, based on the advice given in that document, was nonetheless sound.

43 On ground 2 Mr Jones criticised the use of average figures, and, in particular, the use of "average land use figures" in calculating the baseline nitrogen deposition from the site. Average figures relied on speculation about what might happen in the future, and so were necessarily contrary to the requirement for certainty under regulation 63. In *Dutch Nitrogen* the CJEU had made it clear that reliance on average values was impermissible (paras 55 and 147 of the Advocate General's opinion, and para 119 of the judgment). Using average land use figures to calculate the baseline nitrogen deposition from the site was insufficiently precautionary. Both in adopting these average figures and in its use of the Farmscoper model, Natural England's advice in paras 4.45 to 4.52 of the technical guidance note was flawed, and so was the council's application of that advice in the appropriate assessment.

44 On ground 4 Mr Jones argued that the 20% precautionary buffer applied by the council was unlawful, because it lacked any evidential basis. The purpose of the buffer was not merely to provide an extra level of protection but to ensure that the whole exercise met the required standard of scientific certainty. To remove "all reasonable scientific doubt" about the effects of the proposed works on the protected site concerned", the uncertainty inherent in the initial steps must first be quantified, and then an

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A appropriate buffer applied in light of that uncertainty (see *People Over Wind*, at para 38). Natural England's relevant advice (in paras 4.8, 4.9 and 4.67 of the technical guidance note) was flawed, and so was the council's application of that advice in the appropriate assessment.

45 Those arguments all go to the contention that the council erred in law when performing its duty under regulation 63(5) of the Habitats Regulations not to grant planning permission unless it had ascertained that the proposed B development would "not adversely affect the integrity of the European site". I do not accept that contention. The council's conclusion on the crucial question under regulation 63(5) was, ultimately, an evaluative judgment for it to make as "competent authority". And in my view the conclusion it reached, as a matter of evaluative judgment, was legally sound. I therefore agree with the decision in the court below on this part of the claim.

C **46** I cannot fault the judge's self-direction on the relevant legal principles (in paras 29 to 39 of his judgment), and in my opinion he went on to apply those principles appropriately. I do not think he made the fundamental errors of which he is accused.

47 The first of those alleged errors, essentially, is that the judge simply accepted the evidence of Ms Potts without question. I do not think he did D that. On the contrary, he examined in appropriate depth and detail the evidence of the expert witnesses on either side (in paras 58 to 72, and paras 106 to 111).

48 On occupancy rates, he approached the evidence before him with care. He expressed his own concerns about some of that evidence (in paras 75 to 80). He did not rely on the parts he found less than convincing (para 84). He reminded himself of "[the] need for judicial deference in a domain E of technical and scientific expertise" (para 81). He acknowledged that the figures used by the competent authority must "have the effect of removing all scientific doubt "based on complete, precise and definitive findings" (para 79).

49 Nor did he accept unquestioningly the use of the 20% precautionary buffer, in the way in which it had been applied, merely because Ms Potts F said that this was appropriate. In her evidence, she had explained, at length, the justification for using the 20% buffer (her second witness statement, paras 56 to 64, and her third witness statement, paras 18 to 21). She did not simply assert that its use was correct. And the judge, for his part, did not simply take her evidence at face value. He considered the reasons she had given in support of the 20% buffer, and he concluded, in the light of that evidence, that there was no justification for the court's intervention "on any G *Wednesbury* basis" (para 111). I agree.

50 More generally, it seems to me that the judge adopted the correct approach in his consideration of the council's appropriate assessment as a whole. He understood that the *Wednesbury* standard of review had to be deployed with suitable rigour in the legislative context here. He knew that he had to establish whether, in all the circumstances, the council had H reached a reasonable and lawful conclusion, as a matter of its own exercise of evaluative judgment, in ascertaining whether the high threshold set by regulation 63(5) had been surmounted. He applied an appropriately intense standard of scrutiny, consistent with the proper application of *Wednesbury* principles in the light of the jurisprudence to which he had referred.

51 I reject the submission that the judge ought to have given greater weight than he did to the unfavourable status of the water environment in parts of the Solent. This was a fact explicitly acknowledged and taken into account by Natural England when issuing the advice in its technical guidance note—advice on which the council relied in its appropriate assessment. And there is no support either in the habitats legislation itself or in the relevant authorities for the proposition that the unfavourable status of a protected site raises the level of certainty which has to be achieved if the proposed development is to be approved, or for the proposition that the standard of review the court should adopt in those circumstances is more demanding. In this case, Natural England's technical guidance note, to which the council had regard in undertaking the appropriate assessment, took into account the fact some of the protected sites in the Solent were "widely in unfavourable condition due to existing levels of nutrients" and "at risk from additional nutrient inputs" (para 2.3).

52 Whatever the particular circumstances in a given case, the basic duty of the competent authority under regulation 63 is, and remains, to grant planning permission only if satisfied that the proposed development "will not adversely affect the integrity" of the European protected site. The duty of the court is, and remains, to ensure that the authority's evaluative judgment on that question was lawfully exercised.

53 In doing that, the court must keep in mind the difference between evidence of what was considered by a decision-making authority at the time of its decision and evidence put forward after the event to explain or justify that decision (see *R (United Trade Action Group Ltd) v Transport for London* [2021] EWCA Civ 1197; [2022] RTR 2). It is trite, for example, that later evidence of a decision-maker's thinking cannot be used to contradict the original reasons given or to provide wholly new reasons (see *R v Westminster City Council, Ex p Ermakov* [1996] 2 All ER 302, and *Inclusion Housing Community Interest Co v Regulator of Social Housing* [2020] EWHC 346 (Admin) at [78]). But that has not been done in this case. Ms Potts' evidence goes no further than to amplify the reasons why Natural England decided to adopt the approach it did, and reached the view it did, at the time of its consultation by the council. The evidence was properly admitted, and the judge was entitled to rely on it as he did.

54 As for the second fundamental error of which the judge is accused, I do not think he adopted too lax an understanding of the precautionary principle, either generally or as it applied in this case, or that he wrongly discounted the concept of the "reasonable worst-case scenario", contrary to the CJEU's reasoning in *Bayer CropScience* and the High Court's in *Ex p Milne*. In *Bayer CropScience* the CJEU cited the European Commission's guidance, "Communication on the precautionary principle" (2000) Annex III, which advises that in cases of doubt a "worst-case" hypothesis "could"—not must—be assessed (para 114 of the judgment). But it did not treat the guidance as if it had the status of law. It adopted the established approach, consistent with its own judgment in *Waddenzee*. Nor does the principle referred to in *Ex p Milne*—that a proposal requiring environmental impact assessment must be sufficiently detailed to allow for proper assessment—bear on the question here, which is whether any uncertainty in the data involved in an appropriate assessment under regulation 63 must always be resolved by using a "reasonable worst-case scenario". In *Waddenzee*, as Jay J said (in para 32

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A of his judgment), the CJEU accepted that national authorities do not need to be "absolutely certain" that there will not be adverse effects on the integrity of the protected site, but must be "satisfied that there is no reasonable doubt as to the absence of adverse effects". The judge asked himself "whether "reasonable worst case scenario" is an apt synonym for "precautionary", but he did not think it was necessary to come to a decisive view on the point (para 47). I do not think he needed to do so. In my view it was legitimate for him B to conclude that, at least in this case, the "reasonable worst-case scenario" did not have to be assessed if the precautionary principle was to be satisfied.

55 Turning to ground 1 of the appeal, I do not think there can be any proper challenge in these proceedings to the lawfulness of the advice given by Natural England in its technical guidance note, which seems to have been the real target for much of the argument advanced on behalf of Mr Wyatt.

C **56** It should be remembered that the technical guidance note is not statute. It does not create some additional legal requirement or test. It is an advisory document, which is neither mandatory in effect nor prescriptive of a single correct procedure to be followed. It contains guidance, whose purpose is to assist competent authorities in performing their functions under the habitats legislation. It does not assert that the approach it suggests is D the only means of conducting an appropriate assessment. On the contrary, it expressly acknowledges that this approach is only "a means" or "one way" of undertaking that task (paras 1.3, 2.6 and 4.1).

57 The Supreme Court has recently confirmed that there are only limited grounds on which a policy can be challenged as itself being unlawful (see *R (A) v Secretary of State for the Home Department* [2021] UKSC 37; [2021] 1 WLR 3931, and also the recent decision of this court in *R (Pearce) v* E *Parole Board* [2022] EWCA Civ 4; [2022] 1 WLR 2216). In *R (A)* Lord Sales JSC and Lord Burnett CJ stressed that it is "not the role of policy guidance to eliminate all uncertainty regarding its application and all risk of legal errors" (para 34). The appropriate question for the court is this: "does the policy in question authorise or approve unlawful conduct by those to whom it is directed?" (para 38).

F **58** Where Natural England's advice on the appropriate occupancy rate is concerned, the answer to that question would clearly be "No". At the level of generality at which the technical guidance note was suggesting it, the use of an occupancy rate of 2.4 persons per dwelling cannot be said to be unlawful on the ground that it is inconsistent with the "best scientific evidence". The technical guidance note did not misstate the legal position under regulation 63 (see *R (A)*, at paras 46 and 47). It did not "authorise or approve", let alone G prescribe, the use of that occupancy rate by all local planning authorities in every case, regardless of the circumstances. It did not remove or reduce the onus on those authorities to be sure, beyond "all reasonable scientific doubt", that the integrity of the protected site would not be adversely affected (see paras 1.4, 2.5, 4.6 to 4.9, and 4.18 to 4.19 of the technical guidance note).

59 Nor do I accept the criticism made of the council's use of an occupancy H rate of 2.4 persons per dwelling in the particular circumstances of this case. Although an appropriate assessment must be based on "best scientific knowledge", the question for the court is not whether each individual figure used in it is intrinsically the "best scientific knowledge" when considered on its own, divorced from the full context in which it is used. As Mr David Elvin QC submitted for Natural England, the court must take a "holistic" view

on the question whether the assessment methodology as a whole represents "best scientific knowledge".

60 When that is done here, it is, I think, plain that the council understood its duty under regulation 63 correctly. This much is clear from the summary of the law which the officer set out in his report (in particular, at para 8.26), and from the equivalent summary in the appropriate assessment itself (in particular, at pp 15 to 19).

61 The council consulted Natural England twice. As the judge said (in para 81 of his judgment), Natural England had specifically considered "the application of more size-sensitive datasets but rejected the need for [that]". It does not seem to have intended that the occupancy rate of 2.4 persons per dwelling should always be only a "starting point". It evidently took the view that there were sound reasons in consistency, given the nature and availability of other datasets, to use that occupancy rate for development in the Solent (Ms Potts' third witness statement, paras 7 and 8). This was, on the face of it, a carefully considered judgment. And in any event, the council's committee considered objections to the use of an occupancy rate of 2.4 for the proposed development, but rejected them in the light of Natural England's response to consultation. Tellingly, Natural England did not oppose the use of that occupancy rate in this particular case, rather than the adoption of a bespoke figure. It had seen the council's nitrogen budget before responding to consultation, and it knew therefore that an occupancy rate of 2.4 was being used in that nitrogen budget. Had it been concerned about this, one would have expected it to make that clear, but it raised no such concern. And as Mr Timothy Mould QC submitted for the council, compelling reasons would have been required for the council to depart from Natural England's position.

62 In the circumstances it was, I think, open to the council to rely on the precautionary nature of several factors in the nitrogen budget to ground its own judgment that the use of an occupancy rate of 2.4 persons per dwelling was consistent with a sufficiently precautionary approach in this instance.

63 The judge recognised the strength in two of the points made by Ms Potts in her evidence—that the relationship between occupancy rates and water usage was "not one of direct proportionality", and that the algorithm "assumed 100% migration to the area" (para 84 of the judgment). He did not confine himself to reliance on these two reasons alone—he merely said (in the same paragraph) that these two reasons "have force" and that he found the other reasons "less persuasive".

64 There were, I think, at least six other factors identified by Ms Potts in her second witness statement which, in combination with the two considerations on which the judge focused, were capable of justifying the conclusion that the use of the 2.4 occupancy rate would be consistent with the precautionary principle here. First, the water use figures for the proposed development were themselves precautionary. They were "10% higher than Southern Water's target required", and they did not take into account the fact that "[all] new build development will have meters and water use in metered properties is significantly lower than non-metered properties". Second, the water use figures were based on "water supply", which would in fact be "less than water return to [wastewater treatment works] reflecting use of water to wash cars, [and] water gardens". Third, the wastewater treatment works were "performing 25% more effectively" than the level assumed in the nitrogen calculations (see also para 4.29 of Natural England's

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A technical guidance note). Fourth, there would be natural reductions in nitrogen concentrations, mainly through de-nitrification processes, which were unquantifiable and so were not taken into account in the calculation (see also para 4.42 of the technical guidance note). Fifth, there was not a high degree of correlation between occupancy rates and dwelling sizes. And sixth, an unknown proportion of the nitrogen discharged to the sea would not affect the protected sites.

B **65** The council was also entitled to rely, as the planning officer did in para 8.41 of his report, on the use of the 20% precautionary buffer applied at the end of the calculation to strengthen the conclusion that the use of the 2.4 occupancy rate was appropriate in the particular circumstances of this case. Obviously, the application of such a buffer at the end of a calculation would not excuse a general lack of precaution in the figures used in the calculation C itself. This could lead to impermissible "double-counting". But that is not what happened here. Even though, in this respect, the approach adopted by the council seems not to have been what the technical guidance note contemplated, the precautionary buffer was not used here to justify a general lack of precaution in the exercise, but to strengthen the justification for using an occupancy rate of 2.4 in the calculation. As Mr Mould submitted, D it was not *Wednesbury* unreasonable to use it in this way. It was not the sole justification for the council's conclusion, as a matter of judgment, that an occupancy rate set at this level was consistent with a sufficiently precautionary approach in the appropriate assessment for this proposed development. It was one element in the broader justification for the use of that occupancy rate, to be seen in the context of the assessment methodology as a whole.

E **66** It would not be right for the court to intervene in a case of this kind simply because there is a divergence of expert opinion on some of the figures used in the appropriate assessment. Sometimes, perhaps often, there may not be a consensus of expert opinion. If that is so, there is nothing in law to compel the competent authority in making an appropriate assessment, or the court in reviewing the authority's decision taken in the light of that F appropriate assessment, to default to the most conservative or cautious view propounded.

67 The argument advanced by Mr Jones does not demonstrate that in this case it was inappropriate or unlawful for the council to adopt the occupancy rate of 2.4 persons per dwelling on the ground that it was, in one expert's view, insufficiently precautionary—or for any other reason. As Mr Elvin submitted, this is a paradigm case of expert witnesses differing on G matters of scientific judgment, in which the court would need to be shown some conspicuous error in the competent authority's own evaluation of the expert advice it received at the time of its decision before that decision could properly be overturned. For the court to upset a decision when it has not been shown that the competent authority's own exercise of evaluative judgment was so defective as to be *Wednesbury* unreasonable but where there H is disagreement between experts on the correct ingredients of the appropriate assessment, would involve the court stepping beyond its proper supervisory jurisdiction into the realm of the competent authority's own remit under the habitats legislation.

68 I think Mr Jones' criticism of the judge's reasoning on this issue is mistaken. The judge accepted that "[an] occupancy rate of 3 would be the

best available scientific evidence for 4–5 bedroom houses in the Fareham region" (para 83). This, however, was not fatal to his essential analysis. Reading the relevant passage of his judgment fairly as a whole, I do not think it can be said that he fell into error. He was recognising the fact that, taken in isolation, an occupancy rate of 3 would generally be appropriate for four and five-bedroom houses in the area. Nowhere did he suggest, however, that in this case the appropriate assessment as a whole was inconsistent with "best scientific knowledge". He found that the method used in the appropriate assessment, taken in its entirety and thus including the occupancy rate of 2.4, complied with the precautionary principle. He accepted as lawful the council's conclusion, as a matter of its own judgment, that in the circumstances here an assessment using that occupancy rate was sufficiently precautionary. And in my view he was right to do so.

69 Lastly on this ground, I do not think the judge's view that Natural England's technical guidance note would have to be reviewed in the light of his judgment is inconsistent with his view that the approach taken to the occupancy rate in this case was legally defensible. In effect, he was pointing out that the technical guidance note, as drafted, could be liable to misinterpretation or misapplication in other cases, and suggesting that Natural England might describe more clearly the general approach it suggested to this part of the calculation.

70 Ground 2 is also, in my view, unmeritorious—for two reasons. First, I see no objection in principle to the use of average land use figures to calculate the baseline level of nitrate deposition from the site of the proposed development.

71 And secondly, I cannot agree with the reading of the CJEU's judgment in *Dutch Nitrogen* urged on us by Mr Jones. That case concerned the question of whether "programmatic legislation"—where the appropriate assessment for certain types of project was carried out in advance at a general level and those projects would then be exempt from the requirement for individual assessment—was compatible with article 6(3) of the Habitats Directive. This was the issue to which the observations of the court and Advocate General Kokott on the use of average figures were directed. When the Advocate General said (in para 55 of her opinion), that "[it] would not be sufficient merely to show rough averages and to ignore local or temporary peak load values where those peak values are likely adversely to affect the conservation objectives of the site", she meant, I think, that it was not appropriate to use averages for all projects of a certain type where some projects of that type might exceed those averages and thus damage the integrity of the protected site. She made clear (in para 147 of her opinion) that the difficulty with using an average value for a number of sites was that it might fail to "guarantee that there are no significant effects on any single protected site". To the same effect, the court said (in para 119 of its judgment) that "[an] average value is not, in principle, capable of ensuring that there are no significant effects on any single protected site".

72 Those statements about the use of average values in that context must be viewed with care in a case such as this, which is not concerned with "programmatic legislation" but with the individual assessment of the particular effects of a specific project. Nothing said in *Dutch Nitrogen* implies that in this situation the use of averages is inherently objectionable. It is true that the use of average figures will necessarily involve the exercise of

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A judgment on their validity in the particular context. But this does not mean that using them is, in principle, contrary to the requirement for the necessary degree of certainty, as amplified in *Waddenzee*. The use of average figures may sometimes be conducive to sufficient certainty, sometimes not. Whether that is so in a particular case will be a matter of judgment for the competent authority.

B **73** Nothing suggests that in this case either Natural England or the council misunderstood the degree of certainty required by the precautionary principle. Nor is there any evidence to show some justiciable error in the conclusion reached, as a matter of judgment, that the use of average land use figures was, in this case, suitable for the appropriate assessment, and sufficiently robust. Dr O'Neill's evidence does not demonstrate that there was such an error. Indeed, he recognised (in para 36 of his witness statement) that C the selection of the correct land use for the site was "a matter of judgement", on which he "did not feel qualified to make an assessment".

74 I do not accept that the judge held that the use of average land use figures was impermissible but failed to carry that conclusion through to a finding of legal error. What he did (in paras 75 to 77 of his judgment) was to point out that the relevant advice in Natural England's technical guidance D note might be misconstrued in some other case in which the circumstances were different. One should not infer from what he said that in his view the use of average figures would always be impermissible, or that this was so in the circumstances here.

75 Coming finally to ground 4, I do not think there can be any serious dispute that, in a particular case, the use of a 20% precautionary buffer can ensure that the appropriate assessment meets the required standard of E scientific certainty. As the judge said (in para 111 of his judgment), the 20% figure is "not derived from any arithmetical calculation or other algorithm". There is, however, no legal requirement that every element of an appropriate assessment be based on arithmetic or algorithm. That would be a fallacy. If a precautionary buffer is employed, it should be set at a reasonable level, to help achieve adequate certainty that the high threshold in regulation 63 F is crossed. But as Mr Mould submitted, to think that reasonable scientific judgments in undertaking an appropriate assessment can only be reached through arithmetical calculation would be to take too narrow a view of rational enquiry. Such judgments can be formed, and sometimes will best be formed, without resort to arithmetic. This will not, in principle, expose the appropriate assessment to the charge that it suffers from "lacunae" or that it lacks "complete, precise and definitive findings", as required by the CJEU G (see the CJEU's observations in *People Over Wind*, at para 38).

76 The fact that the 20% precautionary buffer was not the product of arithmetic, but of judgment, does not mean that it lacked an adequate basis. As Ms Potts made clear, the appropriate figure to adopt as a buffer was considered carefully by Natural England, knowing the nature of the risks and uncertainties involved (second witness statement, paras 56 to 64, and third H witness statement, paras 19 to 21).

77 Once again, the essence of the complaint is that there is an expert witness—Dr O'Neill—who, in his evidence to the court, has disagreed with a particular figure used in the calculation. That disagreement does not automatically equate to evidence of serious scientific doubt about an appropriate figure for a precautionary buffer. No doubt Dr O'Neill's evidence

shows that, for the reasons he gave, some experts might have adopted a more generous buffer than 20%. This does not mean, however, that the court is bound to find that the buffer actually chosen by Natural England and applied by the council as competent authority was insufficiently precautionary. As Ms Potts' evidence effectively confirmed, the choice of 20% as the appropriate figure represented the expert regulatory body's judgment on the level of precautionary buffer consistent with "no reasonable doubt" that the integrity of the protected site would not be adversely affected. It was made with that level of certainty explicitly in mind (third witness statement, para 21). Neither the selection of that figure in Natural England's technical guidance note nor its use in the appropriate assessment undertaken by the council in this case is open to attack on any legal grounds.

Section 38(6) of the 2004 Act

78 Section 38(6) of the 2004 Act provides:

> "(6) If regard is to be had to the development plan for the purpose of any determination to be made under the Planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise."

79 This provision and its predecessor, section 54A of the Town and Country Planning Act 1990, are the subject of ample authority, including several decisions at the highest level and in this court. The relevant principles do not need to be set out at length yet again. They have been stated and restated many times (see, for example, the leading judgment in this court in *BDW Trading Ltd (trading as David Wilson Homes (Central, Mercia and West Midlands)) v Secretary of State for Communities and Local Government* [2017] PTSR 1337, at paras 19 to 23). A decision-maker must always heed the statutory priority given to the development plan, but is free to assess what weight to give to its policies and to all other material considerations in deciding whether the decision should be made, as the statute presumes, in accordance with the plan (see the speech of Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447, at pp 1458 and 1459). If the decision-maker fails to have regard to a relevant policy in the plan or to interpret it properly, conscious that relevant policies in the plan may pull in different directions, the court can act (Lord Clyde's speech in *City of Edinburgh*, at p 1459D–F, and the judgments of Lord Reed JSC and Lord Hope of Craighead DPSC in *Tesco Stores Ltd v Dundee City Council* [2012] PTSR 983, at paras 19 and 34 respectively). But there is no prescribed method for discharging the section 38(6) duty, such as a two-stage approach. This is left to the decision-maker's good sense in the particular circumstances of the case in hand (Lord Clyde's speech in *City of Edinburgh*, at pp 1459 and 1460).

80 In *R (Hampton Bishop Parish Council) v Herefordshire Council* [2014] EWCA Civ 878; [2015] 1 WLR 2367, Richards LJ said (in para 28) that "[it] is up to the decision-maker how precisely to go about the task, but if he is to act within his powers and in particular to comply with the statutory duty to make the determination in accordance with the development plan unless material considerations indicate otherwise, he must as a general rule decide at some stage in the exercise whether the proposed development does or does not accord with the development plan". As Patterson J emphasised in

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A *Tiviot Way Investments Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 2489 (Admin); [2016] JPL 171 (at paras 27 to 36), with the later endorsement of this court in *BDW Trading Ltd* (at para 21), the decision-maker must ascertain whether there is compliance or conflict with the development plan "as a whole".

81 It is axiomatic that the interpretation of a development plan policy is ultimately a matter for the court, but that the application of policy is for B the decision-maker, subject to the court's review on public law grounds. The court will intervene on a misconstruction of policy by the decision-maker if satisfied that this has had a material bearing on the decision. But it will only upset a local planning authority's decision based on an officer's exercise of planning judgment in assessing compliance with policy if it is convinced that a public law error has been committed (see the judgment of Lord Reed JSC in C *Tesco v Dundee City Council* [2012] PTSR 983, at para 19).

The policies of the development plan

82 At the time of the decision to grant planning permission, the development plan for the borough of Fareham comprised the adopted Fareham Borough Core Strategy and the adopted Fareham Local Plan Part 2: D Development Sites and Policies Plan. In his report to the committee the officer identified a number of relevant policies, including Policy CS2 ("Housing Provision"), Policy CS6 ("The Development Strategy") and Policy CS14 ("Development Outside Settlements") of the core strategy, and Policy DSP6 ("New Residential Development Outside of the Defined Urban Settlement Boundaries") and Policy DSP40 ("Housing Allocations") of the local plan E (para 4.1 of the officer's report).

83 Policy CS14 of the core strategy says that "[built] development on land outside the defined settlements will be strictly controlled to protect the countryside and coastline from development which would adversely affect its landscape character, appearance and function", and that "[acceptable] forms of development will include that essential for agriculture, forestry, horticulture and required infrastructure …".

F **84** The first part of Policy DSP40 of the local plan refers to the sites allocated for residential development, sites with planning permission for residential development, and sites safeguarded from other forms of development. The second part of the policy deals with the situation where the requisite five-year supply of land for housing is lacking. It states:

G "Where it can be demonstrated that the Council does not have a five year supply of land for housing against the requirements of the Core Strategy (excluding Welbourne) additional housing sites, outside the urban area boundary, may be permitted where they meet all of the following criteria:

"i. The proposal is relative in scale to the demonstrated 5 year housing land supply shortfall;

H "ii. The proposal is sustainably located adjacent to, and well related to, the existing urban settlement boundaries, and can be well integrated with the neighbouring settlement;

"iii. The proposal is sensitively designed to reflect the character of the neighbouring settlement and to minimise any adverse impact on the Countryside and, if relevant, the Strategic Gaps;

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"iv. It can be demonstrated that the proposal is deliverable in the short term; and

"v. The proposal would not have any unacceptable environmental, amenity or traffic implications."

The officer's advice on section 38(6) of the 2004 Act

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85 When considering the implications of the five-year housing land supply, the officer advised the members that section 38(6) of the 2004 Act was the "starting point for the determination of this planning application" (para 8.8 of the report), and that "there is a presumption in favour of policies of the extant Development Plan, unless material considerations indicate otherwise". He also reminded them that "[material] considerations include the planning policies set out in the [National Planning Policy Framework ('NPPF')]" (para 8.9).

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86 He then referred to several policies of the NPPF, including the policy for the "presumption in favour of sustainable development" in para 11 (para 8.12), and the policy in para 177, which states that "[the] presumption in favour of sustainable development does not apply where the plan or project is likely to have a significant effect on a habitats site (either alone or in combination with other plans or projects), unless an appropriate assessment has concluded that the plan or project will not adversely affect the integrity of the habitats site" (para 8.14).

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87 On the question of the proposal's acceptability as residential development in the countryside, the officer concluded that it was in conflict with Policy CS14 and several other policies of the development plan, stating "[the] site is clearly outside of the defined urban settlement boundary and the proposal is therefore contrary to Policies CS2, CS6 and CS14 of the adopted Core Strategy and Policy DSP6 of the adopted Local Plan Part 2: Development Sites and Policies Plan" (in para 8.22).

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88 The officer quoted Policy DSP40 of the local plan in full (in para 8.52) and then dealt with it in a series of paragraphs (paras 8.53 to 8.65), in which he addressed each of the five criteria in the second part of the policy. On the second criterion, he said this (in para 8.55):

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"8.55 The site is considered to be sustainably located within a reasonable distance of local schools, services and facilities at nearby local centres (Warsash and Locks Heath). This part of the northern arm of Brook Avenue is located outside of the urban area, the existing urban settlement boundary being approximately 140 metres east of the site. The proposal is not therefore adjacent to the urban settlement boundary."

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He found compliance with each of the other four criteria (paras 8.54 and 8.56 to 8.65.).

89 When he came to the "planning balance", the officer said (in para 8.78):

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"8.78 Section 38(6) of [the 2004 Act] sets out the starting point for the determination of planning applications …"

He then quoted section 38(6), and continued (in paras 8.79 to 8.83):

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"8.79 This application has previously been the subject of a favourable Committee resolution to grant planning permission. The revised application proposes additional measures to address the matter of nutrient neutrality but is otherwise the same.

"8.80 The site is outside of the defined urban settlement boundary and the proposal does not relate to agriculture, forestry, horticulture and required infrastructure. The principle of the proposed development of the site would be contrary to Policies CS2, CS6 and CS14 of the Core Strategy and Policy DSP6 of Local Plan Part 2: Development Sites and Policies Plan.

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"8.81 Officers have carefully assessed the proposals against Policy DSP40: Housing Allocations which is engaged as this Council cannot demonstrate a 5YHLS. In weighing up the material considerations and conflicts between policies; the development of a greenfield site weighted against Policy DSP40, Officers have concluded that the proposal is relative in scale to the demonstrated 5YHLS shortfall (DSP40(i)), can be delivered in the short-term (DSP40(iv)), and would not have any unacceptable environmental, traffic or amenity implications (DSP40(v)). Whilst there would be harm to the character and appearance of the countryside the unsightly derelict buildings currently on the site would be demolished. Furthermore, it has been shown that the site could accommodate eight houses set back from the Brook Avenue frontage and an area of green space to sensitively reflect nearby existing development and reduce the visual impact thereby satisfying DSP40(iii). Officers have however found there to be some conflict with the second test at Policy DSP40(ii) since the site is acknowledged to be in a sustainable location but is not adjacent to the existing urban area.

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"8.82 In balancing the objectives of adopted policy which seeks to restrict development within the countryside alongside the shortage in housing supply, Officers acknowledge that the proposal could deliver 8 dwellings, as well as an off-site contribution towards affordable housing provision, in the short term. The contribution the proposed scheme would make towards boosting the Borough's housing supply would be modest but is still a material consideration in the light of this Council's current 5YHLS.

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"8.83 There is a clear conflict with development plan policy CS14 as this is development in the countryside. Ordinarily, officers would have found this to be the principal policy such that a scheme in the countryside should be refused. However, in light of the Council's lack of a 5YHLS, development plan policy DSP40 is engaged and officers have considered the scheme against the criteria therein. The scheme is considered to satisfy four of the five criteria and in the circumstances, officers consider that more weight should be given to this policy than CS14 such that, on balance, when considered against the development plan as a whole, the scheme should be approved."

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90 The officer went on to consider relevant policies in the NPPF (in paras 8.84 to 8.87). He referred to the fact that an appropriate assessment had been undertaken and had "concluded that the development would not have an adverse effect on the integrity of the sites"; noted that in these circumstances para 177 of the NPPF said "the presumption in favour of

sustainable development imposed by para 11 … is applied" (para 8.84); confirmed that officers had "therefore assessed the proposals against the 'tilted balance' test set out at paragraph 11 of the NPPF" (para 8.85), and considered there to be "no policies within the [NPPF] that protect areas or assets of particular importance which provide a clear reason for refusing the development proposed" and that "any adverse impacts of granting permission would not significantly and demonstrably outweigh the benefits, when assessed against the policies in the [NPPF] taken as a whole" (para 8.86). He recommended that planning permission be granted, subject to a section 106 obligation and suitable conditions (para 8.87).

The judge's conclusions on the section 38(6) grounds

91 Jay J found it clear that the officer had advised the committee that the proposed development did not accord with the development plan in a number of respects. However, para 8.83 of the report gave rise, in his view, to "a degree of interpretative challenge", and "its various strands are difficult to identify and disentangle" (para 159). That paragraph, he thought, was "somewhat elliptical" and "a degree of benevolence" was required. The issue was "how much?" (para 160).

92 On that question the judge said that in para 8.83 the officer "was dealing with the first stage of the section 38(6) analysis", and "considering the extent of compliance with the development plan and the ordering of policies within that plan". The officer had "found, as he was entitled to, that policy DSP40 was more important in this case than CS14, owing to the shortfall in housing supply, and that the failure to satisfy the second criterion did not undermine this conclusion". In the judge's view, "[the] final clause in para 8.83 could be better worded, but it sets out the planning officer's conclusion on the first stage". It was "not a conclusion on the section 38(6) issue tout court, still less the planning application as a whole" (para 160).

93 Having concluded that paras 8.84 to 8.87 of the officer's report dealt with "the second stage of the section 38(6) exercise", the judge described para 8.86 of the report as a "composite conclusion on all remaining material considerations in the light of the tilted balance [in NPPF policy]". The officer's "overall conclusion" in para 8.87 was, he said, was "legally unexceptionable" (para 161).

Did the council lawfully discharge its duty under section 38(6)?

94 Mr Jones submitted, as he did before the judge, that the council had failed to comply with section 38(6). The officer's advice in paras 8.78 to 8.87 of his report did not contain a conclusive view on the question of whether the proposed development was in accordance with the development plan as a whole—an essential part of the decision-making process, as Patterson J had said in *Tiviot Way Investments* (para 27). There was at least "substantial doubt" over the council's performance of its duty (see the judgment of Elias LJ in *Secretary of State for Communities and Local Government v Calderdale Metropolitan Borough Council* [2011] JPL 412, at para 46). The officer had not dealt properly with the "nature and extent" of the proposal's conflict with the plan, and the significance of that conflict (see the judgment of Lord Reed JSC in *Tesco v Dundee City Council*, at para 22). In the final sentence of para 8.83 of the report, it was not clear whether he was saying that the proposal accorded with the plan as a whole, or that, despite not being

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A in accordance with the plan, it should be approved because "other material considerations [indicated] otherwise". Having recognised the ambiguity in the officer's assessment, the judge should have found there was "substantial doubt" sufficient to justify his quashing the planning permission. He went beyond the "benevolence" appropriate in the reading of a planning officer's report.

B **95** Mr Mould supported the judge's analysis. The court, he submitted, should not read the officer's report with undue rigour, but with "reasonable benevolence" and bearing in mind it was written for councillors with local knowledge (see *R (Mansell) v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314; [2019] PTSR 1452, at para 42). Reading the report fairly, it could not conclude that the members had been materially misled. The officer understood the priority to be given to the development plan. C He was clearly satisfied that, on balance, the proposal was in accordance with the plan. Because of the shortfall in the housing land supply, he gave more weight to Policy DSP40 of the local plan than to Policy CS14 of the core strategy. In para 8.83 of the report he concluded, in effect, that the limited conflict with Policy DSP40, a partial conflict with only one of its five criteria, when added to the conflict with other plan policies, did not prevent him D from finding the proposal in accordance with the plan "as a whole". This was a reasonable and lawful exercise of planning judgment. The following four paragraphs of the report, paras 8.84 to 8.87, were devoted to "other material considerations" arising from the NPPF, which, again as a matter of planning judgment, the officer found not to indicate the refusal of planning permission. Both limbs of section 38(6) were properly dealt with. And the officer's ultimate conclusion on the "planning balance", in para 8.87, was E not irrational or otherwise unlawful.

96 This is an issue to be dealt with in the spirit of realism and common sense to which this court has often referred (see, for example, what was said in *Mansell*, at para 42; and in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government (Practice Note)* [2018] PTSR 746 at para 7).

F **97** Like the judge, I am not persuaded by Mr Jones' argument here. On a fair reading of the officer's report, in particular the passages which embody the performance of the decision-maker's duty under section 38(6), I would accept that the assessment may, in part, be infelicitously expressed, but not that it is, in substance, unlawful. This is not to ignore the well-known principles governing the approach to planning officers' reports to committee stated by this court in *Mansell*, but only to apply those principles G sensibly in the circumstances here. When that is done, I do not think one can conclude that there was any "material defect" in the officer's advice justifying interference by the court (see *Mansell*, at para 42(3)).

98 Unlike several cases which have recently found their way to the Court of Appeal or above (see, for example, *Braintree District Council v Secretary of State for Communities and Local Government* [2018] EWCA Civ 610; H [2018] 2 P & CR 9), there is no issue of policy interpretation for the court to resolve here. The meaning and effect of the relevant policies of the development plan are uncontentious.

99 In any event, I do not think it can be said that this is one of those cases in which the officer, or the members, misinterpreted any of the relevant policies (see *R (Corbett) v Cornwall Council* [2020] EWCA Civ

508; [2020] JPL 1277 at para 65 to 67). The officer recognised that the proposal was in conflict with Policy CS14 of the core strategy because it would be development in the countryside which did not fall into any of the acceptable forms of development identified in that policy. Indeed, he accepted that there was a "clear conflict" with that policy, "as this is development in the countryside", and that this conflict would "ordinarily" have led to the refusal of planning permission (para 8.83 of his report).

100 I agree with Mr Jones that we can put to one side the general quality of the officer's report, and the obvious care he took in other parts of his planning assessment. As Mr Jones submitted, the judge's observations praising the officer for the way in which he dealt with other matters could not override a finding that he went wrong in handling the requirements of section 38(6). But I also accept Mr Mould's submission that those observations of the judge played no part in his conclusions on those parts of the officer's report where the officer applied the policies of the development plan and took other material considerations into account.

101 It cannot be suggested that either the officer or the committee was unaware of section 38(6) and the need to perform the duty it states. The officer quoted that provision at the beginning of his consideration of "the planning balance", in para 8.78 of his report. He obviously had it in mind as he went about that assessment. So this is not a case where it is unclear whether the decision-maker had in mind the words of the statute and proceeded in the light of them. Here, the officer plainly did that. The question is whether he did so lawfully.

102 As Mr Mould submitted, the structure of the officer's section 38(6) assessment, in paras 8.78 to 8.87 of his report, is divided into two parts. In the first, comprising paras 8.78 to 8.83, the officer addressed the first limb of the duty—to ascertain whether the proposal was or was not "in accordance with the development plan". In the second part, which comprises paras 8.84 to 8.87, he turned to "other material considerations", in particular the policy for the "presumption in favour of sustainable development" in paragraph 11 of the NPPF. He did not have to split the assessment in this way, there being no statutory requirement to do so. But he was entitled to do it, and was thus able to divide his conclusions on the two limbs more distinctly than if he had combined them in a single sentence or paragraph.

103 I consider, as the judge did, that the officer reached a clear conclusion on the compliance of the proposal with the development plan as a whole. That conclusion appears in the final sentence of para 8.83 of the report. It is true that the officer did not express it in the language used in the first limb of the section 38(6) duty. He did not say, explicitly, that the proposal was "in accordance with the development plan". He said that "on balance, when considered against the development plan as a whole, the scheme should be approved". This corresponds to the first limb of the statutory duty. In the context of the officer's consideration of the four policies of the development plan to which he referred in para 8.80 and his consideration of Policy DSP40 of the local plan and Policy CS14 of the core strategy in paras 8.81 to 8.83, it was, in my view, a sufficiently clear conclusion that the proposal was in accordance with the plan as a whole. To hold otherwise would be to rob the officer's conclusion of its real meaning, and to undo the committee's acceptance of it in resolving as it did.

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A **104** Was the officer lawfully entitled to reach the conclusion that the proposed development accorded with the development plan as a whole? In my view he was. So long as he did not lapse into a misunderstanding of any relevant policy of the plan—which he did not—the accordance of the proposal with the plan as a whole was a matter of planning judgment for him.

105 What the planning officer did here, as one sees in para 8.22 of the report, was to acknowledge that the application site was "clearly outside ... B the defined urban settlement boundary", so that the proposal was "contrary to" several policies of the core strategy and also Policy DSP6 of the local plan. However, because of the absence of a five-year supply of housing land under the requirements of the core strategy it was Policy DSP40 of the local plan on which the officer focused, as the policy of central relevance to the proposal. There can be no complaint about that. This was a classic case of C two policies of the development plan pulling in different directions: Policy CS14 of the core strategy pointing to a refusal of planning permission for housing development in the countryside, and Policy DSP40 creating, in its second part, a different and permissive approach to such proposals in the absence of a five-year supply of housing land, subject to the criteria set out. In those circumstances the two policies would obviously be in tension with D each other. A proposal satisfying the criteria in the second part of Policy DSP40 would accord with the policy formulated specifically for the situation which arose here, but would likely be in conflict with Policy CS14. In that situation, the decision-maker would have to consider which of these two policies should prevail, the general policy for development in the countryside or the policy deliberately crafted for housing development in the countryside where there is not a five-year supply of housing land. In this case the officer E effectively gave precedence to Policy DSP40, as he was clearly entitled to do.

106 The part of Policy DSP40 which fell to be applied here, because of the absence of a 5-year supply of housing land, sets out what is, in effect, a self-contained policy approach to the determination of applications for planning permission for housing development in those circumstances. The five criteria in the policy encapsulate considerations to which the council will need to F have regard when determining such an application.

107 The officer quoted the relevant part of Policy DSP40 in para 8.52 of his report, and then went through the five criteria, one by one, in paras 8.53 to 8.65. He did not suggest that any of those criteria could be left out of account. He found that four of them—the first, third, fourth, and fifth—were fully complied with. There is no criticism of his consideration of those four criteria. The other criterion—the second—he dealt with in G para 8.55, reaching the significant conclusion that the site was "sustainably located within a reasonable distance of local schools, services and facilities at nearby local centres ...". But because the urban settlement boundary was "approximately 140 metres east of the site", the development would "not ... [be] adjacent to [that] boundary". Thus the proposal complied partially with the second criterion, though not totally. It was non-compliant only to H the extent that the site was 140 metres from the urban settlement boundary, not "adjacent" to it. There is, however, no definition of the concept of adjacency in the policy. This is left to the decision-maker's planning judgment on the facts of the particular case. In summary, therefore, the proposal was fully compliant with four of the five criteria in the policy and substantially compliant with the other.

108 Those conclusions were picked up later in the officer's report, and distilled in para 8.81, where he concluded that there was compliance with the first, third, fourth and fifth criteria of Policy DSP40, but "some conflict" with the second criterion, "since the site is acknowledged to be in a sustainable location but is not adjacent to the existing urban area". None of that part of the officer's assessment betrays any misunderstanding of Policy DSP40, nor any unlawful application of it.

109 The advice in the following paragraph (para 8.82) is also unimpeachable. It refers to the contribution that the proposed development would make towards the provision of housing and affordable housing in the situation to which the second part of Policy DSP40 is directed—the absence of a five-year housing land supply.

110 In para 8.83 the officer recognised the "clear conflict" with Policy CS14 of the core strategy, because this would be "development in the countryside". That policy, however, was not "the principal policy" because the lack of a five-year housing land supply meant that Policy DSP40 was engaged, and that the proposal was to be considered under the criteria in that policy. Having stated that position, the officer then returned to his assessment of the proposal's compliance with Policy DSP40. He concluded that "in the circumstances, … more weight should be given to this policy than CS14 such that, on balance, when considered against the development plan as a whole, the scheme should be approved".

111 That clearly was an expression of planning judgment, having regard to the role of Policy DSP40 as the main policy of relevance, and the degree of compliance the officer had found with it. One can readily infer that in his view some provisions of the development plan pulled in opposite directions (see Lord Clyde's speech in *City of Edinburgh* at p 1459D–F, and the judgments of Lord Reed JSC and Lord Hope of Craighead DPSC in *Tesco v Dundee City Council* respectively at paras 19 and 34, and the judgment of Sullivan J, as he then was, in *Ex p Milne*, at paras 48 to 50). Policy CS14 of the core strategy was in tension with Policy DSP40 of the local plan, but the latter prevailed because there was not a five-year supply of housing land. The proposal substantially complied with the relevant part of Policy DSP40, satisfying all five criteria save for its limited conflict with the second criterion. And that limited conflict with one element of a single criterion in the policy was not, in the officer's view, enough to prevent a finding of compliance with "the development plan as a whole". In other words, the degree of conflict with the policy was not, overall, of such significance as to prevent approval of the scheme being in accordance with the plan for the purposes of section 38(6). This conclusion too, was a matter of planning judgment for the officer and is not assailable on any public law grounds.

112 There was, in my view, no misunderstanding or unlawful misapplication of development plan policy, and the path was open to the officer to reach the conclusion he did in the final sentence of para 8.83—that, "on balance", when it was "considered against the development plan as a whole", the proposal ought to be approved. Though not perhaps expressed with perfect clarity, this was a rational conclusion in the exercise of planning judgment, consistent with the relevant passages of the officer's report read fairly together, and plain in its meaning in that context. In short, it was lawful.

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A **113** The officer's conclusions on other material considerations in paras 8.84 to 8.87 were predicated on his conclusion on the first limb of the section 38(6) duty—that a decision to grant planning permission for the proposed development would be in accordance with the development plan. Those conclusions, whose import was that "material considerations" did not indicate that planning permission should be refused, were clearly stated, and are sufficient, in my view, to comply with the second limb of section 38(6). B I agree with the judge's conclusions to that effect.

114 In my view, therefore, the officer's assessment under section 38(6), regarded with realism and common sense, is not flawed by any error of law. The reality here is that in the conscious performance of the section 38(6) duty, he undertook every necessary exercise of planning judgment for that duty to be complied with, and none of those planning judgments are infected by C legal error. In substance, the officer's assessment, accepted by the members, was not materially defective.

Conclusion

115 For the reasons I have given, Iwould dismiss the appeal.

D

SINGH LJ

116 I agree that this appeal should be dismissed for the reasons given by the Senior President of Tribunals.

MALES LJ

E **117** I agree with the judgment of the Senior President of Tribunals on grounds two, four and five, concerned respectively with the use of average land use figures in the calculation of baseline nitrogen deposition, the use of a 20% buffer in the budget calculation, and section 38(6) of the Planning and Compulsory Purchase Act 2004. On those issues I have nothing to add.

118 On the first ground of appeal, which is concerned with the use of the average national occupancy rate of 2.4 persons per dwelling in calculating a F nutrient budget for a development of 4–5 bedroom houses, I agree with what the Senior President has said and with his conclusion that the appeal should be dismissed. However, I think it necessary to spell out that, in my view at any rate, the council's appropriate assessment was not in accordance with the procedure set out in the technical guidance issued by Natural England, but was nevertheless lawful because there was a good reason not to follow G that procedure. In short, that good reason was that the council consulted Natural England, making clear that it had used the 2.4 persons occupancy rate, and Natural England had no objection to this. I set out my reasoning in this judgment.

The legal framework

H **119** Council Directive 92/43/EC ("the Habitats Directive") was transposed into domestic law by the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations"). In the case of a proposed development which is likely to have a significant effect on a protected site, regulation 63 imposes three relevant obligations on a planning authority (referred to in the Regulations as a "competent authority"). It is common

ground that the development here was likely to have such an effect, and that regulation 63 is therefore engaged.

120 Those three obligations are as follows. They are mandatory. First, the planning authority must make an "appropriate assessment" of the implications of the proposed development for that site (paragraph (1)). Second, it must consult the appropriate nature conservation body, in this case Natural England, and have regard to any representations made by that body (paragraph (3)). Third, it must refuse planning permission if the conclusion of the "appropriate assessment" is that the proposed development will adversely affect the integrity of the site in question (paragraph (5)): strictly, paragraph (5) says that permission may only be granted if the development will not adversely affect the integrity of the site, but this amounts to the same thing.

121 This latter obligation is subject to an exception, not applicable here, if the planning authority is satisfied that there are "no alternative solutions" and that there are "imperative reasons of overriding public interest" for the grant of permission (see regulation 64). But that is the only circumstance in which permission may be granted for a development when an "appropriate assessment" carried out by the planning authority indicates an adverse effect on the site in question. The existence of an exception in these very limited circumstances, but not otherwise, demonstrates the importance which the legislature has attached, as a matter of policy, to the protection of endangered habitats. Unless a proposed development qualifies as necessary for imperative reasons of overriding public interest, with no alternative solution, planning permission *must* be refused for a development which will adversely affect the integrity of the site. There is no balance to be undertaken, weighing protection of the environment against (for example) the need for housing, however acute that need may be. Unless regulation 64 applies, the planning authority has no discretion to exercise once it has concluded, by means of an "appropriate assessment", that the effect of the proposed development will be adverse—and that is equally so even if the adverse effect is only modest.

122 Accordingly Fareham Borough Council had an obligation in the present case to carry out an appropriate assessment, to consult Natural England and to have regard to any representations which it made. The decision whether to grant permission in the light of that "appropriate assessment" remained that of the council as the planning authority. But that decision was constrained by the outcome of the "appropriate assessment". If the assessment was unfavourable, permission had to be refused and the grant of permission would necessarily be unlawful. If the assessment was favourable, the council would have to make a planning judgment in the usual way, with which the court would only interfere on *Wednesbury* grounds.

123 Thus in a case where regulation 63 (but not regulation 64) applies, the task for the planning authority is not merely to undertake an overall evaluation of all the circumstances, giving such weight to each as it thinks fit. Rather, a favourable "appropriate assessment" is a necessary gateway through which an application must pass before the grant of permission can be considered.

The nature of the "appropriate assessment"

124 Accordingly the nature of the "appropriate assessment" which a planning authority is obliged to carry out and the degree of rigour which it

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A must bring to bear may be of critical importance. A more rigorous assessment may show an adverse effect which a less rigorous assessment would not. The question therefore arises, who decides what should be done by way of "appropriate assessment" and how it should be carried out? The answer is that, in general, it is left to the planning authority to decide for itself what steps should be taken to investigate the impact of the proposed development on the protected site. This was explained by Lord Carnwath JSC, giving the B judgment of the Supreme Court, in *R (Champion) v North Norfolk District Council* [2015] 1 WLR 3710:

> "41. The process envisaged by article 6(3) should not be over-complicated. As Richards LJ points out, in cases where it is not obvious, the competent authority will consider whether the 'trigger' for C appropriate assessment is met (and see paras 41–43 of *Waddenzee*). But this informal threshold decision is not to be confused with a formal 'screening opinion' in the EIA sense. The operative words are those of the Habitats Directive itself. All that is required is that, in a case where the authority has found there to be a risk of significant adverse effects to a protected site, there should be an 'appropriate assessment'. 'Appropriate' is not a technical term. It indicates no more than that the D assessment should be appropriate to the task in hand: that task being to satisfy the responsible authority that the project 'will not adversely affect the integrity of the site taking account of the matters set out in the article. As the court itself indicated in *Waddenzee* the context implies a high standard of investigation. However, as Advocate General Kokott said in *Waddenzee* [2005] All ER (EC) 353, para 107: 'the necessary E certainty cannot be construed as meaning absolute certainty since that is almost impossible to attain. Instead, it is clear from the second sentence of article 6(3) of the Habitats Directive that the competent authorities must take a decision having assessed all the relevant information which is set out in particular in the appropriate assessment. The conclusion of this assessment is, of necessity, subjective in nature. Therefore, the competent authorities can, from their point of view, be certain that F there will be no adverse effects even though, from an objective point of view, there is no absolute certainty.' In short, no special procedure is prescribed, and, while a high standard of investigation is demanded, the issue ultimately rests on the judgment of the authority."

125 Accordingly, and in general, so long as the planning authority makes rational choices as to the steps which it will take to investigate the impact G of the proposed development, the court will not interfere. Those rational choices must include application of the precautionary principle, which is implicit in the Regulations, and must involve a high standard of investigation, but precisely what that means in practice in any given case is left to the judgment of the planning authority, subject only to review by the court on *Wednesbury* grounds.

H

Natural England's Advice to planning authorities

126 In the present context, however, Natural England as the appropriate nature conservation body has published specific guidance to planning authorities as to the nature of the "appropriate assessment" which they should carry out, which is precisely applicable to the proposed development

in this case. The relevant advice was its "Advice on Achieving Nutrient Neutrality for New Development in the Solent Region (Version 5 – June 2020)" ("the 2020 Advice"). A

127 The 2020 Advice sets out "a practical methodology to calculating how nutrient neutrality can be achieved", which is said to be "based on best available scientific knowledge". The methodology consists of calculating a "nutrient budget", by which the amount of nutrient deposition on protected sites resulting from a proposed development can be estimated. It is, however, important that the 2020 Advice states repeatedly that it is "one way" (or "one means") of addressing this question (see paras 1.3, 2.2 and 4.1). It does not purport to prescribe a calculation which planning authorities in the Solent region *must* perform in all circumstances in order to carry out a lawful "appropriate assessment". B

128 The 2020 Advice begins by explaining the importance for wildlife of the water environment within the Solent region and the existing (and in some cases increasing) deterioration of protected sites. The methodology which it sets out does not seek to reverse the deterioration. Rather, it has the more limited ambition that new developments should not make things worse. In that context it emphasises repeatedly that planning authorities should take a precautionary approach when addressing uncertainty and calculating nutrient budgets. For example: C D

> "1.4 … It is our advice to local planning authorities to take a precautionary approach in line with existing legislation and case law when addressing uncertainty and calculating nutrient budgets."

129 The 2020 Advice goes on to explain that this precautionary approach must be adopted separately at two stages, first when determining each of the "key inputs and assumptions" underpinning a nutrient budget, one of which is the prediction of occupancy levels for a new development, and then again when adding a precautionary buffer to the Total Nitrogen ("TN") which has been calculated: E

> "4.7 The nutrient neutrality calculation includes key inputs and assumptions that are based on the best-available scientific evidence and research. It has been developed as a pragmatic tool. However, for each input there is a degree of uncertainty. For example, there is uncertainty associated with predicting occupancy levels and water use for each household in perpetuity. Also, identifying current land/farm types and the associated nutrient inputs is based on best-available evidence, research and professional judgement and is again subject to a degree of uncertainty. F G
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> "4.8 It is our advice to local planning authorities to take a precautionary approach in line with existing legislation and case law when addressing uncertainty and calculating nutrient budgets. This should be achieved by ensuring nutrient budget calculations apply precautionary rates to variables and adding a precautionary buffer to the TN calculated for developments. A precautionary approach to the calculations and solutions helps the local planning authority and applicants to demonstrate the certainty needed for their assessments." H

130 The 2020 Advice explains at para 4.12 that the proposed methodology "is for all types of development that would result in a net

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A increase in population served by a wastewater system, including new homes, student accommodation, tourism attractions and tourist accommodation".

131 The methodology contains a number of stages for developments which will drain to the mains network. The first stage is to calculate the Total Nitrogen (measured in kilograms per annum) derived from the development that would exit the Wastewater Treatment Works after treatment. Within this first stage are three steps, the first of which is to calculate the additional B population resulting from the proposed development. This is dealt with at paras 4.18 and 4.19, on which much of the argument focused:

> "**Stage 1** Step 1 Calculate additional population
>
> "4.18 New housing and overnight accommodation can increase the population as well as the housing stock within the catchment. C This can cause an increase in nitrogen discharges. To determine the additional population that could arise from the proposed development, it is necessary that sufficiently evidenced occupancy rates are used. Natural England recommends that, as a starting point, local planning authorities should consider using the average national occupancy rate of 2.4, as calculated by the Office for National Statistics (ONS), as this can be consistently applied across all affected areas.
>
> D "4.19 However competent authorities may choose to adopt bespoke calculation tailored to the area or scheme, rather than using national population or occupancy assumptions, where they are satisfied that there is sufficient evidence to support this approach. Conclusions that inform the use of a bespoke calculation need to be capable of removing all reasonable scientific doubt as to the effect of the E proposed development on the international sites concerned, based on complete, precise and definitive findings. The competent authority will need to explain clearly why the approach taken is considered to be appropriate. Calculations for occupancy rates will need to be consistent with others used in relation to the scheme (eg for calculating open space requirements), unless there is a clear justification for them to differ."

F **132** As is apparent from these paragraphs, the occupancy rate of 2.4 persons per dwelling is the average national occupancy rate for all kinds of dwellings, calculated by the Office for National Statistics. It is derived from the 2011 Census.

133 I would make two observations on what is said in these paragraphs. First, Natural England's recommendation is that this occupancy rate should be "considered" by competent authorities, not that its use is in any way G mandatory. It is described as no more than "a starting point". Second, the Advice states that competent authorities "may" choose to adopt a different rate, tailored to a particular area or particular scheme, but that where they do so, the occupancy rate adopted must be evidence-based, clearly explained and consistent with other calculations used in relation to the proposed development.

H **134** Mr Timothy Mould QC for the council and Mr David Elvin QC for Natural England emphasised the use of the word "may", submitting therefore that competent authorities can be under no obligation to use another occupancy figure. Mr Gregory Jones QC for the appellant objectors submitted that the word "may" should be read as "must". I would not accept either of these submissions. In my judgment the advice to planning authorities

is to begin ("a starting point") by considering whether the average national occupancy rate of 2.4 is appropriate to use for the development in question. As it is a national average rate over all kinds of dwelling, it is likely that it can appropriately be used where a development consists of mixed housing, including both larger and smaller properties. In such cases, the starting point may well also be the finishing point. But it is common sense that a new development consisting exclusively of larger houses is likely to have a higher occupancy rate than the national average. In such a case, there seems to me to be a powerful argument that it is not appropriate to use the 2.4 rate, which a planning authority needs to consider. I would read these paragraphs as encouraging planning authorities to consider whether there is an alternative evidence-based occupancy rate for which a clear justification can be stated. In fact, such an alternative rate would not have been difficult to find in this case: the Office for National Statistics, which is the source of the 2.4 rate, also publishes an average occupancy rate for four-bedroom houses based on the same source (ie the 2011 Census), namely 3.14 persons per dwelling.

135 Once the occupancy rate for the nitrogen budget calculation has been determined, the next step is to determine the estimated water use for the proposed development. The 2020 Advice recommends using a figure, itself described as precautionary, of 110 litres per person per day. There was nothing to indicate any circumstances in which a lesser usage figure should be used, for example that some occupants of the new dwellings might already be residents within the catchment area.

136 Stages 2 to 4 of the calculation need not be considered in any detail for the purpose of this ground of appeal. Stage 2 is to adjust the nitrogen load to account for existing nitrogen from current land use; Stage 3 is to adjust the nitrogen load to account for land use with the proposed development; and Stage 4 is to calculate the net change in the Total Nitrogen load that would result from the development. It is at this last stage that a precautionary buffer is recommended:

> "4.67 It is necessary to recognise that all the figures used in the calculation are based on scientific research, evidence and modelled catchments. These figures are the best available evidence but it is important that a precautionary buffer is used that recognises the uncertainty with these figures and in our view ensures the approach prevents, with reasonable certainty, that there will be no adverse effect on site integrity. Natural England therefore recommends that a 20% precautionary buffer is built into the calculation."

137 Thus the 20% precautionary buffer is not a substitute for use of the best available evidence-based figures for the previous stages of the methodology. On the contrary, it is an additional protection which assumes that the best available figures have been used in those previous stages.

The status of the 2020 Advice

138 Mr Jones submitted that the guidance set out in the 2020 Advice was unlawful, although it is fair to say that his primary attack in this court was that it had not been properly applied. I would reject the submission that the 2020 Advice was itself unlawful. It is a rational methodology recommended by the appropriate nature conservation body.

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A **139** The question then arises whether a planning authority in the Solent Region must carry out an "appropriate assessment" in accordance with the 2020 Advice—or to put it another way, whether any departure from the methodology set out in the 2020 Advice would render an "appropriate assessment" unlawful, such that a grant of planning permission based on such an assessment would be *Wednesbury* unreasonable. In my judgment that cannot be the case. The 2020 Advice itself makes clear that it is only B one way of carrying out an "appropriate assessment" and that its use is not mandatory. The true position is that a planning authority ought to follow the methodology contained in the 2020 Advice unless it has good reason not to do so. That is for the same reason, explained by Sales LJ in *Smyth v Secretary of State for Communities and Local Government* [2015] PTSR 1417, that a planning authority must place considerable weight on the response of C Natural England in response to a consultation under regulation 63(3):

> "85. Moreover, the authorities confirm that in a context such as this a relevant competent authority is entitled to place considerable weight on the opinion of Natural England, as the expert national agency with responsibility for oversight of nature conservation, and ought to do so (absent good reason why not): the *Hart District Council* case D [2008] 2 P & CR 302, para 49; *R (Akester) v Department for the Environment, Food and Rural Affairs* [2010] Env LR 561, para 112; *R (Morge) v Hampshire County Council* [2011] PTSR 337, para 45 (Baroness Hale of Richmond JSC); and *R (Prideaux) v Buckinghamshire County Council* [2013] Env LR 734, para 116. The judge could not be faulted in giving weight to this consideration in the present case, at E para 165 of her judgment."

140 One potentially good reason not to follow the methodology in the 2020 Advice precisely would be that Natural England itself has raised no concerns about a proposed development, despite appreciating that the methodology has not been precisely followed.

F *The obligation to consult Natural England*

141 This brings me to the obligation, contained in regulation 63(3), to consult Natural England and to have regard to its view. As explained in the passage from Sales LJ's judgment in *Smyth* quoted above, the council was both entitled and required to place considerable weight on the opinion of G Natural England, unless there was good reason not to do so.

142 In this case the council did consult Natural England. Although it did not draw specific attention to the use of the national average occupancy rate of 2.4 persons per dwelling for a development consisting of 4–5 bedroom houses, it provided information about the proposed development to Natural England from which the nature of the development and the use of the national average occupancy rate were both readily apparent. We can safely H proceed on the basis that Natural England understood this. That is apparent from its stance and evidence in this action, opposing the claim for judicial review. Natural England made clear in its response to the consultation that it had no concerns about the proposed development, including the use of the average national occupancy rate, provided that certain conditions were imposed. That was so even though using the occupancy rate of 2.4 resulted

in a nitrogen budget calculation which was only just positive, from which it would have been apparent that taking any higher occupancy rate would have meant that the assessment was negative and that permission would necessarily have had to be refused. A

The Officers' Report

143 The Officers' Report for the proposed development, dated 19 August 2020, noted that the application was for eight detached dwellings which were likely to be larger than average. It summarised accurately the content of paras 4.18 and 4.19 of the 2020 Advice, noting that Natural England recommended that, as a starting point, local planning authorities should consider using the average national occupancy rate of 2.4 persons per dwelling, but that they might choose to adopt bespoke calculations where satisfied that there is sufficient evidence to support this approach. Referring to the concern of objectors that a higher occupancy rate ought to be applied since the houses were likely to be larger than average dwellings, the Report concluded as follows: B C

> "8.40 It is acknowledged that some houses will have more than the average number of occupants. It is also of course the case that some will have less. The figure of 2.4 is an average based on a well evidenced source (the ONS) and which has been shown to be consistent over the past 10 years. As stated above the Natural England methodology allows bespoke occupancy rates however to date the Council has only done so to lower, not raise, the occupancy rate and where clear evidence has been provided to demonstrate that the proposed accommodation has an absolute maximum rate of occupancy. In the case of sheltered housing which is owned and managed by the Council for example it has previously been considered appropriate to apply a reduced occupancy rate accordingly. D E
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> "8.41 In all instances it is the case that the Natural England methodology is already sufficiently precautionary because it assumes that every occupant of every new dwelling (along with the occupants of any existing dwellings made available by house moves) is a new resident of the Borough of Fareham. There is also a precautionary buffer of 20% applied to the total nitrogen load that would result from the development as part of the overall nutrient budget exercise. F
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> "8.42 Taking the above matters into account, Officers do not consider there to be any specific justification for applying anything other than the recommended average occupancy rate of 2.4 persons per dwelling when considering the nutrient budget for the development." G

144 For my part, and without (I hope) reading the Report in an unduly legalistic way, I do not think that these paragraphs represent a correct application of the methodology contained in the 2020 Advice. The Report treats the average national occupancy rate as the rate "recommended" by Natural England, to be applied unless there is a "specific justification" for taking some other rate. But that is not what the 2020 Advice says. What it says is that the 2.4 rate should be considered, but it does not suggest that it is anything more than a starting point. H

145 Moreover, the Report's justification for using the 2.4 figure was that the Natural England methodology "is already sufficiently precautionary".

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A The first reason for this view was that the methodology assumes that every occupant of every new development would be a new resident of the borough. On this point the Report is mistaken. There is nothing to that effect in the 2020 Advice. It does not suggest, for example, that in the case of a mixed development where it might be expected that occupancy will be in line with the average national rate, some adjustment should be made to take account of this factor. The second reason was that there was also "a precautionary B buffer of 20% applied to the total nitrogen load". But the existence of that buffer is not a justification for using anything other than the best available evidence-based occupancy rate for the development concerned. Rather, the 20% buffer is intended to be an additional protection, over and above the use of the best available evidence as to the "key inputs and assumptions" underpinning the nutrient budget. It is applied only after the four stages of C the methodology have been completed. In my view, therefore, the Report departs from the methodology set out in the 2020 Advice on the question of occupancy rate.

Conclusion

146 Despite this, however, I consider that the use of the national average D occupancy rate of 2.4 persons per dwelling did not render the "appropriate assessment" carried out by the council unlawful. The question for the council was not whether it had followed precisely the methodology set out in the 2020 Advice, but rather whether it had carried out a sufficient "appropriate assessment" for the purpose of the Habitats Regulations. It was not mandatory to follow precisely the methodology set out in the 2020 E Advice and the use of the national average occupancy rate was not questioned by Natural England when consulted about the proposed development. Rather, Natural England stated that it had no concerns. That was a view to which the council was entitled and required to have regard. It provided a good reason not to follow precisely the methodology set out in the 2020 Advice. In those circumstances we can only interfere with the conclusion of the council, based on the assessment which it had undertaken, that the F proposed development would not contravene regulation 63 of the Habitats Regulations, if that conclusion was *Wednesbury* unreasonable. That is a demanding test and I am not persuaded that it is satisfied here.

Postscript—the 2022 Advice

147 I would add that we have been provided with the latest version of G Natural England's Advice to planning authorities, issued in March 2022 and updated expressly in the light of (among other things) the judgment of Jay J in this case. This Advice is not limited to the Solent region.

148 Interestingly, the 2022 Advice emphasises the importance of local conditions in selecting an occupancy figure, and the need to focus on the particular project being assessed. It recognises that the average national H occupancy rate of 2.4 persons per dwelling (which it notes will be subject to change when the results of the 2021 Census become available) may not be appropriate for certain types of development:

> "*Occupancy rates based on dwelling type*
> "Should the nature or scale of development associated with a particular project proposal suggest that the use of an average occupancy

> rate is not appropriate, then the Local Planning Authority may decide to adopt an occupancy rate based on the dwelling types proposed for that particular project, provided it meets the criteria outlined above ..."

Those criteria include that the rate selected reflects local conditions, is sufficiently robust and appropriate for the project being assessed, and is derived from a reliable source which can show trends over a protracted period of time, such as data from the Office for National Statistics.

149 For the future it is the 2022 Advice which planning authorities will need to consider.

Appeal dismissed.

ISOBEL COLLINS, Barrister

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R. (ON THE APPLICATION OF TOGETHER AGAINST SIZEWELL C LTD) v SECRETARY OF STATE FOR ENERGY SECURITY AND NET ZERO

King's Bench Division (Administrative Court)

Holgate J: 22 June 2023

[2023] EWHC 1526 (Admin); [2023] Env. L.R. 29

Construction projects; Development consent; Environmental impact; Nuclear power; Water supply

H1 *Nuclear power—development consent—environmental impact assessment—water supply—whether water supply part of "project" for purposes of Environmental Assessment—Habitats Regulations assessment—whether failure to assess water supply impacts before granting consent was unlawful—whether water supply separate "project" for purposes of Environmental Assessment—whether obligation to assess theoretical supply options*

H2 The claimant (TASC) was set up by a local community group as a special purpose vehicle to oppose the development of the Sizewell C nuclear power station (the development). TASC sought to challenge the Defendant's (SSENZ) decision to grant development consent for the Sizewell C nuclear power station to the Interested Party (SZC). At the relevant examination stage, no permanent potable water supply solution for the development had been identified, as this depended on a separate statutory process undertaken by the local water company (NWL) as part of the preparation and publication of the relevant Water Resources Management Plan (WRMP).

H3 The Panel at the examination stage reported that because there was no assured supply of potable water identified, the cumulative effects of the development could not be assessed for the purposes of both the environmental impact assessment and the 'appropriate assessment' required under the Conservation of Habitats and Species Regulations 2017 (reg.63(1)) (the Habitats Regulations). Consequently, the Panel could not recommend approval without additional information on the provision of a permanent water supply. Subject to this issue, the Panel considered that the benefits of the proposal strongly outweighed the adverse impacts. The panel also advised that an assessment of the cumulative impacts of the water supply should be undertaken before granting consent. In considering the Panel's report and recommendations, SSENZ requested further information from (amongst others) SZC, the Environment Agency (EA) and Natural England (NE). The Secretary of State disagreed with the Panel's recommendations and granted consent on the basis the impacts would be properly assessed under the WRMP process.

H4 TASC sought to challenge SSENZ's decision, arguing that SSENZ had:

(1) failed to assess the environmental impacts of the permanent water supply as part of the "project" contrary to reg.63(1) of the Habitats Regulations. Alternatively, SSENZ had failed to assess the cumulative environmental impacts of the development along with the solution for the potable water supply.
(2) failed to supply adequate reasons for disagreeing with NE's advice that the permanent water supply should be considered to be a fundamental component of the 'operation of the project' and its effects.
(3) failed to consider 'alternative solutions' to the development before concluding that there were imperative reasons of overriding public interest justifying the environmental harm it would cause, as required by reg.64(1) of the Habitats Regulations.
(4) unlawfully taken into account an irrelevant consideration—in that it was supported by no evidence—namely the contribution the development might make to reducing greenhouse gas emissions by 78% from 1990 levels by 2035.
(5) acted irrationally in concluding that the development site would be clear of nuclear material by 2140 and/or failed to supply adequate reasons for rejecting TASC's arguments on this issue.
(6) erred in law in concluding that the development's greenhouse gas emissions would not have a significant effect on the UK's ability to meet its climate change obligations.

H5 **Held,** in dismissing the claim:

H6 (1) The question of what a 'project' was in any particular case, was a matter of judgment for the decision maker. That decision could only be challenged on *Wednesbury* principles. SSENZ was entitled to conclude that the permanent potable water supply for the development was a separate "project" from the power station itself. This was based on various factors including; the water supply and power station were not on adjacent land, but separated by over 1km; the two 'projects' had separate promoters; there was no functional interdependence—the water company responsible for the water supply had a duty to plan water supply for the whole region, not just the development; and the water supply would be subject to a separate statutory process to approve the water company's WRMP.

H7 (2) Although development consent had been granted in the knowledge that the development was dependent on the future provision of a water supply, (a) it was not dependent on the provision of any particular form of supply and that was currently unknown; and (b) the cumulative environmental impact would have to be assessed properly in an integrated environmental assessment following the WRMP process.

H8 (3) When considering the context of the whole decision letter, SSENZ had adequately explained why he disagreed with NE's views were the water supply was an integral part of the project. NE's views were not so much advice as assertions without detailed reasoning or supporting evidence.

H9 (4) In considering the application of reg.64(1) of the Habitats Regulations, SSENZ had considered the Panel's assessment and the need for nuclear power was seen as an integral part of the strategy for tackling climate change by achieving the net zero target. In the same vein, SSENZ had accepted the Panel's rejection of TASC's arguments that alternative solutions should be considered and that the

approach taken by SZC was too narrow. TASC's arguments depended upon an illegitimate attempt to rewrite policy aims by pretending that a central policy objective was at a higher level of abstraction, without any regard to diversity of energy sources and security of supply.

H10 (5) SSENZ had sufficient material before him to entitle him to reach the conclusion on the contribution the development might make to reducing greenhouse gas emissions by 2035. It was impossible to say that his judgment on such an evaluative subject was irrational. On that basis, there was no legal reason why SSENZ could not take into account the contribution which the development was expected to make to reducing the shortfall in electricity generation or to the target for reducing GHGs.

H11 (6) SSENZ's reasoning on the issue of whether the site would be clear of nuclear material by 2140 could not be treated as irrational or legally inadequate. When reading the decision letter as a whole, it was plain that SSENZ relied, as he was entitled to do, upon the normal assumption that relevant regulatory regimes would be operated properly.

H12 (7) In determining whether emission of GHGs from the development would not have a significant impact upon the UK's ability to meet climate change obligations, the SSENZ had relied upon the Panel's conclusions. There was ample material to support the Panel's conclusions and accordingly SSENZ's decision letter was not unreasonable following *Wednesbury* principles. SSENZ was not required to undertake a personal quantitiatve assessment by delving into the Environmental Statement or the Life Cycle Assessment for the development. The summary provided in the Panel's Report and in the draft decision letter, both of which were provided to the SSENZ, were as, a matter of law, perfectly adequate.

H13 **Cases referred to:**

Bowen-West v Secretary of State for Communities and Local Government [2012] EWCA Civ 321; [2012] Env. L.R. 22; [2012] J.P.L. 1128

East Quayside 12 LLP v Newcastle upon Tyne City Council [2023] EWCA Civ 359

Jones v Mordue [2015] EWCA Civ 1243; [2016] 1 W.L.R. 2682; [2016] 1 P. & C.R. 12

Pearce v Secretary of State Business, Energy and Industrial Strategy [2021] EWHC 326 (Admin); [2022] Env. L.R. 4; [2021] J.P.L. 1229

Preston New Road Action Group v Secretary of State for Communities and Local Government [2018] EWCA Civ 9; [2018] Env. L.R. 18; [2018] J.P.L. 807

R. (on the application of Akester) v Department for the Environment, Food and Rural Affairs [2010] EWHC 232 (Admin); [2010] Env. L.R. 33; [2010] A.C.D. 44

R. (on the application of Ashchurch Rural Parish Council) v Tewkesbury BC [2023] EWCA Civ 101; [2023] Env. L.R. 25; [2023] J.P.L. 1099

R. (on the application of Champion) v North Norfolk DC [2015] UKSC 52; [2015] 1 W.L.R. 3710; [2016] Env. L.R. 5

R (on the application of ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy [2021] EWCA Civ 43; [2021] P.T.S.R. 1400; [2021] J.P.L. 1107

R. (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd [2020] UKSC 52; [2021] P.T.S.R. 190; [2021] J.P.L. 905

R. (on the application of Goesa Ltd) v Eastleigh BC [2022] EWHC 1221 (Admin); [2022] P.T.S.R. 1473; [2022] J.P.L. 1309
R. (on the application of Khan) v Sutton LBC [2014] EWHC 3663 (Admin)
R. (on the application of Larkfleet Ltd) v South Kesteven DC [2015] EWCA Civ 887; [2016] Env. L.R. 4; [2015] P.T.S.R. D50
R. (on the application of Littlewood) v Bassetlaw DC [2008] EWHC 1812 (Admin); [2009] Env. L.R. 21; [2009] J.P.L. 478
R. (on the application of Mott) v Environment Agency [2016] EWCA Civ 564; [2016] 1 W.L.R. 4338; [2017] Env. L.R. 1
R. (on the application of National Association of Health Stores) v Secretary of State for Health [2005] EWCA Civ 154
R. (on the application of Newsmith Stainless Ltd) v Secretary of State for Environment, Transport and the Regions [2001] EWHC Admin 74; [2017] P.T.S.R. 1126
R. (on the application of Plan B Earth) v Secretary of State Transport [2020] EWCA Civ 214; [2020] P.T.S.R. 1446; [2020] J.P.L. 1005
R. (on the application of Spurrier) v Secretary of State Transport [2019] EWHC 1070 (Admin); [2020] P.T.S.R. 240; [2019] J.P.L. 1163
R (on the application of Swire) v Canterbury City Council [2022] EWHC 390 (Admin); [2022] J.P.L. 1026
R. (on the application of Wingfield) v Canterbury City Council [2019] EWHC 1975 (Admin); [2020] J.P.L. 154
R. (on the application of Wyatt) v Fareham BC [2022] EWCA Civ 983; [2023] Env. L.R. 14; [2022] J.P.L. 1509
R. (on the application of Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government [2020] EWHC 3073 (Admin); [2021] P.T.S.R. 553; [2021] Env. L.R. 21
R. (on the application of Transport Action Network Ltd) v Secretary of State Transport [2021] EWHC 2095 (Admin); [2022] P.T.S.R. 31; [2021] A.C.D. 105
R. v Rochdale MBC Ex p. Milne (No.2) [2001] Env. L.R. 22; (2001) 81 P. & C.R. 27; [2001] J.P.L. 229 (Note) QBD
R. (on the application of Association of Independent Meat Suppliers) v Food Standards Agency [2019] UKSC 36; [2019] P.T.S.R. 1443
R. (on the application of Burridge) v Breckland DC [2013] EWCA Civ 228; [2013] J.P.L. 1308; [2013] 18 E.G. 102 (C.S.)
R. (on the application of Finch) v Surrey CC [2022] EWCA Civ 187; [2022] P.T.S.R. 958; [2022] Env. L.R. 27
R. (on the application of Forest of Dean (Friends of the Earth)) v Forest of Dean DC [2015] EWCA Civ 683; [2015] P.T.S.R. 1460; [2016] Env. L.R. 3
R. (on the application of Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy [2022] EWHC 1841 (Admin); [2023] 1 W.L.R. 225; [2022] H.R.L.R. 18
R. (on the application of Law Society) v Lord Chancellor [2018] EWHC 2094 (Admin); [2019] 1 W.L.R. 1649; [2018] 5 Costs L.R. 937
R. v Swale BC Ex p. Royal Society for the Protection of Birds (1990) 2 Admin. L.R. 790; [1991] 1 P.L.R. 6; [1991] J.P.L 39 QBD
Save Britain's Heritage v Number 1 Poultry Ltd [1991] W.L.R. 153; (1991) 3 Admin. L.R. 437; (1991) 62 P. & C.R. 105 HL

Smyth v Secretary of State for Communities and Local Government [2015] EWCA Civ 174; [2015] P.T.S.R. 1417; [2016] Env. L.R. 7

H14 **Legislation referred to:**
Nuclear Installations Act 1965 ss.1 and 3
Directive 92/43 (Habitats)
Senior Courts Act 1981 s.31
Water Industry Act 1991 ss.18, 37A, 55 and 56
Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633)
Directive 2009/147 (Wild Birds)
Water Resources Management Plan Regulations 2007 (SI 2007/727)
Climate Change Act 2008 s.11
Planning Act 2008 ss.5, 6, 104, 105, 106, 114, 118 and 120
Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/572) regs 4, 5, 14, 20 and 21
Conservation of Habitats and Species Regulations 2017 (SI 2017/1012) regs 62, 63, 64 and 84
Carbon Budget Order 2021 (SI 2021/750)
Sizewell C (Nuclear Generating Station) Order 2022 (SI 2022/853) Sch.19 Pt 6
CPR r.23.12

H15 *D. Wolfe KC*, *A. Bowes* and *R. Parekh*, instructed by Leigh Day Solicitors, appeared on behalf of the claimant.
J. Strachan KC and *R. Grogan*, instructed by Government Legal Department, appeared on behalf of the defendant.
H. Phillpot KC and *H. Flanagan*, instructed by Herbert Smith Freehills, appeared on behalf of the interested party.

JUDGMENT

MR JUSTICE HOLGATE:

Introduction

1 The claimant seeks to challenge by judicial review under s.118(1) of the Planning Act 2008 ("the 2008 Act") the decision dated 20 July 2022 made under s.114 of that Act to make the Sizewell C (Nuclear Generating Station) Order 2022 (SI 2022 No. 853) ("the Order") under s.114 of that Act. That decision was made by, and the proceedings were brought against, the Secretary of State for Business, Energy and Industrial Strategy. However, with effect from 3 May 2023 the relevant functions have been transferred to the Secretary of State for Energy Security and Net Zero and he has therefore been substituted as the defendant.

2 The Order grants development consent for the construction, operation, maintenance and decommissioning of a nuclear power station comprising two UK European Pressurised Reactors, each with a net electrical output of 1,670 MW, and a total capacity of 3,340 MW.

3 The claimant, Together Against Sizewell C Limited ("TASC"), is a private company. It was set up on 8 July 2022 by members of a local community group as a special purpose vehicle for the bringing of this claim and to receive public donations to that end. TASC was established in 2013 to oppose the project. It has had about 280 supporters. The group responded to pre-application consultations and participated in the statutory Examination of the draft order. It made written representations on a range of subjects and oral representations at "issue-specific hearings" ("ISHs") held during the Examination.

4 The Order granted development consent to the interested party, NNB Generation Company (SZC) Limited ("SZC").

5 The application for consent was made on 27 May 2020. The defendant appointed a panel of five inspectors ("the Panel") to conduct the Examination of the application under Chapter 4 of Part 6 of the 2008 Act. The Examination took place between April and October 2021.

6 At the time of the Examination, SZC was unable to identify a permanent supply of potable water for the project, because this was to be decided as part of the preparation and publication by Northumbrian Water Limited ("NWL") of a Water Resources Management Plan pursuant to s.37A of the Water Industry Act 1991 ("the 1991 Act") for Essex and Suffolk over the period 2025 to 2050 (referred to as WRMP24).

7 SZC produced a Water Supply Strategy Report in September 2021 which identified the amounts of potable water required during the construction, commissioning and operational phases of Sizewell C. When the station is operating the peak demand will be up to 2,800 m^3/day. This is an entirely separate issue from the cooling water needed in connection with electricity generation, which is obtained directly from the sea.

8 The Panel's Report ("PR") was submitted to the defendant on 25 February 2022. In its assessment of the benefits of the project as part of the overall planning balance the Panel relied upon the contribution of the power station to low-carbon energy production. It would meet the aim of Government policy to achieve delivery of major energy infrastructure including new nuclear electricity generation. They considered that "there is clearly an urgent need for development of the type proposed" and gave "very substantial weight" to the contribution that the scheme would make to meeting that need (PR 7.5.4).

9 Because the project is likely to have a significant effect on "European sites", an "appropriate assessment" was required to be carried out under reg.63(1) of the Conservation of Habitats and Species Regulations 2017 (SI 2017 No. 101 2) ("the Habitats Regulations"). The Panel concluded that an adverse effect on the integrity of the marsh harrier feature of the Minsmere-Walberswick SPA resulting from noise and visual disturbance during the construction phase could not be excluded (PR 6.4.598). Under reg.64 the Panel advised that there were no "alternative solutions" to the proposed development (PR 6.6.12) and the defendant could conclude that the project must be carried out for "imperative reasons of overriding public interest" ("the IROPI test"). The public interest reasons included the continuing growth in the demand for electricity, the retirement of existing generation capacity, the shortfall in generation of 95GW by 2035, the scale of the need for nuclear new build, the UK's commitment to the net zero target for 2050, the continuity and reliability of supply delivered by nuclear energy as part of a diverse energy mix and the urgent need for new nuclear power stations (PR 6.7.4 and

6.7.9). The Panel also identified some additional areas where the information before them was insufficient for the purposes of the Habitats Regulations, but those matters do not give rise to any legal challenge.

10 However, there remained the outstanding issue about a permanent supply of potable water. The power station could not be licensed by the Office for Nuclear Regulation ("ONR") under the Nuclear Installation Act 1965 ("the 1965 Act") and could not be operated without such a supply. The Panel said that because an assured supply of potable water had not been identified, the cumulative environmental effects of the proposed development and that supply could not be assessed (PR 7.5.7) They stated that they could not recommend approval of the application without additional information and assurance on the provision of a permanent water supply. They regarded this "as an important matter of such magnitude that it should not be left unresolved to a future date" (PR 7.5.8). Subject to the permanent water supply issue, the Panel considered that the benefits of the proposal strongly outweighed the adverse impacts. But in view of that unresolved issue as at the close of the Examination, the Panel considered that the case for the grant of development consent had not yet been made out (PR 7.5.9 and 10.3.1)

11 On 18 March 2022 the defendant requested further information from SZC, the Environment Agency ("EA"), Natural England ("NE") and the ONR. The defendant referred to a letter from NWL's Solicitors of 23 February 2022 advising that the company was unable to meet the project's long-term demand for water supply from existing resources and that a number of demand management and supply side options were being appraised. The defendant asked SZC to explain the progress being made to secure a permanent solution so that he could reach a reasoned conclusion on the cumulative environmental effects of different permanent water supply solutions (see DL 4.29).

12 SZC responded to that request on 8 April 2022. In summary, they relied firstly upon the duty of NWL under the 1991 Act to identify through WRMP24 new water resources to meet the demand forecast for its region, including Sizewell C. NWL would carry out an integrated environmental assessment of the Plan, including strategic environmental assessment ("SEA") under The Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004 No.1633) and a Habitats Regulations Assessment ("HRA"). These assessments would be completed before Sizewell could receive the new supply (DL 4.32). SZC submitted that the long-term planning of water supply was subject to the separate requirements of the 1991 Act and could not yet be identified for the power station (and other developments). Indeed, it could change again during the lifetime of the power station as the water undertaker manages its resources in response to *inter alia* changing demand. In accordance with national policy, the decision under the 2008 Act should be taken on the assumption that other statutory regimes will be properly applied (DL 4.33). SZC submitted that there was insufficient information on the permanent solutions that might come forward for any meaningful assessment to be made at that stage.

13 Secondly, SZC said that in the unlikely event of NWL being unable to provide a permanent supply for the power station, SZC could develop a permanent desalination plant. SZC considered that such a plant would be unlikely to generate any new or materially different significant environmental effects (DL 4.30 and 4.66).

14 On 25 April 2022 the defendant invited comments from interested parties on the responses he had received. TASC replied on 23 May 2022. They raised

objections to a permanent desalination plant but offered no comments on the WRMP route. TASC maintained their position that the lack of a guaranteed water supply meant that not all significant environmental effects were being assessed at the development consent stage.

15 The defendant's decision letter was issued on 20 July 2022. The briefing to the Secretary of State for his consideration of SZC's application included the Panel's Report of some 1500 pages, the final HRA for Sizewell C and the draft decision letter, which itself ran to nearly 190 pages.

16 The defendant addressed the potable water supply issue at some length in DL 4.43 to 4.69 (reproduced in the Annex to this judgment). He was satisfied with the tankering arrangements and the temporary desalination plant proposed for the construction period and the assessment of their impacts (DL 4.43). Those conclusions are not challenged in these proceedings.

17 The defendant concluded that the proposed development and NWL's WRMP24 are separate "projects" (DL 4.49). On that basis there was no requirement for an assessment to be made of the permanent water supply solution as a part of the power station project. He then went on to consider the Panel's view that the cumulative impacts of that water supply should nonetheless be considered at the development consent stage for the power station. The defendant concluded firstly, that a long-term water supply for Sizewell C is viable. Secondly, any proposal for the supply of water by NWL will be properly assessed under the WRMP24 process and other relevant regulatory regimes. Thirdly, no further information was required on that subject for the application for development consent to be determined (DL 4.67). Disagreeing with the Panel, the defendant did not consider the present uncertainty over the permanent water supply strategy to be a barrier to granting development consent for the project (DL 4.68).

18 The remainder of this judgment is set out under the following headings:

Heading	**Paragraph Number**
Grounds of challenge	19-23
Statutory framework	24-49
The Planning Act 2008	24-34
Water Industry Act 1991	35-40
The Nuclear Installations Act 1956	41
The Conservation of Habitats and Species Regulations 2017	42-45
The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017	46-49
Ground 1	50-93
A summary of the claimant's submissions	50-53
NWL's position on water supply	54-64
The decision letter	65-68
Discussion	69-93
Ground 2	94-105
Discussion	97-105

Heading	Paragraph Number
Ground 3	106-114
Ground 4	115-132
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Ground 5	133-152
Discussion	137-152
Ground 6	153-177
Discussion	157-177
Ground 7	178-187
Discussion	180-187
Conclusions	188-191
Annex – paragraphs 4.43 – 4.69 of the Secretary of State's decision letter	

The grounds of challenge

19 In summary the claimant seeks to advance the following grounds of challenge:

> **Ground 1:** Contrary to reg.63(1) of the Habitats Regulations the defendant failed to assess the environmental impacts of the "project" (including the necessary permanent potable water supply solution).
> **Ground 2:** In the alternative, contrary to reg.63(1), the defendant failed to assess cumulatively the environmental impacts of the power station together with those of the permanent potable water supply solution.
> **Ground 3:** The defendant failed to supply lawfully adequate reasons for departing from the advice of NE that the permanent water supply should be considered to be a fundamental component of the "operation of the project" and its effects at this stage.
> **Ground 4:** Contrary to reg.64(1) of the Habitats Regulations, the defendant also failed lawfully to consider "alternative solutions" to the power station before concluding that there were imperative reasons of overriding public interest justifying the environmental harm it would cause.
> **Ground 5:** The defendant took into account a legally irrelevant consideration (because it was supported by no evidence), namely the contribution the power station might make to reducing greenhouse gas ("GHG") emissions by 78% from 1990 levels by 2035.
> **Ground 6:** The defendant also acted irrationally in concluding that the power station site would be clear of nuclear material by 2140 and/or failed to supply adequate reasons for rejecting the claimant's case on that point.
> **Ground 7:** The defendant also erred in law in concluding that the power station's operational GHG emissions would not have a significant effect on the UK's ability to meet its climate change obligations.

20 On 19 October 2022 Kerr J refused the claimant permission to apply for judicial review on the papers.

21 On the same day the claimant filed an application to amend its statement of facts and grounds to add a new ground 8. The claimant then renewed its application for permission on grounds 1 to 7.

22 On 14 December 2022 I refused permission for the claimant to add ground 8. Having regard to the parties' submissions, I also ordered that the renewed application for permission should be adjourned to a rolled-up hearing. On 10 January 2023 the claimant withdrew its renewed application for permission to argue ground 8.

23 Projects such as Sizewell C may attract both strong opposition and strong support. It is therefore necessary to reiterate what was said by the Divisional Court in *R. (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government* [2021] P.T.S.R. 553 at [6]:

> "6. It is important to emphasise at the outset what this case is and is not about. Judicial review is the means of ensuring that public bodies act within the limits of their legal powers and in accordance with the relevant procedures and legal principles governing the exercise of their decision-making functions. The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies. The choices may be matters of legitimate public debate, but they are not matters for the court to determine. The court is only concerned with the legal issues raised by the claimant as to whether the defendant has acted unlawfully. The claimant contends that the changes made by the SIs are radical and have been the subject of controversy. But it is not the role of the court to assess the underlying merits of the proposals. Similarly, criticism has been made of the way in which, or the speed with which, these changes were made. Again, these are not matters for the court to determine save and in so far as they involve questions concerning whether or not the appropriate legal procedures for making the changes were followed."

Statutory framework

The Planning Act 2008

24 The 2008 Act provides a dedicated regime for applications to be made for the grant of development consent orders for "nationally significant infrastructure projects" ("NSIPs"). The framework of the Act has been set out in a number of authorities and need not be repeated in detail here. I refer in particular to the decision of the Supreme Court in *R. (Friends of the Earth Ltd) v Secretary of State for Transport* [2021] P.T.S.R. 190 at [19] to [37].

25 One of Parliament's aims was to make the application of development control to NSIPs more efficient and to reduce delays in decision-making. Issues such as the need for different types of infrastructure and the policy of the Government on such development was to be settled in advance by National Policy Statements ("NPSs"). A draft version of a NPS is subject to SEA, HRA, consultation, public involvement and Parliamentary scrutiny before being designated by the relevant Minister by statutory instrument under s.5 of the 2008 Act.

26 Under s.104(2), when determining an application for development consent, the Secretary of State must have regard to any NPS which "has effect" in relation to development of the description to which that application relates (a "relevant NPS"). Under s.104(3) he must determine the application in accordance with that relevant NPS, save to the extent that one or more of the exceptions in s.104(4) to (8) applies. Section 105 applies in relation to an application for an order granting development consent if s.104 does not apply. Section 105(2) provides that in deciding the application the Secretary of State must have regard to *inter alia* any matters which he considers are both important and relevant to his decision. Section 106 enables the Secretary of State to disregard any representation (including evidence) which he considers *inter alia* relates to the merits of policy set out in a NPS. Section 106 applies whether an application is subject to s.104 or to s.105.

27 In the present case there were two relevant NPSs, the Overarching National Policy Statement for Energy (EN-1) and the National Policy Statement for Nuclear Power Generation (EN-6). Both documents were "designated" by the defendant in July 2011.

28 Paragraphs 3.1.1 to 3.1.4 of EN-1 set out the approach for deciding applications for development consent. The UK needs all the types of energy infrastructure covered by the NPS, which include nuclear power, in order to achieve energy security and reduce GHGs dramatically. Applications should be determined on the basis that the need for these types of infrastructure has been demonstrated in the NPS. There is an urgent need for new nuclear power generation which will play an increasingly important role (para 3.5.1). It is Government policy that new nuclear power should be able to contribute as much as possible to the UK's need for new capacity (para. 3.5.2). New nuclear power stations will help to ensure a diverse mix of technology and fuel sources, increasing the resilience of the UK's energy system (para. 3.5.3). New nuclear power forms one of the three key elements of the Government's strategy for moving towards a decarbonised, diverse electricity sector by 2050 (para. 3.5.5). Given the urgent need for low carbon forms of electricity, it is important that new nuclear power stations are constructed and operational as soon as possible "and significantly earlier than 2025." Accordingly, the sites identified in Part 4 of EN-6 were those considered to be capable of deployment by the end of 2025 (paras 3.5.9 and 3.5.10).

29 EN-6 contains similar policy statements (paras. 2.2.1 and 2.2.2). In Part 4 of EN-6 Sizewell was identified as a potentially suitable site for a new nuclear power station along with Hinkley Point and six other sites.

30 On 7 December 2017 the Government issued a Written Ministerial Statement announcing a consultation document on designating in a NPS potentially suitable sites for nuclear power stations expected to be deployed after 2025 and before the end of 2035. The Government stated that EN-6 only has effect for the purposes of s.104 of the 2008 Act in relation to a project expected to be deployed before the end of 2025, that is when a station first begins to feed electricity into the national grid. The statement says that s.105 of the 2008 Act applies to EN-6 in so far as s.104 does not. For projects due to be deployed beyond 2025 the Government continues to give its strong in principle support to proposals for those sites listed in EN-6. Both EN-1 and EN-6 contain information, assessments and statements which continue to be important for projects being deployed after 2025.

31 The Panel considered that the application for Sizewell C should be assessed under s.105 and that EN-1 and EN-6 were important considerations. There have

been no relevant changes in circumstances reducing the weight to be given to those policies. The acceptability of the proposal in terms of planning policy should be assessed primarily against the nuclear-specific policies in the NPSs. The defendant agreed with the Panel (DL 4.4 and 4.5).

32 The defendant also agreed with the Panel's assessment of the need for nuclear power projects, to which he attached substantial weight. Thus, there is an urgent need for new nuclear energy generating infrastructure of the kind proposed at Sizewell. The contribution that the development would make to the delivery of low carbon energy would assist in the decarbonisation of the UK economy in line with the UK's obligations under the Paris Agreement (DL 4.5 to DL 4.11).

33 The main consequence of s.105 of the 2008 Act applying to the determination of SZC's application was that the presumption in s.104(3) did not apply. Thus, the defendant did not have to decide the application in accordance with the NPS unless one or more of the exceptions in s.104(4) to (8) applied. Nevertheless, it is relevant to note that where s.104 is engaged, the balancing exercise described in s.104(7) may not be used to circumvent s.106(1)(b), which has the effect of preventing challenges to the merits of policy in a NPS in an Examination or before the Secretary of State. So, for example, changes of circumstance after the designation of a NPS are to be addressed instead through the process under s.6 for a formal review of a NPS (*R. (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2021] P.T.S.R. 1400 at [105]; *R. (Spurrier) v Secretary of State for Transport* [2020] P.T.S.R. 240 at [106] to [110]).

34 There is no dispute that the NPSs were material considerations for the defendant to take into account under s.105 when determining SZC's application. Section 106 applies to a determination by the Secretary of State under s.105 just as it does to a decision under s.104. Accordingly, the provisions in the 2008 Act preventing challenges to the merits of policy in a NPS were applicable. Although a review of EN-6 under s.6 of the 2008 Act is being carried out, the defendant has decided not to exercise the power in s.11 to suspend either EN-1 or EN-6 pending the completion of that review.

Water Industry Act 1991

35 Section 37(1) lays down a general duty on every water undertaker in the following terms:

> "(1) It shall be the duty of every water undertaker to develop and maintain an efficient and economical system of water supply within its area and to ensure that all such arrangements have been made—
> (a) for providing supplies of water to premises in that area and for making such supplies available to persons who demand them; and
> (b) for maintaining, improving and extending the water undertaker's water mains and other pipes,
>
> as are necessary for securing that the undertaker is and continues to be able to meet its obligations under this Part."

This primary duty is enforceable by the Secretary of State or OFWAT under s.18 of the 1991 Act.

36 Water undertakers are legally obliged to plan to meet demand within their area through a Water Resource Management Plan. Section 37A provides so far as material:

> "(1) It shall be the duty of each water undertaker to prepare, publish and maintain a water resources management plan.
> (2) A water resources management plan is a plan for how the water undertaker will manage and develop water resources so as to be able, and continue to be able, to meet its obligations under this Part.
> (3) A water resources management plan shall address in particular—
> (a) the water undertaker's estimate of the quantities of water required to meet those obligations;
> (b) the measures which the water undertaker intends to take or continue for the purpose set out in subsection (2) above (also taking into account for that purpose the introduction of water into the undertaker's supply system by or on behalf of water supply licensees);
> (c) the likely sequence and timing for implementing those measures; and
> (d) such other matters as the Secretary of State may specify in directions (and see also section 37AA).
> (4) The procedure for preparing and publishing a water resources management plan (including a revised plan) is set out in section 37B below.
> (5) Before each anniversary of the date when its plan (or revised plan) was last published, the water undertaker shall —
> (a) review its plan; and
> (b) send a statement of the conclusions of its review to the Secretary of State.
> (6) The water undertaker shall prepare and publish a revised plan in each of the following cases—
> (a) following conclusion of its annual review, if the review indicated a material change of circumstances;
> (b) if directed to do so by the Secretary of State;
> (c) in any event, not later than the end of the period of five years beginning with the date when the plan (or revised plan) was last published,
> and shall follow the procedure in section 37B below (whether or not the revised plan prepared by the undertaker includes any proposed alterations to the previous plan).
> (7) …."

37 Under s.37AA(8) before preparing its WRMP the water undertaker must consult *inter alia* the EA, OFWAT and the Secretary of State.

38 Section 37B lays down the procedure for the preparation and publication of a WRMP. The undertaker is obliged to publish a draft of the plan so that representations may be made on its proposals to the Secretary of State (s.37B(3)). The WRMP must be sent to *inter alia* OFWAT, the EA, NE and Historic England so that they too may make representations (see reg.2 of The Water Resources Management Plan Regulations 2007 (SI 2007 No.727)). The undertaker may then

comment on those representations (s.37B(4)). The Secretary of State may cause a public inquiry or hearing to be held to consider any issues arising (s.37B(5) and reg.5 of the 2007 Regulations). The Secretary of State has the power to direct that the WRMP must differ from the draft sent to him and the undertaker must then comply with that direction (s.37B(7)). The undertaker must publish the final version of the plan (s.37B(9)).

39 The duties of a water undertaker under s.37A and s.37B are enforceable by the Secretary of State under s.18.

40 Where the owner or occupier of premises in the area of a water undertaker requests a supply of water for non-domestic purposes it is the undertaker's duty, in accordance with terms and conditions determined under s.56, to take steps to provide that supply. Those terms and conditions are to be determined by agreement between the parties or, in default, by OFWAT according to what appears to it to be reasonable. Section 55(3) qualifies the duty under s.55:

> "A water undertaker shall not be required by virtue of this section to provide a new supply to any premises, or to take any steps to enable it to provide such a supply, if the provision of that supply or the taking of those steps would—
> (a) require the undertaker, in order to meet all its existing obligations to supply water for domestic or other purposes, together with its probable future obligations to supply buildings and parts of buildings with water for domestic purposes, to incur unreasonable expenditure in carrying out works; or
> (b) otherwise put at risk the ability of the undertaker to meet any of the existing or probable future obligations mentioned in paragraph (a) above."

Any dispute arising under s.55(3) is determined by OFWAT (s.56(2))

The Nuclear Installations Act 1965

41 The use of a site for the installation and operation of a nuclear reactor is prohibited unless authorised by a nuclear site licence by the "appropriate national authority", the ONR (ss. 1 and 3). When granting a licence the ONR must attach such conditions as it considers necessary or desirable in the interests of safety and may also attach conditions to the licence at any time (s.4(1)). Conditions may be attached providing for *inter alia* the design, construction, operation, siting or modification of any plant or other installation on the site (s.4(3)(b)).

The Conservation of Habitats and Species Regulations 2017

42 The defendant is a "competent authority" for the purposes of the Habitats Regulations. Regulations 63 and 64 apply in relation to the making of an order granting development consent under the 2008 Act (regs. 62(1) and 84(1)).

43 In so far as is material, reg.63 provides:

> "(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—
> (a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and

(b) is not directly connected with or necessary to the management of that site,

must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives.

(2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable it to determine whether an appropriate assessment is required.

(3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specifies.

(4) It must also, if it considers it appropriate, take the opinion of the general public, and if it does so, it must take such steps for that purpose as it considers appropriate.

(5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).

(6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given.

…"

The "appropriate nature conservation" body in this case was NE (reg.5(1)).

44 Regulation 64(1) provides:

"(1) If the competent authority is satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest (which, subject to paragraph (2), may be of a social or economic nature), it may agree to the plan or project notwithstanding a negative assessment of the implications for the European site or the European offshore marine site (as the case may be)."

It is not suggested that reg.64(2) was engaged in this case.

45 In relation to the application of regs.63 and 64 to the development consent procedure, reg.84(2) provides:

"(2) Where those provisions apply, the competent authority may, if it considers that any adverse effects of the plan or project on the integrity of a European site or a European offshore marine site would be avoided if the order granting development consent included requirements under section 120 of the Planning Act 2008 (what may be included in order granting development consent), make an order subject to those requirements."

The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017

46 Regulation 4 of the Infrastructure Planning (Environmental Impact Assessment Regulations 2017 (SI 2017 No. 572) ("the EIA Regulations") prohibits the Secretary of State from making an order granting development consent for "EIA development" under the 2008 Act unless EIA has been carried out (reg.4). Sizewell C constituted EIA development. By reg.5 "EIA" is a process consisting of the preparation of an "environmental statement" ("ES"), the carrying out of consultation under the EIA Regulations and compliance by the defendant with reg.21. Regulation 21 required the defendant when deciding whether to make the development consent order, to examine the environmental information and, taking that into account, to reach a reasoned conclusion on the significant effects of the development on the environment to integrate that conclusion into the decision on whether to grant the order, and to consider whether it was appropriate to impose monitoring measures. Environmental information "means the ES and the representations made by statutory consultees and other persons about the environmental effects of the development" (reg.3(1)).

47 Regulation 5(2) and (3) of the EIA Regulations provides:

> "(2) The EIA must identify, describe and assess in an appropriate manner, in light of each individual case, the direct and indirect significant effects of the proposed development on the following factors—
> (a) population and human health;
> (b) biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC;
> (c) land, soil, water, air and climate;
> (d) material assets, cultural heritage and the landscape;
> (e) the interaction between the factors referred to in sub-paragraphs (a) to (d).
>
> (3) The effects referred to in paragraph (2) on the factors set out in that paragraph must include the operational effects of the proposed development, where the proposed development will have operational effects."

48 Regulation 14 prescribes the contents of an ES. It must include a description of "the likely significant effects of the proposed development on the environment" (reg.14(2)(b)). By reg.14(2)(f) the ES must contain any additional information specified in sched. 4 relevant to "the specific characteristics of the particular development or type of development and to the environmental features likely to be significantly affected". Paragraph 5 of sched. 4 refers to:

> "A description of the likely significant effects of the development on the environment resulting from, *inter alia*—
>
> …
>
> (e) the cumulation of effects with other existing and/or approved projects, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources;
>
> …"

49 Regulation 14(3) provides (so far as is relevant):

"The environmental statement referred to in paragraph (1) must—
(a) …
(b) include the information reasonably required for reaching a reasoned conclusion on the significant effects of the development on the environment, taking into account current knowledge and methods of assessment; and
(c) …"

Ground 1

A summary of the claimant's submissions

50 The claimant submits that in breach of reg.63 of the Habitats Regulations the defendant failed to make an appropriate assessment of the implications of the "project" for European sites because he wrongly excluded from that project the permanent potable water supply solution without which the project is incomplete and cannot function. As at the date of the decision to make the order, that solution would potentially give rise to further impacts on protected areas which have not been assessed and could not be ruled out.

51 The permanent potable water supply was a fundamental component of the operation of the power station according to NE (para. 2.1.2. of representations in October 2021). The defendant agreed with the ONR that in order to satisfy the conditions of any nuclear site licence for the project, SZC will have to put in place a reliable supply of water before any nuclear safety related activities can take place that are dependent on such a supply.

52 The nuclear power station is functionally interdependent with the permanent water supply solution (*R. (Wingfield) v Canterbury City Council* [2020] J.P.L 154 at [64]).

53 The reasons advanced by the defendant as to why the permanent water supply did not form part of the power station project are irrelevant. The claimant relies in particular upon *R. (Ashchurch Parish Council) v Tewksbury BC* [2023] EWCA Civ 101.

NWL's position on water supply

54 SZC's Water Supply Strategy Report (September 2021) summarised NWL's position as at that stage. The local "water resource zone" Blyth WRZ would be unable to supply water to meet the needs of the power station. NWL had identified the possibility of a connection being made to the Northern/Central WRZ which might have sufficient capacity in the River Waveney, subject to completion of NWL's part of the Water Industry National Environment Programme ("WINEP") study led by the EA. This would require the construction of a new transfer main from Barsham Water Treatment Works to Saxmundham, a distance of 28km, and other water network enhancements. The proposed transfer main would connect into the local Blyth distribution network at Saxmundham Water Tower and at other locations. "These local connections have the potential to provide significant legacy benefit by increasing capacity and resilience of the distribution network" (para 3.2.3 and DL 4.53). The main would benefit consumers in the local area and not

simply Sizewell. There were issues affecting the availability of a sustainable supply across the whole of the East of England, which, if confirmed, would require a strategic response by NWL so that it could discharge its duties under the 1991 Act. Accordingly, longer term plans would need to be put in place by NWL "to serve the region and its committed growth."

55 In the decision letter the defendant noted that the transfer main from Barsham to Saxmundham did not form part of SZC's application for development consent (DL 4.59). But SZC had been able to provide information on the environmental impact of that pipeline and concluded that this would not give rise to any new or different significant cumulative impacts (DL 4.65). The defendant agreed (DL 4.51 to 4.52).

56 On 14 September 2021 the Panel held Issue Specific Hearing 11 ("ISH 11"), which covered water supply issues (DL 4.18). SZC provided a written note on issues arising out of that hearing, including the legal framework for WRMPs and the legal obligations of NWL.

57 On 5 October 2021 the Panel held ISH 15. A statement of common ground was agreed between NWL and SZC on 8 October 2021. In that statement NWL said that it would confirm whether it would be able to meet Sizewell C's long-term needs from the Northern/Central WRZ following completion of the WINEP modelling. If it could not, then NWL would have to develop new supply schemes through WRMP24, but that would not meet Sizewell C's long-term needs until the late 2020s at the earliest. The parties agreed 2032 as the backstop date for this long-term supply to be fully available.

58 NWL was represented by counsel at ISH 15 and agreed with SZC's position at the hearing. SZC pointed out that the Water Resources Planning Guidelines state that water undertakers must ensure that their planned property and population forecasts and resulting supply "must not constrain planned growth". Accordingly, even if NWL could not at that stage identify a water supply for Sizewell C, it was obliged to do so. NWL confirmed that that was the case.

59 After the Examination had closed on 14 October 2021, NWL's solicitors wrote to the defendant on 23 February 2022 to provide an update on the permanent supply of potable water. They said that the WINEP modelling showed that NWL would "not be able to supply all forecast household and non-household demand, including the Project's long-term demand, from existing water resources". "NWL will therefore need to identify new water resources to meet the forecast demand". NWL had included SZC's demand figures from 2032 in its WRMP24 demand forecast for the Suffolk supply area.

60 NWL stated that in addition to demand management options (e.g. reduction in leakage from networks and compulsory metering of households), it was appraising options which included:

(i) Imports from Anglian water (subject to exporting water from the Essex WRZ);
(ii) Nitrate removal at Barsham water treatment works to reduce raw sewage outages;
(iii) Effluent re-use and desalination;
(iv) Winter reservoirs post-2035.

The options in the WRMP24, due for submission to Defra by October 2022, would depend on the final WINEP modelling of abstraction in the River Waveney.

61 NWL reiterated its commitment to providing a long-term supply for Sizewell C, although it was unlikely to be available before the late 2020s at the earliest. This was dependent on finalising and funding new supply schemes to meet future demands in Suffolk, including the power station.

62 On 8 April 2022 SZC provided its response to the defendant's request dated 18 March 2022 for further information. The document summarised the submissions and information already supplied and stated that there was no difference between the positions of SZC and NWL. SZC summarised the range of options being considered by NWL, which included water transfer. It emphasised that WRMP24 would be subject to SEA and HRA. NWL had said that after submitting its plan for consultation it would work with SZC to negotiate an agreement under s.55 of the 1991 Act. Paragraphs 2.1.16 and 2.1.17 read as follows:

> "2.1.16 It is because the long-term planning of water supply is the subject of separate statutory provisions and processes that the identification of the source of Sizewell's long-term supply cannot be known at this stage. Indeed, the source may well change during the lifetime of the power station as the undertaker develops and manages its water resources in response to changing demand and other considerations. For the same reasons, and because on the evidence the source of supply is unlikely to be a constraint to the construction and operation of the new power station, the source does not need to be known for the purposes of the DCO.
>
> 2.1.17 NPS EN-1 is clear that that the DCO decision maker should work on the assumption that other regimes and regulatory processes will be properly applied and enforced so that decisions on DCO applications should complement but not seek to duplicate other processes (NPS EN-1 paragraph 4.10.3). That same principle is clear from paragraph 188 of the NPPF, i.e. planning decisions should assume that regimes will operate effectively."

SZC stated that it had put in place plans for a temporary desalination unit which would cover the project's water requirements up to the commissioning of unit 1 of the power station. That would give NWL 10 years to plan for and deliver a permanent water supply.

63 TASC sent to the defendant representations in response by letters dated 8 April 2022 and 23 May 2022. The first made criticisms of the proposal for a temporary desalination plant and said nothing about WRMP24. The second objected to a possible location for a permanent desalination plant and again said nothing about WRMP24. They made a general point to the effect that SZC had failed to assess impacts on receptors in relation to a permanent water supply solution, relying on the views of NE.

64 On 16 June 2022 SZC responded to the defendant's request for further information about any progress made with NWL. They said that NWL had confirmed that draft WRMP24 would make full provision for the long-term demand from Sizewell C and that, subject to the necessary approvals from Defra and OFWAT, it is likely to be possible to deliver the necessary infrastructure. NWL and SZC had agreed to begin negotiations under the 1991 Act in October 2022 for funding the design and delivery of infrastructure specific to Sizewell C, so as to be ready to sign an agreement once NWL's Business Plan had been approved by

OFWAT, most likely in early 2024. SZC said that there was no reason to think that a new water supply scheme for a "critical NSIP" would not be approved in the 2024 Price Review and every reason to expect that NWL, using reasonable endeavours, would be able to deliver the necessary infrastructure for the permanent water supply connection before the end of construction of Sizewell C (see also DL 4.42).

The decision letter

65 This material on NWL's position regarding a permanent water supply was well summarised in the defendant's decision letter at DL 4.12 to 4.42. At DL 4.44 the defendant considered that the options identified by NWL were potentially viable solutions, as was the "fall back" of SZC providing a permanent desalination plant. He concluded that if development consent were to be granted for the power station, there was a "reasonable level of certainty" that a permanent solution could be found before the commissioning of the first reactor. Plainly in arriving at that conclusion the defendant would have taken into account his further conclusions about the need for environmental impacts to be assessed and considered. The defendant's confidence that a permanent solution would be provided before operation of the power station was a matter for his judgment.

66 The defendant also noted that if, and only if, the WRMP process fails to provide a solution, SZC will have to consider providing its own permanent desalination plant (DL 4.60). He noted the objections which had been raised to this possible option and said that a detailed assessment of the impacts would be required if it were to be pursued. The defendant had not asked for an assessment at this stage because (a) this option did not form part of the proposed development and (b) SZC's position was that it was unlikely to be required (DL 4.61).

67 The defendant dealt with environmental assessment in relation to a mains link to Barsham water treatment works, the WRMP process and the possible fallback of a permanent desalination scheme between DL 4.43 to DL 4.69 in some detail. That section needs to be read as a whole.

68 Part 6 of Sched.19 to the Order contains provisions for the protection of NWL. Paragraph 70 states that subject to either condition 1 or condition 2 being satisfied, and subject to the terms of any agreement made under s.55 or determination made by OFWAT under s.56 of the 1991 Act, NWL will use its reasonable endeavours to supply Sizewell C with the quantities of water required for its operational phase as soon as reasonably practicable. Condition 1 is that the EA confirms the new annual licensed quantities which may be abstracted from the River Waveney and NWL confirms to SZC that there is a sufficient resource in the Northern/Central WRZ to meet forecast demand from its existing and future customers, including demand for Sizewell C (paras.71 to 72). Condition 2 is satisfied if there are new supply schemes in WRMP24, the Secretary of State for Environment, Food and Rural Affairs approves the publication of the final version of WRMP24 and OFWAT approves "the required supply schemes" from the approved WRMP24 in its Final Determination for the 2024 Price Review (paras. 73 to 75).

Discussion

69 Neither the Habitats Regulations nor the EIA Regulations define a "project". It is common ground in this case that principles in the case law on the EIA Regulations

are applicable when considering the scope of a project under the Habitats Regulations.

70 The question of what is the project in any particular case is a matter of judgment for the decision-maker, here the Secretary of State. That judgment may only be challenged in this court on *Wednesbury* principles (*Bowen-West v Secretary of State for Communities and Local Government* [2012] Env. L.R. 22 at [39] to [42]; *Smyth v Secretary of State for Communities and Local Government* [2015] P.T.S.R. 1417; *Wingfield* at [63] and *Ashchurch* at [81], [83], [100] and [105].) In the present case the issue is whether the defendant took into account a consideration which was legally irrelevant and, if not, whether his judgment was otherwise irrational. The threshold for irrationality in the making of such a judgment is a difficult obstacle to surmount (see e.g. *Newsmith Stainless Ltd v Secretary of State for the Environment, Transport and the Regions* [2017] P.T.S.R. 1126).

71 The courts have been astute to detect "salami-slicing", that is the device of splitting a project into smaller components that fall below the threshold for "EIA development" so as to avoid the requirement to carry out EIA altogether (*R. v Swale BC Ex p. RSPB* [1991] 1 P.L.R. 6 at [16]; *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] Env. L.R 18 at [69]).

72 In *R. (Larkfleet Ltd) v South Kesteven DC* [2016] Env. L.R. 4 stated at [36] that it is clear from the legislation that the mere fact that two sets of proposed works have a cumulative effect on the environment does not make them a single project. Instead, they may constitute two projects but with cumulative effects which need to be assessed. The court went on to discuss a second type of salami-slicing ([37]-[38]). It acknowledged that the scrutiny of cumulative effects between two projects may involve less information than if the two sets of works are treated together as one project. Accordingly, a planning authority should be astute to ensure that a developer has not sliced up what is in reality one project in order to try to make it easier to obtain planning permission for the first part of the project and thereby gain a foot in the door in relation to the remainder. But the Directives and jurisprudence of the European Court of Justice recognise that it is legitimate for different development proposals to be brought forward at different times, even though they may have a degree of interaction, if they are different "projects". The Directives apply in such a way as to ensure appropriate scrutiny to protect the environment, whilst avoiding undue delay in the operation of the planning control system. Undue delay would be likely if all the environmental effects of every related set of works had to be definitively examined before any of those works could be allowed to proceed. Where two or more linked sets of works are in contemplation, which are properly to be regarded as distinct "projects", the objective of environmental protection is sufficiently secured under the Directives by consideration of their cumulative effects, so far as that is reasonably possible, when permission for the first project is sought, combined with the requirement for subsequent scrutiny under the Directives for the second and each subsequent project.

73 In *Wingfield* at [64] Lang J indicated some factors which *may* be taken into account in determining the extent of a project:

> "64. Relevant factors may include:

i) Common ownership – where two sites are owned or promoted by the same person, this may indicate that they constitute a single project (*Larkfleet* at [60])
ii) Simultaneous determinations – where two applications are considered and determined by the same committee on the same day and subject to reports which cross refer to one another, this may indicate that they constitute a single project (*Burridge* at [41] and [79]);
iii) Functional interdependence – where one part of a development could not function without another, this may indicate that they constitute a single project (*Burridge* at [32], [42] and [78]);
iv) Stand-alone projects – where a development is justified on its own merits and would be pursued independently of another development, this may indicate that it constitutes a single individual project that is not an integral part of a more substantial scheme (*Bowen-West* at [24 – 25])"

The judge made it clear that these factors were not exhaustive. The weight to be given to them will depend upon the circumstances of each case and is a matter for the decision maker.

74 Interdependence would normally mean that *each* part of the development is dependent on the other, as, for example, in *Burridge v Breckland DC* [2013] J.P.L. 1308 at [32] and [42].

75 At DL 4.46 the defendant referred to para 5.15.6 of EN-1 which requires the decision-maker to take into account the interaction of a proposed project with WRMPs (DL 4.46). He had regard to SZC's analysis of the obligations of NWL under the 1991 Act to prepare WRMP24 and to supply water (e.g. DL 4.47, 4.49 to 4.50, 4.55 to 4.60, 4.64 to 4.65 and 4.67). He accepted the key components of that analysis.

76 The defendant's conclusions included the following:

(i) SZC's preferred solution was a link to Barsham *provided by NWL*. SZC's cumulative assessment stated that the pipeline would follow existing roads and boundaries wherever possible. Cut and fill would progress quickly and would impact upon a single receptor for a small number of days at most. Given the footprint and locations of the works ecological impacts "would be minimal and avoidable or mitigable". There would be no significant cumulative effects. The defendant agreed. (DL 4.50 to DL 4.52 and 4.58);
(ii) If NWL's solution for the permanent supply of potable water should require a change to that pipeline connection, that would be subject to its own environmental assessment, including HRA. This would be for NWL to assess (DL 4.56 and 4.58);
(iii) WRMP24 will need to identify new water resources to meet long-term demand in Suffolk, both household and non-household demand. Those new supplies are not limited to meeting the demand for Sizewell C (DL 4.55);
(iv) Sizewell C and the WRMP24 process for identifying new water sources are separate or standalone projects, given that NWL has a duty to undertake WRMP24 regardless of whether Sizewell C proceeds. These two projects have separate "ownership" and "are subject to distinct and asynchronous determination processes". The WRMP process is carried out by NWL and is not something that SZC can dictate (DL 4.49 and 4.60);

(v) Assessment of potential environmental impacts associated with the permanent water supply to be provided by NWL could not be carried out because of the stage reached in the WRMP24 process and the fact that the preferred solution was unknown (DL 4.50 and 4.59);
(vi) Any pipeline or connection needed for the solution adopted by NWL will be the subject of a separate application by that company. That infrastructure does not form part of the current application (DL 4.57 and 4.59);
(vii) The defendant was satisfied with the control that will be exercised by the ONR through the conditions of the nuclear site licence, which will require a reliable supply of potable water to be in place before any nuclear safety-related activities can take place. The cumulative or in-combination environmental effects will be assessed under NWL's WRMP24 process, including a HRA, before operation can commence (DL 4.64);
(viii) The provision of a permanent water supply is not an integral part of the Sizewell C proposal (DL 4.65).

77 Plainly this is not a case where the promoter of a project has sliced up the development in order to make it easier to obtain consent for the first part of a larger project. Sizewell C was initially promoted on the basis that NWL would meet its obligations under the 1991 Act by providing a permanent water supply at Barsham and a transfer main to Saxmundham. Accordingly, the provision of that infrastructure by NWL was not included in SZC's application for development consent. The present uncertainty about what form the long term supply will take only emerged subsequently. In the circumstances, it is inappropriate for the claimant to say that SZC has caused uncertainty by "keeping its options open". SZC has had to react to the changing circumstances of the WINEP modelling and NWL's evolving response to that assessment. SZC has made it plain that it wishes to rely upon the solution that NWL says it will be able to deliver through the WRMP24 process and not upon permanent desalination on-site. On the other hand the defendant's decision recognises that in the unlikely event of NWL being unable to provide a solution, SZC would seek to provide a desalination plant (DL 4.66).

78 In summary, the claimant submits that the defendant took into account the following irrelevant considerations:

(i) The current uncertainty as to the final source of the water supply was irrelevant. The lack of definition of that supply cannot "of itself" provide the answer to the question whether that supply forms part of the project;
(ii) The infrastructure for the potable water supply did not form part of the application for development consent;
(iii) The potable water supply would be subject to a separate and asynchronous decision process;
(iv) Separate ownership.

79 The claimant seeks to base these criticisms upon *Ashchurch*. That case concerned the grant of planning permission for a bridge over a railway line. This is sometimes referred to as "the bridge to nowhere", because when viewed in isolation it served no purpose. It did not connect to any existing road or development. It was a bridge in the middle of a field. It would only begin to be used if and when housebuilders obtained planning permission for and developed a link road and housing site. The claim for judicial review had to succeed in any event because the officer's report

wrongly directed the defendant's planning committee that they could take into account the benefits which would arise from the housing development anticipated but not any of the harm that that development would cause. The benefits of the additional development could not be realised without the concomitant harms. So the decision involved a failure to take into account an obviously material consideration and was irrational (grounds 1 and 2 at [32] to [69]).

80 The claimant relies upon the later part of the judgment of Andrews LJ which dealt with ground 3 at [70] to [104] and the defendant's decision that the bridge should be treated as a single project for the purposes of the EIA Directive. She held that the identification of a project is a fact-specific matter. Consequently, other cases, decided on different facts, are only relevant to the limited extent that they indicate the type of factors which might assist in determining whether a proposed development forms an integral part of a wider project.

81 Andrews LJ referred to the principle under the EIA Regulations that where EIA is required, it should generally be carried out as early as possible. As Lang J said in her second judgment in *Wingfield* [2019] EWHC 1974 (Admin) at [72]-[77] there is no objective in the Habitats Directive (92/43/EEC) requiring appropriate assessment at the earliest possible stage. Instead, the Directive focuses on the end result of avoiding damage to a European site. In the case of a "multi-stage consent" (or a multi-consent) it may be a subsequent rather than the first consent which authorises the implementation of the project (see also *No Adastral New Town Ltd v Suffolk Coastal DC* [2015] Env. L.R. 28 and *R. (Swire) v Canterbury City Council* [2022] J.P.L. 1026 at [94] to [95]).

82 The central flaw in the Council's decision in *Ashchurch* was its failure even to consider whether the bridge formed an integral part of a wider project for the purposes of the EIA Regulations ([82] to [84] and [96]). The court rejected the notion that in a case where the specific development for which permission is sought clearly forms an integral part of an envisaged wider future scheme, without which that development would never take place, there *can only* be a single project if the wider scheme has reached the stage where it could be the subject of an application for planning permission ([88] and see also [101]).

83 The Court then stated that the mere "difficulty" of carrying out any assessment of the impacts of a larger future project which is lacking in detail, is irrelevant to the question whether the application under consideration forms an integral part of that larger project ([90]). *Ashchurch* was a case where it was possible to carry out some assessment of the future scheme. It was not a case where that was impossible ([91] to [92]).

84 At [102] and [104] Andrews LJ held that the fact that the EIA Regulations would require EIA to be carried out on the future wider scheme could not be conclusive on the issue of whether the earlier phase, the bridge, should be treated as a standalone project. But the Court did not suggest that this factor was altogether irrelevant and therefore must be disregarded. For example, it could be relevant to an assessment of whether the procedure being followed would have the effect of avoiding the requirements of the legislation, as in a salami-slicing case.

85 In the present case, unlike *Ashchurch*, the defendant considered whether the provision of a permanent water supply formed an integral part of the Sizewell C development and concluded that it did not. In reaching that conclusion the defendant did not take into account any irrelevant considerations.

86 The defendant did not rely upon the mere "difficulty" of carrying out an assessment of the water supply solution or the mere lack of detail on any option. Rather, WRMP24 had yet to be published in draft. NWL's solution to the water supply issue for Suffolk was unknown and would remain so until that process was completed. There was no option to assess. In any event, the defendant did not treat this factor as conclusive. Instead, it was one of a number of matters to which he had regard in the exercise of his judgment.

87 The defendant was entitled to take into account the fact that the permanent water supply had not formed part of the application for development consent and would be dealt with under a subsequent, separate process and subject to an integrated environmental assessment. He did not treat those matters as conclusive. His approach was lawful in accordance with *Wingfield* at [64] and *Ashchurch*.

88 I understand that "separate ownership" in DL 4.49, read in context, to be a reference to the separate responsibilities of SZC, for Sizewell C, and NWL, for WRMP24 and the supply of water. As the defendant noted, NWL is under a statutory duty to prepare and publish WRMP24 and SZC has no control over that process. Undoubtedly this was a relevant factor which the defendant was entitled to take into account.

89 The claimant alleges that there is functional interdependence between the Sizewell C scheme and the provision of a permanent water supply. This argument relies upon the assertion that "the need for the permanent potable water supply arose from the power station development." The implication would appear to be that there would be no such need in the absence of that development and so there is interdependence. This was not an argument which appears to have been pursued before the Panel during the Examination or subsequently before the Secretary of State. The claimant has not identified any evidence to support its assertion. Rather NWL stated that they would need to make additional water supplies available to meet the forecast demand and not just the demand from Sizewell C. The defendant had regard to NWL's obligation to undertake WRMP24 so as to be able to meet its duties under the 1991 Act. Beyond that the defendant took into account the requirement for the permanent water supply to be available before Sizewell C can operate under a nuclear site licence.

90 I have already summarised the considerations to which the defendant had regard in deciding that the provision by NWL of additional water sources for Suffolk is not part of the Sizewell C project. There is no basis upon which the defendant's evaluative judgment can be said to be irrational.

91 The claimant's argument has much wider implications. The need for the supply of utilities such as water is common to many, if not all, forms of development. A utility company's need to make additional provision so as to be able to supply existing and new customers in the future does not mean that that provision (or its method of delivery) is to be treated as forming part of each new development which will depend upon that supply. The consequence would be that where a new supply has yet to be identified by the relevant utility company, decisions on those development projects would have to be delayed until the company is able to define and decide upon a proposal. That approach would lead to sclerosis in the planning system which it is the objective of the legislation and case law to avoid (*R. (Forest of Dean (Friends of the Earth)) v Forest of Dean DC* [2015] P.T.S.R. 1460 at [18]).

92 Lastly, in his reply Mr. Wolfe chose to focus more on the complaint that a permanent desalination plant was not treated as forming part of the Sizewell C

project. He submits that SZC could have put forward a design for assessment. He claims that the absence of that information and an assessment was unlawful by virtue of *Ashchurch* at [90] and [92]. I disagree. In *Ashchurch* the bridge was only going to be constructed in order to serve the wider development in the Masterplan area. As Andrews LJ said, although it was a matter for the local authority to address on a redetermination, it was difficult to see how the bridge could not be treated as an integral part of the wider project ([100]). The unassessed wider project was a real proposal. But there is no obligation to assess a hypothetical scheme (*Preston New Road* at [75]). Here SZC considered that a permanent desalination plant was unlikely to be necessary and was not currently proposing that option. The defendant's decision that such a desalination plant was not an integral part of the Sizewell C project cannot be faulted.

93 For all these reasons ground 1 must be rejected.

Ground 2

94 On the assumption that the defendant was entitled to treat Sizewell C and the provision of a permanent water supply as separate projects, the claimant argues that the defendant acted in breach of reg.63 of the Habitats Regulations by failing to assess the cumulative impacts of both. The defendant relies upon the Panel's conclusion that even if the water supply did not form part of the project, nevertheless those cumulative effects should be assessed at the development consent stage (PR 5.11.284 to 5.11.287 and 7.5.7).

95 The claimant accepts that the adequacy of the information in an assessment is a matter for the judgment of the competent authority, the defendant, subject to a legal challenge on *Wednesbury* principles, whether under the Habitats Regulations or the EIA Regulations (*R. (Champion) v North Norfolk DC* [2015] 1 W.L.R. 3710 at [41]; *Wingfield* at [97]; *R. (Friends of the Earth Ltd) v Secretary of State for Transport* [2021] P.T.S.R. 190 at [142] to [148]). The claimant submits that the defendant exercised his judgment irrationally and in breach of the principle stated in *Ashchurch* at [90] and [92] (see above). It is also suggested that the approach taken by the defendant is inconsistent with the decision in *R. v Rochdale MBC Ex p. Milne* [2001] Env. L.R. 22 (referred to by Andrews LJ in Ashchurch at [76] and [88]).

96 In this case the grant of development consent depended upon the IROPI test being satisfied. Mr. Wolfe submits that if assessment of the cumulative effects of power station and water supply are left to a subsequent decision, the IROPI test cannot be applied properly at that stage. By that he means that it cannot be applied in the same way as if the cumulative impacts were being assessed before the decision on whether to grant the development consent order was made. He suggests that the prior grant of the Order under the 2008 Act will make it easier for the public interest in Sizewell C going ahead to override cumulative harm or, indeed, that that would "automatically" be the outcome.

Discussion

97 It is well-established that a decision-maker may rationally reach the conclusion that the consideration of cumulative impacts from a subsequent development which is inchoate may be deferred to a later consent stage (e.g. *R. (Littlewood) v Bassetlaw DC* [2009] Env. L.R. 21; *Larkfleet* at [37]-[38]; Forest of Dean at [13] to [18]; *R.*

(Khan) v Sutton LBC [2014] EWHC 3663 (Admin) at [121] – [134] approved in Preston New Road at [67] and *R. (Finch) v Surrey CC* [2022] P.T.S.R. 958 at [15 (4)]).

98 In the present case the defendant referred to the possibility that new sources of water might enable a connection to be made by NWL providing a tunnel to Barsham. He accepted the assessment that that option would not give rise to additional cumulative impacts (e.g. DL 4.52). Beyond that, he decided that the new sources of water and any consequential need for a different connection were simply unknown and could not be assessed at the development consent stage. He agreed that they would instead be appropriately assessed under the WRMP process. Those judgments cannot be faulted as irrational.

99 Ground 2 is predicated upon ground 1 having failed. In other words the provision of the permanent water supply does not form part of the Sizewell C project for the purposes of the decision under challenge. On that basis the claimant's suggestion that the insufficiency of detail could have been addressed by the defendant assessing a "*Rochdale* envelope" is misconceived. *Rochdale* was concerned with the grant of outline planning permission for a project which *included* uncertain components. In any event, the claimant did not develop this submission so as to show how an "envelope" could even be defined (and then assessed) covering possible options for additional water supplies and the connections that could be necessary, all of which would be outside the development site at Sizewell C. The suggestion was wholly unrealistic.

100 The defendant's conclusion that an assessment of the permanent water supply could not be carried out does not conflict with *Ashchurch* at [90] and [92]. Those paragraphs were concerned with whether subsequent works formed part of the current project (i.e. ground 1 of this challenge). They do not detract from the principles in the case law referred to in [97] above.

101 Mr. Wolfe made a faint attempt to rely upon the decision in *Pearce v Secretary of State for Business, Energy and Industrial Strategy* [2022] Env. L.R. 4 as requiring cumulative impacts of the permanent water supply to be assessed in the decision on whether to make the Order. The decision in Pearce turned on its own special facts (see e.g. [118] to [119]). The circumstances of the present case are completely different. Furthermore, in Pearce the promoter had been able to produce a cumulative impact assessment and the reasons given by the decision-maker for deferring consideration of that material were legally flawed. Here options for providing a permanent water supply were unknown at the time of the decision.

102 I do not think there is any merit in Mr. Wolfe's IROPI point. If a future assessment should show that the water supply option chosen would adversely affect the integrity of a European site, whether by itself or in combination with Sizewell C, IROPI would have to be applied according to the language of the Habitats Regulations and the relevant principles in the case law. It would not be appropriate to take into account the overall *benefits* of Sizewell C without also taking into account the overall *harms* of that project. The court has not been shown any authority in which deferral of the consideration of the cumulative impacts to a subsequent consent stage has caused the application of the IROPI test to be distorted or biased or watered down in some way. I note that in *Forest of Dean* Sales LJ (as he then was) stated at [19] that the earlier grants of planning permission for the original project in that case created no presumption and added no force to the contention that planning permission should subsequently be granted for the spine

road that connected the two sites. The earlier permissions had not been granted on the footing that the development of those two sites was dependent upon the spine road.

103 True enough, in this case Sizewell C cannot be operated without a permanent water supply. But although the development consent has been granted in the knowledge that the power station is dependent on the future provision of a water supply, (a) it is not dependent on the provision of any particular form of supply and that is currently unknown and (b) the cumulative impact will have to be assessed properly in accordance with the legislation without any bias or distortion. The benefits of Sizewell C could not be taken into account in that future IROPI assessment without also taking into account the disbenefits. I understood Mr. Strachan KC for the defendant and Mr. Phillpot KC for SZC to adopt this analysis. They both submitted that the defendant's decision has not allowed SZC to have a "foot in the door."

104 I also note that, according to the evidence before the defendant, NWL and SZC expect a s.55 agreement to be signed in early 2024 following the WRMP process in which the integrated environment assessment will have been carried out. It is also expected that the water supply scheme will be approved in the 2024 Price Review. Paragraph 75 of sched.19 to the Order under the 2008 Act has been drafted on that basis (see [68] above).

105 Accordingly, ground 2 must be rejected.

Ground 3

106 NE is the "nature conservation body" for the purposes of the Habitats Regulations. In this case it performed the role of providing specialist advice within its remit to the defendant as the competent authority. There is no dispute that the defendant is entitled to disagree with NE. But the claimant complains that when the defendant did so in the present case he failed to comply with the line of authority which indicates that the decision-maker is expected to give significant weight to the views of an expert body such as NE and to give "cogent reasons" for disagreeing with their views (see e.g. *R. (Akester) v Department for Environment, Food and Rural Affairs* [2010] Env. L.R. 33 at [112] and *R. (Wyatt) v Fareham BC* [2023] Env. L.R. 14 at [9 (4)]).

107 But it is important to note two additional points. First, this issue arises in the context of s.116 of the 2008 Act by which the defendant is obliged to prepare a statement of his reasons for deciding to make an order granting development consent. Even when disagreeing with the expert views of a body such a NE, the relevant standard to apply in assessing the adequacy of the reasons given is that set out in *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 W.L.R. 153 and *South Bucks District Council v Porter (No.2)* [2004] 1 W.L.R. 257 (see Sales LJ in *Mordue v Secretary of State for Communities and Local Government* [2016] 1 W.L.R. 2682 at [26] and Sir Keith Lindblom SPT in *East Quayside 12 LLP v Newcastle upon Tyne City Council* [2023] EWCA Civ 359 at [51], drawing also a parallel with *R. (Mott) v Environment Agency* [2016] 1 W.L.R. 4338 at [69] to [77]).

108 Second, the basis for the deference given to the decision of an expert body such as NE in proceedings to review their own decisions was explained more fully by Beatson LJ in Mott at [69] to [77]. He also stated at [64] that the court may insist

upon being provided with a sufficiently clear and full explanation of the reasons for that decision as a *quid pro quo* for that deference. In my judgement similar considerations apply where a decision-maker is expected to show deference to the advice of an expert body. The level of reasoning which the law expects of a decision-maker disagreeing with the view of an expert body may depend upon whether that view is an unreasoned statement or assertion, or a conclusion which is supported by an explanation and/or evidence. It may also depend upon the nature of the subject-matter. Some advice may not call for reasoning and/or supporting evidence, other advice may do.

109 The views of NE shown to the court were sent in a submission dated 12 October 2021. They provided comments to the defendant on a Report by the Panel on the implications of the proposed development for European protected sites and species which had been submitted to the defendant. The claimant has not relied upon any other document from NE. In paragraphs 2.1.1. and 2.1.2. NE said:

> "2.1.1. It is Natural England's advice that pushing any Habitats Regulations Assessment (HRA) conclusions for integral and inextricably linked elements of the project down the line into other consenting regimes beyond the Development Consent Order (DCO) raises the likelihood that cumulative and 'in combination' impacts in these regards may get missed/ downplayed, and we wish to draw the Examining Authority's attention to this point.
>
> 2.1.2. For example, the current Water Supply Strategy proposes a mains pipeline to the site from the central/ northern Suffolk Water Resource Zone (WRZ). The environmental impacts of this pipeline have not yet been fully assessed through the HRA process. Neither have the interim solutions of a desalination plant as proposed through Change 19 [PD-050] (not considered within the RIES) and tankered water supply. Currently, the Applicant's position is 'no likely significant effects (LSE)' to any European sites from water use as stated in [REP7 -073] and summarised in paragraph 3.2.55 of the REIS. Clearly, such works could lead to a LSE on those European sites already scoped into the HRA or European sites further afield through the pipeline works, abstraction of this magnitude and other associated works to facilitate it. The water supply is a fundamental component of the eventual operation of the project, and the potential impacts of its construction should be clearly assessed in accordance with sections 4.2 and 5.15 of National Policy Statement EN-1 (NPS EN-1), sections 3.7 and 3.9 of NPS EN-6 and paragraph 3.3.9 of the Planning Inspectorate's Scoping Opinion for the Proposed Sizewell C Nuclear Development (July 2019) [APP-169]…"

110 In essence NE said no more than:

(i) The water supply is a fundamental component of the eventual operation of the project and potential impacts of its construction should be assessed with Sizewell C;
(ii) Pushing any HRA for integral and inextricably linked elements of the project down the line into other consenting regimes beyond the development consent

order raises the likelihood that cumulative and in combination impacts may be missed or downplayed.

In relation to NE's comments on the pipeline connection to Barsham and the temporary desalination plant, the defendant has explained why he is satisfied with the assessment of the impacts from those elements. There is no legal challenge to that part of his decision.

111 The two bare points set out in [110] above were not so much advice as assertions without any reasoning or supporting evidence. There was no explanation as to why the water supply should be considered part of, or integral to, the project, nor any application of considerations of the kind indicated in *Wingfield*. Why should relevant impacts be altogether missed in a subsequent assessment, any more than if assessed as part of the power station project? The same statutory regime will be applicable and NE will scrutinise the environmental information provided by NWL. Why should those impacts be downplayed without any consultee noticing, or downplayed by the decision-maker? It should not be forgotten that the water supply solution is to address a regional issue. On any view, it will be a project in its own right and the normal standards of assessment will apply to the proposal as a whole, including any connection to Saxmundham. Why should any cumulative impact of NWL's proposal not take into account cumulative impacts with Sizewell C? None of these points were addressed by NE to justify their apparent concerns.

112 I also note that, notwithstanding the national importance of the proposed project, SZC found it necessary to complain about the "unfairness" of NE having failed to attend Examination hearings to which they had been specifically invited, so that their views could be clarified and tested, in the same way as those of experts relied upon by SZC and other participants (see para. 1.3.1 of SZC's written summary of oral submissions made at ISH 15 held on 5 October 2021).

113 NE's views were summarised by the Panel in PR 5.11.284. No complaint is made about the adequacy of that summary, nor could there be. To the limited extent that NE expressed any views on this subject, they were before the defendant.

114 In my judgment the defendant did adequately explain in DL 4.65 why he disagreed with the bare assertions of NE, all the more so when that paragraph is read properly in the context of the other parts of the decision letter dealing with the same subject. The present case illustrates the inappropriateness of relying upon statements in the *Akester* line of authority as a mantra, rather than looking properly at the materials in any given case in context. Ground 3 should never have been raised by the claimant.

Ground 4

115 The defendant concluded that the project would have an adverse effect upon the integrity of the breeding marsh harrier feature of the Minsmere – Walberswick SPA arising from noise and disturbance during the construction phase (DL 5.20). Accordingly, under reg.64(1) of the Habitats Regulations the defendant had to be satisfied that there were no "alternative solutions" to the project. At DL 5.33 he did so conclude, in agreement with the Panel.

116 The claimant made representations in the Examination that there were alternative means of achieving the objective of generating electricity compatibly with the Climate Change Act 2008 which do not involve the use of nuclear power. It submits that the defendant failed to comply with the requirement in reg.64(1) to consider

alternative solutions by failing to consider how that objective could be met without relying upon new nuclear power. In so far as nuclear power is considered to have particular benefits, those matters ought to have been assessed as part of a wider consideration of alternative methods of generating electricity and their respective benefits. The defendant acted unlawfully by basing his conclusion on too narrow a policy objective, namely to provide additional nuclear power. However, if the defendant was legally entitled to adopt that approach, the claimant does not contend that he failed to assess "alternative solutions" lawfully.

117 The claimant submits that the decision-maker must consider alternative solutions which fulfil the "core policy objectives" or the "central policy objective", these being legal terms of art. They are not simply factual descriptions of a decision-maker's policy position. They fall to be identified not by the "mere election of the decision-maker", but with reference to the purpose of reg.64(1) and case law. The central policy objective should not be drawn so narrowly as to curtail the ability of the Habitats Regulations to inhibit unnecessarily harmful development in favour of less harmful alternatives. Furthermore, the phrase "alternative solutions" means that the "central policy objective" must comprise, or closely relate to, a problem "capable of solutions".

118 The claimant submits that the policy goal of providing nuclear power is "artificially limiting", to the extent that it "cannot logically be characterised as 'central'". The claimant says that, by contrast, the provision of comparatively clean energy does qualify as a central policy objective because that goes to the heart of what is sought to be achieved. Relying on its submission that the "solutions" referred to in the Habitats Regulations correspond to problems, the claimant asserts that a lack of nuclear energy is not a problem. Instead, a lack of clean energy is a problem capable of a range of alternative solutions, and so it is the provision of clean energy which qualifies as a central policy objective.

119 Lastly, the claimant suggests that the defendant erred in law by treating NPS EN-6 as determinative in deciding what were the appropriate policy objectives and alternative solutions.

Discussion

120 That last point can be rejected immediately. There is no basis for suggesting that the defendant in his decision treated the NPSs, or either of them, as conclusive on the issue of what could be considered to be relevant objectives or alternative solutions. Plainly, they were treated as "important" considerations (see e.g. DL 4.9), about which no complaint could possibly be made.

121 NPS EN-1 and EN-6 treat the need for nuclear power generation as having been demonstrated as part of the national strategy for achieving the net zero target in 2050 and ensuring diversity of supply and energy security. The Government's Energy White Paper, "Powering our Net Zero Future" (published in December 2020), announced a review of the suite of the energy NPSs but confirmed that they would not be suspended under s.11 of the 2008 Act in the meantime (DL 4.9). The White Paper includes as a "key commitment" the aim to bring at least one large-scale nuclear project to the point of Final Investment Decision by the end of the current Parliament (pp.16 and 48). The British Energy Security Supply Strategy (April 2022) states that the Government's aim is that by 2050 up to 25% of the electricity consumed in Great Britain will be generated by nuclear power, a

deployment of up to 24GW (see p.197 of the defendant's HRA and DL 4.656 and 8.10).

122 The Panel accepted SZC's case that there is an urgent need for new nuclear energy generating infrastructure of the kind proposed for Sizewell C, the proposed development responds directly to that need and would make a significant contribution to low-carbon electricity generation. Furthermore, that need case accords with Government policy (see e.g. PR 5.19.1 to 5.19.18, 5.19.90 to 5.19.110, 5.19.129 to 5.19.138, 5.19.261 to 5.19.266, 6.6.4 to 6.6.5, 6.7.4, 6.7.8, 7.2.1. to 7.2.4, 7.5.4, 7.5.9 and 10.2.19).

123 The defendant's conclusions on need in the HRA and in his decision letter were based upon the Panel's assessment (see e.g. HRA at pp.189 to 190 and 196 to 201 and DL 4.1 to 4.11, 4.242, 7.1 to 7.4 and 7.13 to 7.15). The need for new nuclear power was seen as an integral part of the strategy for tackling climate change by achieving the net zero target.

124 In the same vein, the Panel rejected submissions by the claimant and others that alternative technologies should be considered and that the approach taken by SZC was too narrow (see e.g. PR 5.4.106 to 5.4.108 and 6.6). The defendant accepted those conclusions (DL 4.133 and 4.148 to 4.152 and 4.155).

125 The claimant seeks to base its approach to the identification of objectives and alternative solutions upon the judgments of the Divisional Court and the Court of Appeal in the legal challenge to the "Airports National Policy Statement" designated in June 2018 (*Spurrier* and *R. (Plan B Earth) v Secretary of State for Transport* [2020] P.T.S.R. 1446).[1] But they lend no support to the claimant's case.

126 The Court of Appeal held that the standard of review in relation to both art.6(3) and art.6(4) of the Habitats Directive, and therefore reg.64 of the Habitats Regulations, is the *Wednesbury* standard ([77] to [79]). Subject to those principles, it is a matter for the decision-maker to determine the relevant objectives which need to be met and which alternative solutions would or would not meet that need.

127 At [92] and [93] the Court of Appeal addressed the problem of when objectives are defined in an unlawfully narrow manner. It endorsed the approach of the Divisional Court that an option that does not meet the core objectives of a policy statement is not an alternative solution for the purposes of reg.64(1). Such objectives must be both "genuine and critical", in the sense that a development which failed to meet those objectives would have no policy support. But it would clearly be insufficient to exclude an option simply because, in the decision-maker's view, it would meet those policy objectives to a lesser degree than the proposed or preferred option. The extent to which an option meets those policy objectives is different from an option failing to meet them at all. The judgments of the Divisional Court and the Court of Appeal provide no support for any of the additional glosses which the claimant now seeks to place on reg.64.

128 In *Plan B Earth* the objectives of the NPS under challenge were to increase airport capacity in the south east *and* to maintain the international "hub status" of the UK. The NPS rejected the option of a second runway at Gatwick as an "alternative solution" to a north west runway at Heathrow because expansion at Gatwick would not enhance, rather it would threaten, the UK's hub status ([64] to [65]). The Court of Appeal held that the Secretary of State had been legally entitled to reach that conclusion ([87] to [93]). The "hub objective" had been one of the

[1] I mention for completeness that this issue was not before the Supreme Court.

"central", or "essential", or "genuine and critical", objectives of the policy. That objective had not been constructed with deliberate and unlawful narrowness so as to exclude other options improperly.

129 The objectives of EN-1 and EN-6 include the generation of clean energy but the central or essential objectives of those policies is not limited to that aim. They also include diversity of methods of generation and security of supply. The Government sees new nuclear power as an essential component of those objectives, just as wind and solar power. That has remained the Government's policy in its recent statements (see also [28] to [32] above). Accordingly, there can be no legal challenge to the approach taken by the Panel and by the defendant which excluded alternative technologies as alternative solutions. In the light of the Court of Appeal's decision in Plan B Earth the legal position is crystal clear.

130 The claimant's argument depends upon an illegitimate attempt to rewrite the Government's policy aims by pretending that the central policy objective is at a higher level of abstraction, namely to produce clean energy, without any regard to diversity of energy sources and security of supply. But it is not the role of a claimant, or of the court, to rewrite Government policy, or to airbrush objectives of that policy which are plainly of "central" or "core" or "essential" importance.

131 The absurdity of the claimant's argument was well-demonstrated by Mr. Strachan KC and by Mr. Phillpot KC for the defendant and SZC respectively. The implication of ground 4 would be that a decision-maker dealing with a proposal for a solar farm or wind turbine array, obliged to comply with reg.64(1), would have to consider as alternative solutions nuclear power and, as the case may be, wind power or solar power options, But in my judgment there is nothing artificial or unlawfully limiting about a Government policy which identifies as core objectives the need to provide a mix of new electricity generation technologies, comprising solar, wind and nuclear power. Indeed, in para. 9.1.1 of the HRA the defendant noted a decision of the CJEU that the objective of ensuring security of supply may constitute IROPI.

132 For these reasons, ground 4 must be rejected. In my order providing for a rolled up hearing, I directed the claimant to review the legal merits of its various grounds, taking as an example its failure to address (a) the content of the Government's policy on nuclear power as part of a mix of energy sources and (b) the decision in Plan B Earth. The claimant should have abandoned ground 4, but chose instead, in effect, to try to continue its challenge to the merits of Government policy through the means of judicial review. The use of the court's process in that way is wholly inappropriate.

Ground 5

133 The claimant submits that when the defendant carried out his IROPI assessment he took into account a legally irrelevant consideration and/or one which was "unevidenced", namely that the project would contribute to achieving the objective of reducing GHG emissions by 78% by 2035 from the UK's 1990 baseline (para. 74 of skeleton).

134 I interpose to make one point straight away. The claimant's two propositions cannot both be correct. Either a consideration is irrelevant or it is not. If it is, then it does not matter whether any evidence was before the decision-maker on the point. Not surprisingly, it turns out that the claimant does not really contend that this consideration is incapable of being relevant. Instead, the complaint is that the

defendant drew a conclusion which was unsupported, or "insufficiently" supported, by evidence (skeleton paras. 76 and 80 to 81).

135 The claimant points out that, according to SZC's Construction Method Statement, it is expected that the first of the two reactors would be operational at the end of 2033 and the second by mid-2034. But that depends upon a number of assumptions, including the provision of a permanent potable water supply before the power station can be operated. The claimant submits that there was no evidence that that water supply would be implemented before 2035. It is said that SZC's expectation does not take into account uncertainty and delay in resolving that issue (paras. 75 to 76 of skeleton). The claimant complains about the absence of a timeline for the provision of the water supply and of evidence as to the degree of contribution Sizewell C would make to "the 2035 target". These are said to have been "obviously material considerations", applying the irrationality test laid down by the Supreme Court in the *Friends of the Earth* case. But ultimately, the criticism that the contribution to reducing GHG emissions by 2035 was not estimated comes down to an allegation that the timescale for determining and providing a permanent potable water solution was unclear (para. 85 of skeleton).

136 The claimant also submits that the defendant could not maintain that there was insufficient information about the eventual water supply to assess its environmental impacts (under ground 2) and at the same time rely upon the environmental benefits of Sizewell C where its operation is dependent upon that supply.

Discussion

137 A reduction in GHG emissions by 78% by 2035 relates to the Sixth Carbon Budget ("CB6") which was set under the Climate Change Act 2008 by the Carbon Budget Order 2021 (SI 2021 No. 750). It requires the UK's net carbon account not to exceed 965 Mt CO2e over the period 2033-2037 (see *R. (Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2023] 1 W.L.R. 225 at [2] to [12]). This is said to equate to a reduction in GHG emissions from the 1990 baseline by 78% by 2035.

138 Initially the claimant's argument was a little difficult to follow because the main sources upon which it relied in the Statement of Facts and Ground and its skeleton do not address the 78% target. Instead, it referred to the IROPI case for Sizewell C, which was based upon the national importance and urgent need for new nuclear power generation, including:

(i) The continuing growth in the UK's electricity demand, the retirement of existing electricity capacity and "a generation shortfall of 95GW by 2035."
(ii) The UK's commitment to reducing GHG emissions to net zero by 2050 (page 195 of the defendant's HRA and see also paras. 8.1, 8.3.4 and 8.3.5).

Similarly, the HRA rejected alternatives which would involve a significant delay to the construction programme, because Sizewell C would not contribute to addressing the shortfall in generation capacity of 95GW in 2035.

139 Likewise, the Panel had referred in its Report to the 95GW shortfall in 2035 and the contribution which Sizewell C could make (PR 6.6.4 and 6.7.4). But Mr Bowes showed how that issue was linked to the CB6 target, relying upon PR 5.19.137. That explained that in a report by the Climate Change Committee making recommendations for the sixth carbon budget, the "Balanced Net Zero Pathway",

which they treated as a central scenario, assumed that it would be necessary for the power sector to reach zero emissions by 2035, or to decarbonise completely.

140 The defendant and SZC sought to argue that the focus of the decision letter was on the net zero target for 2050 rather than any 2035 target along the way. But I do not agree. The Panel's conclusions took into account the contribution that Sizewell C could make to meeting a shortfall in generating capacity by 2035 and not simply the net zero target for 2050. Although one part of the decision letter referred in broad terms to the contribution of Sizewell C to limiting climate change in accordance with the objectives of the Paris Agreement (DL 5.35), other parts rely upon the Panel's Report at PR 7.5.4 (i.e. DL 7.3). PR 7.5.4 was based in turn upon the detailed assessment in PR 5.19. That section of the Report relied upon the urgent need for new nuclear power to contribute to electricity generation by 2035 (see e.g. PR 5.19.78, 5.19.136 to 5.19.137 and 5.19.163).

141 Furthermore, the defendant's decision also took into account his HRA. In that document he decided that the IROPI test was satisfied, basing himself upon the policy context for the project, its benefits as presented by SZC and the UK's commitment to decarbonising the electricity sector by 2035 (pp.195-6). In his overall conclusion on IROPI the defendant also relied upon section 6.7 of the Panel's Report which, as we have seen, was based upon section 5.19 of that document. Accordingly, it cannot be said that the project's claimed contribution to addressing the shortfall in 2035 in electricity generation did not materially influence the defendant's decision on the application of the Habitats Regulations as well as his decision to grant development consent. That leaves the gravamen of the claimant's complaint, namely the claimed lack of evidential support for the Secretary of State's view that the project would make such a contribution by 2035.

142 I have previously summarised under ground 1 much of the material before the Examination and the defendant on the steps which NWL and SZC stated would be followed in relation to WRMP24 so that NWL will comply with its duties under ss. 37, 37A and 37B.

143 In a statement of common ground between NWL and SZC dated 8 October 2021, NWL acknowledged that 2032 had been identified by SZC in discussion as "the backstop date" for the permanent water supply to be "fully available". The Panel referred to this date in its Report (PR 5.11.283).

144 In its letter to the defendant dated 23 February 2022 NWL confirmed that the water demand figures for the operational phase of Sizewell C had been included in WRMP24 from 2032 and that new schemes would be required in that Plan to meet all the forecast demand in the Suffolk supply area, including that of the project. NWL reiterated its commitment to providing the supply required for Sizewell C. That would be reliant upon the finalisation of new supply schemes and their identification in WRMP24, the completion of a s.55 agreement under the 1991 Act and "the costs approval process". The defendant was informed that the draft WRMP would be submitted to Defra by October 2022.

145 The position of both NWL and SZC was that after the submission of the draft WRMP for statutory consultation, they would work together from October 2022 to negotiate an agreement under s.55, which would include funding for the design and delivery of any infrastructure specific to Sizewell C.

146 SZC pointed out that the WRMP24 would be subject to a fully integrated environmental appraisal, including SEA and, where necessary, HRA. That would involve consultation with *inter alia* NE. The final version of the plan would have

to be compliant with the Habitats Regulations and by definition that would have to precede the installation of a permanent water supply. I also note that the defendant has already stated in his decision letter that he is satisfied with the assessment of the Barsham transfer pipeline if that connection should be chosen.

147 The provision of a *temporary* supply by SZC (which has been assessed in the process under the 2008 Act and is not itself the subject of legal challenge) gives NWL 10 years within which to provide a permanent solution. In addition, SZC indicated (in para. 2.2.5 of its response dated 8 April 2022) that, subject to detailed assessment, the lifespan of the temporary desalination plant could be extended for a short period after the end of the construction phase, if necessary.

148 Subsequently, SZC informed the defendant that an agreement with NWL under s.55 and/or s.56 of the 1991 Act would be likely to be ready to be signed once NWL's Business Plan had been approved by OFWAT most likely in 2024. There was no reason to suppose that a new water supply scheme for a critical NSIP would not be approved in the 2024 Price Review.

149 This material was carefully summarised in the decision letter (DL 4.12 to 4.42). The weight to be given to it was a matter for the defendant. He concluded that there was a reasonable level of certainty that a permanent water supply solution can be found before the first reactor is commissioned (DL 4.44). He was satisfied on the basis of the information supplied on the WRMP process under the 1991 Act that "there is a requisite degree of confidence that a long-term solution is deliverable" (DL 4.64).

150 In my judgment the material before the defendant was legally adequate to entitle him to reach those conclusions. It is impossible to say that his judgment on such an evaluative subject looking into the future was irrational. Once that position is reached, there is no legal reason why the defendant could not take into account the contribution which Sizewell C is expected to make to reducing the shortfall in electricity generation in 2035 (or to the target for reducing GHGs).

151 Lastly, there is no internal contradiction in the decision letter between the approach taken by the defendant to the assessment of cumulative effects arising from the permanent water supply for Sizewell C and his reliance upon environmental benefits which are dependent upon the provision of that supply. As to the former, the defendant decided that there was no option under the WRMP24 process which could be assessed at the stage when the decision letter was issued. As to the latter, the defendant was sufficiently confident that a solution would be found through the WRMP24 process (after having been subject to environmental assessment) and then completed before the operation of the power station is expected to begin in 2033. It is therefore apparent from the decision letter that there is no inconsistency in the defendant's reasoning or lack of coherence. The two conclusions are self-evidently compatible.

152 For all these reasons, ground 5 must be rejected.

Ground 6

153 The claimant submits that the defendant acted irrationally in concluding that the Sizewell C site would be clear of nuclear material by 2140 and/or failed to give legally adequate reasons for rejecting the claimant's case on this subject. Inadequacy of reasoning depends upon the claimant showing a lacuna in the decision raising

a substantial doubt as to whether it was tainted by a public law error (see *Save* and *South Bucks*).

154 The Panel noted that it is a requirement of Government policy that spent fuel be stored on a new nuclear site such as Sizewell C until a UK Geological Disposal Facility ("GDF") becomes available (PR 5.20.57 and 5.20.97). NPS EN-6 states that the key factors in determining the duration of on-site storage are the availability of a GDF and the time needed for spent fuel to cool sufficiently for disposal in a GDF (PR 5.20.96.).

155 The claimant submits that the defendant was aware of an estimate provided by SZC that a GDF would not be available to accept spent fuel from a new build project until 2145. Furthermore, during the Examination the claimant had relied upon information provided by the ONR in relation to Hinkley Point C which, according to the claimant, suggested that spent fuel would need to be kept at the Sizewell C site until about 2165.

156 The claimant submits that it was irrational for the defendant to proceed on the basis that spent fuel would be removed from the site by 2140. The modelling of future sea levels, storm events and the adequacy of the coastal defences only ran to 2140. It was irrational for the defendant not to engage with the risk of the site being flooded from the sea while spent fuel remains on site after 2140 and before the site is decontaminated.

Discussion

157 It is well-established that an enhanced margin of appreciation is to be afforded to a decision-maker relying on scientific, technical and predictive assessments (*Mott* at [69] to [78]). Plainly that principle is engaged when dealing with the evaluation of predictions far into the future about such matters as the effects of climate change on sea levels, the availability of a GDF and the life span and decommissioning of a project such as Sizewell C. It is also clear that a decision-maker deciding whether to grant development consent for such a project does so in the context of a range of statutory regimes which address changes in circumstance (and predictions) as they occur during the remainder of this century and well into the next. Those regimes are obviously material considerations.

158 SZC stated in the Examination that for the purposes of the EIA of the project it is assumed that the operation of the power station will end in the 2090s and by 2140 the interim spent fuel store will have been decommissioned (PR 5.20.19 to 5.20.20). Under its nuclear site licence SZC is required to demonstrate that the on-site facilities for interim storage of spent fuel can be designed, operated and decommissioned in a safe manner that ensures any risks to *inter alia* the environment are suitably and sufficiently controlled, including risks from flooding (PR 5.20.55). At PR 5.20.104 the Panel noted that Suffolk County Council and East Suffolk Council had raised no concerns regarding radioactive waste and said that that was to be expected because ONR would regulate on-site radioactive waste management and the EA would regulate gaseous and aqueous emissions.

159 The Panel summarised objections to the modelling work made by the claimant (e.g. at PR 5.20.59).

160 The Panel referred to the Government's firm policy commitment to the GDF for the long-term storage of high-level radioactive waste, in order to meet the UK's international obligations (PR 5.20.123 to 5.20.125). SZC's assumptions regarding

on-site storage of spent fuel had been based upon there being a GDF available for transfer in the long term. The Panel considered that to be a reasonable assumption (PR 5.20.130), although it acknowledged that there was a degree of uncertainty in relation to the timing of the GDF (PR 5.20.131). The Panel reached the judgment that there was sufficient evidence to be able to conclude that the policy tests for the handling of the waste were met, taking into account SZC's statement that spent fuel would be removed from Sizewell C by 2140 (PR 5.20.133 to 5.20 134). They said that this issue should not weigh against the making of the Order (PR 7.4.195 to 7.4.202).

161 On 7 August 2020 the ONR had provided information in an email which responded to questions sent to them by the claimant on 15 June 2020. Those questions covered a range of issues. One question asked ONR whether, in the light of a comment made by the Nuclear Decommissioning Agency (NDA), the spent fuel from Sizewell C would not be accepted at the GDF until about 140 years from the end of operations, and so would have to remain on site for about 200 years from start up. ONR responded that they did not have information on this subject in relation to Sizewell C. But for Hinkley Point C their understanding was that:

(i) The cooling period was dependent upon the burn-up rate assumed for the fuel used in a reactor. The NDA had used a maximum peak burn-up rate and had not taken into account a number of aspects of the strategy for Hinkley Point C. The average burn-up for spent fuel at that power station would be lower than the NDA had assumed and would therefore have a lower heat output;

(ii) The thermal output of a dry disposal canister containing four spent fuel assemblies is dependent upon a mixing strategy which combines high and low burn-up fuel assemblies within a single cannister;

(iii) An analysis had shown that a storage period of 55-60 years after the end of operation would be needed to meet the assumed GDF thermal limits for disposal for all fuel assemblies, using the strategy for Hinkley Point C;

(iv) Accordingly, on the assumption that generation at Hinkley Point C begins in 2025 and ends in 2085, that fuel would be sufficiently cool to transfer to the GDF in 2140-2145. Assuming that it takes just over 9 years to remove fuel to the GDF, all fuel would be transferred from Hinkley Point C by between 2150 and 2155, which would determine the end of use of the fuel stores at that site.

The ONR also stated that the "assumed availability date for the GDF" to accept fuel from new reactors is around 2130, which is earlier than the date relied upon by the claimant taken from a document produced by SZC (see [155] above).

162 The ONR's response also stated that if there were to be a subsequent acceleration in the effects of climate change, so that the impacts were greater or more rapid than currently predicted, that would involve timescales of several decades, so that monitoring would be able to inform decisions under the conditions of the nuclear site licence on the protective measures required. "Managed adaptive options", such as an increase in the height of a coastal defence, with trigger points, would ensure that the site remains safe under the terms of the nuclear site licence.

163 In its representations to the Panel dated 24 September 2021 the claimant relied upon the email from the ONR and submitted that, assuming Sizewell C begins

operation in 2035 and ceases to operate in 2095, a 60-year cooling period would end in 2155 and the removal of spent fuel off site would take until 2165.

164 In its representations to the Panel in September 2021 after ISH 11, SZC stated that the Fourth Addendum to the Environmental Statement for the project assumed that Sizewell C would cease to operate in the 2090s, the fuel store will have been decommissioned by "the 2140s" and 2190 was "the theoretical maximum site lifetime". An EIA for decommissioning would be required in the years leading up to the end of electricity generation (paras. 1.11.1 to 1.11.2 on p.14).

165 An Addendum to the Flood Risk Assessment for the main development site, produced by SZC in January 2021, had increased the height of the proposed "hard coastal defence feature" to 14.6m above Ordnance Datum. Updated modelling was said to show that this would be sufficient to protect the site against events up to 2190 under reasonably foreseeable climate change scenarios. More extreme events are to be dealt with in SZC's safety case which will be assessed by the ONR (para. 1.36 of the Flood Risk Assessment and the Panel's Report at PR 5.8.91).

166 The issues concerning the adequacy of coastal defence proposals and long-term flood risks impact not only on-site radiological waste management but also a number of other subjects. The issues were considered by the Panel in some detail in a number of sections of their report, such as sections 5.7, 5.8 and 5.20. The Panel's Report has an interlocking structure and needs to be read as whole. The Panel was well aware of the objections on this point raised by the claimant and by other participants, such as Professor Blowers. The Report provided a good summary of the material submitted, including that provided by SZC (e.g. PR 5.7.35 to 5.7.40, 5.8.252 and 5.8.259 to 5.8.260, 5.8.276, 5.8.295 to 5.8.296, 5.20.6, 5.20.18 to 5.20.20, 5.20.59 and 5.20.98). In several places in its Report the Panel expressed satisfaction with *inter alia* the "adaptive design" for the proposed coastal defences, the monitoring of future sea levels through the Coastal Processes Monitoring and Mitigation Plan ("CPMMP") and future modifications of the design through the controls exercisable by the ONR and EA (e.g. 5.8.97, 5.8.99, 5.8.231, 5.8.239, 5.8.259 to 5.8.260, 5.8.299, 5.8.315 to 5.8.320, 5.20.98 to 5.20.102). At PR 5.8.313 the Panel noted that the design parameters of the sea defences would be secured by Requirement 19 of the development consent.

167 Participants continued to make representations after the close of the Examination. For example, a Mr. Parker returned to the subject of the lifetime and adequacy of the sea defences at Sizewell C. The EA and ONR provided a joint response dated 7 June 2022 which was forwarded to the defendant. At DL 4.366 the Secretary of State relied upon this response which he had summarised at DL 4.365:

> "4.365 The Secretary of State notes the post-Examination representations submitted by IPs related to flood risk, including Mr Bill Parker who raised concerns regarding the protection from flooding during operation, decommissioning and the residual time spent fuel is stored on site. The Secretary of State notes the EA's letter to Mr Bill Parker of 7 June 2022 which confirmed that the FRA extended to 2190, and that for the Reasonably Foreseeable actual risk up to 2190, there would be no inundation of the main platform or SSSI crossing from overtopping of the HCDF or the remaining lower northern and southern sand dunes/shingle defences in all events up to the 0.1% annual probability flood events in 2019. The EA's letter also included a subsection titled 'ONR' response, confirming that during the operation of

> a nuclear licenced site, it is a regulatory expectation for the licensee to periodically review the validity of the safety case for all facilities on site against external hazards, to ensure the site remains protected, including the dry fuel store and taking updated climate change projections into account for coastal flood hazard."

The ONR specifically said that the design of the sea defences had been based upon the period running up to 2140, but if the life-time of the station extended beyond that year, SZC would need to demonstrate that the sea defences will continue to protect the site adequately, and if not provide additional protection.

168 In DL 4.250 the defendant agreed with the conclusions of the Panel summarised in DL 4.244 to DL 4.248. In DL 4.295 he expressed satisfaction with the modelling of sea level rises to 2140 for reasonably foreseeable events, including up to the 1 in 10,000 year event and in DL 4.246 with the adaptive design to provide a feasible means of increasing the crest height of the Hard Coastal Defence Feature to cope with a "credible maximum sea level rise". The defendant also relied upon further work carried out by SZC and the EA after the close of the Examination which had resolved all of the Agency's outstanding concerns at that stage. The defendant was also satisfied that matters such as the monitoring of climate change and adaptive measures would be adequately addressed by the ONR through the nuclear site licensing regime (DL 4.235 to DL 4.241, 4.247 and 4.250).

169 The defendant returned to these issues at DL 4.279 which summarised the Panel's views as follows:

> "4.279 The ExA considers [ER 5.8.232 et seq.] the adequacy of the proposed climate change adaptation measures and the resilience of the Proposed Development to ongoing and potential future coastal change during its operational life and any decommissioning period including the scope for the HCDF to undergo design adaptation to maintain nuclear safety against predicted sea level rises. The Sizewell Coastal Defences Design Report [REP8-096] provides a design description of the HCDF Adaptive Design at section 3.11 and is designed to protect the Proposed Development from a 1 in 10,000 year storm event with reasonably foreseeable ("RF") climate change effects up to the end of its design life in 2140. The ExA consider that the Applicant recognises that, given the inherently uncertain nature of climate change, the RF climate change scenario may be exceeded. ONR and EA guidance requires that the sea defence be capable of adaptation to a credible maximum sea level rise [ER 5.8.252]. The sea defences have therefore been designed to allow for future adaptation to accommodate the credible maximum scenario, should it develop. The Adaptive Design would provide a simple means of increasing the crest height of the HCDF to reach a crest level of 16.4m OD [ER 5.8.252]. The implementation of measures to enact the Adaptive Design would be driven by progressively observed effects of climate change, specifically mean sea level rise. The MDS FRA [AS-018] confirms that the impacts of climate change on sea level rise would be monitored and assessed at set intervals to determine the trajectory of the projections, and consider whether there is any change from either the current considered projections or the climate change guidance as applied in the application [ER 5.8.253]. A number of issues were raised by IPs in relation to Adaptive design and its implementation [ER 5.8.254 et seq.]. Having considered the

> submissions and responses from the Applicant [ER 5.8.252 et seq.] the ExA takes the view that as indicated in relation to the SMP, and having regard to the details and explanation provided by the Applicant, that the HCDF, including the Adapted Design, would be positioned as landward as possible. In addition, the requirement 19 in the Order would provide a means whereby the design details of various aspects of the HCDF would require ESC approval in consultation with the MMO and the EA before commencement of that work. The ExA considers that this would provide an appropriate safeguard at detailed design stage in relation to matters relating to layout, scale and external appearance of the HCDF, and its integration with other marine infrastructure [ER 5.8.256]."

The defendant agreed (DL 4.293) (and see also DL 4.280, 4.284, 4.285 and DL 4.290).

170 DL 4.261 referred to the Fourth Addendum to the Environmental Statement (see [164] above) and additional modelling work carried out during the Examination. DL 4.266 referred to the suitability of the CPMMP to provide controls in the future for coastal defence. Certain extreme events are to be left to regulation by the ONR (DL 4.267).

171 The decision letter began to deal with radiological issues at DL 4.583 and in that context it returned to the subject of climate change, sea levels and the safe storage of fuel rods. The defendant summarised the views of the Panel at DL 4.589 to DL 4.597. At DL 4.598 the defendant agreed with the Panel's conclusions and referred to the further information on coastal defence modelling and the requirement for a nuclear site licence.

172 The claimant relied upon DL 4.590 which states:

> "The issues of coastal defences, and the impact of climate change on the modelling for the safety of those defences, were considered by the ExA in section 5.8 and section 5.7 of the ExA Report respectively. The ExA considers [ER 5.20.101] that the coastal defences have been designed so they can be modified if it is necessary to do so, with the monitoring of the sea levels secured through the CPMMP, and this is further reinforced by the obligations required by the NSL regime regulated by the ONR and the permits regulated by the EA. The ExA is persuaded [ER 5.20.102] that the Applicant's conclusions are predicated on the basis that the site will be clear of nuclear material by 2140, the period which has been modelled for coastal defences, and under these circumstances the ExA consider the tests set out in paragraph 2.11.5 of NPS EN-6 would be met."

The claimant places a good deal of emphasis on the last sentence, and also upon DL 4.245. These paragraphs refer to an assumption that spent fuel will be removed from Sizewell C by 2140, which is also the year to which the modelling for predicted extreme sea levels runs.

173 The claimant complained that the defendant failed to give reasons addressing its reliance upon the ONR's email dated 7 August 2020. In my judgment he was under no legal obligation to do so. The limitations of that material produced in 2020 were obvious on the face of the document itself, without there being any need for the Panel or the defendant to spell that out by simply repeating them. The comments by the ONR related to the Hinkley Point C project in the absence of

information on Sizewell C. They were not of any real significance. Naturally the Panel and the defendant would focus on later material produced in 2022 which specifically related to the Sizewell C project (see e.g. [167] above). An application for a nuclear site licence for that scheme had yet to be submitted. SZC said to the Examination that the fuel store would be decommissioned by the 2140s, that is not necessarily by 2140 (DL 4.252). Although the ONR had estimated in 2020 that the GDF would be available by 2130, the claimant relies upon an alternative prediction, 2145, emanating from SZC. The Panel stated that it was reasonable to assume that storage would be available in a GDF in the long term, but added, not surprisingly, that there is a degree of uncertainty (PR 5.20.131), referring no doubt to timing.

174 It is obvious that the issue of how far into the next century spent fuel will need to remain at Sizewell C is subject to uncertainty. But that is not the only uncertainty about the future. The ONR, EA, SZC and others have addressed the possibility that climate change may cause sea levels to increase more quickly. Estimates about the availability of facilities and projections are having to be made an unusually long way into the future. On any fair reading of the Panel's Report and the decision letter, that uncertainty was recognised. I agree with counsel for the defendant and for SZC that what matters is how that subject was addressed.

175 The claimant's ground 6 is a classic example of a failure to read the decision letter fairly and as a whole. It is plain that in DL 4.590 the defendant also relied upon the adaptive nature of the design for the coastal defences, the monitoring of sea levels through the CPMMP and the controls which will be applied by the ONR and the EA through their respective regulatory regimes. That paragraph has to be read in the context of the many passages in the Panel's Report and in the decision letter where those matters were explained and relied upon. The suggestion by the claimant's counsel that the defendant did not rely upon those matters when addressing the future adequacy of coastal defences in relation to the storage of spent fuel is wholly untenable. The point was made clear in relation to the ONR and the nuclear site licence, for example in DL 4.365. The defendant relied, as he was entitled to do, upon the normal assumption that those other regulatory regimes will be operated properly. The defendant's reasoning cannot be treated as irrational or legally inadequate.

176 In addition, Requirement 19 of the development consent requires details of coastal defence features to be submitted and approved by the local planning authority, before construction of those works may commence, which must include a monitoring and adaptive sea defence plan that sets out periodic monitoring proposals and the trigger point for when the crest height of the sea defence would need to be increased to 16.9m above Ordnance Datum.

177 Accordingly, ground 6 must be rejected. In reaching that conclusion, I have not found it necessary to consider the application of s.31(2A) or (3C) and (3D) of the Senior Court Act 1981.

Ground 7

178 This ground is concerned with GHG emissions from the operation of Sizewell C. The claimant refers to DL 4.248 and DL 4.250 in which the defendant agreed with the Panel that "emissions of the magnitude demonstrated would not have a significant effect on the UK's ability to meet its carbon budget commitments or the ability of the Government to meet the UK's obligations under the Paris

Agreement". The claimant then says that that conclusion is inconsistent with this part of DL 8.9:

> "Operational emissions will be addressed in a managed, economy-wide manner, to ensure consistency with carbon budgets, net zero and our international climate commitments. The Secretary of State does not, therefore need to assess individual applications for planning consent against operational carbon emissions and their contribution to carbon budgets, net zero and our international climate commitments."

179 The claimant submits firstly, that DL 8.9 should be read as meaning that the defendant has made no assessment of the contribution of *operational* GHG emissions to the carbon budgets and secondly, there was no evidential basis upon which he could conclude in DL 4.248 and DL 4.250 that operational emissions from Sizewell C would not have a significant effect on the UK's ability to meet its climate change obligations (skeleton paras. 106 to 110).

Discussion

180 DL 8.9 appears in section 8 of the decision letter which is entitled "Other Matters". Under that heading DL 8.8 to DL 8.9 refer to the Climate Change Act 2008 and the Net Zero Target in broad terms. The context for the part of DL 8.9 which the claimant quotes is set by the opening two sentences to which it did not refer. Thus, the context is the continuing significance of the NPSs and the need for nuclear generation of the kind represented by Sizewell C in accordance with those policy statements.

181 EN-1 states that carbon emissions from a new nuclear power station are likely to be much less than from a fossil fuelled plant (para. 3.5.5.). New nuclear power forms one of the three key elements of the Government's strategy for moving towards a decarbonised, diverse electricity sector by 2050, along with *inter alia* renewable electricity generation (para. 3.5.6 and see also para 3.5.10). I agree with the defendant and SZC that the part of DL 8.9 which the claimant seeks to criticise is entirely consistent with para 5.2.2 of EN-1 which states:

> "5.2.2. CO_2 emissions are a significant adverse impact from some types of energy infrastructure which cannot be totally avoided (even with full deployment of CCS technology). However, given the characteristics of these and other technologies, as noted in Part 3 of this NPS, and the range of non-planning policies aimed at decarbonising electricity generation such as EU ETS (see Section 2.2 above), Government has determined that CO_2 emissions are not reasons to prohibit the consenting of projects which use these technologies or to impose more restrictions on them in the planning policy framework than are set out in the energy NPSs (e.g. the CCR and, for coal, CCS requirements). Any ES on air emissions will include an assessment of CO_2 emissions, but the policies set out in Section 2, including the EU ETS, apply to these emissions. The IPC does not, therefore need to assess individual applications in terms of carbon emissions against carbon budgets and this section does not address CO_2 emissions or any Emissions Performance Standard that may apply to plant."

182 Section 4 of the decision letter is entitled "Matters considered by the ExA [the Panel] during the Examination." DL 4.232 to DL 4.250 dealt with climate change and resilience. Within that part DL 4.242 to DL 4.243 addressed GHG emissions and the carbon footprint. DL 4.244 to DL 4.250 summarised the Panel's overall conclusions on various climate change issues and stated that the defendant agreed with the Panel on those matters.

183 DL 4.242 and DL 4.248 referred back to the parts of the Panel's Report which summarised the quantitative analysis before the Examination, the responses of other parties to that material, and the Panel's conclusions at PR 5.7.56 to PR 5.7.100. That summary covered the quantitative analysis in the ES and in the subsequent Life Cycle Analysis carried out for SZC.

184 At PR 5.7.90 the Panel concluded:

> "The ExA concludes that the ES [APP-342], as updated by [AS-181, REP2-110], and [REP10-152], demonstrates that construction emissions from the Proposed Development would be less than 1% of the UK Government's carbon budget for the relevant period, and would not be significant in accordance with the criteria as described in Chapter 26 [APP-342]. The ExA is therefore content that those emissions would not materially affect the ability of the Government to meet the UK's obligations under the Paris Agreement. Similarly, the gross emissions associated with the operational phase have been found to be less than 1% of relevant periods in which they arise. The ExA also recognises the support provided by national policy for low carbon power generation projects such as the Proposed Development, and that the importance for the UK's carbon budgets should also be considered from the perspective of the carbon emissions that would otherwise be produced by other sources, if they were not generating. The national policy support for such low carbon generation projects has been considered in detail in section 5.19 of this Report."

That conclusion was then carried forward to PR 5.7.100. It is also relevant to note the reference here to the policy support for new nuclear power generation because of the contribution it makes to reducing GHGs that would otherwise be produced from other sources (as opposed to the "gross" emissions from a nuclear power station taken in isolation).

185 The defendant's decision letter accepted both PR 5.7.90 and PR 5.7.100. There was therefore ample quantitative material to support the conclusions of the Panel and, in turn, the Secretary of State. Mr. Wolfe KC relies once again upon a dictum in *R. (Association of Independent Meat Suppliers) v Food Standards Agency* [2019] P.T.S.R. 1443 at [8]. But for the reasons set out in *R. (Goesa Ltd) v Eastleigh BC* [2022] P.T.S.R. 1473 at [19] that passage does not alter the well-known *Wednesbury* principles applied by the Courts (see also *R. (Law Society) v Lord Chancellor* [2019] 1 W.L.R. 1649 at 98]).

186 The claimant then complains that there is no evidence that the defendant personally considered the quantitative assessment carried out for SZC, whether in the ES or the Life Cycle Assessment. This is yet another attempt to rely upon part of the judgment of Sedley LJ in *R. (National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154 without reading the relevant passages as a whole. The High Court has analysed the principles in *R. (Transport Action Network Ltd) v Secretary of State for Transport* [2022] P.T.S.R. 31 at [60] to [73] and *R. (Save Stonehenge World Heritage Site Ltd) v Secretary of State for*

Transport [2020] P.T.S.R. 74 at [62] to [66] and [178]. A Minister is entitled to rely upon a summary prepared by his officials of the material which his department has received. The issue is therefore the narrower one of whether there are any grounds for criticising the legal adequacy of that summary in the context of ministerial decision-making. In my judgment the Secretary of State was not required himself to delve into the ES or the Life Cycle Assessment in the way the claimant suggests. The summary provided in the Panel's Report and in the draft decision letter, both of which were provided to the defendant for him to consider, were as, a matter of law, perfectly adequate.

187 Ground 7 is utterly hopeless and must be rejected.

Conclusions

188 The court is faced with a similar situation to that which arose in the Heathrow litigation where, having heard full submissions in a rolled-up hearing (in that case dealing with five different claims), it had to decide whether permission to apply for judicial review should be granted on each ground (*Spurrier* at [667]). In the present case as in *Spurrier*, the mere fact that the court has had to consider in a rolled-up hearing, and in a judgment, a substantial amount of material and legal submissions, does not mean that the grounds raised pass the threshold for arguability.

189 I consider that each of grounds 3 to 7 is totally without merit (CPR 23.12). Accordingly, permission must be refused in relation to those grounds.

190 In relation to grounds 1 and 2 I conclude that both are unarguable and permission should be refused.

191 The application for permission to apply for judicial review is dismissed.

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

In the matter of an application made pursuant to s.288 Town & Country Planning Act 1990

BETWEEN:

CREST NICHOLSON OPERATIONS LIMITED

Claimant

-and-

(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

(2) HORSHAM DISTRICT COUNCIL

Defendants

LIST OF ESSENTIAL DOCUMENTS FOR ADVANCE READING BY THE COURT

Tab No.	Document	Date	Page(s) in core claim bundle
1.	Statement of Facts and Grounds	4 December 2024	9 – 29
2.	Decision Letter of the Secretary of State for Housing, Communities and Local Government	25 October 2024	33 – 41
3.	Section 10 of Darren McCreery's Report to the Secretary of State for Housing, Communities and Local Government	30 July 2024	86 – 109
4.	Sections 4, 5 and 6 of Proof of Evidence of Alistair Aiken	12 February 2024	176 – 200
5.	R (Harris and another) v Environment Agency [2022] EWHC 2264 (Admin)	2022	428 – 455