

Briefing Note:

Interim approach to assessing planning applications for potential impact on the Ashdown Forest SAC

In March 2017, the High Court handed down a judgment in relation to nitrogen deposition on the Ashdown Forest Special Area of Conservation (SAC). Wealden District Council brought a legal challenge against the Joint Core Strategy prepared by Lewes District Council and the South Downs National Park Authority. The legal challenge centred on the assessment of air quality impact on the Ashdown Forest SAC which was based on advice provided by Natural England. The *Wealden*¹ judgment found that the advice provided by Natural England on the in combination assessment was flawed and the outcome was that the judge quashed part of the Joint Core Strategy.

The potential air quality impacts on the Ashdown Forest SAC arise from additional nitrogen deposition resulting from increased traffic emissions as a consequence of new development. Natural England had advised that the Design Manual for Roads and Bridges (DMRB) could be used to assess air quality impacts applying the 1000 Annual Average Daily Traffic (AADT) methodology. It was advised that if the development proposals in a Plan by itself were calculated to be below 1000 AADT, then the air pollution impacts could be considered not significant and no further work would be needed.

The judge had to consider if development could be screened out for Habitats Regulations purposes if the development did not cause an increase of more than 1000 AADT on roads within and surrounding Ashdown Forest where the assessment looked at the effects of the development by itself (alone). However, the judge found that the advice provided by Natural England was erroneous and that an assessment of air quality impact should include other development proposals thus considering the in combination effect of nitrogen deposition from increased traffic.

The judgment suggests that planning applications will require a consideration of the potential in combination air quality impacts arising from the proposed development, however, the judge gave no ruling as to the practical effects of the judgment. The parameters for any assessment of traffic impact are now unclear beyond a general presumption that any development that is likely to lead to air quality impacts on the Ashdown Forest SAC in the form of additional traffic will need to be considered through a Habitats Regulations Assessment.

At present it is uncertain what form further advice from Natural England will take and when this will be completed, however, the judge supported the use of thresholds as a means of identifying which development can be eliminated from further consideration because of *de minimis* impacts. The Judge also did not necessarily hold the 1000 AADT threshold to be unlawful, rather that when assessing if the effects of a proposed development will exceed the 1000 AADT threshold, the in combination effects of other plans and projects also need to be included. It should also be noted that while the *Wealden* decision does not necessarily hold that the thresholds set out in the DMRB or elsewhere are inherently unlawful, it does raise questions as to whether in the spirit of the decision they remain defensible, even in combination, particularly without justification.

Mid Sussex District Council understands the considerable challenges and uncertainty that the *Wealden* decision has created and wishes to address the issues as practically as possible. The consequence is that District Council will need to assess each planning

¹ Wealden District Council v Secretary of State for Communities and Local Government & Ors [2017] EWHC 351 (Admin) (20 March 2017): <http://www.bailii.org/ew/cases/EWHC/Admin/2017/351.html>.

application for its potential traffic impacts on Ashdown Forest. This is an interim approach until further guidance is issued to the District Council or further evidence becomes available.

Any advice given by Mid Sussex District Council should be considered in conjunction with the Habitats Directive, the Habitats Regulations, relevant Acts, relevant case law, planning policy, Government Circulars, and recognised European Commission and Government guidance. Applicants should satisfy themselves that all relevant and current policy, legislation, case law and guidance has been considered and complied with.

The aim of Mid Sussex District Council is to take a positive approach that both protects the integrity of the Ashdown Forest SAC and leads to practical and timely decision making. However, in consenting development in the District, Mid Sussex now needs to satisfy itself, before granting consent, that proposals, alone and in combination with other projects and plans, will not lead to adverse effects on the integrity of the Ashdown Forest SAC. These effects could arise from the nature of the development proposed or the effect of any additional traffic that is generated by the proposal.

In most cases, Mid Sussex District Council's suggested starting point is to identify the likely traffic effects from proposals, alone and in combination, and to proceed to the appropriate assessment stage of the Habitats Regulations Assessment where such effects cannot be ruled out.

To support the emerging Mid Sussex District Plan, the Council has undertaken a transport modelling exercise using the West Sussex Transport Model to consider the traffic effects of known development allocations. This is an in combination approach which includes growth assumptions for areas beyond the District, based on assumptions derived from Plans and the National Trip End Model (NTEM). This transport modelling exercise suggests that the proposed allocations of the District Plan, together with an allowance for windfall development, are unlikely to impact the SAC, subject to the final Habitats Regulations Assessment. This is, in part, because the major allocations of the District Plan are some distance from Ashdown Forest. The modelling exercise suggests that the influences of traffic through the Forest arise from both the location and the scale or type of development. There is no part of the District that can necessarily be excluded from the need for a screening assessment, although it is accepted that some types of development are unlikely to create additional traffic. It should also be noted that there is no agreed zone of influence for impacts on the SAC.

This transport modelling work will form the starting point for the District Council's assessment of the likelihood of any significant effects from proposals as they come forward. Where traffic generating proposals come forward which have already been tested as part of the District Plan, it is likely to be possible to 'screen out' the need for further assessment as long as the in combination growth assumptions used in the modelling remain valid. For cases which have not been tested, or where in combination growth circumstances have changed since the original modelling, further modelling will be required. In these cases, the recommended option would be to use the West Sussex Transport Model to assess proposals. Requests to use the model should be made through the District Council in order to ensure that the in combination assumptions are made consistently.

Where a proposal is assessed to have a likely impact on traffic through the Forest, the proposal will need to be subject to appropriate assessment. This assessment will identify the pollution effects of the additional traffic on the integrity of the SAC. While not necessarily the case that additional traffic through the Forest will be detrimental to the SAC, it is unlikely that the District Council will be able to make a decision until this absence of effect can be reasonably demonstrated. The District Council will discuss the approach needed for appropriate assessment with applicants and where appropriate, will undertake consultation with relevant statutory bodies.

At the screening or appropriate assessment stages, applicants may also propose additional measures to avoid significant effects, including mitigation. These will be considered practically in terms of their effectiveness in avoiding effects on the Ashdown Forest SAC.

The Council remains open to the discussion of other approaches and commits to work with surrounding local authorities, statutory agencies and Government to identify other ways to meet Habitats Regulations requirements in positive and practical ways.

The Council suggests the following in relation to specific applications:

1. Planning applications that can reasonably demonstrate that the proposed development will not result in additional traffic are unlikely to be affected. The District Council has already assessed these types of development as generally unlikely to lead to an increase in traffic:
 - Advert consent
 - Discharge of condition
 - Listed building consent
 - Minor householder, e.g. porch, conservatory, small extension, fencing, walls
 - Permitted development except where it is for the change of use of a building to flats and dwelling houses
 - Telecommunications
 - Tree works
 - Variation of condition

The planning application can be submitted in the usual way. The Council will advise applicants of any concerns in relation to specific proposals.

2. For planning applications where the proposed development has been assessed through existing relevant District Council transport modelling (because they are allocations in the emerging District Plan, allocations in a neighbourhood plan or where they are within the modelled windfall capacity), it may be possible to screen out the need for further assessment. In all cases, the District Council will complete a Habitats Regulations Assessment Screening Report, which will set out the reasons for the screening opinion.
3. For planning applications where the proposed development has not been assessed through the Mid Sussex Transport Study, the District Council will need to satisfy itself on the potential traffic impacts as part of a Habitats Regulations Assessment in terms of screening and any further appropriate assessment. The Habitats Regulations, ref. Regulation 61(2), state that the applicant must provide information that the competent authority (Mid Sussex District Council) reasonably requires for the purposes of a Habitats Regulations Assessment. If further work is necessary, this is likely to mean transport evidence will need to be undertaken to indicate the level of impact that the proposed development will have on Ashdown Forest. Further advice will be issued to applicants in this situation.

It is recommended that an applicant contacts the District Council prior to submitting a planning application or at the pre-application stage to check how the planning application will be assessed and if any further transport evidence is required.

Should you have any questions about the interim approach or how a planning application will be assessed, then please contact Development Management on 01444 – 477566 or planninginfo@midsussex.gov.uk.