



Neutral Citation Number: [2025] EWHC 2194 (Admin)

Case No: AC-2024-LON-004013

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 August 2025

Before :

MRS JUSTICE LANG DBE

Between :

CREST NICHOLSON OPERATIONS LIMITED
- and -
(1) SECRETARY OF STATE FOR HOUSING,
COMMUNITIES AND LOCAL GOVERNMENT
(2) HORSHAM DISTRICT COUNCIL

Claimant

Defendants

Christopher Boyle KC and Luke Wilcox (instructed by DAC Beachcroft LLP) for the
Claimant

Sasha Blackmore KC (instructed by the Government Legal Department) for the First
Defendant

The Second Defendant did not appear and was not represented

Hearing date: 22 July 2025

Approved Judgment

This judgment was handed down remotely at 10 am on 22 August 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....
MRS JUSTICE LANG DBE

Mrs Justice Lang:

Introduction

1. In this claim for planning statutory review under section 288 Town and Country Planning Act 1990 ('TCPA 1990'), the Claimant challenges the decision of the First Defendant, dated 25 October 2024, in which she accepted the recommendation of her Inspector to approve reserved matters, in respect of a development of 280 dwellings on land at Kilnwood Vale, Crawley Road, Faygate, Horsham, subject to Condition 6 which prevents occupation of the approved dwellings until water neutrality has been demonstrated.
2. The Claimant, who is the developer, appealed under section 78 TCPA 1990 against the failure of the Second Defendant ('the Council') to determine its application for reserved matters approval for layout, appearance, landscaping and scale for Phase 3 DEFG of the Kilnwood Vale development. The Inspector, Mr D. McCreery MA BA (Hons) MRTPI held a public local inquiry in March 2024. On 8 April 2024, the appeal was recovered for the First Defendant's determination, pursuant to section 79 TCPA 1990.
3. Horsham's water supply is, in part, abstracted on the River Arun, at a site near a group of nature conservation sites, known as the Arun Valley Sites, that are designated for their rare and protected habitats. On the recommendation of the Inspector, the First Defendant concluded that Condition 6 was 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'), until such time as access into the Council's Water Offsetting Scheme ('SNOWS') or an equivalent scheme has been secured.
4. Condition 6 provides:

"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."
5. The Claimant submitted that the imposition of Condition 6 was unlawful on two grounds:
 - i) **Ground 1:** The Inspector and the First Defendant erred in law and acted irrationally by proceeding on the basis that groundwater abstraction at Hardham

might continue at a level that could not be excluded from resulting in harm to protected habitats, by reliance on “imperative reasons of overriding public interest” (‘IROPI’) under regulation 64(1) of the Habitats Regulations.

- ii) **Ground 2:** The Inspector and the First Defendant erred in their approach to the effect of uncertainty in the appropriate assessment under the Habitats Regulations. The lack of specificity as to the future actions of the Environment Agency (‘EA’) and Southern Water was not a proper basis for a finding of uncertainty as they could be expected to fulfil their legal obligations under the Habitats Regulations. What was required was certainty as to the end, not the means. The Inspector and the First Defendant erred in the interpretation of regulations 9(3) and 63 of the Habitats Regulations, and by failing to have proper regard to the application of regulation 63 to the discharge of the EA’s functions under section 52 of the Water Resources Act 1991 (‘WRA 1991’).

History

6. Kilnwood Vale is a strategic development located on the western edge of Crawley, to the north of the A264. It was identified in the West of Bewbush Joint Area Action Plan (July 2009) as a new neighbourhood of around 2500 homes with associated social, environmental, and transport infrastructure.
7. Outline permission was decided under 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. It was subsequently taken forward in the Horsham District Planning Framework, adopted in 2015.
8. Outline permission was approved in 2011 (DC/10/1612) and varied in 2016 (DC/15/2813). Of the four parts in the outline permission, Parts C and D are complete (291 homes). In Parts A and B, 1318 homes have detailed consent and are either occupied/complete or under construction. Phase 3 DEFG (the proposal for 280 dwellings which is the subject of this claim), is within Part A of the outline permission. The Claimant’s application for reserved matters approval for the proposal was made on 28 April 2023.
9. Horsham is within Southern Water’s Sussex North Water Resource Zone (‘WRZ’) and includes supply from groundwater abstraction on the river Arun, close to Pulborough (referred interchangeably throughout the evidence as ‘Hardham’ or ‘Pulborough’).
10. The abstraction site is located close to the Arun Valley Sites, that are nationally or internationally designated. The sites are the Arun Valley Special Protection Area (‘SPA’), Special Area Conservation (‘SAC’), and Ramsar site. They overlap with the Pulborough Brooks and Amberley Wild Brooks Site of Special Scientific Interest (‘SSSI’).
11. In September 2021, Natural England (‘NE’) published a ‘Position Statement’ giving advice for all applications falling within the WRZ. It stated:

“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;”

12. In 2022 Southern Water published its draft WRMP 24, accompanied by a Habitat Regulations Assessment. It has not yet been finalised.
13. NE published an ‘Advice Note’ in February 2022 to expand on its Position Statement which included the following advice:

“..... Natural England believes that the ongoing abstraction is having a detrimental impact on a number of designated sites...”

“Natural England first advised Southern Water in December 2019 that it could not conclude, with certainty, that the existing abstraction within the Sussex North Water Supply Zone was not having an adverse impact on the integrity of the Habitats Sites, through reduced water levels and potential water quality impacts.

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

Natural England is currently undertaking a full integrated condition assessment of the SSSI sites that make up the Habitats Sites. The present indication (on the basis of water levels) is that the sites’ condition is Unfavourable..... at this stage existing abstraction cannot be ruled out as contributing to or causing an ongoing adverse impact on the sites.”

“Pursuant to these concerns, on 14 September 2021 Natural England advised the relevant Local Authorities that the existing abstraction within the Sussex North Water Supply Zone could not be ruled out as causing an adverse effect on the Habitats Sites. Furthermore, if further development were to be consented in this region (with the requirement for additional abstraction) such development was 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 to integrate Water Neutrality into the relevant Local Plans. 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...”

14. The Advice Note explained the concept of water neutrality, as follows:

“Definition of Water Neutrality

Water Neutrality is not currently defined in legislation, but is drawn from the Gatwick Sub regional Water Cycle Study (2020)

“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.”

‘New development’ is considered to be any relevant project requiring a public water supply from Southern Water’s Sussex North Water Supply Zone, but is likely to be dominated by large planning applications.

The decision on whether the 2017 Regulations apply to a specific project will be a matter for the relevant Competent Authority (usually the local planning authority). However, the 2017 Regulations are likely to apply to any development which could materially increase water consumption. This could include dwellings, office, commercial and educational development among others.....”

“Achieving Water Neutrality

..... In summary, the amount of water from new developments using public water supply in the Sussex North Water Supply Zone will be calculated on an individual or cumulative basis to produce a predicted “demand” for water from growth.

Once this per-capita calculation has been made, each new qualifying development will need to demonstrate how that development will achieve no net increase in water consumption. This can be done through a combination of:

- water efficiency measures; and,
- offsetting

....”

“Legal basis for Water Neutrality

In order to avoid an adverse effect on integrity, the conservation status of a habitat must, if favourable, be preserved. If unfavourable, it must not be further harmed or rendered more

difficult to return to a favourable status. It is this which Water Neutrality is seeking to achieve.

The concept of Water Neutrality has been developed to form what is intended to be a legally robust and proportionate route to consenting plans and projects where a site is in Unfavourable Conservation Status or in Favourable Conservation Status but exceeding the relevant thresholds.

However, whilst Natural England encourages the adoption of Water Neutrality by decision makers, this is only a tool to help ensure compliance with the 2017 Regulations, and does not preclude the consideration by local planning authorities of alternative methods to protect the Habitats Sites whilst enabling development, provided the Habitat Regulations Assessment tests are met.

Furthermore, each project will continue to require its own assessment. The Advice Note is not intended to pre-judge the outcome of individual applications, each of which will need to be considered on its individual merits and the findings of its accompanying assessment.”

“...given the existing stresses on the sites and the need to engage with individual planning decisions, the Statement is considered the most effective interim approach to help ensure that any planning applications within the Sussex North Water Supply Zone can be determined in compliance with the 2017 Regulations whilst the Strategy is evolving.

Strategic long-term approach

Given existing pressures, both environmental and developmental, achieving Water Neutrality is likely to remain necessary for as long as the adverse effect risk from water supply abstraction continues, and may be required until the Habitats sites in question are restored to FCS. In practical terms, this is likely to require the delivery of an alternative water supply (estimated around 2030 with significant uncertainty).”

15. In a letter dated 26 April 2022, the EA replied to questions posted by Mr Aitken, the Claimant’s consultants, as set out 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.”

16. In December 2022, the ‘Final Report’ of the ‘Sussex North Water Neutrality Study: Part C - Mitigation Strategy’ was published by the Council and other Councils in the WRZ. It was summarised in the Inspector’s Report at paragraph 6.6 (‘IR/6.6’):

“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.”

17. The Final Report described the operation of the local authority offsetting scheme at section 2.4, explaining that a developer who submits a planning application will be required to pay a fee to the offsetting operating body, based on the assessed water consumption of the proposed development. The offsetting will then be delivered by a range of measures, summarised in section 5.3.

18. The anticipated time frame of the water neutrality strategy was set out at paragraphs 28 - 29:

“28. 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 Southern Water can provide an alternative water source to replace groundwater abstraction at Pulborough. Time is required to allow SW to identify, design, obtain funding and construct an alternative source through their business plan and Water Resource Management Plan (WRMP) and business planning processes. It is therefore unlikely that a new source could be available before 2030. This strategy will therefore take the approach that neutrality will be required throughout the time frame covered by the Local Plans of CBC, CDC and HDC; a period up until 2038/2039. This will be referred to in the rest of the report as the “Local Plan period”.

29. Once a long-term solution has been put in place by SW, a water neutrality scheme may no longer be required. For this reason, it is proposed that the Offsetting Scheme outlined in this Strategy runs to 2030, when it is reviewed.....”

19. By a letter dated 11 July 2023, the EA again responded to questions from Mr Aitken on behalf of the Claimant, 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.”

20. By a letter of 7 July 2023, Southern Water responded to questions from Mr Aitken in respect of a different development in the same area, as follows:

“.....

The bulk supply agreement with Portsmouth Water provides for a minimum daily water supply capacity to Southern Water ...

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....

Southern Water has assumed supply availability may reduce by 50% in an extreme drought event based on a best estimate of resource availability.....

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 MI/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 MI/d; or, since 1/1/02, was 11.7 MI/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.

.....

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 MI/d (or 4.2 MI/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 MI/day and will utilise alternative sources available to it?

As previously stated, we are committed to continue to abstract a target rolling average of 5 MI/d from our groundwater source at Hardham, whenever conditions are favourable 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 MI/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.”

21. NE did not participate in the Inquiry but in a letter dated 19 April 2024 it responded to the Inspector’s queries (emphasis added) as follows:

“3. Do you agree:

a. 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?

Natural England does not believe that the evidence provided by the appellant is sufficient to conclude that the proposal would not adversely affect the integrity of the Arun Valley designated sites without the need to demonstrate water neutrality.

It is understood that Southern Water and the Environment Agency have an active investigation into the environmental impacts of the Hardham groundwater abstraction (currently forecast for completion in March 2025); and that the findings of this investigation will determine what level of abstraction at Hardham can continue, while ensuring adverse effects on the

Arun Valley designated sites can also be ruled out. However, it is Natural England's opinion that until this investigation has been completed, it remains unknown as to what is an acceptable level of groundwater abstraction (that would be able to rule out an adverse effect on integrity on the Arun Valley designated sites).

As such, 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" (Natural England advice note, February 2022) in order to ensure that future development does not contribute to increased levels of abstraction.

Based upon the information submitted by the appellant, it is proposed that there is not a requirement to demonstrate water neutrality, owing to the minimisation currently being undertaken by Southern Water. However, Natural England would reiterate that the minimisation does not consider, nor evidence, the fundamental question of how much water can be abstracted without having an adverse effect on the Arun Valley designated sites.

Given the current uncertainty as to what level of abstraction can occur without having an adverse effect on the Arun Valley designated sites, it is Natural England's advice that the current minimisation does not provide sufficient certainty nor evidence to conclude that any proposed developments that fail to demonstrate water neutrality will not have an adverse effect on the integrity of the Arun Valley designated sites.

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 in order to ensure it does not result in additional abstraction beyond appropriate levels (with regard to the Arun Valley designated sites).

b. that an alternative method that would protect the Arun Valley Sites has been put forward (paying regard to page 3 of the Natural England Advice Note: February 2022)?

As outlined within our February 2022 advice note, it is our view that the delivery of an alternative water supply may be required until the Arun Valley designated sites are restored to favourable conservation status.

c. Does the imposition of the condition at page 28 the Statement of Common Ground [ID11] change your response to questions a or b?

The specific wording and suitability of conditions is a matter outside of Natural England's remit and area of expertise. However, in this context, it is Natural England's advice that any conditions that seek to ensure that there is not an adverse effect on the integrity on the Arun Valley designated sites should be suitably worded as to ensure that an adverse effect can be ruled out and be based upon robust evidence. We would advise that any mitigation that a proposed condition seeks to secure, should also consider both the scientific certainty that it would provide, as well as the practicality of its delivery.

4. Do you agree that the imposition of the two conditions set out on page 27 of the Statement of Common Ground [ID11] 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 additional measures you consider are necessary.

.... Natural England would advise that, in order to rule out an adverse effect on the integrity of the Arun Valley designated sites, that appropriate measures should be secured that clearly demonstrate how an adverse effect can be ruled out. We would advise that the demonstration of water neutrality is a suitable means of achieving this."

The Decision

22. The Inspector held a public local inquiry in March 2024. On 8 April 2024, the appeal was recovered for the Secretary of State's own determination because it involved 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.
23. The Inspector sent his Report ('IR') to the First Defendant, dated 30 July 2024 in which he recommended approval of the reserved matters, subject to Condition 6. He recommended that the First Defendant adopt section 10 of his Report as the appropriate assessment of the proposal.
24. In a decision letter ('DL') dated 25 October 2024, the First Defendant agreed with the Inspector's conclusions and his recommendations, and decided to approve the reserved matters, subject to Condition 6.
25. The First Defendant determined as follows:

"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.

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.

.....

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.”

Legal framework

Challenges under section 288 TCPA 1990

26. Under section 288 TCPA 1990, a person aggrieved may apply to quash a decision on the grounds that (a) it is not within the powers of the Act; or (b) any of the relevant requirements have not been complied with, and in consequence, the interests of the applicant have been substantially prejudiced.
27. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990. Thus, the Claimant must establish that the Secretary of State misdirected herself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety.
28. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26. As Sullivan J. said in *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, at [6]:

“An application under section 288 is not an opportunity for a review of the planning merits.....”

29. In *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, [2018] PTSR 746, at [6] – [7], the Court of Appeal set out the principles upon which the Court will act in an application for statutory review under section 288 TCPA 1990. Lindblom LJ held:

“6. In my judgment at first instance in *Bloor Homes East Midlands Ltd. v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin) (at paragraph 19) I set out the “seven familiar principles” that will guide the court in handling a challenge under section 288. This case, like many others now coming before the Planning Court and this court too, calls for those principles to be stated again – and reinforced. They are:

“(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to “rehearse every argument relating to each matter in every paragraph” (see the judgment of Forbes J. in *Seddon Properties v*

Secretary of State for the Environment (1981) 42 P. & C.R. 26, at p.28).

(2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the “principal important controversial issues”. An inspector’s reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council and another v Porter (No. 2)* [2004] 1 W.L.R. 1953, at p.1964B-G).

(3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, “provided that it does not lapse into Wednesbury irrationality” to give material considerations “whatever weight [it] thinks fit or no weight at all” (see the speech of Lord Hoffmann in *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector’s decision (see the judgment of Sullivan J., as he then was, in *Newsmith v Secretary of State for Environment, Transport and the Regions* [2001] EWHC Admin 74, at paragraph 6).

(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in *Tesco Stores v Dundee City Council* [2012] P.T.S.R. 983, at paragraphs 17 to 22).

(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, *South Somerset District Council v The Secretary of State for the Environment* (1993) 66 P. & C.R. 80, at p.83E-H).

(6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in *Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government* [2012] EWHC 1419 (QB), at paragraph 58).

(7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill L.J. in *Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government* [2013] 1 P. & C.R. 6, at paragraphs 12 to 14, citing the judgment of Mann L.J. in *North Wiltshire District Council v Secretary of State for the Environment* [1992] 65 P. & C.R. 137, at p.145)."

7. Both the Supreme Court and the Court of Appeal have, in recent cases, emphasised the limits to the court's role in construing planning policy (see the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd.* [2017] UKSC 37, at paragraphs 22 to 26, and my judgment in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, at paragraph 41). More broadly, though in the same vein, this court has cautioned against the dangers of excessive legalism infecting the planning system – a warning I think we must now repeat in this appeal (see my judgment in *Barwood Strategic Land II LLP v East Staffordshire Borough Council* [2017] EWCA Civ 893, at paragraph 50). There is no place in challenges to planning decisions for the kind of hypercritical scrutiny that this court has always rejected – whether of decision letters of the Secretary of State and his inspectors or of planning officers' reports to committee. The conclusions in an inspector's report or decision letter, or in an officer's report, should not be laboriously dissected in an effort to find fault (see my judgment

in *Mansell*, at paragraphs 41 and 42, and the judgment of the Chancellor of the High Court, at paragraph 63).”

30. In *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865, Lord Carnwath JSC held at [25]:

“... the courts should respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly.”

31. A decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well-informed reader who understands the principal controversial issues in the case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment* [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, at 271; *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28; and *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83.

32. In *Clarke Homes*, Sir Thomas Bingham MR said at 271-2:

“I hope I am not over-simplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication.”

Habitats Directive 92/43/EEC and the Habitats Regulations 2017

33. The Habitats Regulations continue to have effect in UK law, following exit from the EU, because they are EU-derived domestic legislation and retained EU law (sections 1B(7), 2(1) and 6(7) of the European Union (Withdrawal) Act 2018). 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 European Union (Withdrawal) Act 2018).

34. Article 6 of the Habitats Directive provides:

“Article 6

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 contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I 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 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.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.”

35. The Habitats Directive was transposed into UK domestic law by the Habitats Regulations. Article 6(1) is given effect by regulation 9(1) of the Habitats Regulations and Article 6(2) is given effect by regulation 9(3). Article 6(3) is given effect by regulation 63 of the Habitats Regulations and Article 6(4) is given effect by regulation 64.
36. Regulation 9 of the Habitats Regulations provides, so far as is material:

“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)
- (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.”

37. Regulation 3 interprets “appropriate authority” as the Secretary of State and any person exercising any function of the Secretary of State. By regulation 7, a competent authority includes any Minister of the Crown, government department, statutory undertaker, public body of any description or person holding public office.
38. The assessment of plans or projects is governed by regulation 63 of the Habitats Regulations which provides, so far as is material:

“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.

.....

(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.”

39. Regulation 64 of the Habitats Regulations sets out the circumstances where a plan or project may be carried out for imperative reasons of overriding public interest, notwithstanding a negative assessment:

“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, 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 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.

.....”

40. In the leading case of *Wyatt v Fareham BC and Others* [2022] EWCA Civ 983, Sir Keith Lindblom SPT set out the key principles to be applied to an appropriate assessment:

“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 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 paragraph 44). That is an evaluative judgment, which the court is neither entitled nor equipped to make for itself (see the judgment of Lord Carnwath in *R. (on the application of Champion) v North Norfolk District Council* [2015] UKSC 52; [2015] 1 W.L.R. 3170, at paragraph 41, and the judgment of Lord Justice Sales, as he then was, in *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174; [2015] PTSR 1417, at paragraph 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 instance judgment in *Compton Parish Council v Guildford Borough Council* [2020] J.P.L. 661, at paragraph 207).

(2) In *Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu v College van Gedeputeerde Staten van Limburg* (Case C-293/17) [2019] Env. L.R. 27 (“Dutch Nitrogen”), the CJEU said that it is “for the national courts to carry out a thorough and in-depth examination of the scientific soundness of the “appropriate assessment”...” (paragraph 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” (paragraph 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 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.

(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 L.J. in *Smyth*, at paragraph 80, and the judgment of this court in *Plan B Earth v Secretary of State for Transport* [2020] PTSR 1446, at paragraphs 68 and 75 to 79, which were not doubted by the Supreme Court in the same proceedings ([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 parte Smith* [1996] Q.B. 517, and *R. (on the application of Mahmood) v Secretary of State for the Home Department* [2001] 1 W.L.R. 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 in *Kennedy v Charity Commission* [2014] UKSC 20, at paragraph 245, and the first instance decision in *R. (on the application of McMorn) v Natural England* [2015] EWHC 3297 (Admin), at paragraphs 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 paragraphs 74, 75 and 137, discussing the CJEU’s decision in *Craeynest v Brussels Hoofdstedelijk Gewest* (Case C-723/17) [2020] Env. L.R. 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 L.J. in *Smyth*, at paragraph 84, and the first instance judgment in *R. (on the application of Preston) v Cumbria County Council* [2019] EWHC 1362 (Admin), at paragraph 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 in *R. (on the application of Morge)*

v Hampshire County Council [2011] 1 W.L.R. 268, at paragraph 45, the judgment of Sales L.J. in *Smyth*, at paragraph 85, and the first instance judgment in *R. (on the application of Prideaux) v Buckinghamshire County Council* [2013] Env. L.R. 32, at paragraph 116). And the court for its part will give appropriate deference to the views of expert regulatory bodies (see, for example, the judgment of Lord Justice Beatson in *R. (on the application of Mott) v Environment Agency* [2016] 1 W.L.R. 4338, at paragraphs 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. (on the application of BACI Bedfordshire) v Environment Agency* [2020] Env L.R. 16, at paragraph 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 whether the views they have stated are based on a conspicuous error (see the judgment of Sales L.J. in *Smyth*, at paragraph 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 appreciation (see the judgment of this court in *Plan B Earth*, at paragraph 68, and, at first instance in the same case, *Spurrier v Secretary of State for Transport* [2020] PTSR 240, at paragraphs 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 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 (Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA intervening)* (Case C-127/02)) [2005] 2 C.M.L.R. 31 (“*Waddenzee*”), at paragraph 58). The “precautionary principle” requires a high standard of investigation (see the judgment in *Waddenzee*, at paragraphs 44, 58, 59 and 61).

(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” (paragraphs 44, 58, 59, and 61 of the CJEU’s judgment and paragraphs 107 and 108 of the Advocate General’s opinion in *Waddenzee*, and the judgment in *Holohan*, at paragraphs 33 to 37). In *Waddenzee* (at paragraph 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 no reasonable scientific doubt remains as to the absence of such effects”. But as Advocate General Kokott explained in *Waddenzee* (in paragraphs 102 to 106 of her opinion), a requirement of “absolute certainty” would be “disproportionate”. As she said (at paragraph 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 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 paragraphs 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, at paragraph 41). This 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] Env. L.R. 23, at paragraph 69, and *Prideaux*, at paragraph 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 paragraph 33). Such knowledge must be both up-to-date and not merely an expert’s bare assertion (see the judgment of Sales L.J. in *Smyth*, at paragraph 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 paragraph 44, and its judgment in *People Over Wind and Sweetman v Coillte Teoranta* (Case C-323/17) [2018] PTSR 1668, at paragraph 38).”

41. Ms Blackmore KC made the following submissions on mitigation. First, mitigation requires evidence. The provision of mitigation cannot be relied on in the absence of information regarding the effectiveness of the mitigation: Case C-142/16 *Commission v Germany* (26 April 2017) at [34] - [38]. It is only when it is sufficiently certain that a measure will make an effective contribution to avoiding harm to the integrity of the site concerned, by guaranteeing beyond all reasonable doubt that the project at issue will not adversely affect the integrity of that site, that such a measure may be taken into consideration in the appropriate assessment: Case C-293/17, C-294/17 *Coöperatie Mobilisation for the Environment and Vereniging Leefmilieu* [2019] Env LR 27 (“*Dutch Nitrogen Case*”) at [126].
42. Second, the appropriate assessment must not take into account the future benefits of mitigation measures if those benefits are uncertain e.g. because the procedures needed to accomplish them have not yet been carried out or because the level of scientific knowledge does not allow them to be identified or quantified with certainty: *Dutch Nitrogen Case* at [126] and [130].
43. In *Wyatt*, at [45], Lindblom LJ rejected the submission that the Council had 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 development would not adversely affect the integrity of the European site, holding:

“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.”

44. Lindblom LJ then set out the correct approach for the Court to adopt, at [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 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.”

45. In *Harris v Environment Agency* [2022] PTSR 1751, which concerned the scope of an EA investigation into damage caused by water abstraction in the Norfolk Broads, Johnson J. analysed regulation 9(3) of the Habitats Regulations as follows:

“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 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 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 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.

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 way that 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 that 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, insofar as it is (in 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” considerably narrowed.”

TCPA 1990

46. The determination of the Claimant’s appeal under section 78 TCPA 1990 and the approval of the reserved matters application were subject to the requirements of the Habitats Regulations. Under regulation 63, the First Defendant was required to carry out an appropriate assessment to ensure that the Proposal would not adversely affect the integrity of the protected Arun Valley sites. In compliance with regulation 63(3), the First Defendant “had regard to the representations made by Natural England, as the appropriate nature conservation body”. At DL/20, the First Defendant “adopted IR 10.3 – IR 10.114 as the necessary Appropriate Assessment in her role as the Competent Authority on this matter”.
47. When determining a planning application, a planning decision-maker is entitled to proceed on the basis that other regimes will operate effectively and properly. This is a rebuttable presumption and the decision-maker must make an informed judgment whether and to what extent it applies, depending on the circumstances of the individual case. Furthermore, the Supreme Court held in the recent case of *R (Finch) v Surrey County Council* [2024] UKSC 20, that the existence of other regulatory controls does

not remove the obligation on a planning authority to undertake a full environmental impact assessment ('EIA').

48. The National Planning Policy Framework (December 2023 version) ('NPPF'), which should now be read in the light of *Finch*, states at paragraph 194:

"The focus of planning policies and decisions should be on whether proposed development is an acceptable use of land, rather than the control of processes or emissions (where these are subject to separate pollution control regimes). Planning decisions should assume that these regimes will operate effectively. Equally, where a planning decision has been made on a particular development, the planning issues should not be revisited through the permitting regimes operated by pollution control authorities."

49. The Planning Practice Guidance ('PPG') advises at paragraph 016 Reference ID: 34-016-20140306

"Planning for the necessary water supply would normally be addressed through authorities' strategic policies, which can be reflected in water companies' water resources management plans. Water supply is therefore unlikely to be a consideration for most planning applications. Exceptions might include:

- large developments not identified in plans that are likely to require a large amount of water; and/or
- significant works required to connect the water supply; and/ or
- where a plan requires enhanced water efficiency in new developments as part of a strategy to manage water demand locally and help deliver new development."

50. In *R (An Taisce) v Secretary of State for Energy and Climate Change* [2015] PTSR 189, the Court of Appeal held that, in assessing whether or not a project had likely significant effects for the purposes of the EIA regime, the planning decision maker was "in principle entitled to have regard to the UK nuclear regulatory regime when reaching a conclusion as to the likelihood of nuclear accidents" (at [47]). Sullivan LJ explained, at [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 paragraph 38 of his judgment in *R(Jones) v Mansfield District Council* [2024] 2

P & CR 14, Dyson LJ (as he then was) adopted paragraphs 51 and 52 of the judgment of Richards J. (as he then was) 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 any uncertainties that may exist, as to the likelihood of significant environmental effects. Everything depends on the circumstances of the individual case.”

51. *R (Together against Sizewell C Ltd) v Secretary of State for Energy Security and Net Zero* [2023] Env LR 29, was a challenge to the grant of development consent for a power station, including a finding of IROPI under regulation 64 of the Habitats Regulations, when no assured supply of potable water had as yet been identified for the power station by the statutory water undertaker (‘NWL’). The developer had stated that, in the unlikely event that NWL was unable to provide a permanent supply of water, it could develop a permanent desalination plant which would be unlikely to generate any new or materially different significant environmental effects (at [13]).

52. Holgate J. upheld the Secretary of State’s decision that the provision of the water source was not part of the Sizewell C project for the purposes of the EIA regime or the Habitats Regulations, saying at [90] – [91]:

“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 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”

53. In *Finch*, the Supreme Court allowed an appeal against the grant of planning permission for an oil well on the ground that the local planning authority, by confining its assessment of greenhouse gas emissions to those directly released from the well site, had not complied with the legal requirements of an environmental impact assessment. The Court found, by a majority, that the existence of regulatory controls by other non-

planning authorities, did not remove the obligation on the part of the planning authority to fully identify and assess the potential environmental effects.

54. Lord Leggatt said:

“Other environmental regimes

106 The further reason given by the developer and accepted by the council for confining the assessment to direct GHG emissions from sources within the well site boundary was that the council should not concern itself with emissions that will occur “downstream” when the oil produced from the wells is processed and used because such processes are regulated by other, non-planning regimes and the council “can assume that these regimes will operate effectively to avoid or mitigate the scope for material environmental harm” (see para 36 above).

107 Paragraph 122 of the developer’s environmental statement, which made this argument, quoted from the National Planning Policy Framework (July 2018), paragraph 183, which stated:

“The focus of planning policies and decisions should be on whether proposed development is an acceptable use of land, rather than the control of processes or emissions (where these are subject to separate pollution control regimes). Planning decisions should assume that these regimes will operate effectively. ...”

Reference was also made in footnotes to paragraph 122 to the National Planning Practice Guidance, Minerals, para 012, which was in similar terms, and to *R (Frack Free Balcombe Residents Association) v West Sussex County Council* [2014] EWHC 4108 (Admin). This case was cited for the proposition that a “local planning authority may consider that matters of regulatory control can be left to a statutory regulatory authority to consider.”

108 It was a clear legal error to regard this aspect of planning policy as a justification for limiting the scope of an EIA. An assumption made for planning purposes that non-planning regimes will operate effectively to avoid or mitigate significant environmental effects does not remove the obligation to identify and assess in the EIA the effects which the planning authority is assuming will be avoided or mitigated. This is clear from a line of authority referred to in the Frack Free Balcombe Residents Association case. In *R (Lebus) v South Cambridgeshire District Council* [2003] Env LR 17, paras 41–46, Sullivan J held that it is an error of law to reason that no environmental statement is needed because, although a project would otherwise have significant effects on the environment, mitigation measures will

render them insignificant. What is required in such a case is an environmental statement setting out the likely significant effects and the measures which can be taken to mitigate them; see also *R (Champion) v North Norfolk District Council* [2015] 1 WLR 3710, paras 49–51. The same principle must apply in determining the scope of the assessment required where an environmental statement is carried out.

109 As pointed out in those cases, the requirement in the EIA Directive to describe “measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment” (see para 104 above) implies that the potentially significant environmental impacts of a development should be described together with the measures expected to avoid or reduce them. The public is thereby able to understand the assumption made and to comment on it.”

55. In *National Farmers Union v Herefordshire Council* [2025] EWHC 536 (Admin), Lieven J. dismissed a challenge to the lawful scope of a Local Plan policy concerning river pollution. The following passages from her judgment are relevant to the issue in this claim:

“72. Dr Wolfe submits, both from the evidence of Mr Watson and the wider supporting material for the policy, that the spreading of chicken manure is causing environmental harm, or at the very least is causing the risk of environmental harm.

That is the case despite the fact that there is a regulatory regime in place to protect water quality. It is not necessary to assume that another regulatory regime works effectively when the evidence clearly establishes that it does not do so. He relies on Thornton J’s summary of the relevant approach in *Vanbrugh Court Residents’ Association v London Borough of Lambeth* [2022] EWHC 1207 (Admin) at [23]:

“[A] local planning authority is entitled to place reliance upon the effective operation of the other regulatory regime(s) in determining an application for planning permission. However, it cannot simply ignore the issues in question. It must assess them sufficiently so as to be able to satisfy itself that the other regulatory regime is capable of regulating the relevant issues. If it is not satisfied, then consent must be refused. The existence of the other regulatory regime is a material planning consideration, to be weighed in the balance. *Gateshead MBC v Secretary of State for the Environment* 1995 Env. LR 37 at [44] & [49] and *R(Bailey) v Secretary of State for Business, Enterprise & Regulatory Reform* [2008] EWHC 1257 (Admin) at [13]).”

.....

81.It is apparent from the Recitals and Article 13 of the WFD that the overall purpose of the WFD is to reduce and prevent environmental harm. The exclusions to the definition of waste in Article 2(1)(f) is made expressly subject to no harm to the environment. An approach which assumed no environmental harm on the basis of a regulatory regime which beyond any doubt had failed to protect the environment from harm would be contrary to the statutory purpose. I note what is said at [194] of the 2023 NPPF, but to the degree that the LPA in adopting W3 are not assuming that the regimes will operate effectively, there is clear evidence to support their approach. There is therefore good reason, as set out copiously in the documentation, to depart from [194] of the 2023 NPPF.”

Water Industry Act 1991

56. Section 37 of the Water Industry Act 1991 (‘WIA 1991’) imposes a duty on every water undertaker to develop and maintain an efficient and economical system of water supply within its area, and to ensure that arrangements are made to make supplies available to persons who demand them, as necessary to secure that they meet their statutory obligations.
57. Section 45 WIA 1991 provides that it shall be the duty of a water undertaker to make a connection where the owner or occupier of any premises serves notice requiring a supply of water for domestic purposes.
58. In exercising its statutory functions, a water undertaker is a “competent authority” under the Habitats Regulations and “must have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions”: see regulation 9(3) of the Habitats Regulations.
59. Sections 37A – D WIA 1991 make provision for the preparation and publication of water resources management plans by water undertakers. Such plans are required to be prepared every five years and reviewed annually. They must set out how the undertaker will achieve a secure supply of water for customers, as well as a protected and enhanced environment.
60. The preparation of water resources management plans is informed by the Water Resources Planning Guideline. The guidance to statutory undertakers includes the following matters:
 - i) The overarching objective of a water resources management plan (‘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.” (paragraph 1.1.1).
 - ii) 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” (paragraph 6.3). That includes planned growth via strategic housing developments.

- iii) Statutory undertakers are required to ensure that their WRMPs comply with the Habitats Regulations, and they are required to conduct assessments of their WRMPs under regulation 63 of the Habitats Regulations (paragraph 9.4.3). NE is a statutory consultee for draft WRMPs, as part of the facilitation of the Habitats Regulations assessment process.

WRA 1991

- 61. Chapter II of Part II of the WRA 1991 makes provision for the grant of licences for the abstraction of water, and for licences to be varied or revoked either by the licence holder (section 51) or by the EA (section 52).
- 62. In exercising its statutory functions, the EA is a “competent authority” under the Habitats Regulations and “must have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions”: see regulation 9(3) of the Habitats Regulations.
- 63. Additionally, decisions in respect of abstraction licences under section 52 WRA 1991 are subject to regulation 63 of the Habitats Regulations: see regulation 102(a) of the Habitats Regulations which refers to the grant of a licence, and also extends to variation or modification of licences, when read with regulation 61(2) of the Habitats Regulations.

Grounds of challenge

Ground 1

Claimant’s submissions

- 64. Under Ground 1, the Claimant submitted that the First Defendant proceeded on the basis that, although Southern Water’s WRMP 24 for the supply of water was itself subject to regulation 63 of the Habitats Regulations, the WRMP 24 might nonetheless continue groundwater abstraction at Hardham at a level that could not be excluded from resulting in harm to protected habitats, by reliance on IROPI under regulation 64(1) of the Habitats Regulations.
- 65. The Claimant submitted that finding was erroneous in law and/or irrational. Under regulation 64(1) of the Habitats Regulations, IROPI was only available if the competent authority is satisfied that there are no “alternative solutions” to carrying out the project, notwithstanding a negative assessment of the implications for the protected site. Here, the Inspector found, at IR/10.89, 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”. That finding was sufficient to rule out any prospect of IROPI, regardless of the Inspector’s lack of certainty as to which solutions might be deployed, or when they might be deployed.
- 66. Furthermore, the amount of groundwater that can be abstracted at Hardham is governed by the terms of the abstraction licence granted by the EA, not by WRMP 2024. Southern Water’s actual operation will be bound by the outcome of the EA’s

Sustainability Study. There is no scope for the WRMP 24 to rely upon IROPI to depart from that. (I observe here that the Sustainability Study is being produced by Southern Water, at the request of the EA, not by the EA itself).

67. Put another way, the First Defendant could not rationally conclude that no alternatives to the cessation of groundwater abstraction at Hardham existed. Therefore it was not open to the Inspector to approach the WRMP on the basis that IROPI was a possibility.

Conclusions

68. The Inspector correctly directed himself in law on regulation 64 of the Habitats Regulations and the IROPI test, at IR/10.9 – 10.11:

“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.¹

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

¹ See guidance on derogations at <https://www.gov.uk/guidance/habitats-regulations-assessments-protecting-a-european-site>

as suggested below, I would not recommend that the Secretary of State reaches a decision on the basis that IROPI applies.”

69. It is apparent from IR/10.11 that the Inspector understood that the Claimant’s position on regulation 64 of the Habitats Regulations and IROPI was that it did not apply to the planning application for reserved matters approval because there were alternative solutions. The Inspector had correctly set out the Claimant’s position earlier in the Report, at IR/7.17.
70. Also in IR/10.11, the Inspector made a clear recommendation to the First Defendant that she should not apply IROPI when making her decision on the application for reserved matters approval because (1) the substantive evidence did not make the case for IROPI, and (2) there appeared to be “feasible alternative solutions” if conditions were used (e.g. Condition 6).
71. At DL/14, the First Defendant agreed with the Inspector’s approach on IROPI, as set out at IR/10 – 11. Thus, the appeal on the reserved matters approval was not decided on the basis of IROPI.
72. Ground 1 relates to IROPI in respect of the WRMP 2024 under preparation by Southern Water. The challenge is based on IR/10.64 which stated:

“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].”

73. The Inspector cross-referred to the Claimant’s submissions which were summarised at IR/7.67 and IR/7.69, and to the Council’s response at 8.23:

“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. That is another reason why the legal basis of the Appellant’s contention that WRMP 2024 must necessarily be ‘zero Hardham’ is wrong.”

74. The Inspector’s conclusion at IR/10.64 has to be read in the context of the Inspector’s analysis of the WRMP 2024, set out as follows:

“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. 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 and must, therefore, be accompanied by its own HRA. As things presently stand the WRMP 2024 and its 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 its 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.

10.60 A reasonable planning system parallel to this situation would [*sic*] 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 WRMP 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 *[sic]* 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 IROPI 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 operate 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 [*sic*] water demand (including from [*sic*] 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."

75. The Inspector went on to find, in his "Conclusions":

"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 *[sic]* conclude that it can be ascertained (with reasonable certainty) that the proposal will not adversely affect the integrity of the Arun Valley Sites."

76. In my judgment, there is no basis in these passages of the Report to suggest that the Inspector misdirected himself on regulation 64 of the Habitats Regulations and the IROPI test, having earlier set out the provisions correctly at IR/10.10. An expert decision-maker can be taken to be familiar with the relevant statutory framework and legal principles, in the absence of a "sufficient positive contra-indication" per Holgate J. at [48] in *R (Keir) v Natural England* [2021] EWHC 2021 (Admin), applying the principle enunciated by Sales LJ in *Jones v Mordue* [2016] 1 WLR 2682, at [28].
77. In my view, IR/10.64 is a correct statement of the law. The Claimant's objection to it was, essentially, that it did not rule out IROPI on the basis that there were "alternative solutions". However, as the Report demonstrates, the Inspector's judgment was that the evidence was insufficiently certain to determine whether or not IROPI could apply. The second half of the final sentence in IR/10.64 references the uncertainty, where it states: "whether any such decision would be made in response to evidence that, is at present, is unknown". See also IR/10.87 and IR/10.88 (at paragraph 75 above).
78. The Claimant submitted that the Inspector's finding at IR/10.89 that there was some "capacity in supply" was sufficient to rule out IROPI. However, in the same paragraph the Inspector expressly found that the "evidence does not allow a specific source of alternative supply to be identified".
79. Earlier in the Report the Inspector examined the evidence relating to alternative sources and concluded that they were uncertain:

"10.72 How the additional supply from Weir Wood would be used is a different matter. The Statement of Responses 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. 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 Weir 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.

....

10.74 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.”

80. The Inspector also rejected the Claimant’s submissions on demand management savings, as follows:

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

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/d75, (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). 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. 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].

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."

81. In conclusion, I accept the First Defendant's submissions that the Inspector did not misdirect himself in law. Furthermore, his findings, based on the evidence before him, were a lawful exercise of his planning judgment, and cannot be characterised as irrational.
82. For these reasons, Ground 1 does not succeed.

Ground 2

Claimant's submissions

83. Under Ground 2, the Claimant challenged the First Defendant's conclusion that there was insufficient certainty as to what would happen after the publication of the Sustainability Study. At IR/10.55, the Inspector noted the options open to the EA and to Southern Water. At IR/10.56, the Inspector found that 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 to fulfil their legal obligations under the Habitats Regulations, the question of 'how' and 'when' lacks reasonable certainty."

84. The Claimant submitted that the Inspector and the First Defendant should have proceeded on the basis that the regulatory regimes under the WIA 1991 and the WRA 1991 would operate effectively and properly. A lack of certainty as to how or when the EA and Southern Water took action was “nothing to the point” (Skeleton argument/85) since whatever they chose to do, they had to comply with the Habitats Regulations so as to ensure the protection of the relevant sites. To require certainty risked the “sclerosis” which Holgate J. referred to in *Sizewell C* (see paragraph 51 above). The Claimant also relied upon *An Taisce* (paragraph 50 above); paragraph 194 of the NPPF (paragraph 48 above) and the PPG (paragraph 49 above).
85. The Claimant submitted that the Inspector erred in his approach at IR/10.52 - 10.53 in two ways. First, the Inspector found that the EA’s letter of 26 April 2022 “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”. The Claimant read this to mean that the Inspector did not disagree with the view expressed by the EA and that he considered that the EA had a greater freedom of action under regulation 9(3) of the Habitats Regulations than under regulation 63. The subsequent letter from the EA dated 11 July 2023 (paragraph 20 above) clarified its position in the light of the *Harris* judgment which was handed down on 6 September 2022, but the Inspector did not refer to that.
86. Second, when the Inspector stated that the EA’s duty under regulation 9(3) of the Habitats Regulations was “more general than” the duty under regulation 63, he failed to take into account the judgment of Johnson J. in *R (Harris) v Environment Agency* [2022] EWHC 2264 (Admin), at [86] - [87], which found that the EA was effectively the sole body responsible for deciding whether abstraction licences should be granted, varied or revoked, and therefore the scope for departure from the duty to have regard to the requirements of the Habitats Directive was considerably narrowed. The Claimant, in his skeleton argument at [82] – [83], submitted:

“82. 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 ensure that the requirements of the Habitats Directives are complied with....

83. The substance of the EA’s reg 9(3) duty is thus, in the circumstances, equivalent in substance to ... 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*.”

Conclusions

87. The challenged paragraphs (IR/10.52 - 10.53) need to be read in their proper context, in the section of the IR titled “*Southern Water voluntary minimisation and Environment Agency action following the Sustainability Review*” which states as follows:

“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 1990².

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 concludes³. Minimisation in this context means Southern Water using their best endeavours to keep abstraction as low as possible whilst also meeting customer demand⁴. 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 2023⁵, discharge the Environment Agency's duties under the Habitats Regulations. That would, instead, follow by making any necessary changes to the abstraction licence.

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’.

² 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]).

³ See page 2 of Southern Water letter dated 7 July 2023 at Appendix 2 of [CD1 1.02a].

⁴ See Environment Agency letter dated 6 June 2022 at Appendix 2 of [CD1 1.02a].

⁵ Appendix 2 of [CD1 1.02a].

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 2022⁶ 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 can assume will be operated judiciously.

⁶ Appendix 2 of [CD1 1.02a].

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 *[sic]* 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.”

88. The Inspector correctly directed himself in law on the Habitats Regulations at IR/10.3 – 10.16. The passages that are relevant to this Ground are set out below:

“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.....

.....

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*, 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* 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* 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.

....

10.16 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.”

89. Earlier in his Report, the Inspector summarised the Council’s submissions on the Habitats Regulations materially as follows:

“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 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 [Footnote dated 11 July 2023] 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)."

90. This summary was based on the Council's 'Closing Statement' at paragraphs 19 and 20.
91. In the light of these submissions from the Council, which referred both to the decision in *Harris* and the EA's letter of 11 July 2023, I reject the Claimant's submission that the Inspector overlooked the EA's letter of 11 July 2023, which referred to the decision in *Harris*, and erroneously only had regard to the EA's earlier letter of 26 April 2022. In fact, the Inspector expressly referred to the letter of 11 July 2023 at IR/10.48.
92. On my reading of IR/10.52, the Inspector was referring to, and agreeing with, the Council's submissions when he stated:
- "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." (*emphasis added*)
93. Furthermore, the Inspector was correct to describe the duty under regulation 9(3) of the Habitats Regulations as "more general" than the duty under regulation 63. The duty under regulation 9(3) is drafted in broad terms, providing that "a competent authority, when 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". In contrast, regulation 63 imposes a specific and more stringent duty on a competent authority to undertake an appropriate assessment of any proposed plan or project, in accordance with the step-by-step requirements set out in the regulation, in order to determine whether the plan or project will adversely affect the integrity of the site. In *Harris*, the Court held that the nature and extent of the "have regard" duty in regulation 9(3) may vary according to the duties under consideration, but it did not and could not re-write the regulations so as to remove the obvious distinction between regulation 9(3) and regulation 63 of the Habitats Regulations.
94. In my judgment, there are material distinctions between this case and *Harris*. In *Harris*, the EA was found to be "the sole (and certainly the principal)" public body charged with relevant duties where water was being abstracted for agriculture, and only some of the relevant geographic area was under review. Johnson J. considered that, if the EA did not secure the requirements of Article 6(2) of the Directive, "then no other public body is capable of filling the gap" (at [86]).
95. In *Harris*, Johnson J. observed, at [85], that the "have regard" duty in regulation 9(3) of the Habitats Regulations "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” and “in some contexts, different competent authorities may have overlapping roles that are relevant to the discharge of the requirements of the Habitats Directive” (at [84]). That is the position in this case.

96. In this case, the EA is a competent authority with responsibility, *inter alia*, for the grant, revocation and variation of abstraction licences. However, the statutory undertaker, Southern Water, is also a competent authority and is reviewing the relevant area in its WRMP 2024 and the Sustainability Review. Each of these “plans” will be accompanied by a Habitats Regulations assessment. Furthermore, the Claimant’s planning application, now at reserved matters stage, also requires a Habitats Regulations assessment from the First Defendant, who is a competent authority in her capacity as a planning decision-maker.
97. The Inspector was entitled to take into account the EA’s understanding of its powers and duties, as set out in the letter of 26 April 2022 (see paragraph 15 above). On my reading of IR/10.53 - 10.54, the Inspector was not approving or agreeing with the EA’s letter as a correct statement of the law; he was merely recording it. The Inspector correctly observed that the letter indicated that the EA “perceived” that it had a greater freedom to “balance a wider range of factors and still accord with their obligations under the Habitats Regulations”. The Inspector did not say that he also “perceived” this to be the case, and I disagree with the Claimant’s suggestion that he can be assumed to have done so.
98. Furthermore, the EA’s letter of 11 July 2023 (set out at paragraph 19 above) did not withdraw its earlier statement in the letter of 26 April 2022. Rather, it explained that it was acting in accordance with the Habitats Regulations by currently undertaking an investigation, and once the Sustainability Review was available, by making any changes to the abstraction licence which it considered necessary. It also distinguished the factual position in *Harris*.
99. On my reading of the Report, I consider that the Inspector had the relevant provisions of the Habitats Regulations (regulations 9(3) and 63) well in mind when considering the position of the EA: see IR/8.16, IR/8.70, IR/10.4-10.8, IR/10.51 – 10.57, IR/10.85. It is also clear from paragraphs IR/10.46, IR/10.49 and IR/10.55 that the Inspector was looking ahead to the EA’s exercise of powers under section 52 WRA 1991, at which point regulation 63 of the Habitats Regulations would be engaged. An expert decision-maker can be taken to be familiar with the relevant statutory framework in the absence of a “sufficient positive contra-indication: per Holgate J. at [48] in *R (Keir) v Natural England* [2021] EWHC 2021 (Admin), applying the principle enunciated by Sales LJ in *Jones v Mordue* [2016] 1 WLR 2682, at [28].
100. In my view, the Claimant’s submission that the Inspector and the First Defendant erred in law in finding that the unspecified future action by the EA and/or Southern Water did not provide evidence of reasonable certainty that no adverse effects on the integrity of the Arun Valley sites would result from the proposed development, is misconceived.
101. The case law on regulation 63 of the Habitats Regulations confirms that the competent authority must be certain, and that on the evidence there should be no reasonable scientific doubt, in the context of a strict precautionary approach. As stated in *Wyatt*, at [9(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 paragraph 44, and its judgment in *People Over Wind and Sweetman v Coillte Teoranta* (Case C-323/17) [2018] PTSR 1668, at paragraph 38).”

102. In this case, scientific work was ongoing; the evidence base was not “complete, precise and definitive”; and substantial scientific doubt remained as to development’s effect on the protected site, and whether and how and when it would be resolved.
103. The proposition that a planning decision-maker is entitled to proceed on the basis that other regimes will operate effectively and properly is not a legal requirement to do so. It is a rebuttable presumption that a decision-maker may depart from, if the evidence justifies it. Whether or not to do so is an evaluative public law judgment for the decision-maker, subject only to challenge on *Wednesbury* grounds: see *An Taisce* at [48]; *Sizewell C* at [90]; *National Farmers Union* at [72] and [81]. Moreover, in *Finch*, at [106] – [108], the Supreme Court held that the existence of other regulatory controls does not remove the obligation on a planning authority to undertake a full EIA. It is likely that this principle applies, by analogy, to an appropriate assessment under the Habitats Regulations.
104. In this case, there was specific advice from NE that the ongoing abstraction was having a detrimental impact on the protected sites and therefore further development should be avoided unless it was subject to water neutrality mechanisms to avoid exacerbating the adverse impacts. See the Position Statement, September 2021, (paragraph 11 above); the Advice Note, February 2022, (paragraph 13 above) which stated that Southern Water had been warned of the issue as long ago as December 2019; and NE’s letter of response to the Inspector’s queries, 19 April 2024, (paragraph 21 above).
105. Applying *Wyatt*, at [9(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”.
106. At the Inquiry, the evidence from NE was accepted by the EA, Southern Water and the Council. It was subjected to careful consideration by the Inspector. It has not been challenged in the statutory review.
107. The Inspector properly explored the uncertainty in the evidence base and its consequences before concluding that it could not be ascertained with reasonable certainty that the proposal will not adversely affect the integrity of the Arun Valley sites (IR/10.90). No public law error is disclosed in the carefully reasoned conclusions by the Inspector and the First Defendant that, in their judgment, reliance upon other

regulatory regimes lacked the necessary degree of certainty to reach the high standards required of the Habitats Regulations. For example:

“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 operate 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.”

108. It was not irrational or otherwise unlawful for the Inspector and the First Defendant to conclude there was insufficient certainty to conclude a positive appropriate assessment without Condition 6. Such a decision was well within the scope of the First Defendant’s planning judgment given the “basic duty of the competent authority under regulation 63 ... to grant planning permission only if satisfied that the proposed development will not adversely affect the integrity of the ... protected site” (*Wyatt*, at [52]). The decision did not turn on the precise scope of the EA’s duties under regulation 9 or regulation 63 of the Habitats Regulations. It was based upon the uncertainty, on the evidence, that the relevant bodies could or would take the steps necessary in time to ensure that the proposed development would not adversely affect the integrity of the protected site.
109. For these reasons, Ground 2 does not succeed.

Final conclusions

110. Grounds 1 and 2 are dismissed. In the circumstances, it is not necessary for me to address the First Defendant’s submissions on the alternative remedy available to the Claimant, namely, an application under section 73 TCPA 1990 to vary Condition 6, if or when circumstances change.
111. For the reasons set out above, the claim for statutory review is dismissed.