

Written Evidence for the Planning and Infrastructure Bill Public Bill Committee Submitted by Berkshire, Buckinghamshire and Oxfordshire Wildlife Trust

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Executive Summary

Part 3: Development and Nature Recovery amounts to a regression in environmental law

We are concerned that the bill will lead to the following issues:

- 1. An undermining of the mitigation hierarchy**
- 2. Compensation for environmental damage not being delivered in the locations where the harm takes place. This undermines the rectification at source principle and risks urban areas being cut off from nature**
- 3. An erosion of the polluter pays principle**
- 4. A risk of Natural England's work becoming dependent on the facilitation of development**
- 5. In the event of failure to deliver the environmental measures in an EDP there is no obligation on Natural England to undertake the necessary procedures to remediate this**
- 6. The standards for having an EDP signed off by the Secretary of State are not stringent enough to ensure that EDPs will always deliver positively for nature**
- 7. A risk that EDPs will not be delivered in perpetuity and that irreparable damage may occur if conservation measures are not delivered prior to the harm from development**
- 8. Developers being disincentivised from creating high quality habitats on site**

Introduction

1. The Berkshire, Buckinghamshire and Oxfordshire Wildlife Trust is a registered charity that manages 85 nature reserves, offers advice to landowners, works with developers to provide biodiversity net gain solutions. provides educational services and represents over 29,000 members from across the three counties. The written evidence provided here both raises our concerns about, and offers our recommendations for, Part 3: Development and Nature Recovery. We would be happy to expand on this document and give oral evidence.
2. We would like to see a number of amendments selected and integrated into the Bill such that the abovementioned concerns are fully addressed. This may require a pausing of part three so that this can undergo a consultation period.

Mitigation Hierarchy

3. The proposed Nature Restoration Fund completely undermines the mitigation hierarchy. Developers are supposed to firstly avoid harm to biodiversity, then where that isn't possible, minimise harm and then compensate or provide offsets. The mitigation hierarchy is a central guiding principle that underpins a range of other frameworks and policies for development. It is essential that this principle is not overridden if we are to solve the dual climate and nature crises. However, the NRF allows developers to skip straight to the final point in the hierarchy and simply pay to offset the harm they cause. This represents a weakening of the Habitat Regulations and a regression in our environmental law.
4. The result is that protected species and habitats that are not covered by an EDP will be better protected than species and habitats that are covered by an EDP, even though they are both covered by the same legislation, namely the Habitats Regulations, Wildlife and Countryside Act or Protection of Badgers Act. This two-tier approach will create confusion for land managers, developers and be bad for nature restoration.

Alienation in time and space

5. The NRF system will sever environmental compensation from the development causing the harm. Harm could occur in one part of the country and the compensation be delivered in another part if the size of EDPs are not

constrained. For example, whilst development and the associated environmental harm might occur in the south east, Natural England could decide to deliver the compensatory environmental measures in another part of the country where land is cheaper. This means that the community that bears the impact of new developments might not see the benefits of the nature restoration projects. Clause 53(2) requires Natural England to have regard to local nature recovery strategies when preparing an EDP. However, Natural England should be required to deliver the compensatory environmental measures within the same local nature recovery strategy area as the damage was suffered.

6. Clause 66(4) (a) allows the regulations to permit NRF money to be used to reimburse expenditure already incurred and (b) allows it to be reserved and spent in the future. So, the NRF severs the delivery of compensatory measures from developments in both time and space. There should be a time limit placed on Natural England to ensure environmental measures are delivered at the same time or earlier than the harm is caused by development.
7. By severing the link between the location of the environmental damage and the location that conservation measures are delivered this Bill undermines the rectification at source principle as included in the Environment Act 2021.

Levy / Polluter Pays

8. Clause 64 deals with the factors Natural England must consider when setting a levy. When deciding what to charge developers for offsetting the environmental harm developments cause, Natural England must have regard to impacts on the "economic viability of development" and "other actual or expected sources of funding for those conservation measures." So, if developers argue they can't afford to pay or Natural England gets funding for conservation measures from elsewhere, there is a chance developers can destroy habitats for protected species and not have to pay the full cost of offsetting that damage. This is completely out of line with the polluter pays principle and therefore in conflict with the Environment Act 2021. A sliding towards a 'polluter pays so long as it is not too costly principle' must not become the paradigm for nature restoration.

9. This is reinforced by clause 62 which requires the Secretary of State to consider when making the regulations that the overall purpose of the nature restoration levy is to ensure that costs incurred in maintaining or improving the conservation status of environmental features can be funded (wholly or partly) by developers in a way that does not make development economically unviable. If a developer cannot afford to put right the harm their development would cause, the development should simply not go ahead.
10. Clause 67(6) means that developers won't even need to pay into the levy and can instead offer services in kind. The fallout of this being that an EDP may not receive adequate funding to deliver on the conservation measures it prescribes.

Ring fencing of funds

11. Clause 66(1) requires Natural England to spend money received on conservation measures, but clause 66(4) allows NRF funds to be used to cover administrative expenses, the giving of loans, guarantees and indemnities. Such administrative expenses would include the costs of preparing an EDP which would be significant. Clause 69 also allows for NRF funds to be used to pay compensation to those who suffer as a result of enforcement action (enforcement of late payment and failure to pay). This means that funds that should be used to create habitats could be used to cover administrative costs of enforcement and compensation payments. Every penny raised by the NRF should be spent on the ground, not in bureaucratic processes. Otherwise, the Habitat Regulations, Wildlife and Countryside Act and Protection of Badgers Act will be fundamentally undermined. The polluter pays principle requires developers to pay to put good the damage they cause, to pay compensation to nature, not pay for compensation owed by Natural England or local authorities.
12. Clause 66(5)(a) says that the regulations may require Natural England to account separately for any money received by the NRF, but it is absolutely essential that it is required to account separately. Similarly for regulations outlined in 66(5)(b) and (c), these must be required.
13. Natural England's core mission is to help conserve, enhance and manage the natural environment for the benefit of present and future generations, thereby

contributing to sustainable development. Its management of the NRF can play a part in that but must be separate to the rest of its work. Like many public bodies, Natural England is constrained by limited resources, but its work must be properly funded, separate to the NRF, and the Government must not see the NRF as a gift that enables it to cut its budget. Natural England's work must never become dependent on facilitating development.

Resilience and Remedy

14. Clause 57(5) requires Natural England's reports on EDPs to include whether the conservation measures have been implemented and have had their intended effect. Clause 73 requires Natural England to report annually on the effectiveness of each EDP. However, there is no provision made for Natural England being required to take remedial steps in the event that an EDP is not effective. Additionally, if an EDP is not effective or does not deliver the results required to offset the damage caused by the related development, there is no obligation on Natural to make good the shortfall and no detail on where money would come from to remedy any failings of an EDP.
15. Clause 71 sets out the conditions for administering and implementing EDPs and 71(3) allows Natural England or another body performing the functions of Natural England (see clause 74) to pay another person to oversee conservation measures.
16. In cases where Natural England pays another person to take conservation measures, clarification is needed on the remedial actions that such person, responsible for delivering these conservation measures, must carry out in the event of failure to deliver an EDP.
17. Clause 59(8) appears to give the Secretary of State the discretion to order another public authority to take measures to improve the conservation status of an environmental feature that was the subject of a revoked EDP, but not an obligation. Nor does it cover the situation where an EDP is not delivering the full intended measures but is not revoked.

Threshold of test

18. The Secretary of State for MHCLG (note: not Defra) has the final sign off for EDPs and must be satisfied they pass the "overall improvement test". However, the threshold for passing the test is low. An EDP passes the overall improvement test if the conservation measures are *likely to be sufficient to outweigh* the negative effect caused by the development on the conservation status of each identified environmental feature. The test of "likely" is too low a threshold.
19. Setting such a weak or low threshold means that in reality there is a good chance some EDPs will not outweigh the negative effects of development leading to an overall decline in protected species and habitats.
20. A threshold of "reasonably certain" or higher would be more appropriate. Although greater thought needs to be given to the exact phrasing. The term "outweigh" is also inadequate and represents the absolute bare minimum that could be considered as taking a minute step towards "restoring" nature. The scales on which the harm caused and the conservation measures sit, must fall decisively on the side of conservation measures. A slight tipping or outweighing on the side of the conservation measures will not help restore nature. Indeed, the failure rate of EDPs would only need to be miniscule to wipe out any improvements in nature generated by a small outweighing.
21. Clause 50(3)(b) is also incredibly weak. The requirement for a conservation measure to simply 'contribute' to an overall improvement of an identified environmental feature again sets the bar very low for delivering positively for nature. Identified conservation measures ought instead to be delivered at the highest standard possible toward the end of improving the conservation status of the identified environmental feature.
22. Due to risk of failure or risk of an EDP not delivering all the benefits intended, a buffer should be factored in and the EDP required to deliver significantly more than the damage it is compensating for.

Environmental Impact?

23. It is unclear how an EDP can detail the environmental impact it is compensating for when it has no details of the specific developments it will provide offsets for. Not every development and impact on a protected species or habitat is the same. Such a standardised approach assumes every such habitat or species of a given type is impacted in exactly the same way by every type of development.

Greater detail is needed on how the quantity or measures of impact will be assessed both at the harm and conservation measures stages.

Duration of Conservation Measures

24. Clause 49(7) requires that an EDP must specify the date on which it expires, which must be within 10 years of its start date. This is presumably the period in which developers can pay into the fund to offset the damage they cause. Clause 50(6) gives the discretion to Natural England to ensure the levy can fund the conservation measure beyond the duration of the EDP if it is required to address the environmental impact of the development. Impacts of developments last in perpetuity so conservation measures should be managed and protected in perpetuity as well with the land designated as such. If the conservation measures are not managed and maintained beyond the first 10 years they will be entirely inadequate as mitigation.
25. There is also no clarity over what period of time the "improvement" needs to be delivered. The harm caused by development would be immediate so a tight timeframe for the delivery of the "improvement" needs to be required. Otherwise harm would be caused now with only a likelihood of adequate compensation being delivered in the future. Where there is the prospect of significant or irreparable damage occurring to a habitat, the schedule of the EDP should ensure benefits to conservation status occurs prior to harm e.g. through adequate buffering of an ancient woodland, calcareous grassland or chalk stream.
26. We support the amendment tabled by Chris Hinchliff (Clause 52) to address this issue.

Uncertainty for Developers

27. At a time when developers are ever more aware of their environmental commitments, the NRF would punish those developers who want to do the right thing on site but need to pay the NRF levy because it's mandatory (clause 61(4)). They would essentially need to double pay if that want to deliver mitigation on site. For those who only pay the levy, the NRF makes consultation with the local community over the environmental impacts of the development more difficult, because instead of engaging on how to deal with the issues onsite, the

developer can only say they have paid into a fund which has little or no relevance to the local community.

28. This is a step away from sustainable development because instead of promoting sustainable developments and plans that enhance nature, they force a developer to separate the impacts of development from the measures to improve protected species.

Regression

29. At the top of the Bill Angela Rayner states "the Bill will not have the effect of reducing the level of environmental protection provided for by any existing environmental law." We disagree.
30. Arguably the NRF does not secure the same level of environmental outcomes as legal obligations in the Habitats Regulations do. The NRF replaces the Habitat Regulations Assessment standard of "beyond reasonable doubt" with the lower threshold EDP test of "likely to outweigh". The lack of pilot schemes or evidence of effectiveness of the proposed NRF also risks unintended consequences and does not take account of the precautionary principle, which is an internationally recognised principle which underpins the Habitats Regulations.
31. The Bill allows for protected habitats and species to be destroyed by simple payment of a levy. Such destruction is not possible under existing law and therefore the accuracy of Angela Rayner's statement is dubious to say the least.

Chalk streams

32. As currently drafted, the bill is a missed opportunity to remedy one of the long standing problems with our planning system and existing environmental protections. Namely, the lack of protections for our chalk streams. 85% of the world's chalk streams are in England. They are so precious that they are our equivalent of the Amazon rainforest and we must protect them. They are currently heavily polluted, in poor condition and overly abstracted. An amendment to the bill could provide that new protections for chalk streams are given through Spatial Development Strategies. This would create a real win-win for people and nature.

Recommendations for amendments

33. We are in favour of the chalk stream protection amendment (clause 47) and the EDP scheduling amendment (clause 52) both tabled by Chris Hinchliff. We are also in full support of the proposed amendment on evidence (clause 53), the amendment tabled by Gideon Amos on significant improvement test (clause 55) and the amendment tabled by Ellie Chowns on the mitigation hierarchy (clause 61).
34. Natural England must be satisfied that developers have adhered to the mitigation hierarchy and avoided harm where possible before payment into the NRF is made.
35. Natural England must supply clear scientific evidence to justify the conservation measures of an EDP.
36. Where irreversible and/or significant harm is foreseeable, up front benefits to conservation status must be delivered. To ensure this a transparent schedule of improvements must be included in the EDP.
37. We firmly believe that the 'likely outweigh' condition for EDPs is not stringent enough. The wording here leaves nature restoration highly susceptible to failure. Instead, proper environmental recovery will require an amendment that ensures that NE demonstrates to a level of reasonably certain or higher that the conservation status of environmental features will be significantly improved.
38. Ultimately our concerns are considerable enough that we think Part III of the bill should be paused so its potential impacts can be fully assessed and the issues identified above resolved.

Please contact matthewstanton@bbowt.org.uk if you have any questions.