NATURESPACE PARTNERSHIP LTD

Part 3 of the Planning & Infrastructure Bill

O P I N I O N

1. I am instructed to advise NatureSpace Partnership Ltd ("**NSP**") which is concerned about the potential impact of Part 3 of the Planning & Infrastructure Bill ("**PIB**") on Development and Nature Recovery.

2. NSP runs a Great Crested Newt ("**GCN**") "district licensing" scheme for local planning authorities ("**LPAs**") under which NSP procures from Natural England ("**NE**") GCN organisational licences under which developers may carry out their developments lawfully under the LPAs' licences in return for payment to NSP which arranges for strategic "landscape scale" GCN compensatory habitat. NSP also secures organisational licences for some infrastructure organisations such as Network Rail and under these licences NSP similarly provides strategic landscape scale GCN compensatory habitat in return for payment.

3. NSP's concerns with regard to the PIB are not so much as to its possible impact on NSP's business model (though this might arise) but from a concern for the environment and its protection. NSP is committed to nature conservation and its scheme operates to high standards[1] and has been a great success[2].

4. The PIB was published on 11 March 2025. A second reading of the PIB concluded on 24 March 2025 but had no impact on the published drafting of Part 3 and the associated schedules (4 and 6). The PIB will now go to Committee Stage at which point amendments may be tabled. Parliament has announced that oral evidence sessions will be held on Thursday 24 April 2025 and are expected to report by 5pm

---

[1] See https://naturespaceuk.com/

[2] See https://naturespaceuk.com/news/

on 22 May 2025.

5. The Parliament website records that the stages the PIB has reached and are timetabled are[3]:

   (1) First Reading – 11 March 2025

   (2) Second Reading – 24 March 2025

   (3) Committee Stage - yet to begin. Expected to report by 22 May 2025[4].

   It is understood that the intention is for the Bill to receive Royal Assent by July 2025 and NSP is keen to be in a position to make representations as soon as possible during the bill process.

Questions for advice

6. I am instructed to consider the following questions, namely whether Part 3 PIB -

   (1) can be considered not to have the effect of reducing the level of environmental protection provided for by any existing environmental law;

   (2) breaches the terms of the Bern or Ramsar Conventions;

   (3) either -

      (a) breaches the terms of Article 391 of the EU/UK Trade and Cooperation Agreement through a failure by the UK to adopt or modify its law and policies in a manner consistent with each Party's international commitments (this links directly to Q2); or

      (b) has the potential to breach Article 391 through a weakening or reduction of its environmental levels of protection (I am not asked to consider whether this would affect trade or investment between the Parties).

Proposals in Part 3 PIB[5]

7. The first page of the PIB contains the following statement pursuant to s. 20(2) of

---

[3] https://bills.parliament.uk/bills/3946/stages

[4] https://bills.parliament.uk/bills/3946/news

[5] The current version is the version as introduced to Parliament.

the Environment Act 2021 ("**EA 2021**"):

> "ENVIRONMENTAL STATEMENTS
>
> Secretary Angela Rayner has made the following statements under section 20(2)(a) and (3) of the Environment Act 2021.
>
> In my view—
>
> (a) the Planning and Infrastructure Bill contains provision which, if enacted, would be environmental law, and
>
> (b) the Bill will not have the effect of reducing the level of environmental protection provided for by any existing environmental law."

8. Whether or not the PIB achieves that stated intention will be considered under Issue 1.

Statutory purpose

9. An explanation of Part 3 and its purpose is given in the Government's "*Guide to the Planning and Infrastructure Bill*" (11.3.25)[6] which is to provide an alternative route to meeting a number of requirements imposed on developers to discharge environmental obligations under the Conservation of Habitats and Species Regulations 2017 ("**HR 2017**"), the Wildlife and Countryside Act 1981 ("**WCA 1981**") and the Protection of Badgers Act 1992 ("**PBA 1992**"):

> "**Part 3: Development and nature recovery**
>
> Currently, where development is required to discharge an environmental obligation relating to protected habitats and species there is often little or no strategic coordination as to how these obligations are or should be discharged.
>
> As the system stands, development is often delayed until sufficient mitigation is put in place. The time it takes to secure mitigations can range from a number of months to a number of years where mitigation is challenging to secure – for example, there are areas where nutrient neutrality advice was issued between 2020 and 2022 that still have no operational supply of mitigation.
>
> Assessing the environmental impact of a development requires a high level of technical knowledge and a bespoke assessment is required, even for small developments. Each development must then be linked to specific mitigation measures with development being blocked where such measures are not readily available. While this approach addresses the specific impact of a development, by not taking a holistic view, mitigation measures may not secure the best outcomes for the environment. This approach may also lead to higher than necessary administrative costs, because of multiple transactions and information exchanges, as well as inefficient allocation of limited specialist capacity such as ecologists, whose focus is solely on project level mitigation work rather than the recovery of habitats and species overall.

---

[6] https://www.gov.uk/government/publications/the-planning-and-infrastructure-bill/guide-to-the-planning-and-infrastructure-bill

These delays can slow housing delivery, with accompanying burdens on developers and local authorities. For example, for local authorities these delays can result in challenges in meeting their local housing need. In areas where there are significant delays caused by environmental issues it can result in housing needing to be placed in alternative locations. This can result in increased infrastructure demand being overly concentrated in specific areas.

The Bill establishes the Nature Restoration Fund (NRF), an alternative approach for developers to meet certain environmental obligations relating to protected sites and species. It allows Natural England (or another designated delivery body) to bring forward Environmental Delivery Plans (EDPs), that will set out the strategic action to be taken to address the impact that development has on a protected site or species and, crucially, how these actions go further than the current approach and support nature recovery. Where an EDP is in place and a developer utilises it, the developer would no longer be required to undertake their own assessments, or deliver project-specific interventions, for issues addressed by the EDP.

The government believes this approach will facilitate a more strategic approach to the discharge of environmental obligations and result in improved environmental outcomes being delivered more efficiently. By reducing delays to development, this new approach may also facilitate faster delivery of housing across England.

Frequently asked questions

Q. Won't this lead to environmental regression?

Since these measures were announced in the King's Speech we have stated that we would only act in legislation where we can confirm to Parliament that the steps we are taking will deliver positive environmental outcomes.

On Bill introduction the Minister confirmed via a statement under section 20(3) of the Environment Act that this Bill would not have the effect of reducing the level of environmental protection of existing environmental law.

We are clear in our desire to deliver a win-win for nature and for the economy and are committed to exploring how taking a more strategic approach can secure improved outcomes for the environment.

Q. The previous government attempted to weaken the Habitats Regulations and scrap nutrient neutrality rules. How does this approach differ?

This approach will not reduce overall levels of environmental protection. It will do the opposite, by enabling development to go beyond maintaining an unacceptable environmental status quo and make a positive contribution to nature recovery.

By moving away from piecemeal interventions to a more strategic approach, we can deliver more for nature, not less.

Q. We already have District Level Licensing and nutrient neutrality schemes. What more will the new system offer and how will it be easier for developers?

Existing approaches are delivering on interventions to mitigate for development, but are complex and inefficient, failing to fix the underlying issues, only maintaining the status quo and operating at only a project specific mitigation scale. We need to do better, both to enable nature recovery and streamline the process for development and planning decision-makers.

As District Level Licencing for Great Crested Newts has proved, taking a strategic approach is often more efficient and reduces the proportion of expenditure directed towards surveying or complicated calculations. The strategic approach is therefore also more effective, enabling us to go further than mitigation and deliver

improvements for nature. However the existing legal framework is not designed to support strategic approaches and complex legal agreements and payments are needed.

Where an EDP is in place, our approach will enable developers to fulfil their existing environmental obligations in a different way. By making a straightforward and simple payment, without complex legal agreements, to pass the responsibility of sourcing and delivering mitigations and improvements onto Natural England. In order to secure the certainty needed for this approach to work, it has been necessary to implement this new system through legislation

Q. Who will ensure that the environmental obligation is delivered?

EDPs will be prepared by experts in Natural England before being approved and made by the Secretary of State. The Secretary of State will only be able to give the go ahead to an EDP where they are satisfied that doing so will deliver an overall improvement compared with the current approach. EDPs will include clear criteria for success to ensure this overall improvement is delivered alongside robust monitoring and reporting requirements. If an EDP is shown to be underperforming, the EDP will be expected to deliver additional conservation measures to ensure the environmental outcome is secured.

It is essential that Natural England will be resourced sufficiently to carry out their role as the delivery body. The budget allocated £14 million for the Nature Restoration Fund in the next financial year, but its steady state operation will be on a full cost recovery basis.

We are confident that the backstop measures for EDPs ensure certainty that the conservation measures proposed under an EDP will outweigh the negative effects of development. "

10. A factsheet was also issued with the guidance regarding the Nature Restoration Fund[7] which begins by stating what Government considers to be the reason for legislating:

"**What is the issue?**

Sustained economic growth is the number one mission of this government, but this cannot come at the expense of our natural environment. A healthy natural environment is essential both in its own right and for sustained and resilient growth.

Existing approaches to protect and restore our most important habitats and species have not been able to reverse the trend of environmental decline, while creating significant barriers to building the homes and infrastructure we need. To grow the economy and recover nature we need new tools and a new approach. We want to make better use of the millions of pounds that are spent each year on bespoke mitigation and compensation schemes, by using this money to fund strategic interventions that provide greater benefit for nature than the status quo. Through this approach we want to provide the necessary certainty for all parties that we will take consolidated, coordinated action to drive nature recovery whilst allowing vital development to come forward."

---

[7] https://www.gov.uk/government/publications/the-planning-and-infrastructure-bill/factsheet-nature-restoration-fund

11. Among the principal reasons for concern with the existing legislation are the difficulties and delays caused to development by existing environmental regulations:

    (1) The requirements for licensing in reg. 55 of the HR 2017, s. 16 of the WCA 1981 and s. 10 of the PBA 1992; and

    (2) The high threshold required to be met under the requirements for certain protected sites under the WCA 1981 and HR 2017 i.e. primarily SSSIs, and sites listed under reg. 8 of the HR 2017 (proposed to include Ramsar Sites under Schedule 6 Part 1 of the PIB).

12. This is clear from the Planning Reform Working Paper: *Development and Nature Recovery* (January 2025, updated 13 February) which preceded the PIB. While nature recovery is a stated aim of the proposals it is not unreasonable to infer that the provisions are primarily driven by the Government's economic and housing objectives which are said to require "*dealing with environmental harms at source*" (emphasis added):

> "2. The government's plan for change committed to the hugely ambitious milestone of building 1.5 million safe and decent homes in England and delivering the infrastructure the country needs by deciding 150 planning applications for major infrastructure this Parliament. This will require a rate of housebuilding not seen in over 50 years. But the sheer scale of the housing crisis demands a radical response, which is why the government has committed to use the Planning and Infrastructure Bill to reform the failing status quo to create a win-win for development and nature.
>
> 3. We need to rebuild nature at the same time as building the sustainable homes, clean power, and other infrastructure we need, which is why we will continue to expect development projects to meet high environmental standards and avoid causing unnecessary harm to nature or the environment. Our planning reforms will support developers to submit good quality applications which deliver for communities and the environment. However, some environmental obligations may be more efficiently discharged - with better outcomes for development and growth, as well as nature, water, air, and climate resilience - at a more strategic level, rather than project-by-project.
>
> 4. Streamlining development processes and the discharging of environmental obligations can unlock economic benefits – including to build 1.5 million new homes and clean power infrastructure – which in turn can help fund tangible and targeted action for nature's recovery. To deliver this win-win for the environment and for growth, we need to move to a system that can identify and deliver on opportunities for development to collectively fund nature projects at the right spatial scale. This means converting small, poorly targeted, and time-consuming project-specific obligations into strategic action plans for environmental protection and improvement where these will deliver the most for nature.
>
> **Our objectives**
>
> 5. Unlocking this win-win outcome for the economy and for nature must start with addressing pollution and environmental harm at source. This means taking more

robust regulatory and policy action on a number of fronts. While it is right that we should do everything we can to manage the environmental impact of development, too often housing and infrastructure experience additional costs and delays due to poor underlying environmental conditions arising from other causes. This is evidenced, for example, by the need for nutrient neutrality advice in parts of England. The government is determined to go further in dealing with environmental harms at source.

6. With that goal in mind, the government's rapid review of the Environmental Improvement Plan will allow us to develop a new, statutory plan to protect and restore our natural environment at the scale and pace that is needed, drawing on the review's findings and a wide range of stakeholder input. This will focus on cleaning up our waterways, reducing waste across the economy, planting millions more trees, improving air quality, creating nature rich habitat, and halting the decline in species by 2030.

7. The review will engage with stakeholders across environment and nature, farming, resources, energy, waste and water sectors, working hand in glove with businesses, local authorities and civil society across the country to develop new ambitious plans to save nature. This review is an important step in turning the page on nature recovery and will provide the foundations for delivering these targets.

8. We recognise that upstream improvements take time, but we are committed to restoring nature, including sites of international and domestic importance, preserving our natural heritage for future generations while providing the necessary environmental headroom to support growth.

9. In addition to taking action at source, the government is therefore determined to make sure that where development will have an environmental impact that should be addressed, we have a system that delivers the best outcomes for nature in a way that supports rather than holds up development.

10. In adopting this more strategic approach – one which delivers more effectively for nature while enabling development to proceed where it is needed – we want to:

a) take a holistic view of nature recovery to secure better environmental outcomes;

b) go beyond offsetting environmental impacts and instead use development to deliver positive outcomes for nature recovery;

c) improve efficiency and reduce duplication to ensure every pound spent helps deliver our environmental goals;

d) make it far easier for developers to discharge a range of environmental obligations, and provide the legal certainty necessary to underpin substantial capital investment;

e) give delivery partners the tools they need to generate positive outcomes for nature, empowering them to make the right choices to deliver nature recovery;

f) establish a robust and transparent framework to monitor delivery of environmental outcomes; and

g) create a lasting legacy of environmental improvement that will promote better public health through increased access to high quality green spaces.

11. This is not achievable under the existing legislative framework. While the government will not reduce the level of environmental protection provided for in existing law, we do believe it is necessary to revise environmental legislation to establish the proposed new approach. By making targeted amendments to legislation like the Habitats Regulations and the Wildlife and Countryside Act we can deliver improved environmental outcomes. This does not mean moving away from the outcomes envisaged by existing environmental law, but instead involves changing the

process of how these outcomes are achieved, allowing us to go further to support nature recovery."

13. See also the Explanatory Notes to the PIB at e.g. paras. 1 to 4 and 82 to 87. For example:

> "84 Under the current system, development is often delayed until sufficient mitigation is put in place. The time it takes to secure mitigations can range from a number of months to a number of years where mitigation is challenging to secure – for example, there are areas where nutrient neutrality advice was issued between 2020 and 2022 that still have no operational supply of mitigation.
>
> 85 Assessing the environmental impact of a development requires a high level of technical knowledge and a bespoke assessment is required, even for small developments. Each development must then be linked to specific mitigation measures with development being blocked where such measures are not readily available. While this approach addresses the specific impact of a development, by not taking a holistic view, mitigation measures may not only fail to secure the best outcomes for the environment. This approach may also lead to higher than necessary administrative costs at the system level, because of multiple transactions and information exchanges, as well as inefficient allocation of limited specialist capacity such as ecologists, whose focus is solely on project level mitigation work rather than the recovery of habitats and species.
>
> 86 These delays can slow housing delivery, with accompanying burdens on developers and local authorities. For example, for local authorities these delays can result in challenges meeting their local housing need. In areas where there are significant delays caused by environmental issues it can result in housing needing to be placed in alternative locations. This can result in increased infrastructure demand being overly concentrated in specific areas."

14. It is clear that what is contemplated by way of environmental delivery plans (**"EDPs"**) and nature recovery levy (**"NRL"**) is advanced as a replacement for a number of current environmental protections/obligations rather than being additional to them: see PIB clause 76 and Schedule 6 Part 2, which proposes significant amendments to the WCA 1981 and HR 2017.

15. The key to the proposals being effective and acceptable is that they will achieve outcomes for environmental concerns which are better (and certainly no worse) than can be achieved by the present regulatory structure. In terms of environmental protections, speeding up the development process is irrelevant though this is plainly a key reason (if not the principal reason) for the change of approach. This is also a highly significant question given the Secretary of State's (**"SoS"**) view that the PIB will not have the effect of reducing the level of environmental protection under existing environmental law.

Structure of the proposals in Part 3

16. Part 3 introduces a number of new mechanisms:

(1) EDPs which is (clause 48)

"(1) … a plan prepared by Natural England, and made by the Secretary of State, that sets out, in relation to development to which it applies

— (a) the environmental features that are likely to be negatively affected by the development,

(b) the conservation measures that are to be taken by or on behalf of Natural England in order to protect those environmental features,

(c) the amount of the nature restoration levy payable by developers to Natural England to cover the cost of those conservation measures (see sections 51 and 61 to 70), and

(d) the environmental obligations in relation to development that are discharged, disapplied or otherwise modified if a developer pays the nature restoration levy in relation to the development (see section 61 and Schedule 4)."

(2) The content of the EDPs (clause 50) requires -

"**50 Environmental features, environmental impacts and conservation measures**

(1) An EDP must identify—

(a) one or more environmental features which are likely to be negatively affected by development to which the EDP applies, and

(b) one or more ways in which that negative effect is likely to be caused by the development (the "environmental impact"). But an EDP need not identify all of the possible environmental impacts on an environmental feature.

(2) An environmental feature identified in an EDP may be—

(a) a protected feature of a protected site, or

(b) a protected species.

(3) An EDP must set out the measures ("conservation measures") that are to be taken by, or on behalf of, Natural England, under the EDP in order to—

(a) address the environmental impact of development on the identified environmental feature, and

(b) contribute to an overall improvement in the conservation status of the identified environmental feature (see also section 55(3)).

(4) Where an identified environmental feature is a protected feature of a protected site, the EDP may, if Natural England considers it appropriate, set out conservation measures that do not directly address the environmental impact of development on that feature at that site but instead seek to improve the conservation status of the same feature elsewhere.

(5) An EDP may include some conservation measures that are not expected to be needed but which may be taken if the conservation measures that have been implemented fail to address the environmental impact of development or contribute to an overall improvement in the conservation status of an identified environmental

feature as anticipated.

(6) An EDP must state how much the conservation measures are expected to cost over the period covered by the EDP or, if longer, the period for which a conservation measure is likely to be required to address the environmental impact of the development.

(7) A conservation measure may take the form of a requirement for Natural England to request that a condition of development be imposed (see section 75).

(8) In this section, "the environmental impact of development" means the environmental impact, as identified in the EDP, of the maximum amount of development to which the EDP may apply, as specified in accordance with section 49(5).'

(3) There are various procedural requirements for consultation and publicity. Cl. 55 then requires that EDPs must be submitted to the Secretary of State to be made who must be satisfied that it meets the "*overall improvement test*" –

"**55 Making of EDP by Secretary of State**

(1) After complying with section 54, Natural England may send a draft of the EDP to the Secretary of State to be made.

(2) When providing the Secretary of State with a draft EDP, Natural England must also provide to the Secretary of State—

(a) copies of all responses to the consultation, and

(b) Natural England's response to the consultation and details of any further consultation.

(3) The Secretary of State may make the EDP only if the Secretary of State considers that the EDP passes the overall improvement test.

(4) An EDP passes the overall improvement test if the conservation measures are likely to be sufficient to outweigh the negative effect, caused by the environmental impact of development, on the conservation status of each identified environmental feature.

(5) In subsection (4), "the environmental impact of development" means the environmental impact, as identified in the EDP in accordance with section 50(1)(b), of the maximum amount of development to which the EDP may apply, as specified in accordance with section 49(5).

(6) The Secretary of State may request further information from Natural England in order to decide whether to make an EDP. (7) If the Secretary of State decides not to make an EDP, the Secretary of State must publish a notice of the decision that sets out the reasons for the decision."

(4) The NRL. Clause 51 requires -

"(1) An EDP must include one or more charging schedules which set out the rates or other criteria by reference to which the amount of nature restoration levy is to be determined for each kind of development to which the EDP applies.

(2) Each charging schedule must relate to an environmental impact of development on an identified environmental feature.

(3) The rates or other criteria must be set in accordance with nature restoration levy regulations (see sections 62 to 69)."

(5) Clause 61 provides:

"(1) A developer may, at any time before development commences, make a request in writing to Natural England to pay the nature restoration levy in relation to a development to which an EDP applies.

(2) If Natural England accept the request, the developer is committed to pay the nature restoration levy (see also section 63(4)).

(3) Schedule 4 sets out how a commitment by a developer to pay the nature restoration levy in relation to a development results in—

(a) an environmental impact of development on a protected feature of a protected site being disregarded for the purposes of obligations under the Habitats Regulations 2017 or the Wildlife and Countryside Act 1981;

(b) a developer being treated as having been granted a licence under regulation 55 of the Habitats Regulations 2017, section 16 of the Wildlife and Countryside Act 1981 or section 10 of the Protection of Badgers Act 1992.

(4) An EDP may provide, in relation to a kind of development and kind of environmental impact on an identified environmental feature, that payment of the levy is mandatory, and if it does so—

(a) in a case where the feature is a protected feature of a European site or a Ramsar site, the developer does not have the option of ensuring that any actions relating to the development comply with Part 6 of the Habitats Regulations instead of paying the levy;

(b) in a case where the feature is a protected feature of an SSSI, the developer does not have the option of—

(i) getting Natural England's consent under section 28E of the Wildlife and Countryside Act 1981 for operations mentioned in that section, to the extent that the operations have that kind of environmental impact on the identified environmental feature, or

(ii) of ensuring that any actions relating to the development comply with section 28H or 28I of that Act, instead of paying the levy;

(c) in a case where the feature is a protected species, the developer does not have the option of applying for a licence directly under regulation 55 of the Habitats Regulations 2017, section 16 of the Wildlife and Countryside Act 1981 or section 10 of the Protection of Badgers Act 1992 (as the case may be) instead of paying the levy.

(5) If an EDP makes provision as mentioned in subsection (4), it must set out the reasons why Natural England considers that to be necessary."

(6) The Nature Restoration Fund ("**NRF**") is not a statutory concept but something which is said by the Explanatory Notes para. 88 to be the collected NRL contributions. The accounting duties of Natural England with regard to NRL contributions are found in cl. 67.

(7) The effect of a commitment to pay the NRL (subject to regulations) is to trigger relaxations of current environmental controls set out in Schedule 4. See below.

17. The provisions as to the content, monitoring, review and application of the EDPs are lengthy and helpfully summarised by the Explanatory Notes:

> "89 Natural England (or where set by regulations, another body[8]) will produce EDPs on one or more environmental effects of development relating to a specific geographic area and will specify the amount and type of development that can benefit from its cover. EDPs will set out:
>
> • the environmental feature the EDP seeks to protect. This will be a protected feature of a protected site (a European Site, SSSI or Ramsar site[9]), or a protected species[10].
>
> • the environmental impacts the EDP seeks to address. This includes information on the type and amount of development that can benefit from the EDP's cover. This can be Town and Country Planning Act (TCPA) or Nationally Significant Infrastructure Projects (NSIP) development, it also extends to Listed Building Consents.
>
> • the conservation measures to be taken, both to address those impacts and contribute to nature restoration. It should clearly set out whether conservation measures are being delivered locally or at the broader network scale.
>
> • the amount payable by development to cover the costs of these conservation measures. Whilst EDPs will usually be voluntary, there may be circumstances where use of an EDP may be mandatory if that is necessary.
>
> • the environmental obligations that are disapplied once the developer is liable to pay the nature restoration levy.
>
> 90 The EDP will also set out how its interventions will be monitored. Natural England will be required to publish reports on an EDP at the halfway and end points.
>
> 91 Through an EDP developers will be relieved of the requirement to conduct relevant environmental assessments, to the extent that the impacts covered by that requirement is instead dealt with through payment to the EDP. Natural England will then take responsibility for delivering the conservation measures in the EDP and, in doing so, secure positive environmental outcomes.
>
> 92 When preparing an EDP Natural England must:
>
> • notify the Secretary of State that it is preparing an EDP on a particular issue in a particular area;
>
> • prepare the draft EDP – having regard to relevant strategies and guidance;
>
> • consult the public and statutory consultees (the Environment Agency, the Joint Nature Conservation Committee, local authorities and any other Natural England or Secretary of State considers relevant) taking their views into account; and
>
> • send the final EDP to the Secretary of State for consideration as to whether to approve or "make" the EDP.
>
> 93 Once made, EDPs will have a defined 6-week challenge window and it will not be possible to then challenge an individual development on this basis at the grant of

---

[8] Cl. 53, 71, 74.

[9] Schedule 6 Part 1.

[10] Cl. 50.

planning permission stage.

94 When making a decision on whether to make an EDP, the Secretary of State must be satisfied that the conservation measures set out in the EDP outweigh the negative effects of the development[11]. In making this decision, the Secretary of State will benefit from the views of consultees and, where applicable, the expertise of Natural England in preparing the EDP, as to the adequacy of the proposed measures and the safeguards included in the EDP."

Amendments to current environmental regulation

18. Pursuant to Bill clauses 61(3) and 76, Schedules 4 and 6 modify current environmental regulations and protections in the context of the EDP and NRL contributions.

19. These provisions propose amendments to the existing regulatory protections said to be consequential upon Part 3, though in the light of the purpose of the provisions, it might be thought that the proposals in Part 3 are to facilitate the making of the amendments in Schedule 4 and 6 to speed up the development management process.

Clause 61(3) and Schedule 4

20. Cl. 61(3) provides:

> "(3) Schedule 4 sets out how a commitment by a developer to pay the nature restoration levy in relation to a development results in—
>
> (a) an environmental impact of development on a protected feature of a protected site being disregarded for the purposes of obligations under the Habitats Regulations 2017 or the Wildlife and Countryside Act 1981;
>
> (b) a developer being treated as having been granted a licence under regulation 55 of the Habitats Regulations 2017, section 16 of the Wildlife and Countryside Act 1981 or section 10 of the Protection of Badgers Act 1992."

21. Schedule 4 provides:

> "SCHEDULE 4
>
> ENVIRONMENTAL DELIVERY PLANS: EFFECT ON ENVIRONMENTAL OBLIGATIONS
>
> Protected sites: assessments under Part 6 of the Habitats Regulations 2017

---

[11] Cl. 55(3) and (4) – referred to as the "*overall improvement test*". The SoS must be satisfied of this with respect to "the environmental impact of development" i.e. "*the environmental impact, as identified in the EDP in accordance with section 50(1)(b), of the maximum amount of development to which the EDP may apply, as specified in accordance with section 49(5)*." (cl. 55(5)). Accordingly, if the maximum amount of development stated in the EDP has been exceeded, the development exceeding it will not have the benefit of the effects of the EDP.

1 (1) Sub-paragraph (2) applies where—

(a) an environmental feature identified in an EDP in accordance with section 50(1)(a) is a protected feature of a European site or a Ramsar site, and

(b) a developer has committed to pay, in respect of a development, such amount of the nature restoration levy set out in a charging schedule to the EDP as applies in relation to an environmental impact of the development on that protected feature.

(2) The environmental impact of the development on the protected feature is to be disregarded for the purposes of Part 6 of the Habitats Regulations 2017.

Protected sites: SSSIs

2 (1) Sub-paragraph (2) applies where—

(a) an environmental feature identified in an EDP in accordance with section 50(1)(a) is a protected feature of an SSSI, and

(b) a developer has committed to pay, in respect of a development, such amount of the nature restoration levy set out in a charging schedule to the EDP as applies in relation to an environmental impact of the development on that protected feature.

(2) The environmental impact of the development on the protected feature is to be disregarded for the purposes of—

(a) a determination by Natural England on whether to give consent (and if so on what terms) under section 28E of the Wildlife and Countryside Act 1981 or withdraw or modify any such consent,

(b) a determination by the Secretary of State of an appeal under section 28F of that Act (appeals in connection with consents), (c) section 28H of that Act (statutory undertakers etc: duty in relation to carrying out operations),

(d) section 28I of that Act (statutory undertakers etc: duty in relation to authorising operations), and

(e) section 28P(2) and (5A) of that Act (offences in connection with sections 28H and 28I of that Act).

Protected species: licences under Part 5 of the Habitats Regulations 2017

3 (1) Sub-paragraph (2) applies where—

(a) an environmental feature identified in an EDP in accordance with section 50(1)(a) is a species listed in Schedule 2, 4 or 5 of the Habitats Regulations 2017, and

(b) a developer has committed to pay, in respect of a development, such amount of the nature restoration levy set out in a charging schedule to the EDP as applies in relation to an environmental impact of the development on that protected species.

(2) A licence under regulation 55(1) of the Habitats Regulations 2017, relating to the protected species and on the terms set out in the EDP, is to be treated as having been granted by Natural England to the developer.

Protected species: licences under Part 1 of the Wildlife and Countryside Act 1981

4 (1) Sub-paragraph (2) applies where—

(a) an environmental feature identified in an EDP in accordance with section 50(1)(a) is a species protected by Part 1 of the Wildlife and Countryside Act 1981, and

(b) a developer has committed to pay, in respect of a development, such amount of the nature restoration levy set out in a charging schedule to the EDP as applies in relation to an environmental impact of the development on that protected species.

(2) A licence under section 16(3)(j) of the Wildlife and Countryside Act 1981, relating to the protected species and on the terms set out in the EDP, is to be treated as having been granted by Natural England to the developer.

Protected species: licences under the Protection of Badgers Act 1992

5 (1) Sub-paragraph (2) applies where—

(a) badgers are identified in an EDP as an environmental feature in accordance with section 50(1)(a), and

(b) a developer has committed to pay, in respect of a development, such amount of the nature restoration levy set out in a charging schedule to the EDP as applies in relation to an environmental impact of the development on badgers.

(2) A licence under section 10 of the Protection of Badgers Act 1992, on the terms set out in the EDP, is to be treated as having been granted by Natural England to the developer."

22. The critical aspect of these provisions is that the current environmental protections imposed by assessment under Part 6 of the HR 2017 or the requirements for licensing under the HR 2017, WCA 1981 and PBA 1992 are disregarded from assessment (in the case of Part 6), disregarded in granting consents (including appeals), dealing with duties in respect of potentially damaging operations or in the commission of offences (in respect of SSSIs under the WCA 1981) or deemed to have been licensed on the terms of an EDP:

(1) If they are an environmental feature identified in an EDP (either with regard to the designated site or protected species); and

(2) The developer has committed to pay, in respect of a development, the amount of the NRL set out in a charging schedule to the EDP as applies in relation to an environmental impact of the development on that protected feature.

23. On the assumption that specific proposals for development, operations or licensing fall within the terms of an EDP and there is a commitment to pay the required sum of NRL, the functions of the relevant protective legislation are thereby replaced by the EDP and imposition of the NRL.

24. The Explanatory Notes state:

"**Schedule 4: Environmental Delivery Plans: Effect on Environmental Obligations**

850 This schedule sets out how certain environmental obligations are altered when a developer makes a payment of the nature restoration levy.

851 Paragraph 1 provides that where a developer has committed to pay the levy in respect of an EDP relating to a protected feature of a European site or Ramsar site then the environmental impact of that development on the protected feature is disregarded for the purposes of assessment under Part 6 of the Conservation of Habitats and Species Regulations 2017.

852 Paragraph 2 operates on a similar basis in respect of SSSIs and provides for circumstances where the making of a payment under an EDP means that the relevant environmental impact of development is disregarded in respect of consenting regimes and notification requirements for protection of the SSSI in the Wildlife and Countryside Act 1981. 853 Paragraphs 3 and 4 relate to protected species and provide that where a developer has made a payment in respect of a protected species covered by an EDP then the developer is treated as holding a licence in respect of it. Species are protected under both the Conservation of Habitats and Species Regulations 2017 and the Wildlife and Countryside Act 1981. Licences are to be treated as having been granted to the developer by Natural England, for the purposes of them being managed under the existing legislation, in respect of enforcement and modification for example.

854 These provisions also provide for circumstances where badgers are the protected species covered by an EDP. Badgers are protected under separate legislation, the Protection of Badgers Act 1992, and paragraph 5 mirrors the approach taken to other protected species, with a licence being deemed where a development makes a relevant payment to an EDP in respect of the environmental impact of development on badgers.

855 The territorial extent of this Schedule is England and Wales.

856 This Schedule will be commenced through regulations."

25. It is notable that the disapplication or substitution of existing mechanisms applies where:

(1) There is an obligation to pay NRL, not having made actual payment; and

(2) The relevant matter is stipulated in the EDP, not that the EDP needs to have implemented protective, mitigatory or compensatory measures at the time of the development.

26. The Explanatory Notes incorrectly state at §852:

> "where the making of a payment under an EDP means that the relevant environmental impact of development is disregarded in respect of consenting regimes and notification requirements for protection of the SSSI in the Wildlife and Countryside Act 1981 … where a developer has made a payment in respect of a protected species covered by an EDP then the developer is treated as holding a licence…"

- since the requirement is not making payment but having "committed to pay".

27. This will be considered further below, but it contrasts with the current requirements which e.g. in the case of Part 6 HR 2017 assessments, requires that

either there be no adverse effect on integrity (to a high standard of proof[12]) at the time of issuing the permission or consent or that compensation should be in place in time to offset the negative effect arising from the development on the coherence of the national site network. Whether or not the licensing terms under an EDP match the level of protection which current licensing might achieve will depend very much on the terms set out in the EDP.

Clause 76 and Schedule 6

28. Clause 76 provides:

> "**76 Amendments relating to this Part**
>
> (1) In Schedule 6—
>
> (a) Part 1 amends the Habitats Regulations 2017 to provide that, for certain purposes, Ramsar sites are treated in the same way as European sites;
>
> (b) Part 2 makes amendments related to, or consequential on, provision made by this Part.
>
> (2) The Secretary of State may by regulations make amendments (including amendments to an Act or to assimilated law) that are consequential on this Part."

29. Part 1 adds Ramsar Sites to the protective mechanisms for designated sites under the HR 2017 (although the status of Ramsar Sites is currently under consideration by the Supreme Court in the ***Fry*** case[13]). This can be seen as a positive improvement in environmental protection.

30. Part 2 further amends current legislation relating to licensing and adjusts current statutory requirements for EIA and under HR 2017:

> "PART 2
>
> MINOR AND CONSEQUENTIAL AMENDMENTS RELATED TO PART 3
>
> *Wildlife and Countryside Act 1981*
>
> 35 (1) Section 16 of the Wildlife and Countryside Act 1981 (power to grant licences), as it applies in England and Wales, is amended as follows.
>
> (2) After subsection (6) insert—
>
> "(6A) The maximum period for the validity of a licence set out in subsection (6)(b) does not apply to—
>
> (a) a licence granted to Natural England to facilitate the carrying out of any

---

[12] See e.g. ***Landelijke Vereniging Tot Behoud Van De Waddenzee v Staatssecretaris Van Landbouw*** (C-127/02) [2005] 2 C.M.L.R. 31, ***Sweetman v An Bord Pleanála*** (C-258/11) [2014] PTSR 1092, ***R. (Champion) v North Norfolk District Council*** [2015] 1 W.L.R. 3170 at [41], ***Holohan v An Bord Pleanála*** (Case C-461/17) [2019] Env LR 16 and ***R (Wyatt) v Fareham BC*** [2023] PTSR 1952.

[13] ***CG Fry & Son Ltd v Secretary of State*** [2024] PTSR 2000, SC judgment awaited.

conservation measures within the meaning of Part 3 of the Planning and Infrastructure Act 2025, or

(b) a licence that, by virtue of paragraph 4 of Schedule 4 to that Act, is treated as having been granted to a developer under subsection (3)."

(3) After subsection (8) insert—

"(8ZA) In this section, in the case of a licence granted to Natural England under subsection (3) to facilitate the carrying out of any conservation measures within the meaning of Part 3 of the Planning and Infrastructure Act 2025, "the appropriate authority" means the Secretary of State."

(4) In subsection (8A), at the end insert ", but this is subject to subsection (8ZA)."

(5) In subsection (9), in the words before paragraph (a), after "subsections" insert "(8ZA),"

Town and Country Planning Act 1990

38 The Town and Country Planning Act 1990 is amended as follows.

39 In section 74A (deemed discharge of planning conditions), in subsection (2A)— (a) after "to" insert

"— (a)";

(b) at the end insert ", or

(b) a condition that Natural England has requested under Part 3 of the Planning and Infrastructure Act 2025 (see sections 50(7) and 75 of that Act)."

40 In section 100ZA (restrictions on power to impose planning conditions in England), in subsection (6), after "apply" insert "—

(a) in relation to a condition that Natural England has requested under Part 3 of the Planning and Infrastructure Act 2025 (see sections 50(7) and 75 of that Act), or

(b)".

Protection of Badgers Act 1992

41 (1) Section 10 of the Protection of Badgers Act 1992 (licences), as it applies in England and Wales, is amended as follows.

(2) In subsection (1)—

(a) in paragraph (d), for "to interfere with a badger sett" substitute "to kill or take badgers in England, or to interfere with a badger sett,";

(b) at the end insert—

"(g) in England, for the purpose of preserving public health or safety or for reasons of overriding public interest, to kill or take badgers, or to interfere with a badger sett, within an area specified in the licence by any means so specified."

(3) After subsection (1) insert—

"(1A) In the case of a licence granted to Natural England to facilitate the carrying out of any conservation measures within the meaning of Part 3 of the Planning and Infrastructure Act 2025, the reference in subsection (1) to the appropriate conservation body is to be read as a reference to the Secretary of State."

(4) In subsection (2)—

(a) in paragraph (d), for "to interfere with a badger sett" substitute "to kill or

take badgers in England, or to interfere with a badger sett,";

(b) at the end insert—

"(e) in England, for the purpose of preserving public health or safety or for reasons of overriding public interest, to kill or take badgers, or to interfere with a badger sett, within an area specified in the licence by any means so specified."

(5) After subsection (2) insert—

"(2A) In the case of a licence that, by virtue of paragraph 5 of Schedule 4 to the Planning and Infrastructure Act 2025, is treated as having been granted to a developer under subsection (2)(d), the reference in subsection (2) to the appropriate Minister is to be read as a reference to Natural England."

(6) After subsection (8) insert—

"(8A) A licence granted under this section in relation to an area in England—

(a) may be, to any degree, general or specific;

(b) may be granted either to persons of a class or to a particular person;

(c) may be modified at any time by the authority by whom it was granted;

(d) subject to paragraph (c), is to be valid for the period specified in the licence. (8B) A fee may be charged for granting a licence in relation to an area in England under this section."

(7) After subsection (9) insert—

"(9A) Natural England or the Secretary of State must not grant a licence under this section in relation to an area in England unless satisfied—

(a) that there is no other satisfactory solution, and

(b) that the grant of the licence is not detrimental to the survival of any population of badgers."

Environmental Assessment of Plans and Programmes Regulations 2004

42 In the Environmental Assessment of Plans and Programmes Regulations 2004 (S.I. 2004/1633), in regulation 5 (environmental assessment for plans and programmes: first formal preparatory act on or after 21st July 2004), in paragraph (5) (plans in relation to which assessments are not required under the regulations), after paragraph (a) insert—

"(aa) an environmental delivery plan, within the meaning of Part 3 of the Planning and Infrastructure Act 2025;".

Conservation of Habitats and Species Regulations 2017

43 The Conservation of Habitats and Species Regulations 2017 (S.I. 2017/1012) are amended as follows.

44 In regulation 9 (duties relating to compliance with the Directives)—

(a) after paragraph (2) insert—

"(2A) Paragraph (1) does not apply to functions exercisable under or by virtue of Part 3 of the Planning and Infrastructure Act 2025 (development and nature recovery).";

(b) after paragraph (3) insert—

"(3A) Paragraph (3) does not apply to functions exercised by a competent authority in connection with an environmental delivery plan

within the meaning of Part 3 of the Planning and Infrastructure Act 2025."

45 In regulation 55 (licences for certain activities relating to animals or plants), after paragraph (10) insert—

"(10A) The maximum time period for a licence set out in paragraph (10) does not apply to—

(a) a licence granted to Natural England to facilitate the carrying out of any conservation measures within the meaning of Part 3 of the Planning and Infrastructure Act 2025, or

(b) a licence that, by virtue of paragraph 3 of Schedule 4 to the Planning and Infrastructure Act 2025, is treated as having been granted to a developer under regulation 55."

46 In regulation 58 (relevant licensing body)—

(a) in paragraph (2), at the beginning insert "Subject to paragraph (2A),";

(b) after paragraph (2) insert—

"(2A) In the case of a licence granted to Natural England under regulation 55(1) for a purpose specified in any of paragraph (2)(a) to (d) of that regulation, to facilitate the carrying out of any conservation measures, "relevant licensing body" means the Secretary of State.";

(c) in paragraph (3), at the beginning insert "Subject to paragraph (4A),";

(d) after paragraph (4) insert—

"(4A) In the case of a licence that, by virtue of paragraph 3 of Schedule 4 to the Planning and Infrastructure Act 2025, is treated as having been granted to a developer under regulation 55 for any of the purposes specified in regulation 55(2)(e) to (g), "relevant licensing body" means Natural England.";

(e) at the end insert—

"(7) In paragraph (2A), "conservation measure" has the same meaning as in Part 3 of the Planning and Infrastructure Act 2025 (development and nature recovery)."

47 In regulation 62 (application of the provisions of Chapter 1 of Part 6), after paragraph (1) insert—

"(1A) But the requirements of the assessment provisions and the review provisions do not apply in relation to an environmental delivery plan or any conservation measures under it.

(1B) In paragraph (1A), "environmental delivery plan" and "conservation measures" have the same meaning as in Part 3 of the Planning and Infrastructure Act 2025 (development and nature recovery)."

48 In regulation 63 (assessment of implications for European sites etc), in paragraph (7), at the end insert—

"See also paragraph 1 of Schedule 4 to the Planning and Infrastructure Act 2025 (environmental delivery plans: effect on environmental obligations)."

31. The Explanatory Notes comment on Part 2 (emphasis added):

"862 Part 2 of this schedule makes minor consequential amendments to the Wildlife and Countryside Act 1981, the Town and Country Planning Act 1990, and the Protection of Badgers Act 1992.

863 In respect of the Protection of Badgers Act 1992, the amendments extend which prohibited activities may be covered by a licence. This is in order to enable a deemed licence – which needs to operate within the parameters of a licence granted under the legislation in the normal way – is capable of covering the conduct necessary to allow development and implement an EDP. The amendments also provide for greater alignment between licences granted under the Protection of Badgers Act 1992 and those granted in respect of other species under the Wildlife and Countryside Act 1981 and the Conservation of Habitats and Species Regulations 2017, in terms of who a licence can be granted to, the validity of the licence and its nature. Again, this is to ensure that deemed licences operate within the parameters of ordinary licences and are consistent with those which will be granted in respect of other protected species.

864 Paragraph 42 amends the Environmental Assessment of Plans and Programmes Regulations 2004 ("the SEA Regulations") to clarify that EDPs will not be required to undergo a strategic environmental assessment (SEA). While EDPs will not be required to conduct an SEA, the Bill embeds the relevant elements of the SEA process into the EDP process. In particular, EDPs will be required to set out alternative measures that were considered alongside Natural England's reasoning for not pursuing these measures. In addition, the role of public consultation and the scrutiny of local plans will ensure the Secretary of State, when considering whether to approve an EDO, has the information they need to make an informed decision. This decision making will be further supported by the requirements to report on the EDPs and put in place monitoring requirements which will ensure that EDPs not only consider the environmental effects as part of the process of their creation but actively manage these across the relevant period.

865 Paragraphs 43 to 48 amend the Habitats Regulations so that neither EDPs nor conservation measures delivered under it will require assessment under Part 6 of the Habitats Regulations. By their very nature, EDPs would result in the outcomes that that assessment would lead to being met or exceeded over the period that the EDP applies for. An EDP would achieve this outcome in a different way to the Habitats Directive, therefore paragraph 44 amends regulation 9 of the Habitats Regulations so that to that these duties do not apply to any functions under Part 3 of this Bill (delivering EDPs or conservation measure) or for a competent authority in exercising their functions (such as undertaking assessment under regulation 63 for any effects of development not covered by an EDP).

866 Paragraphs 45 and 46 make amendments to provisions on wildlife licensing under the Habitats Regulations, to ensure workability under an EDP. Paragraph 45 allows deemed licences for developers and licences for NE conservation measures to surpass the usual maximum time period of five years, to align with the potential 10 year lifespan of an EDP and beyond. Paragraph 46 makes provision for the Secretary of State to act as the licensing authority for the purpose of granting Natural England any licences relevant to undertaking conservation measures.

867 The territorial extent of this Schedule is England and Wales, but it applies to England only.

868 This Schedule will be commenced through regulations."

Advice

General matters

32. Under s. 20(2) of the EA 2021 where a bill is introduced which would if enacted be "environmental law":

"(2) The Minister must, before Second Reading of the Bill in the House in question, make—

(a) a statement to the effect that in the Minister's view the Bill contains provision which, if enacted, would be environmental law, and

(b) a statement under subsection (3) or (4).

(3) A statement under this subsection is a statement to the effect that in the Minister's view the Bill will not have the effect of reducing the level of environmental protection provided for by any existing environmental law.

(4) A statement under this subsection is a statement to the effect that—

(a) the Minister is unable to make a statement under subsection (3), but

(b) Her Majesty's Government nevertheless wishes the House to proceed with the Bill."

33. S. 20(8) defines "existing environment law"

> "in relation to a statement under this section, means environmental law existing at the time that the Bill to which the statement relates is introduced into the House in question, whether or not the environmental law is in force."

34. While such a statement is a statement in Parliament and would not be amenable to judicial review (or may be contrary to Article IX of the Bill of Rights[14]) my Instructing Solicitors have used it as a means of considering the first issue.

35. In that context, it appears to me that "existing environmental law" is not confined to the words of statute but case law relevant to its interpretation since what is law is, of course, a mixture of statutory language and the construction put on it by the courts. On that basis, I have considered the case law relating to the statutory provisions in question here, including pre-Brexit CJEU case law[15] which has been applied by the UK courts especially in the interpretation of the HR 2017.

36. I do not consider that "environmental law" is likely to include the provisions of unincorporated international conventions, such as the Ramsar and Bern Conventions and I consider that these do not fall within the definition in s. 46 of the 2021 Act:

> "**46 Meaning of "environmental law"**
>
> (1) In this Part "environmental law" means any legislative provision to the extent that it —
>
> (a) is mainly concerned with environmental protection, and
>
> (b) is not concerned with an excluded matter.

---

[14] See **Erskine May** at https://erskinemay.parliament.uk/section/4591/proceedings-in-parliament/

[15] See s. 6 of the European Union (Withdrawal) Act 2018.

(2) Excluded matters are—

(a) disclosure of or access to information;

(b) the armed forces or national security;

(c) taxation, spending or the allocation of resources within government.

(3) The reference in subsection (1) to "legislative provision" does not include devolved legislative provision, except for the purposes of section 20.

(4) [Devolved legislative provision] …

(5) The Secretary of State may by regulations provide that a legislative provision specified in the regulations is, or is not, within the definition of "environmental law" in subsection (1) (and this Part applies accordingly).

(6) Before making regulations under subsection (5) the Secretary of State must consult—

(a) the OEP, and

(b) any other persons the Secretary of State considers appropriate.

(7) Regulations under subsection (5) are subject to the affirmative procedure."

37. Moreover, English constitutional law requires international treaties to be specifically incorporated by statute to make them enforceable in domestic law and ratification must follow the process in the Constitutional Reform and Governance Act 2010. Ratification alone does not amount to incorporation. See ***R (Miller) v Secretary of State for Exiting the European Union*** [2018] AC 61 at [55]-[57]. If the definition of "existing environmental law" were to be read widely to include such conventions, it would amount to incorporation without specific statutory authorisation and run contrary to general constitutional law principles. Moreover, I doubt that such conventions could be included by regulation since the power in s. 46(5) only applies to "a legislative provision".

38. There is a form of Henry VIII clause at clause 76(2);

> "(2) The Secretary of State may by regulations make amendments (including amendments to an Act or to assimilated law) that are consequential on this Part."

39. However that power may be exercised in future, the PIB and its proposals stand to be considered as they are currently drafted which is what I have done in this Opinion. It is always possible that the exercise of the power to amend may themselves give rise to concerns regarding reduction in the level of environmental protection. The fact that the current provisions of the PIB may be amended in future to make them more compatible with existing environmental protection does not mean that the current version of the provisions do so.

(1) Reduction in the existing level of environmental protection

40. See the SoS's statement in the PIB set out in paragraph 7 of this Opinion. The real issue is whether the proposed mechanisms of the PIB will be effective to address the impacts of the potentially many developments that each EDP proposes to cover as effectively as the current legislation.

41. As touched on earlier, the purposes of the proposed legislation have given some cause for concern to the extent that it is driven by, if not wholly then to a significant degree, the intention to speed up development and to reduce obstacles to development being permitted and proceeding: see the various expressions of statutory purpose above.

42. As a result, the approach in Part 3 in terms of habitats (including Ramsar sites) and SSSIs is to subsume the statutory protections within the EDP/NRL structure so that these will replace both assessments as to the impacts which are dealt with in the EDP and funded through the NRL. Developments can only approach permission with the existing controls disapplied if their development and its various environmental consequences are subsumed into an EDP which is sufficiently clear to include them. If this is not the case, then the amended provisions in cl. 61(3) and Schedule 4 will not apply and the existing regulation will continue to apply.

43. As I have noted there is a discrepancy between the provisions in Schedule 4 and the Explanatory Notes in that there only needs to be a commitment to pay the relevant NRL to disapply the provisions listed in Schedule 4 and not actual payment. I am not sure that this is critical since the commitment to pay is enforceable under the proposed regulations referred to in clauses 63, 64, 67 and 68.

44. However, what is of greater concern is the apparent lack of direct correspondence between:

    (1) The grant of permission or consent;

    (2) The commencement of development and/or the carrying out of operations which are likely to damage the feature(s) of environmental interest;

    (3) Payment or application of the NRL to the measures required by the EDP in order to offset, mitigate or compensate for damage to the relevant feature(s) of environmental interest within a specific timescale relative to the cause of the damage (s. 66(1) does not require this to be considered); and

(4) When the measures will be delivered and how likely they are to be successful.

45. Further, there is a lack of any systematic approach to assessment of impacts comparable of Part 6 HR 2017 other than the "overall improvement test" which substitutes a balance for the high level of protection created by Part 6 and the identification of conservation measures is not required to be based upon a systematic assessment of environmental effects of the proposals.

46. The provisions for the application of the NRL do not require this as currently framed and there is as yet no requirement as to when measures to be funded by the NRL should be carried out.

47. Indeed, the NRL application provisions leave that open:

> "**66 Use of nature restoration levy**
>
> (1) Nature restoration levy regulations must require Natural England to spend money received by virtue of the nature restoration levy on conservation measures that relate to the environmental feature in relation to which the levy is charged (see section 51(2)).
>
> (2) The regulations may specify—
>
> (a) conservation measures that may be, or may not be, funded by the nature restoration levy;
>
> (b) maintenance and operational activities in connection with conservation measures that may be, or may not be, funded by the levy;
>
> (c) what is to be, or not to be, treated as funding.
>
> (3) The regulations may—
>
> (a) require Natural England to prepare and publish a list of conservation measures that are to be, or may be, wholly or partly funded by the nature restoration levy;
>
> (b) include provision about the procedure to be followed in preparing a list (which may include provision for consultation, for the appointment of an independent person or a combination);
>
> (c) include provision about the circumstances in which Natural England may and may not spend money received by virtue of the nature restoration levy on anything not included on the list.
>
> (4) In making provision about funding, the regulations may, in particular—
>
> (a) permit money received by virtue of the nature restoration levy to be used to reimburse expenditure already incurred;
>
> (b) permit such money to be reserved for expenditure that may be incurred in the future;
>
> (c) permit such money to be used (either generally or subject to limits set by or determined in accordance with the regulations) for administrative expenses in connection with an EDP;
>
> (d) make provision for funding to extend beyond the EDP end date;
>
> (e) make provision for the giving of loans, guarantees or indemnities; (f) make provision about the use of money received by virtue of the nature restoration

levy where anything for which it was to be used no longer requires funding;

(g) make provision about the use of money received by virtue of the nature restoration levy in a case where the EDP under which the levy was paid is revoked.

(5) The regulations may—

(a) require Natural England to account separately, and in accordance with the regulations, for any money received or due by virtue of the nature restoration levy;

(b) require Natural England to monitor the use made and to be made of such money;

(c) require Natural England to report on actual or expected charging, collection and use of money received by virtue of the nature restoration levy;

(d) permit or require Natural England to pass money to another public authority (and in paragraphs (a) to (c) a reference to Natural England includes a reference to a person to whom Natural England passes money in reliance on this paragraph)."

48. The current draft provisions:

(1) Do not impose a duty to draft or make an EDP. This appears to be a matter for the discretion of NE[16] (cl. 53(1) "when Natural England decides to prepare…") and there is no power for the Secretary of State to direct the making of an EDP or to undertake an EDP directly. There are only direct powers to amend or revoke an EDP;

(2) Do not say anything about the time at which use should be made of the funds for conservation measures and whether that must be connected to the creation of harm to the environmental features;

(3) Allow funds to be expended to reimburse previous expenditure or held in reserve for the future and even possibly extend beyond the EDP, which suggests they may not correspond precisely with the necessary conservation measures to offset the identified developments or the need to do so immediately;

(4) Are not even clear as to whether the EDP or the regulations will, or will have the ability to, stipulate the date by which the conservation measures must be in place other than the fact the EDPs must cease to have effect within 10 years (clause 49(7));

[16] Or such other delivery body appointed by the Secretary of State pursuant to regulations: see cl. 74.

(5) Mean that without any clear and timely link between the delivery of measures under the EDP and the undertaking of development then, depending on the period over which the EDP will operate (up to 10 years), there must be a risk that habitat damage will occur both through development and other damaging operations associated with development;

(6) Provide for monitoring of the effectiveness of EDPs and annual reporting, see cl. 57(5)(d) and 73(2)(d). However no specific parameters are (yet) set for the terms of monitoring or the measures by which effectiveness is to be judged, including timescales. This should be contrasted with the requirement of certainty under Part 6 of the HR 2017 (and relevant case law) for determining the efficacy of mitigation (see below);

(7) Make no provision for any mitigation hierarchy and indeed make clear through cl 50(4) that NE is empowered to ignore such a hierarchy. This means that EDPs could result in there being no incentive (or requirement) on developers to "avoid" or even "mitigate" their impacts first, risking unnecessary loss of valuable protected features; and

(8) Make clear through cl 62(2) and cl 64(1) that the levy charged to developers under the EDP will not necessarily cover the costs of the conservation measures set out in an EDP. This arises since the levy must be set at a level which is consistent with the economic viability of development (cl 62(2)) and the levy is not required to cover the element of the conservation measures which under cl 50(3)(b) goes to "contributing to an overall improvement in the conservation status of the identified environmental feature" (cl 64(1)(b)). Hence the polluter is paying but only if not too expensive. This calls into question how the conservation measures linked to the "contributions to an overall improvement…" will be funded and hence the ability of EDPs to meet the so-called "overall improvement test" (in fact a "likely outweighing" test).

<u>Comparison with the protections in Part 6 of the HR 2017</u>

49. When considering, for example, mitigation measures for the purposes of avoiding an adverse effect pre-Brexit CJEU authority requires meeting the high level of protection secured through the rigorous standard of scientific certainty in the avoidance of an adverse effect to EU habitats, applied by the UK courts e.g. in ***Champion*** at [12]-[14] and [41] and ***Wyatt*** at [9(7)]. In ***Sweetman v An Bord Pleanála*** (C-258/11), the CJEU stated the issue in terms frequently restated in the

authorities and accepted by the UK courts in construing Part 6 of the HR 2017:

> "40. Authorisation for a plan or project, as referred to in article 6(3) of the Habitats Directive, may therefore be given only on condition that the competent authorities - once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field - are certain that the plan or project will not have lasting adverse effects on the integrity of that site. That is so where no reasonable scientific doubt remains as to the absence of such effects . . . "

50. The difficulty of delayed or uncertain offsetting is illustrated by the proposals for dynamic habitat compensation that were rejected in ***Grace & Sweetman v An Bord Pleanála*** (C-164/17) [2018] Env LR 37 at [51]-[53]:

> "51 It is only when it is sufficiently certain that a measure will make an effective contribution to avoiding harm, guaranteeing beyond all reasonable doubt that the project will not adversely affect the integrity of the area, that such a measure may be taken into consideration when the appropriate assessment is carried out (see, to that effect, judgment of 26 April 2017, *Commission v Germany* C-142/16; EU:C:2017:301, at [38]).
>
> 52 As a general rule, any positive effects of the future creation of a new habitat, which is aimed at compensating for the loss of area and quality of that habitat type in a protected area, are highly difficult to forecast with any degree of certainty or will be visible only in the future (see, to that effect, judgment of 21 July 2016, *Orleans v Vlaams Gewest v Vlaams Gewest* (Joined Cases C-387/15) EU:C:2016:583 , at [52] and [56] and the case-law cited).
>
> 53 It is not the fact that the habitat concerned in the main proceedings is in constant flux and that that area requires "dynamic" management that is the cause of uncertainty. In fact, such uncertainty is the result of the identification of adverse effects, certain or potential, on the integrity of the area concerned as a habitat and foraging area and, therefore, on one of the constitutive characteristics of that area, and of the inclusion in the assessment of the implications of future benefits to be derived from the adoption of measures which, at the time that assessment is made, are only potential, as the measures have not yet been implemented. Accordingly, and subject to verifications to be carried out by the referring court, it was not possible for those benefits to be foreseen with the requisite degree of certainty when the authorities approved the contested development.
>
> 54 The foregoing considerations are confirmed by the fact that art.6(3) of the Habitats Directive integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected areas as a result of the plans or projects being considered (see, to that effect, judgment of 15 May 2014, *Briels and Others* C-521/12; EU:C:2014:330, at [26] and the case-law cited).

51. See also, e.g., ***Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu v College van Gedeputeerde Staten van Limburg*** (C-293/17) [2019] Env. L.R. 27 ("***Dutch Nitrogen***") at [126]-[130]:

> "126. Moreover, according to the Court's case-law, 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 plan or 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" within the meaning of art. 6(3) of the Habitats Directive (see, to that effect, judgments of 26 April 2017, *Commission v Germany* C-142/16, EU:C:2017:301, at [38], and of 25 July 2018, *Grace and Sweetman*, C-164/17, EU:C:2018:593, at [51]).

127. In the present case, the referring court notes, first, that the approach to the nitrogen problem adopted by the authors of the PAS is intended to reduce nitrogen deposition in Natura 2000 sites by means of measures in sites already affected which will take effect in the long term, it being understood that some of those measures may be taken only in the future and that others still must be regularly renewed.

128. Thus, as the Advocate General noted in [AG92] of her Opinion, for some of them, those measures have not yet been taken or have not yet yielded any results, so that their effects are still uncertain.

129. Secondly, the referring court states that the PAS provides for annual monitoring of both deposition development and the implementation progress and results of measures, and also adjustment where their result is less favourable than the estimate used as a basis by the authors of the appropriate assessment.

130. The appropriate assessment of the implications of a plan or project for the sites concerned is not to take into account the future benefits of such "measures" if those benefits are uncertain, inter alia 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."

52. Accordingly, by that measure, the power in cl. 50(5) (which permits the EDP to include "back up" conservation measures which are not expected to be needed but which may be taken if the primary conservation measures do not perform as expected) would be insufficient to meet the certainty requirement under the HR 2017 if the offsetting measures proposed were not sure to prevent an adverse effect arising.

53. The language of cl. 50 does not use the language of Part 6 of the HR 2017 or that endorsed in ***Champion*** and it is far from clear that the standard of the conservation measures is targeted at the level of certainty currently required under Part 6. Cl. 50(3) refers to conservation measures that are to be taken by '*in order to address the environmental impact of development on the identified environmental feature*" as well as "*contribute to an overall improvement in the conservation status of the identified environmental feature (see also section 55(3))*". This does not require meeting the same high standard as is applied under the HR 2017.

54. It might be contended that Part 3 goes further than the HRA 2017 and does not merely seek to offset damage to protected sites but to contribute to an overall improvement in status. However:

(1) This does not avoid the need to ensure at least equivalent offsetting measures

to remedy harm caused by development, which is plainly a primary function of EDPs and which is an important and integral part of the HR 2017 and is undoubtedly a driving force behind the provisions of the PIB as the various statements of purpose make clear;

(2) The requirement to improve status and to prevent deterioration is already a duty under article 6(1) and (2) of the Habitats Directive applied by reg. 9 of the HR 2017, which is disapplied by Schedule 6 in respect of EDPs. There are some principles applicable, at least to the application of article 6(2)[17] set out in ***Grüne Liga Sachsen eV and others v Freistaat Sachsen*** (C-399/14] [2016] PTSR 1240. However, since the positive measures are not clearly specified in the HR 2017 it is less likely that the disapplication of reg. 9 will be regressive in this respect – other than that the art 6(2) duty is broadly comparable to that for appropriate assessment and could therefore be regressive for the same reason as the EDP does not match the level of protection of Part 6.

55. I have considered the detailed analysis of various issues set out in Table 1 to my Instructions and agree that the protections of Part 6 are not replicated also in respect of other requirements e.g. the requirement for in combination effects to be assessed is not repeated in cl. 50 (whether or not it would be considered in practice) so it becomes a matter for the discretion of NE and the Secretary of State.

56. The Bill (cl 59) permits revocation of EDPs once relied upon by developers (through payments of the NRL) but does not then guarantee replacement conservation measures to address those development's impacts. See para. 653 of the Explanatory Notes:

> "Where an EDP is revoked, the Secretary of State has a responsibility to carry out the actions they consider appropriate to outweigh the negative effect of development in respect of which the nature restoration levy has already been committed to pay. The focus will be on the negative effect on the conservation status of each identified environmental feature in the EDP that is caused by the environmental impact of that development. What is considered appropriate in this context will include ecological factors, but it will not be limited to that, and the Secretary of State will also consider economic and social factors".

57. The monitoring duty (see below) at cl. 73(2)(d) only applies to EDPs that are "in force" so, once revoked, there will not be a duty to consider longer term efficacy,

---

[17] Which is specific to art. 6(2) not 6(1).

and the reg. 9 duty applying arts. 6(1) and (2) of the Habitats Directive will not apply.

58. I also note that reg. 9 of the HR 2017 is amended by para. 44 of Schedule 6 to exclude from its scope the functions under Part 3. Since that provision requires compliance with the Habitats and New Wild Birds Directives[18], this reinforces the conclusions set out here with regard to Part 3 being regressive.

59. The removal of the EDPs from the scope of SEA by para. 42 of Schedule 6 also reinforces those conclusions since it excludes the systematic assessment of the environmental implications of an EDP and consideration of *reasonable alternatives* (see cl. 52(2) which does not replicate the more stringent duty under SEA). This might be less of a concern to the extent that EIA may still be required of the individual developments/operations included in a EDP and it will doubtless be said that the requirements for making an EDP require the same issues to be considered. However, as with other regulations that are replaced by Part 3, the replacement is far from being on a "like for like" basis (see e.g. cl. 50(3)(a) and 55(5)) and, absent relevant guidance or regulations, deprives EDP of the systematic assessment otherwise required for plans and programmes under the Environmental Assessment of Plans and Programmes Regulations 2004.

60. The requirement of the so-called "*overall improvement test*" (in reality the "likely outweighing" test, not as rigorous at para 94 of the Explanatory Notes suggests) is also not as stringent a protection as that applied under Part 6 since cl. 56(4) only requires that "*the conservation measures are likely to be sufficient to outweigh the negative effect, caused by the environmental impact of development, on the conservation status of each identified environmental feature*." A "likely outweighing" of a negative effect, which appears to be a simple balancing approach, is by no means equivalent to being certain to a high standard that an adverse effect will not occur as the result of the development which is beyond reasonable scientific doubt. The Guidance (above) states:

> "The Secretary of State will only be able to give the go ahead to an EDP where they are satisfied that doing so will deliver an overall improvement compared with the current approach. EDPs will include clear criteria for success to ensure this overall improvement is delivered alongside robust monitoring and reporting requirements. If an EDP is shown to be underperforming, the EDP will be expected to deliver

[18] See the definition of "the Directives" in reg. 3(1) of the HR 2017.

additional conservation measures to ensure the environmental outcome is secured."

61. This raises the inevitable question as to over what period of time the improvement would be considered and how it interacts with offsetting of harm from individual developments.

62. The difficulty with the broad approach proposed which may permit the taking into account of net improvements in some respects is that, under the present regime, there must be no harm caused to a high level of certainty and the provision of other improvements, unless they actually offset or mitigate the harm or provide compensation (subject to further rigorous criteria, below) are not relevant to the protection of the habitat in question.

63. The *overall improvement test* applied here does not require the systematic and rigorous protection afforded by Part 6 and amounts to a reduction in the level of protection. It substitutes a mandatory series of hurdles to be overcome with a general discretionary test. The test simply allows all the factors to be put together without a mandatory systematic analysis of either environmental effects or the level of certainty of success in avoiding or offsetting harm, and is based on an overall judgment which is a laxer and, in my opinion, a clear reduction in the level of environmental protection. Whilst Brexit permits the Government to depart from the rules set by the Habitats and New Wild Birds Directives, they are nonetheless regressive in my opinion. See also my comments on para. 865 of the Explanatory Notes, below.

64. Further, cl. 50(4) also permits, where NE considers it appropriate, to "*set out conservation measures that do not directly address the environmental impact of development on that feature at that site but instead seek to improve the conservation status of the same feature elsewhere*" which is essentially for the provision of compensatory measures but without the stringent "no alternative" and "IROPI" preconditions on compensation imposed by regs. 64 and 68 HR 2017. While a mitigation/compensation hierarchy is not spelled out in terms in the HR 2017, it is clear that mitigation or offsetting measures are preferable since they either prevent a likely significant effect from arising (subject to ***People over Wind*** [2018] PTSR 1668) or can be considered in undertaking an appropriate assessment, but compensation is far more difficult to establish given the stringent preconditions mentioned. The choice between the various compensation measures available within an EDP does not create anything remotely comparable to the structure of

Part 6 in this respect since the conservation measures are wholly a matter for the discretion of NE and the Secretary of State.

65. It is possible that regulations or even policy guidance may seek to remedy the deficits in protection which appears to be created by the PIB but, on the basis of the PIB alone, there appears to me to be a deficit at least in respect of the protection of habitats in comparison to the existing provisions of Part 6 of the HR 2017.

66. The monitoring of effectiveness of an EDP's conservation measures (see above) and any expressions of intention in the various statements of policy by Government that this is intended not to provide weakened protection of the environment is little more than a statement of intention and it remains to be seen whether there is regression in protection, and deterioration of habitats, as a matter of fact.

67. It is also relevant to note in respect of the current version of the PIB that:

(1) The requirements for EIA do not appear to be modified by the PIB for individual projects nor is it stated that the matters subsumed within an EDP would not remain material planning considerations when applications are being considered, nor are the NPPF or PPGs affected. NE, in making an EDP, must have regard to the Development Plan under cl. 53(2) but it is not required to give it any specific weight. The interaction with the planning system in terms of both plan-making and development management is not fully thought through or clear;

(2) On the other hand, SEA is excluded in respect of EDPs (Schedule 6 para. 42); and

(3) The PIB does not disapply or modify the development plan provisions of Part 6 of the HR 2017. That may be because the pace of the economic development purpose applies less strongly there and therefore less so in the case of local plans. See the Guidance (above) e.g. –

> "development is often delayed until sufficient mitigation is put in place. The time it takes to secure mitigations can range from a number of months to a number of years where mitigation is challenging to secure… "
>
> "These delays can slow housing delivery, with accompanying burdens on developers and local authorities. For example, for local authorities these delays can result in challenges in meeting their local housing need. In areas where there are significant delays caused by environmental issues it can result in housing needing to be placed in alternative locations. This can result in increased

infrastructure demand being overly concentrated in specific areas."

68. Whilst it may not be challengeable outside the political process, I do not agree with the Secretary of State's certificate so far as the habitats protections of Part 6 are concerned. Neither do I agree with para. 865 of the Explanatory Notes which makes unevidenced assumptions as to the outcomes of EDPs:

> "Paragraphs 43 to 48 amend the Habitats Regulations so that neither EDPs nor conservation measures delivered under it will require assessment under Part 6 of the Habitats Regulations. **By their very nature, EDPs would result in the outcomes that that assessment would lead to being met or exceeded over the period that the EDP applies for.** An EDP would achieve this outcome in a different way to the Habitats Directive, therefore paragraph 44 amends regulation 9 of the Habitats Regulations so that to that these duties do not apply to any functions under Part 3 of this Bill (delivering EDPs or conservation measure) or for a competent authority in exercising their functions (such as undertaking assessment under regulation 63 for any effects of development not covered by an EDP)".

69. It is undoubtedly correct that EDPs will operate differently to Part 6 but it is no more than a statement of purpose not fact or evidenced assessment that EDPs will lead to outcomes that would be better – and, if so, over a wholly unknown timeframe which itself might lead to further deterioration.

<u>WCA 1981 and SSSIs</u>

70. With regard to SSSIs under the WCA 1981 and the prohibition on carrying out specified operations in ss. 28E, 28H and 28I without consent or other controls, the position is less clear since the operation of the protective provisions of WCA 1981 are in most cases dependent on the terms of any consent granted by NE.

71. It can be said that since NE provides an EDP to the Secretary of State to be made under cl. 55, the difference between NE consent under the WCA 1981 (which is subject to appeal to the Secretary of State under s28F) and under an EDP is likely not to lead to a reduction in the existing level of environmental protection as a matter of the PIB (individual decisions or EDPs may be different of course).

<u>Licensing under s. 16 of the WCA 1981</u>

72. S. 16 sets out a number of preconditions for licensing in s. 16, which include:

> "(1A)The appropriate authority—
>
> (a) shall not grant a licence for any purpose mentioned in subsection (1) unless it is satisfied that, as regards that purpose, there is no other satisfactory solution; and
>
> (b) shall not grant a licence for any purpose mentioned in paragraphs (e) to (h) of that subsection otherwise than on a selective basis and in respect of a small

number of birds."

"(3B) In England, the appropriate authority shall not grant a licence under subsection (3) unless it is satisfied—

(a) that there is no other satisfactory solution, and

(b) that the grant of the licence is not detrimental to the survival of any population of the species of animal or plant to which the licence relates."

73. There is no requirement under PIB to replicate these and other controls when producing an EDP, whether or not NE and the Secretary of State choose to do so in specific cases – which would be done as a matter of discretion and not as a result of a legal duty. While the terms of a licence (specific or general) will be a matter for the appropriate authority under s. 16, and NE and the Secretary of State will replicate that function in producing and making an EDP, there is nonetheless no legal requirement[19] that the preconditions for the grant of licences must be met since Schedule 4 simply deems the grant of a licence (on the terms as to commitment to pay NRL) when an EDP is "*relating to the protected species and on the terms set out in the EDP*". There is no requirement as such that the EDP terms replicate those in s. 16, though the Schedule 6 amendments appear to tighten up or clarify the provisions where the existing requirements still apply.

74. Unless the deeming of the grant of a licence required the EDP to be subject to the same requirements as s. 16, which seems unlikely given the broad powers in which the making of EDPs is expressed, and the purpose of Part 3 of the PIB, it therefore appears in respect of WCA 1981 licensing that the PIB as currently drafted does not maintain the same level of environmental protection since it does not require compliance with the same level of protection as is currently in existence.

<u>Licensing under reg. 55 of the HR 2017</u>

75. The structure of reg. 55 is similar to s. 16 of the WCA 1981 as are the preconditions – see e.g. regs. 55(2)-(4) (to permit the "*capture, keeping or other judicious use of certain wild birds*") and (8)-(9) ("*taking or keeping of certain specimens of any of the species or subspecies listed in Annex II(b) (other than any bryophyte) or Annex IV to the Habitats Directive*").

76. The terms of Schedule 4 para 3 are similar to those applicable to the WCA 1981 (para. 4) and similarly treats a licence to have been granted if the EDP is "*relating to*

[19] Though they could be included in regulations under cl. 53(4), if they were not considered to provide an obstacle to more efficient and speedy decision-making.

the protected species and on the terms set out in the EDP".

77. It might be considered that deeming of the grant of a licence requires an the EDP to be subject to the same requirements as reg, 55, but this seems unlikely given the broad powers in which the making of EDPs is expressed and given the purpose of the legislation and the marked differences when compared with the current legislation. Specifically, the three licensing tests of regulation 55(2), 55(9)(a) and 55(9)(b) are not required to be applied in the context of an EDP. I therefore consider that the PIB as currently drafted which will replace the HR 2017 licensing where EDPs are made will not maintain the same level of environmental protection since it does not require compliance with the same level of protection as is currently in existence which will be true even if as a matter of discretion in some cases they are applied, since the tests are currently mandatory and universal (subject to exceptions).

Licences under s. 10 of the PBA 1992

78. S. 10 of the PBA 1992 sets out a series of purposes in s. 10(1) (by appropriate conservation body) and (2) (by the minister) for which licences may be granted.

79. There is nothing which replicates the restrictions in s. 10 so far as the making of an EDP is concerned, unless they are impliedly incorporated into the provisions as to the content of an EDP, which appears unlikely given the terms of the powers and the purpose of the legislation.

80. On that basis, the purposes for which a licence may be deemed to be granted do not require in principle the same protections even if, in practice, they may be replicated in whole or part in an EDP because that then makes their imposition a matter of discretion and not mandatory. As with licensing under the WCA 1981 and HR 2017, Part 3 does not maintain the same level of environmental protection for this type of licensing either.

Do the Explanatory Notes support a different approach?

81. The Explanatory Notes state at para. 853 (see above) that:

> "853 Paragraphs 3 and 4 relate to protected species and provide that where a developer has made a payment in respect of a protected species covered by an EDP then the developer is treated as holding a licence in respect of it. Species are protected under both the Conservation of Habitats and Species Regulations 2017 and the Wildlife and Countryside Act 1981. Licences are to be treated as having been granted to the developer by Natural England, for the purposes of them being managed under the existing legislation, in respect of enforcement and modification for

example."

82. This is a reference to "managed under the existing legislation", i.e. following their grant and on the terms of their grant in the EDP, and not to restrictions on their grant and provides an insufficient basis to read back into the EDP provisions all the terms of s. 16 in apparent contradiction of the different approach taken to making EDPs set out above.

83. At para. 665 the notes state:

> "It is anticipated that the Secretary of State would consider other factors, such as whether the impact of the development is sustainable, conservation measures that will be maintained beyond the EDP end date are properly funded are well-enough funded for that duration, or that requirements set in regulations (such as that the licensing tests are met in relation to a protected species) are adequately dealt with. The exercise of this discretion would be subject to the usual principles of public law."

84. That passage only suggests that the same or similar considerations to those in the existing legislation may be applied as a matter of discretion and are not mandatory as they are at present. Even if the application of the same principles was subject to guidance, that of itself would not demonstrate the same level of protection as is found in the existing legislation since it would be discretionary. In contrast, if the current requirements were stated to be mandatory in setting the terms of the EDP, that would be a different matter, but this is not proposed.

85. I do not consider that the Explanatory Notes in this paragraph and elsewhere (e.g. 625, 664) provide a sound basis in respect of the licensing relaxations in Schedule 4 for reading in complex existing restrictions not expressly incorporated into Part 3 for the granting of EDPs and in apparent contradiction to the approach set out.

Scope for guidance or regulatory controls

86. At the moment, consideration can only be given to the PIB since no draft regulations or guidance has been published under e.g. cl. 53(4). It is possible that the terms, at least of draft regulations, might modify the assessment I have set out above, but that is currently unknown.

Conclusion on issue (1)

87. For the detailed reasons set out above, I consider that the SoS's s. 20 statement is incorrect on the basis that the aims of Part 3 are both to deal with harm from development and also to achieve an overall improvement in sites and species protection. It should be remembered, as I have set out, that the current legal duties

include an improvement duty under art. 6(1) of the Habitats Directive and its corollary art. 6(2) which are applied by reg. 9 and disapplied in the case of EDPs.

88. I have explained above why I do not consider that the purpose of improving protected habitats and species should lead to the conclusion that the lax, generalised test of *overall improvement*, which in any event is only one of "likely to improve" (in contrast to the high level of certainty currently required) provides equivalent environmental protection to the existing regulatory regime. There are many important factors unresolved in Part 3 which I have highlighted above and which in any event call into serious question the likely efficacy of the Government's stated purposes.

89. Had the Minister wanted to focus on improvement, this could have been done without disapplying existing Part 6 and species licensing provisions, but it should be remembered that a key aspect of the provisions of Part 3 is to assist the speeding up of development and the removal of the obstacles to speedy decision making created by the current environment regime. I have drawn attention to the specific complaints, for example. about the delays in the provision of habitat mitigation. See also the Planning Reform Working Paper, quoted earlier.

90. In my view, the solution adopted is a significantly laxer approach to protection, allows issues of mitigation/offsetting, compensation and improvement to be fudged in the overall improvement test, wholly depending on the individual decision made by NE and the adequacy of the resourcing provided for these purposes, and a clear reduction in existing environmental protection. It is not even clear that the production of an EDP for specific development will be any speedier for development than the application of Part 6 where the rules are well-understood.

91. For completeness, I have considered the application of the duty of the Minster in s. 19(1) of the 2021 Act when making policy, which in my view would be engaged when the Minster makes an EDP, to have due regard to the policy statement on environmental principles currently in effect. By virtue of s. 17(5) of the 2021 Act, the environmental principles include the "precautionary principle, so far as relating to the environment" and the "polluter pays principle". I do not consider, however, that this "have due regard" duty overrides my concerns above about the regressive nature of Part 3 PIB. It should be recalled in this context that those principles underpin the statutory purposes and construction of the Part 6 obligations in any event.

(2) Breach of the Bern or Ramsar Conventions

92. At present, sites which are listed under the Ramsar Convention ("**RC**") do not enjoy legal but only policy protection under the NPPF. The Supreme Court is current considering the application of the HR 2017 via policy in its reserved judgment in ***Fry***.

93. Schedule 6 Part 1 of the PIB would expressly incorporate Ramsar Sites into Part 6 protection but only with legal effect from the introduction of the new regime on Royal Assent (depending on commencement). It is arguable, depending on the Supreme Court, that if policy has made Ramsar Sites protection within the HR 2017 "environmental law" that the PIB would have a similar effect to its effect on current European Sites but this would be much more difficult to maintain given that it would only be so by the operation of policy which could be amended or revoked at any time (though it has in fact been in existence for many decades).

94. Both Conventions do not have the status of being directly incorporated into domestic law, unlike e.g. the HR 2017, and the amendments proposed by Part 1 of Schedule 6 do not incorporate the RC but merely apply the protections of the HR 2017 to Ramsar sites. It is therefore more difficult to argue for breach to the extent that the Conventions leave, to the contracting states, the means by which the provisions should be given effect and what form those provisions should take. It makes it more difficult to contend that the protections to be created by PIB in place of existing regulations are insufficient for the purposes of the Conventions since there is no necessary point of comparison in terms of an existing regulatory regime.

95. Further, express legal protection for Ramsar sites will be introduced by Part 1 of Schedule 6 and will sit alongside the provisions of Part 3 where EDPs are made. In strict terms, therefore, it would be more difficult to establish that the protections would be diminished in law since there will be 2 parallel regimes of regulation under English law i.e. Part 3 and the HR 2017. Regression is not a direct consideration under the RC (below) and the question is a more direct one of whether the obligations under the RC are met in fact.

96. Articles 3 and 4 of the RC provide:

> "**Article 3**
>
> 1. The Contracting Parties shall formulate and implement their planning so as to promote the conservation of the wetlands included in the List, and as far as possible the wise use of wetlands in their territory.

2. Each Contracting Party shall arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory and included in the List has changed, is changing or is likely to change as the result of technological developments, pollution or other human interference. Information on such changes shall be passed without delay to the organization or government responsible for the continuing bureau duties specified in Article 8.

Article 4

1. Each Contracting Party shall promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands, whether they are included in the List or not, and provide adequately for their wardening.

2. Where a Contracting Party in its urgent national interest, deletes or restricts the boundaries of a wetland included in the List, it should as far as possible compensate for any loss of wetland resources, and in particular it should create additional nature reserves for waterfowl and for the protection, either in the same area or elsewhere, of an adequate portion of the original habitat.

3. The Contracting Parties shall encourage research and the exchange of data and publications regarding wetlands and their flora and fauna.

4. The Contracting Parties shall endeavour through management to increase waterfowl populations on appropriate wetlands.

5. The Contracting Parties shall promote the training of personnel competent in the fields of wetland research, management and wardening."

97. On compensation, under art. 5, Resolution XI.9 at Cop. 11 explained this further:

"**Compensation**

39. Where there are residual post-mitigation impacts, it is necessary to compensate for the resultant change in ecological character, as agreed by the Parties in Resolution VII.24, Compensation for lost wetland habitats and other functions (1999). Any such action should be ex situ and appropriate to offset the residual impacts.

40. The following decision criteria require consideration during the development and implementation of compensation measures:

- ***Is the compensation type-for-type?***

The change of ecological character of one type of wetland (for instance, an area of saltmarsh) should be compensated, as appropriate, by the protection, enhancement, restoration or creation of a similar wetland type (Resolution VII.24), in this case another area of saltmarsh rather than, for example, an area of freshwater marsh.

- ***Is the compensation function-for-function, component-for-component, or area-for-area?***

The residual change in ecological character may result in a loss of area and/or a loss of function or loss of provision of ecosystem services. The compensation provided should address the areal extent, significant ecosystem components, and the functional performance of the wetland. Therefore, it is necessary to understand the range of ecosystem services provided by the wetland, its physical size, and the type of biodiversity a wetland supports prior to developing compensatory habitat.

- ***Where should compensation be located?***

The location of any compensatory wetland habitat is important. Ideally it should

be in close proximity to the impacted wetland and within the same hydrological catchment or coastal zone. Where compensation measures require habitat restoration or creation, the existing ecological character of the proposed restoration or creation site needs to be assessed to ensure that a) other existing important wetland values and services are not damaged, and b) other non-wetland impacts are not generated.

- ***How can compensation be achieved?***

Compensation may be achieved through the restoration, enhancement, and/or creation of wetlands. The compensation measures must address cumulative impacts on both area and function and promote integrity and resilience through a detailed scientific understanding of risks and uncertainties. The timing of implementing compensatory measures is important. Compensation must be established in advance of, or at least in consideration of, the timing of the proposed impacts. The monitoring of any compensatory measures needs to be undertaken to evaluate whether the residual impact to the ecological character has been adequately compensated, or whether further compensation provision proves to be necessary. Securing the conservation of other existing wetlands, for example through increasing statutory protection for maintaining the ecological character of another wetland, whilst covered under the terms of Article 4.2, should generally be considered a less appropriate compensation option under the overall terms of the Convention, since all Parties have already committed themselves to the wise use, through the maintenance of ecological character, of all wetlands.

- ***How can long-term compensation be implemented?***

The security of any long-term success will depend on appropriate stewardship and resourcing. When considering compensation, the ability to ensure that the necessary technical, financial, management and legislative capabilities will exist into the future needs to be considered with sufficient care and consideration. As with any wetland restoration, enhancement or creation, full local community engagement, support and stewardship is a key prerequisite for long-term success (in line with Resolutions VII.8, Guidelines for establishing and strengthening local communities' and indigenous people's participation in the management of wetlands (1999), and VIII.16, Principles and guidelines for wetland restoration (2002)).

- ***Are the costs and risks associated with effective compensation considered to be too high?***

A risk-based approach may consider the full cost of compensation, including both initial or capital costs and the long-term cost to secure the future ecological character of the area in perpetuity, to be prohibitive. Alternatively, because of ecosystem complexity, irreplaceability and/or scientific uncertainty the risk of failure to successfully compensate an adverse decision may be unacceptably high. In these scenarios a decision needs to be made as to whether compensation is appropriate or instead the party should refrain from implementing the activity, with avoidance becoming the appropriate strategy."

98. Given the general point made above, whether there would be a breach of the obligations in arts. 3 or 4, taken with the guidance regarding compensation in Resolution IX.9, will depend much more on the specific provisions of each EDP and whether they can be regarded as promoting the conservation of wetlands in the

Ramsar list or provide appropriate compensation where necessary. I have already set out my assessment of the provisions of the PIB relating to what might be regarded as compensation and how they differ from the provisions in Part 6 of the HR 2017.

99. However, depending on the terms of the EDP and their case-by-case treatment of Ramsar sites, and any regulations or guidance issued as to their treatment, I question whether the requirement of the "overall improvement test" which is, as I have pointed out, a balance on the basis of a mere likelihood (see cl 55(4)) would itself meet the requirements of compensation in art 4 of the RC as amplified by Resolution XI.9 absent case specific measures in an EDP.

100. Similar considerations apply, in my opinion, to compliance with the BC provisions in art. 4 for habitats protection and art. 5-9 for species protection in the light of the principal objectives of the BCset out in arts. 1 to 3 and the general duty in art. 3(1) and (2):

> "1 Each Contracting Party shall take steps to promote national policies for the conservation of wild flora, wild fauna and natural habitats, with particular attention to endangered and vulnerable species, especially endemic ones, and endangered habitats, in accordance with the provisions of this Convention.
>
> 2 Each Contracting Party undertakes, in its planning and development policies and in its measures against pollution, to have regard to the conservation of wild flora and fauna."

101. This gives considerable scope to the contracting party as to the measures to be taken as do the specific provisions of arts. 4 and 5 to 9 e.g.

> "**Chapter II – Protection of habitats**
>
> **Article 4**
>
> 1 Each Contracting Party shall take appropriate and necessary legislative and administrative measures to ensure the conservation of the habitats of the wild flora and fauna species, especially those specified in Appendices I and II, and the conservation of endangered natural habitats.
>
> 2 The Contracting Parties in their planning and development policies shall have regard to the conservation requirements of the areas protected under the preceding paragraph, so as to avoid or minimise as far as possible any deterioration of such areas.
>
> 3 The Contracting Parties undertake to give special attention to the protection of areas that are of importance for the migratory species specified in Appendices II and III and which are appropriately situated in relation to migration routes, as wintering, staging, feeding, breeding or moulting areas. …"

"**Chapter III – Protection of species**

Article 5

Each Contracting Party shall take appropriate and necessary legislative and administrative measures to ensure the special protection of the wild flora species specified in Appendix I. Deliberate picking, collecting, cutting or uprooting of such plants shall be prohibited. Each Contracting Party shall, as appropriate, prohibit the possession or sale of these species.

Article 6

Each Contracting Party shall take appropriate and necessary legislative and administrative measures to ensure the special protection of the wild fauna species specified in Appendix II. The following will in particular be prohibited for these species:

a all forms of deliberate capture and keeping and deliberate killing;

b the deliberate damage to or destruction of breeding or resting sites;

c the deliberate disturbance of wild fauna, particularly during the period of breeding, rearing and hibernation, insofar as disturbance would be significant in relation to the objectives of this Convention;

d the deliberate destruction or taking of eggs from the wild or keeping these eggs even if empty;

e the possession of and internal trade in these animals, alive or dead, including stuffed animals and any readily recognisable part or derivative thereof, where this would contribute to the effectiveness of the provisions of this article.

…."

102. As with the provisions of the RC, the question as to whether the BC is breached will turn on the specifics of any EDPs which affect the habitats and species protected and not, specifically, on the nature of the Part 3 proposals as compared to existing habitats and species protection.

(3) Breach of Art. 391 of the EU/UK Trade and Cooperation Agreement

103. I am only asked to consider the issue of weakening or reducing environmental levels of protection and not the issue of the effect on trade or investment in Article 391(2). The relevant provisions are:

"**CHAPTER 7**

ENVIRONMENT AND CLIMATE

Article 390

Definitions

1. For the purposes of this Chapter, "environmental levels of protection" means the levels of protection provided overall in a Party's law which have the purpose of protecting the environment, including the prevention of a danger to human life or health from environmental impacts, including in each of the following areas:

(a) industrial emissions;

(b) air emissions and air quality;

(c) nature and biodiversity conservation;

(d) waste management;

(e) the protection and preservation of the aquatic environment;

(f) the protection and preservation of the marine environment;

(g) the prevention, reduction and elimination of risks to human health or the environment arising from the production, use, release or disposal of chemical substances; or

(h) the management of impacts on the environment from agricultural or food production, notably through the use of antibiotics and decontaminants.

2. For the Union, "environmental levels of protection" means environmental levels of protection that are applicable to and in, and are common to, all Member States.

3. For the purposes of this Chapter, "climate level of protection" means the level of protection with respect to emissions and removals of greenhouse gases and the phase-out of ozone depleting substances. With regard to greenhouse gases, this means:

(a) for the Union, the 40 % economy-wide 2030 target, including the Union's system of carbon pricing;

(b) for the United Kingdom, the United Kingdom's economy-wide share of this 2030 target, including the United Kingdom's system of carbon pricing.

Article 391

Non-regression from levels of protection

1. The Parties affirm the right of each Party to set its policies and priorities in the areas covered by this Chapter, to determine the environmental levels of protection and climate level of protection it deems appropriate and to adopt or modify its law and policies in a manner consistent with each Party's international commitments, including those under this Chapter.

2. A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its environmental levels of protection or its climate level of protection below the levels that are in place at the end of the transition period, including by failing to effectively enforce its environmental law or climate level of protection.

3. The Parties recognise that each Party retains the right to exercise reasonable discretion and to make bona fide decisions regarding the allocation of environmental enforcement resources with respect to other environmental law and climate policies determined to have higher priorities, provided that the exercise of that discretion, and those decisions, are not inconsistent with its obligations under this Chapter.

4. For the purposes of this Chapter, insofar as targets are provided for in a Party's environmental law in the areas listed in Article 390, they are included in a Party's environmental levels of protection at the end of the transition period. These targets include those whose attainment is envisaged for a date that is subsequent to the end of the transition period. This paragraph shall also apply to ozone depleting substances.

5. The Parties shall continue to strive to increase their respective environmental levels of protection or their respective climate level of protection referred to in this Chapter."

104. The "environmental levels of protection" under consideration here seem to me to

fall within art. 390(1)(c) and (e) but may fall also under other categories depending on the issues in a specific EDP. In any event, the PIB proposals are capable of affecting protections falling within art. 390.

105. For the reasons I have set out under issue (1), and subject to the issues I have set out, I do consider the provisions in Part 3 and the associated schedules of the PIB as they currently stand do amount to a weaking or reduction in the environmental levels of protection within art. 391(2) "*the levels that are in place at the end of the transition period*" i.e. at the end of 2020[20] which are those in the HR 2017, WCA 1981 and PBA 1998.

106. For the reasons discussed in connection with Issue (2), it is less clear whether it can be established that the PIB would not operate "*in a manner consistent with each Party's international commitments*".

107. I have nothing to add as currently instructed but would be pleased to advise further should it be necessary.

DAVID ELVIN K.C.

Landmark Chambers
London EC4A 2HG
23 April 2025

[20] Art. 6(1)(g) referring to Article 126 of the Withdrawal Agreement – "126. There shall be a transition or implementation period, which shall start on the date of entry into force of this Agreement and end on 31 December 2020".