Commissioned by

PLANNING AND INFRASTRUCTURE BILL REDUCING THE LEVEL OF ENVIRONMENTAL PROTECTION

OPINION

Advice in summary

1. We are asked to advise Wild Justice as to the legal accuracy of the statement made by the Minister[1] on the face of the Planning and Infrastructure Bill ("**the Bill**") that "the Bill will not have the effect of reducing the level of environmental protection provided for by any existing environmental law."[2]

2. In our view the only possible reading is that the Bill will have the effect of reducing the level of environmental protection provided under the Conservation of Habitats and Species Regulations 2017 ("**the Habitats Regulations**") and related legislation.[3] Part 3 and Schedule 4 of the Bill will reduce the level of environmental protection for endangered species and their habitats in Special Areas of Conservation and Special Protection Areas. The current statutory requirement under the Habitats Regulations is that development which might adversely affect a protected site can only be permitted where the decision maker is sure, on the basis of up-to-date scientific evidence, that there will be no adverse impact on the integrity of the site in question.[4] However, one of the

[1] Described on the Bill as Secretary of State Angela Rayner.

[2] A statement of this kind is required by section 20(3) of the Environment Act 2021.

[3] For example, the Conservation of Offshore Marine Habitats and Species Regulations 2017.

[4] Regulation 63(5) of the Conservation of Habitats and Species Regulations 2017.

principal consequences of the Bill is that any adverse impact on the integrity of a protected site must now be "disregarded."

3. We have been unable to understand the legal rationale for the Secretary of State's statement that the proposals in the Bill will not reduce the existing level of environmental protection: we have not seen any published explanation of that opinion. It is, under section 30 of the Environment Act 2021, the statutory function of the Office of Environmental Protection to give and to publish advice on changes to environmental law where that is requested by the Minister. We have looked for and asked for any such advice. On 17 April 2025, the OEP confirmed to those instructing us as follows:

> "The Secretary of State has not sought the OEP's advice regarding how the Planning & Infrastructure Bill may affect levels of environmental protection as compared to existing environmental law. Nor has the OEP given advice on this matter of our own volition under s.30(3) Environment Act 2021 at this time."

The existing legal position

4. Existing UK law protects the habitats of endangered species through an established network of Special Areas of Conservation ("**SACs**") and Special Protection Areas ("**SPAs**") (together: "**protected sites**").[5] To give some context, about 7% of England's land is designated as an SAC or SPA.[6] The principal legal safeguard for protected sites (and the one which the Bill will abrogate) is that before a local planning authority or the Secretary of State may grant planning permission for a project which might affect the integrity of a protected site they must, beyond reasonable scientific doubt, be certain that there will be no adverse effects on the integrity of the protected site. That reflects the "strict precautionary approach" contained in the Habitats Regulations: an approach which the Secretary of State has recently acknowledged in her legal submissions to the Supreme Court.[7]

[5] See Part 6 of the Conservation of Habitats and Species Regulations 2017.

[6] That is to say around 1 million of England's 13 million hectares are so designated: see Land use statistics: England 2022 - GOV.UK and Special Areas of Conservation | JNCC - Adviser to Government on Nature Conservation.

[7] See the Secretary of State's written legal submissions to the Supreme Court in *CG Fry and Son Ltd v SSHCLG* (Appeal No: UKSC 2024/0108), (27 January 2025), paragraph 45:

5. Under existing law, schemes set up under the Community Infrastructure Levy Regulations 2010[8] are operated whereby developers contribute to infrastructure costs that will mitigate the impact of development on such sites:

   a) For example, around the Ashdown Forest, additional housing which results in population increases and increased pressure from dog walkers on endangered ground nesting birds is permissible by dint of levy schemes being in place for the provision of Suitable Alternative Natural Greenspaces (i.e. the provision of parks mitigates the pressure of increased populations by drawing dog walkers away from the Forest to other places).

   b) Another example of existing levy schemes is where it is determined that population increases will lead to an increase in sewage which existing sewerage treatment infrastructure is unable to manage. Thus, under existing law, a developer may pay into a levy scheme towards sewerage infrastructure upgrades so as to mitigate the harm that will be caused by additional housing. Provided there is no reasonable scientific doubt that the scheme will mitigate the harm from new housing, the development can proceed.

   c) We note also the recent partnership between the Environment Agency and Oxford City Council which is said to unlock 18,000 new homes whilst ensuring high standards of environmental protection, through the provision of additional sewage infrastructure.[9]

"…(1) the purpose of the Habitats Directive is to provide a high level of protection for sites and species of international nature conservation importance; (2) to that end the Habitats Directive embodies a strict precautionary approach…"

(The Habitats Regulations transposed the requirements in the Habitats Directive.)

The Secretary of State referred to the "strict precautionary" nature of the obligations in the Habitats Regulations no less than seven times in her written legal submissions.

See also the Annex appended to this Opinion for a detailed summary of the case law on the required approach under the Habitats Regulations.

[8] The Community Infrastructure Regulations 2010 and Part 10 of the Planning Act 2008 (the parent statute) were themselves recently amended by parliament introducing a new "Infrastructure Levy" through section 137 and schedule 12 to the Levelling Up and Regeneration Act 2023.

[9] https://www.gov.uk/government/news/environment-agency-and-oxford-city-council-unlock-growth

The proposals in the Bill and their effect

Removal of the requirement for certainty as to lack of harm beyond reasonable scientific doubt

6. In place of this existing system, including the existing system for levies which mitigate harm to protected sites, the provisions of Part 3 of the Bill will allow development to proceed by the developer paying into a new levy scheme: but at no point will any decision-maker (neither the Secretary of State nor the local planning authority) have to be sure, beyond reasonable scientific doubt, that a harmful development will not adversely affect the integrity of the protected site.

7. In our view, for that simple reason (among others below), it is obvious that the provisions of the Bill will reduce the level of environmental protection provided for by existing law.

8. Under the scheme proposed by the Bill, Natural England will prepare an "Environmental Delivery Plan" ("**EDP**") in respect of a protected site (clauses 48-54) which is then "made" by the Secretary of State (clause 55). The EDP identifies features of a protected site that will be harmed by development. A developer then pays a nature restoration levy (clauses 61-64) towards the cost of implementing the plan (subject to considerations as to the viability of the development: clause 64(1)(b)). Under the scheme articulated in the Bill, when a decision-maker decides an application for planning permission, the environmental impacts of the development on any "protected feature" of protected sites[10] must be "disregarded." That is to say that instead of being *sure* that there is no reasonable scientific doubt as to an adverse impact from the development on the SAC or SPA, the decision-maker must instead leave the question entirely out of account. Similarly, instead of a developer having to apply for a licence for any disturbance of a protected species, they will be deemed to be granted one merely by virtue of having paid the levy.[11]

[10] By Clause 78, protected sites also include Ramsar Sites and Sites of Special Scientific Interest. A "protected feature" in relation to a protected site, means any habitat, species or geological, physiological or physiographical feature by reason of which the land is a protected site.

[11] Clause 61(3) and paragraphs 3-5 of Schedule 4 to the Bill.

9. The Bill thereby withdraws from local planning authorities and the Secretary of State the duty and indeed the ability to consider, at the point of granting planning permission, whether they are certain that a development will not have an adverse impact on protected sites and species.[12] It thereby withdraws the principal legal safeguard for protected sites. This amounts to a very significant change. As the Secretary of State recently submitted to the Supreme Court in January this year, "*both the legislative purpose and the legislative wording [in the Habitats Regulations] seek to protect internationally important biodiversity in a strict precautionary manner*" (emphasis added).[13] We agree. One of the ways in which the Habitats Regulations provide that protection is by imposing the certainty requirement that the Bill proposes to remove.

10. The statutory disregard of any harm to the protected site is premised on there being an EDP. However, when the Secretary of State makes an EDP, she does not need to be satisfied (even then) that reasonable scientific doubt as to adverse effects on a protected site have been eliminated. The Secretary of State must instead determine that the conservation measures in the EDP are "likely to be sufficient to outweigh the negative effects" of envisaged development (clause 55(4)) on the conservation status of each identified environmental feature (clause 55(4)). The decision required as to the making of an EDP is one on the balance of probabilities. The Bill thereby abrogates the need to eliminate reasonable scientific doubt as to a potential adverse effect on a protected site.

11. In our view, it is beyond argument that the scheme under the Bill does not apply an equivalent standard to the strict precautionary approach which is required when granting planning permission under existing law, because:

    a) the determination as to the impact of the EDP is made on the balance of probabilities ("likely") rather than on the basis of excluding reasonable scientific doubt, and

[12] Currently provided for by regulation 63(5) of the Habitats Regulations 2017.

[13] Secretary of State's written legal submission to the Supreme Court in *CG Fry and Son Ltd v SSHCLG* (Appeal No: UKSC 2024/0108) (27 January 2025), paragraph 50. See also paragraph 1: "*A central aspect of the protection is that planning authorities may not "agree" to development taking place unless, following an "appropriate assessment", they are "certain" that the development "project" will not adversely affect the integrity of the protected habitat or species.*"

And paragraph 74: "*The Article 6(3) obligation is not to "agree" a project unless the competent authority is certain that it will not adversely affect the integrity of a protected site*."

b) that determination about the plan may be made many years before a specific proposal for development comes forward (the EDPs are to run for up to ten years).

12. Accordingly, on that basis alone, there is no proper rationale for the Minister's statutory statement (pursuant to s.20(3) of the Environment Act 2021) that the Bill will not reduce existing environmental protections.

Other ways in which the bill reduces existing environmental protections

13. Further, we do not consider that the Bill can be read as doing otherwise than weakening protections for the environment. In our view, there are at least four, and arguably five, other ways in which the Bill will reduce existing environmental protections.

14. First, Part 3 of the Bill permits a significant or permanent loss of species at one protected site so long as this is compensated for on a different protected site in another part of England.[14] This aspect of the Bill regresses from the protections under the Habitats Regulations which currently permit such compensatory measures only for imperative reasons of overriding public importance.[15] We also note the European Commission's guidance states that "*Compensatory measures should be located in areas where they will be [of] most highest effective[ness] in maintaining the overall coherence of the Natura 2000 network*."[16] There is no such requirement in the Bill.

15. Second, Part 3 of the Bill will allow adverse effects on the integrity of protected sites provided they are 'offset' by compensatory measures in the future.[17] Under the Bill, such compensatory measures become measures of first resort. Under existing legislation such an approach is impermissible: compensatory measures may only be measures of last resort.[18]

[14] Clause 50(4) of the Bill.

[15] Regulation 64 of the Conservation of Habitats and Species Regulations 2017.

[16] Commission Guidance on Article 6, 5.5.5.

[17] Clause 50(3).

[18] Regulation 64 of the Conservation of Habitats and Species Regulations; *Briels and others v Minister van Infrastructuur en Milieu* (Case C-521/12) [2014] PTSR 1120, [32]-[33] (see Annex below).

16. Third, Part 3 of the Bill provides that where a developer commits to paying the levy due under an EDP, that developer will be treated as being licensed to capture, kill or disturb protected species on the basis of general conditions set out in the EDP.[19] That licence will be deemed to be granted on the basis of surveys undertaken for the EDP over a wide area and potentially many years before, rather than as currently on the basis of up-to-date surveys of the particular area affected by the development. It is easy to envisage cases in which the proposed system will not pick up adverse effects on protected species that the current system would.

17. Fourth, "environmental protection" in the Environment Act 2021 (which the Minister's statement asserts is not reduced) is defined in section 45 of that Act as including the monitoring, assessing and reporting on the protection of the natural environment from the effects of human activity on the natural environment. The purpose of Part 3 is to reduce the number of site-specific assessments and reports on environmental impacts that are currently required by law.

18. Fifth, this is not strictly a legal consequence, but clause 64(1)(b) of the Bill provides that when considering the formulation of a charging schedule Natural England must have regard to matters (which are to be set out in regulations) related to economic viability of development – including potential economic effects of the imposition of the levy. There will be cases (indeed perhaps the majority of cases) where it is not economically viable for the environmental harm caused by development to be offset by developers paying into a levy. The cost of offsetting the environmental harm will in those cases therefore fall on the state or be unmet, but it is not apparent that the Bill secures that development will not proceed where funding for measures in an EDP is not secured.

Conclusion

19. We conclude that the Minister's assertion on the face of the Bill that it "*will not have the effect of reducing the level of environmental protection provided for by any existing environmental law*" is obviously wrong as a matter of law.

[19] Clause 61(3)(b) and paragraphs 3-5 of Schedule 4 of the Bill.

20. As currently drafted, Part 3 and Schedule 4 of the Bill weaken the existing level of environmental protection in the five ways we have already set out at paragraphs 4-18 in the Summary Advice above. We have been unable to identify a rational basis for the government's contention that the Bill does not have the effect of reducing the level of environmental protection provided for by any existing environmental law. It plainly regresses existing environmental protections in a number of respects.

21. Whether that is politically or practically desirable is not for us to comment upon, but that is its legal effect and the Minister's statement on the face of the Bill is therefore erroneous.

22. We also note that Article 391(2) of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community and the UK commits the UK to non-regression in environmental protection.[20]

23. We emphasise that the principle of a strategic and/or area-level approach to the protection of important habitats and species could be designed in a way that does not result in a regression of existing environmental protections. Certain schemes such as charging schedules under the Community Infrastructure Levy Regulations 2010 (introduced under the Planning Act 2008) already allow for strategic schemes that mitigate harms to protected sites in compliance with the Habitats Regulations (for example charging schedules for the provision of Suitable Alternative Natural Greenspaces). The Habitats Regulations and related legislation provide a longstanding, well-understood and well-tested series of site-specific protections based on the precautionary principle. As it is drafted, Part 3 and Schedule 4 of the Planning and Infrastructure Bill replace those protections with something manifestly less robust.

[20] TCA, Article 391(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*."

24. We are happy to advise further if required.

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29 April 2025

Annex
Detailed Explanation of Existing Protections and the Proposals Under the Bill

25. In this Annex we set out in greater detail an explanation of the existing framework of environmental law, particularly that related to special areas of conservation and protected species. We then summarise the key provisions of Part 3 and Schedule 4 of the Bill.

The existing level of environmental protection

The Habitats Regulations

26. In 1992 the Habitats Directive required the establishment of a coherent network of ecological sites across the European Community under the title "Natura 2000" which encompasses the "Special Protection Areas" established under the Birds Directive 1979 (i.e. areas important to protected birds) and the "Special Areas of Conservation" established under the Habitats Directive (together: "European protected sites").[21] The first UK regulations implementing the Habitats Directive were made in 1994. The latest version (2017) are the current Habitats Regulations.

27. In the UK, the existing network of Sites of Special Scientific Interest (SSSIs) (which had already been established under domestic legislation) was used as the baseline for designating sites pursuant to the Habitats Directive. However, not all SSSIs are European protected sites and vice versa. Sites were designated according to ecological criteria contained in Annex III to the Directive, including a global assessment of the value of a habitat and/or the size of a population of protected species on the habitats site.

28. The Habitats Regulations provide the strictest form of environmental protection in UK law and apply to for European protected sites (SSSIs are also given protection by various means, but not by the Habitats Regulations). When a person applies for planning permission which may affect a habitats site, they have to undertake an "appropriate assessment": a form of environmental assessment. Planning permission may only be granted if it is shown that the development will not adversely affect the European

[21] Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds; Council Directive 92/43/EEC on the conservation of natural habitats of wild fauna and flora.

protected site (Regulation 63(5)). This can be more difficult to prove when the site is already in an unfavourable condition, as many protected sites are.

The level of certainty required under the Habitats Regulations

29. In *Waddenzee,*[22] the European Court of Justice held that before granting planning permission, a competent authority must be "certain" that proposed new development will not adversely affect the integrity of the European protected site: and that is the case where there is no reasonable scientific doubt as to the absence of such effects ([59]). This does not need to be "absolute certainty": but where doubt remains as to the absence of adverse effects on the integrity of the site in question, the competent authority must refuse permission ([57]). The assessment must take place in light of the precautionary principle ([44]) (see further below). The Court also emphasised at [58]:

> "A less stringent authorisation criterion than that in question could not as effectively ensure the fulfilment of the objective of site protection intended under that provision."

30. The assessment carried out by the competent authority cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned: *Sweetman v An Bord Pleanála* (Case C-258/11) [2014] PTSR 1092, [44].

31. If the assessment cannot remove all reasonable scientific doubt as to adverse impacts, a plan or project can only be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, where there are no alternative solutions: regulation 64.

[22] *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (Case C-127/02) [2004] ECR I-7405.

The precautionary principle and the Habitats Regulations

32. The precautionary principle is one of the five key environmental principles set out in s.17(5) of the Environment Act 2021 and the Environmental Principles Policy Statement to which Ministers much have due regard in the formulation of policy under s.19 of the Environment Act 2021.

33. The precautionary principle has a long pedigree. At the international level, precautionary measures were mentioned in the preamble to the 1985 Vienna Convention for the Protection of the Ozone Layer. The 1987 Ministerial Declaration of the Second International Conference on the Protection of the North Sea also emphasised the need for a precautionary approach that may require action before a causal link had been established between certain substances and environmental damage. The precautionary principle has long been integrated into UK law through the transposition of European environmental legislation.

Avoid, Mitigate, Compensate

34. Under the Habitats Regulations there is a mitigation hierarchy: first avoid harm, then if that is not possible, mitigate the harm, and only if that fails, where there is an imperative reason of overriding public importance for the development, seek to compensate for any adverse impact on the integrity of a protected site. Measures designed to compensate for environmental damage which are not part of, or which do not come into place before the development is commenced, cannot be taken into account in appropriate assessment of the effects of the development on a protected site. Consequently, if an appropriate assessment does not rule out adverse effects on a protected site, then consent must be refused, save in the case of development for imperative reasons of overriding public interest.

35. This issue arose in *Briels and others v Minister van Infrastructuur en Milieu* (Case C-521/12) [2014] PTSR 1120. In this case, the ECJ was asked to rule on whether a new motorway in the Netherlands which adversely affected a protected habitat could be granted consent under the Habitats Directive in circumstances where the scheme provided for the creation of an area of equal or greater size of the same natural habitat

type within the same site (an approach very similar to what is now proposed under the Planning and Infrastructure Bill).

36. The ECJ said at [32]-[33]:

> "…as a rule, any positive effects of a future creation of a new habitat which is aimed at compensating for the loss of area and quality of that same habitat type on a protected site, even where the new area will be bigger and of higher quality, are highly difficult to forecast with any degree of certainty and, in any event, will be visible only several years into the future... Consequently, they cannot be taken into account at the procedural stage provided for in article 6(3) of the Habitats Directive [the appropriate assessment stage].
>
> Secondly, as rightly pointed out by the Commission in its written observations, the effectiveness of the protective measures provided for in article 6 of the Habitats Directive is intended to avoid a situation where competent national authorities allow so-called "mitigating" measures—which are in reality compensatory measures—in order to circumvent the specific procedures provided for in article 6(3) and authorise projects which adversely affect the integrity of the site concerned."

37. In that case, Advocate General Sharpston commented as follows at [30] (emphasis added):

> "It is generally agreed among environmental specialists, and it appeared to be common ground among those presenting argument at the hearing, that plans or projects likely to have an effect on the environment should be assessed in the light of a "mitigation hierarchy". The content of that hierarchy may be expressed in greater or lesser detail and in slightly varying forms but its essence may be stated thus: **"compensation for residual harm is a last step and comes after consideration of how harm can be avoided in the first place and then, if that is not possible, how harm can be minimised through mitigation**" (taken from Biodiversity Offsetting Pilots 1—Guidance for developers (March 2012), issued by the United Kingdom Department for Environment, Food and Rural Affairs, point 16). The three major steps or levels are thus, in decreasing order of preference: avoid, mitigate, compensate."

38. She also explained at [36]-[38]:

> "The basic semantic distinction between mitigation (or minimisation or reduction) and compensation (or offsetting) does not appear to me to be very controversial. In the context of article 6(3) and (4) of the Habitats Directive, a mitigation measure must be one which lessens the negative effects of a plan or project, with the aim of ensuring, if possible, that (while some insignificant and/or transient effects might not be totally eliminated) the "integrity of the site" as such is not adversely affected. A compensatory measure, by contrast, is one which does not achieve that goal within the narrower framework of the plan or project itself but seeks to counterbalance the failure to do so through different, positive effects with a view to, at the very least,

> avoiding a net negative effect (and, if possible, achieving a net positive effect) within a wider framework of some description…
>
> In that light, I would classify the measures in issue in the main proceedings as being, in principle, compensatory measures. From their description, it appears to be accepted that the quality and/or extent of (some of) the existing molinia meadows in the Natura 2000 site may deteriorate as a result of the widening of the motorway. It seems that those meadows are at risk of deterioration through (long term) increased nitrogen deposits due to increased motorway traffic and that, while no steps taken or planned are such as to provide an adequate reduction of that pollution or to prevent it from reaching the areas of molinia meadow nearest the motorway, new meadows are planned and are expected to lie beyond the reach of the increased pollution.
>
> I cannot, therefore, agree with the Netherlands Government that the creation of new molinia meadows elsewhere within the Natura 2000 site is a mitigation measure; it is a compensatory measure."

39. Accordingly, under the existing framework, levy schemes to *mitigate* environmental harm can already be created as long as the decision maker is sure they will work. However, the proposal in the Bill is different: it allows developers to pay a levy to fund a scheme to be undertaken by Natural England that may not yet be in place but which is considered to be likely to *compensate* for the environmental damage caused by the development. That form of scheme could not enable harmful development to proceed under existing law. Indeed, it is possible that under existing law, even development for imperative reasons of overriding public interest might not be permissible without reasonable scientific certainty that the compensation scheme would work.

Other protections under the Habitats Regulations

40. The Habitats Regulations also make it a criminal offence to capture, injure, kill or disturb animals of a European protected species (regulation 43) or pick, collect, cut, uproot or destroy a wild plant of a European protected species (regulation 47). These activities can only be carried out lawfully with a licence (regulation 55).

41. European protected species in the UK include for example hazel dormice, otters, kingfishers and the large blue butterfly.

The Wildlife and Countryside Act 1981 ("WCA 1981")

42. Under s.1 of the WCA 1981 it is a criminal offence to, among other things, kill, injure or take a wild bird, or take, damage or destroy its nest. These activities can also be licensed (s.16).

43. These provisions transposed the Birds Directive (Directive 79/409/EEC), one of the first pieces of environmental legislation to be adopted at European Community level.

The Protection of Badgers Act 1992

44. Under the Protection of Badgers Act 1992 it is a criminal offence to, among other things, kill, injure or take a badger (s.1), or interfere with a badger sett (s.3). These activities can also be licensed (s.10).

Section 20 of the Environment Act 2021

45. Section 20(2)-(3) of the Environment Act 2021 provides that before a Second Reading of a Bill containing environmental law, the Minister in charge of the Bill must make a statement that in their view "the Bill will not have the effect of reducing the level of environmental protection provided for by any existing environmental law." "Existing protection" includes protection that could be provided by powers under existing law (s.20(6)(a)). "Environmental protection" is defined in s.45 of the Environment Act 2021 as follows (emphasis added):

> "(a) protection of the natural environment from the effects of human activity;
>
> (b) protection of people from the effects of human activity on the natural environment;
>
> (c) maintenance, restoration or enhancement of the natural environment;
>
> (d) monitoring, assessing, considering, advising or reporting on anything in paragraphs (a) to (c)."

46. Therefore, under the Environment Act 2021, any reduction in monitoring, assessing or reporting on environmental matters, as well as any damage to the environment will necessarily amount to a reduction in environmental protection.

Key provisions in Part 3 and Schedule 4 of the Planning and Infrastructure Bill

47. Part 3 and Schedule 4 of the Bill will weaken the protections under the existing system of protection for protected sites and species under the Habitats Regulations, the WCA 1981 and the Protection of Badgers Act 1992.

48. The Bill provides for the preparation by Natural England of "Environmental Delivery Plans" ("**EDPs**") which set out, in relation to development to which the EDPs apply (clause 48):

> "(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, 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."

49. The stated "overall purpose" of the nature restoration levy payable pursuant to an EDP expressly limits the payment according to the economic considerations of developers, rather than what is required from an environmental perspective (clause 62(2)):

> "…to ensure that costs incurred in maintaining or improving the conservation status of environmental features can be funded (wholly or partly) by developers in a way that does not make development economically unviable."

50. Clause 50(4) provides that an EDP is not required to directly address the environmental impact of development on a protected feature of a protected site or a protected species, but can instead seek to improve the conservation status of the same feature "elsewhere."

51. In deciding how the EDP should be monitored, Natural England must have regard to guidance issued by the Secretary of State (clause 52(8)).

52. Natural England must consult relevant public bodies on a draft EDP for a period of 28 days, after which it is not required to have regard to any consultation responses received (clause 54(1)-(4)).

53. It is ultimately the Secretary of State that will make the EDP. The Secretary of State may only do so if they consider the EDP passes the "overall improvement test" (clause 55(3)).

54. 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 (clause 55(4)). The test accordingly requires to Secretary of State to consider whether the EDP will improve the protected sites on the balance of probabilities.

55. Clause 61(3)(a), and Schedule 4 of the Bill set out that a commitment by a developer to pay the nature restoration levy in relation to a development will result in both of the following:

    a) The environmental impact of the development in question on a protected feature of a protected site must be "disregarded" (Schedule 4, paragraph 1(2) and 2(2)),

    b) The developer will be treated as having been granted a licence under regulation 55 of the Habitats Regulations 2017, section 16 of the WCA 1981 or section 10 of the Protection of Badgers Act 1992. Licences under these provisions may permit, among other things, the capturing, injuring, killing, or disturbance of European protected animals, birds, and badgers.[23]

56. Clause 60 is an ouster clause that precludes any legal challenge that is not brought within six weeks of publication of the EDP, the amendment or revocation of an EDP, or a decision not to amend or revoke an EDP.

[23] Reg 55(3) read with Regulation 43 of the Habitats Regulations; s.18 of the WCA 1981 read with s.1 and s.5; s.10(1)(a) of the Protection of Badgers Act 1992.