

POTENTIAL DIVERGENCE FROM EU NATURE LAW FROM THE PLANNING AND INFRASTRUCTURE BILL



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CONTENTS



SUMMARY	1
INTRODUCTION AND AIMS OF THIS BRIEFING	3
BACKGROUND AND CONTEXT	5
Aims and key components of EU Nature Legislation	5
Rationale and aims of the overall Planning and Infrastructure Bill and Part 3 concerning development and nature recovery provisions	7
Environmental Delivery Plans	10
DESCRIPTION OF THE KEY COMPONENTS	10
The Nature Restoration Levy and Fund	12
Role of Natural England and other actors	12
Overall level of protection and certainty in the overall improvement test	14
POTENTIAL DIVERGENCE FROM EU LEGISLATION, RISKS AND BENEFITS	14
Weakening of the current mitigation hierarchy	16
Scope and components of the EDP	16
Prioritisation of economic objectives	18
CONCLUSIONS	19

SUMMARY



While adjustments have been made to UK nature legislation as a result of its departure from the EU, the main provisions and procedures in all four nations have remained aligned with those in the Birds Directive and Habitats Directive (Nature Directives). The Habitats Regulations (2017) protect specific habitats and species with protected European sites (Natura 2000 sites in the EU) as well as European protected species wherever they occur.

Although past evidence from England reviews have indicated the nature protection legislation and procedures have been generally working well, the current government considers that it is slowing up development. The focus on maintaining the status quo, and treatment of development impacts individually, is also providing little benefit for nature. Because of the political prominence being given to some aspects of nature protection allegedly slowing down major housing and infrastructure developments, a proposed new approach was set out in a major Bill intended to remove obstacles to faster development. The Planning and Infrastructure Bill (PIB) was introduced by the Ministry for Housing, Communities and Local Government (MHCLG) to the UK Parliament on 11 March 2025. Following discussion by the Public Bills Committee, an amended version was published on 23 May 2025.

Part 3 of the PIB sets out a new approach to nature recovery in relation to development in England. It aims to enable a more strategic approach to addressing environmental obligations that would reduce delays to development and result in improved environmental outcomes being delivered more efficiently. The Bill allows Natural England, the statutory agency responsible to the Department for Food, and Rural Affairs (Defra) in this sphere, (or another designated delivery body) to prepare a new policy mechanism named Environmental Delivery Plans (EDPs) that would address certain development impacts on specific protected habitats or species and would be intended to result in an overall improvement in their conservation status. Each EDP would set out the required strategic measures needed and their costs. The costs of each EDP will be met through a new system of Nature Restoration Levy payments on developers paid into a new Nature Restoration Fund. Where an EDP is in place a developer can choose to utilise it and pay the specific levy entailed or follow the existing procedures. If it pays the levy, the developer would no longer be required to undertake their own assessments, or deliver project-specific interventions, for issues addressed by the EDP.

The proposed Bill would result in substantial divergence from the EU's nature legislation and the corresponding practical procedures required for protecting specific habitats and species within the applicable protected areas, as well as strictly protected species wherever they occur. The purpose of this policy paper is to identify and summarise the most significant potential areas of divergence if the PIB remains as it is now.

Setting aside the issue of divergence, some aspects of the proposed new regime could

potentially provide nature conservation benefits, including the proposed more strategic approach to the control of development, the combined treatment of developer impacts and the new dedicated funding instrument for nature. However, the PIB swaps protection of nature as it is now for uncertain gains in the future. This contrasts with the EU Nature Directives, which have been designed to have a robust approach to the protection of the most valuable sites and threatened habitats and species, in accordance with the precautionary principle and mitigation hierarchy.

In particular the following points of divergence from the current regime in the Habitats Regulations would result in weaker and less certain protection of European sites and European protected species in England in several respects:

- ∞ The key requirement for EDP measures to be 'likely to be sufficient to outweigh the negative impacts of development' would allow considerably more subjectivity and uncertainty in decision making than under existing legislation, especially for habitat and species features within European sites (HD Article 6(3)).
- ∞ Cumulative impacts of development on habitats and species within European sites would not be considered.
- ∞ The mitigation hierarchy applicable under present law would be largely circumvented, with the focus instead being to provide the best overall nature conservation outcome.
- ∞ The absence of any requirement to have compensation/offsetting measures in place in advance of development impacts.

It is also uncertain whether the EDPs would be adequately prepared and implemented in practice, due to resource constraints on Natural England. Furthermore, the PIB also includes a requirement for Natural England to consider the impacts of the costs of an EDP on the economic viability of the development it covers, which could result in conflicting objectives and the underfunding of these plans.

As concluded by the Office for Environmental Protection (OEP), the independent statutory body charged with overseeing compliance with environmental law in England and Northern Ireland, in its letter to the Secretary of State:

'the bill would have the effect of reducing the level of environmental protection provided for by existing environmental law. As drafted, the provisions are a regression. This is particularly so for England's most important wildlife - those habitats and species protected under the Habitats Regulations.'

Two independent environmental lawyers have also provided legal opinions that the PIB would reduce the protection of habitats and species compared to the existing Habitat Regulations. One of them has also concluded that, as a result of the regression, the PIB would contravene the EU/UK Trade and Cooperation Agreement requirement not to weaken or reduce levels of environmental protection.



INTRODUCTION AND AIMS OF THIS BRIEFING

Current nature conservation legislation and procedures in England are based on the Wildlife and Countryside Act (1981)¹ and Habitats Regulations (2017)² that transpose the EU Birds Directive (BD)³ and Habitats Directive (HD).⁴ Known as the Nature Directives, these are the cornerstones of the EU's nature legislation. Whilst adjustments have been made to nature legislation in all four nations as a result of its departure from the EU, the main provisions and procedures have remained unchanged from those in the Nature Directives.

Following a Ministry for Housing, Communities and Local Government (MHCLG) consultation on a 'Development and Nature Recovery' Planning Reform Working Paper (15 December 2024),⁵ MHCLG introduced the Planning and Infrastructure Bill (PIB) to the UK Parliament on 11 March 2025.⁶ The stated overall aim of the PIB is to speed up and streamline the delivery of new homes and 'critical' infrastructure. Part 3 of the PIB sets out a new strategic approach to nature recovery in relation to development, which applies to England only. The proposed changes are widely considered to be the most significant in the UK for decades. They would result in substantial divergence from the EU's nature legislation and required practical procedures for protecting specific habitats and species within protected areas, as well as strictly protected species wherever they occur.

The key aim of this briefing paper is to examine how nature protection in England could diverge from EU policies and legislation as a result of the PIB, especially in relation to the development of Environmental Delivery Plans and the new Nature Restoration Fund. It is mainly based on analysis of the MHCLG Planning Reform Working Paper and subsequent published Bill and its accompanying explanatory notes⁷ and guidance.⁸ It also draws on the responses to the working paper and PIB from the Office for Environmental Protection (OEP), as well as some environmental NGOs (including Wildlife and Countryside Link (WCL), The Wildlife Trusts), professional bodies including the Chartered Institute for Ecology and Environmental Management (CIEEM) and other experts. Although this is not a legal analysis, it refers to some published legal opinions.

This briefing takes into account agreed amendments to the PIB up to 23 May 2025, which have followed the 1st and 2nd Readings of the Bill in the House of Commons and completion

1 *Wildlife and Countryside Act 1981*

2 *The Conservation of Habitats and Species Regulations 2017*

3 *Directive - 2009/147 - EN - Birds Directive - EUR-Lex*

4 *Directive - 92/43 - EN - Habitats Directive - EUR-Lex*

5 *Planning Reform Working Paper: Development and Nature Recovery - GOV.UK*

6 *Planning and Infrastructure Bill - Parliamentary Bills - UK Parliament*

7 *240196en.pdf*

8 *Guide to the Planning and Infrastructure Bill - GOV.UK*



of consideration of evidence and discussion by the Public Bills Committee. Whilst many amendments to Part 3 of the Bill were proposed, including in response to recommendations from professional bodies and NGOs to strengthen nature protection (e.g. CIEEM⁹ and WCL¹⁰), few amendments had been agreed at the time of writing. With one exception relating to the timing of required overall improvements (discussed later), the agreed amendments do not appear to substantially change the Bill's aims, the procedures it introduces and likely impacts on nature.

Further amendments may be proposed by the House of Commons and House of Lords. However, it seems unlikely that Part 3 of the Bill will change very significantly before finalisation, especially given the government's substantial majority in Parliament, its prioritisation of economic growth and numerous statements claiming environmental law is a blocker of development.

9 *CIEEM-PIB-Amendments-Briefing-April-2025-FINAL.pdf*

10 *Proposed amendments for the Planning and Infrastructure Bill*



BACKGROUND AND CONTEXT

Aims and key components of EU Nature Legislation

The overall objective of the EU Nature Directives is to ensure that listed European protected species and habitats are restored to, or maintained at, a favourable conservation status across their entire natural range within the EU. This is to be achieved through two principal pillars of action:

1. **Site protection and conservation management** measures, which are targeted to sites of particular importance, comprising Special Protection Areas (SPAs) for protected birds (listed in BD Annex I and other selected migratory species), and Special Areas of Conservation (SACs) for selected protected habitat types (listed in HD Annex I) and selected non-bird species (listed in HD Annex II); in combination creating the Natura 2000 network. Within the UK SPAs and SACs are now referred to as 'European sites'.
2. **Species protection** measures that apply to all wild birds (with exceptions for listed huntable species), and other selected taxa (listed HD Annex IV), wherever they occur.

The Nature Directives are now complemented by the EU Nature Restoration Regulation,¹¹ which sets legal requirements and deadlines to achieve favourable conservation status of EU protected habitats and species, as well the broader restoration of all major ecosystems, aiming to ensure the recovery of biodiverse and resilient nature across the EU in the period to 2050. Whilst the UK Environment Act 2021 includes some targets for nature restoration by 2042, an IEEP-UK report¹² concluded that they are not as ambitious, targeted or as comprehensive as those of the Nature Restoration Regulation. (Other targets for biodiversity in England, such as for species abundance should not be disregarded however).

Within Natura 2000 sites the Nature Directives give strict protection to all the European protected habitats and species for which the site was designated, unless there are exceptional circumstances. To ensure this, a key requirement under HD Article 6(3) is for environmental authorities to assess the impacts of all projects (e.g. built development) and plans (e.g. regional development plans) that may significantly affect a Natura 2000 site through an 'appropriate assessment', referred to as a Habitat Regulation Assessment (HRA) in the UK. If the assessment indicates that there may be a significantly detrimental effect on the protected habitats and species within the site then the project may not go ahead, unless under HD Article 6(4) there are reasons of overriding public interest and no alternatives. Under HD Article 7, HD Articles 6(3) and (6) also apply to SPAs.

¹¹ Regulation - EU - 2024/1991 - EN - EUR-Lex

¹² Divergence of environmental policy post Brexit

Similarly, European protected species (e.g. most birds, the Great Crested Newt, and all European bats) cannot be killed, or their habitats and breeding sites destroyed. Derogations are only supposed to be allowed for exceptional reasons (e.g. overriding public interest) and if there are no alternatives. Another derogation condition is that the species' overall conservation status is not affected.

Importantly, all potentially significant impacts on Natura 2000 sites and strictly protected species must be assessed on a case-by-case basis. Also the key requirement for Natura 2000 sites is to prohibit impacts that are significant for the site, irrespective of whether it would have a significant impact on the overall status of the habitats and species concerned. Similarly, the strict protection requirements for species applies to the individuals, irrespective of the numbers concerned and the implications for their overall conservation status.

Whilst there were initial problems with the implementation of the Nature Directives, especially in relation to the site protection provisions, jurisprudence, European Commission guidance¹³ and Member State experience has dealt with many of the issues. Consequently, a Fitness Check of the Nature Directives in 2016 concluded that the Nature Directives were 'fit for purpose' and generally working effectively and efficiently when properly implemented.¹⁴ Evidence for this included a 2012 government review of the implementation of the Nature Directives in England, which concluded that 'the Directives are working well, allowing both development of key infrastructure and ensuring that a high level of environmental protection is maintained'.¹⁵

Where problems have occurred in the UK with the implementation of the Nature Directives, these have mainly concerned the strict protection of species in accordance with the requirements of the Habitats Directive. These have contributed to delays and high costs for some developments in the UK, especially where they have affected Great Crested Newts, although published evidence of typical costs seems to be lacking. In practice, faced with similar concerns, some flexibility in interpretation of the provisions has occurred elsewhere in the EU, bringing about more focus on each species' status at a population level rather than protecting each individual.¹⁶ This appears to have received at least tacit approval from the European Commission. Such an approach has been developed in England over recent years for Great Crested Newts through District Level Licensing.¹⁷ This involves taking a more proactive strategic approach that has established the local distribution and conservation status of the newts, and, where necessary, created new newt habitat in advance of developments occurring ([Box 1](#)). This has reduced delays and costs, whilst creating a more resilient newt population in the area concerned.

¹³ *Permitting procedure - European Commission*

¹⁴ *Fitness check of the EU Nature Legislation (Birds and Habitats Directives) Directive 2009/147/EC on the conservation of wild birds and Council Directive 92/43/EEC on the - European Commission*

¹⁵ *Report of the Habitats and Wild Birds Directives Implementation Review*

¹⁶ Tucker, G. (2023) *Nature Conservation in Europe – approaches and lessons*. Cambridge University Press.

¹⁷ *Great crested newts: district level licensing schemes for developers and ecologists - GOV.UK*

Box 1 Key elements of District Licensing for the Great Crested Newt in England

The Great Crested Newt (GCN) or Northern Crested Newt (*Triturus cristatus*) is an amphibian inhabiting woodlands, scrub and wet grasslands that breeds in fish-free ponds. It is rare over much of Europe and therefore receives protection under Article 12 of the EU Habitats Directive wherever it occurs. Although it has declined considerably in the UK, it remains widely distributed throughout lowland England, and therefore often at risk from built developments. The species has been protected in the UK through a development licensing system under the Habitats Regulations 2017, in accordance with the derogations conditions of Article 16 of the Habitats Directive. This licensing has focused on management to prevent harm to all GCN individuals on individual development sites rather than addressing the wider health of GCN populations.

More recently a District Level Licensing approach has been developed that meets the derogation conditions under the Habitats Regulation, by avoiding developments in high-risk areas and compensating for losses by providing GCN habitat in areas that will most effectively connect and expand GCN populations. Surveys, including the use of eDNA techniques, and modelling are used to predict the distribution of GCN across an area. The modelled distribution is then used to map risk zones, assess the likely impact of proposed development and predict suitable areas where compensatory habitat creation can be targeted (Compensation Priority Zones).

Outside higher risk areas, the District Level Licensing approach is offered to developers by which they can make a 'Conservation Payment' which will be sufficient to fund a net increase in GCN habitat elsewhere. The payment amount depends on a number of factors including the risk zone affected, types of impact, the amount and quality of pond and terrestrial habitat affected, and population connectivity considerations. A 25-year monitoring, management and maintenance strategy for all compensatory GCN habitat is also funded by the Conservation Payment. This means that in many cases on-site mitigation and compensation for GCN is not required for developments authorised under District Level Licensing.

Sources:

Natural England (2019) A framework for district licensing of development affecting great crested newts

Natural England Interim Guidance (2021)

Rationale and aims of the overall Planning and Infrastructure Bill and Part 3 concerning development and nature recovery provisions

According to the Impact Assessment for the Bill, the government considers that current procedures for regulating and mitigating environmental impacts from developments still result in significant barriers and delays to development as well as poor and inefficient environmental outcomes ([Box 2](#)).

Box 2 Problems with the current environmental regulations in relation to development according to the Impact Assessment for the PIB

- ∞ Barriers to development where an environmental obligation cannot be discharged on the development site and a suitable provider of affordable offsite environmental services is not available.
- ∞ Delays to development projects while assessments and surveys are undertaken and measures necessary to fulfil obligations are secured and assured.
- ∞ Missed opportunities to harness economies of scale and lack of strategic, spatial plans for the deployment of developer contributions for given environmental obligations.
- ∞ Little to no emphasis in law or policy for the role of developer obligations in recovering the condition of sites and species, alone or in concert with other sources of public and private funding.
- ∞ Likely duplication of effort and inefficiencies at the system level because of overlapping surveys and evidence gathering for the purposes of environmental assessments and fulfilment of environmental obligations.
- ∞ Likely higher than necessary administrative costs at the system level because of multiple transactions and information exchanges between developers, planning authorities, regulators, and a range of environmental service providers (e.g. consultants, ecologists, surveyors, habitat banks).
- ∞ Likely inefficient allocation of limited specialist capacity (e.g. ecologists and hydrologists) – within environmental regulators, planning authorities, and third-party consultancies, with focus directed to project level case work.
- ∞ Inefficient and piecemeal approaches to mitigation that has the sole purpose of balancing the impacts of development uses on land that could otherwise support nature recovery.
- ∞ Increased land take to support mitigation measures arranged on an ad hoc basis which risks undermining wider objectives like food security.

Sources:

MHCLG (2025) [Impact Assessment of the Planning and Infrastructure Bill](#)

However, it is important to note that no evidence is provided for these claims within the Impact Assessment, nor the White Paper or other published documents. Although many environmental experts agree that there are inefficiencies, in part due to piece-meal treatment of development impacts, the claims in relation to projected delays and excessive costs have been widely disputed or refuted. In particular, the claims are out of date in relation to Great Crested Newts since the introduction of District Level Licensing.

Building on the strategic approach to District Level Licensing for newts, and other similar initiatives, the MHCLG working paper indicates that it aims *‘to establish a more efficient and effective way for Habitats Regulations and other environmental obligations to be discharged, pooling individual contributions to deliver the strategic interventions necessary to drive nature recovery.’* Thus, it aims to go beyond simply offsetting harm – in this sense it is potentially more ambitious than the requirements in relation to development impacts under the Nature Directives.

The following three new steps are proposed to achieve the development and nature recovery aims:

1. Moving responsibility for identifying actions to address environmental impacts away from multiple project-specific assessments to a single strategic assessment and Environmental Delivery Plan (EPD) setting out strategic measures for defined areas, environmental features and types of development impact (see below); to be developed by Natural England (or an approved body).
2. Moving more responsibility for planning and implementing the strategic EDP measures onto the state, delivered through organisations with the right expertise (e.g. potentially nature conservation NGOs).
3. Allowing impacts to be dealt with strategically by the EDP and delivery body through a Nature Restoration Levy payment which has to be made by a developer into a Nature Restoration Fund, which will support ‘strategic actions’ (i.e. offsetting / compensation) to restore nature in a different location to the development and with no further involvement of the developer.

The government’s rationale for using payments from developers to drive broad nature recovery is that it will increase the so-called ‘environmental headroom’ for future development. Currently many protected habitats and species populations have such a poor condition that even small impacts from development, or other sources, can have a significant potential impact on their conservation status. Thus, improving their condition can increase the prospects for future sustainable development – a potential win-win for development and for nature.

Nature conservationists have also long argued that much more needs to be done to strategically and proactively support the recovery of nature, beyond the maintenance of the status quo. For such reasons, some have welcomed the government’s proposed integrated approach to planning and establishment of the Nature Restoration Fund, including the Chair of Natural England.¹⁸ However, much of this could be achieved without the proposed changes to the legislation. Furthermore, as described later, many environmental and legal experts have highlighted the risks from the legislative proposals.

¹⁸ *We can make space for nature and people – Inside track*



DESCRIPTION OF THE KEY COMPONENTS OF THE NATURE PROVISIONS IN THE PLANNING AND INFRASTRUCTURE BILL

The main components of PIB with respect to nature conservation closely reflect the stated aims of the working paper and key steps outlined above. As noted by CIEEM,¹⁹ there are no significant changes to the model proposed in response to the numerous criticisms made during the consultation period.

The key components of the PIB are further described below, with their implications in relation to potential divergence examined in the following section.

Environmental Delivery Plans

EDPs will be drafted by Natural England (the statutory nature conservation agency in England), or where set by regulations, by another delivery body. The Bill also includes a duty on all public bodies in England to co-operate with Natural England in connection with the preparation and implementation of EDPs. Although EDPs may be prepared by Natural England according to its own initiative, or at the request of the Secretary of State, no information is provided on what may trigger their production. Each EDP will subsequently be approved or rejected by the relevant Secretary of State.

Each EDP will apply to a specific geographic area (or separate areas) in England or its territorial waters, which may include the whole of England. Plans may apply for up to ten years. Within its area, the EPD will address one, or more, of the environmental effects of development and will specify the amount and type of development that can benefit from its cover. Thus, rather than being limited to addressing the impact of a single development, EDPs aim to pool resources and deliver nature conservation measures at scale.

EDPs (see [Box 3](#) for a hypothetical example) will set out:

- ∞ The 'environmental feature' the EDP seeks to protect, which will be a protected feature of a protected site, i.e. a European Site, Site of Special Scientific Interest (SSSI) or Ramsar site), or a protected species. These are protections stemming from either the Habitats Regulations, the Wildlife and Countryside Act 1981, or the Protection of Badgers Act 1992.
- ∞ The environmental impacts the EDP seeks to address (which appear to be potentially any type of impact).
- ∞ The conservation status of the feature, and the conservation measures to be taken, both to address those impacts and contribute to nature restoration, indicating which are to

19 CIEEM comment on the Planning and Infrastructure Bill 2025 | CIEEM



be delivered locally and which at the broader network scale.

- ∞ the amount payable as a Nature Restoration Levy by the developers to cover the costs of the EDP's conservation measures.
- ∞ the environmental obligations that are disapplied on payment of the Nature Restoration Levy.
- ∞ how the interventions required under the EDP will be monitored.

Box 3 HM Government hypothetical example of what might need to be included in an EDP

'In this illustrative example, the development area covers a river catchment, the environmental feature is a water course for which a habitats site is designated and the environmental impact is nutrient pollution from 1,000 houses. These will be identified as such in the EDP.

The EDP must identify sufficient conservation measures to not only address the nutrient pollution from the expected development but ensure that the environmental feature is in a better condition than it would have been in the scenario where neither the development nor the conservation measures set out in the EDP went ahead. The conservation measures proposed in this example are the building of a wetland and a requirement for local authorities to apply a condition on all planning permissions that houses include septic tanks. The EDP also includes a proposal for an extension to the wetland, which will only be delivered if monitoring shows that the main measures are not having the level of impact expected. The expected costs of the delivery of these measures over the lifetime of the EDP, in this illustrative case, the maximum ten years, and the ongoing cost of maintaining the measures beyond the lifetime of the EDP, must also be detailed here.

The EDP must also highlight which environmental obligations can be discharged under it. In this example that would be the need to carry out an appropriate assessment for nutrient pollution impacts on the specified water course resulting from the development covered by the EDP.'

Sources:

HM Government Explanatory Notes relate to the Planning and Infrastructure Bill (as introduced 11 March 2025).

It is envisaged that once an EDP has been produced, developers would be able to choose whether to use it or follow the current regulatory procedures. However, the government states that there may be circumstances where use of an EDP may be mandatory.

Where an EDP is in place and a developer decides to utilise it, the developer would no longer be required to undertake their own assessments, or deliver project-specific interventions, for issues addressed by the EDP. It is important to highlight that the environmental obligations of a developer that are discharged by an EDP and Nature Restoration Levy payment will only relate to the specific impacts covered by the EDP. For example, a protected site might be covered by one EDP that only addresses the impact of increased nutrient levels in the water within a



protected site. Use of the EDP and payment of the relevant levy would only relieve the developer of responsibility to address those specific water nutrient impacts. Additional potential impacts to the site not covered by another EDP, such as recreational disturbance to birds would still be subject to screening, and if necessary, an appropriate assessment in accordance with the Habitats Regulations.

The Nature Restoration Levy and Fund

The Nature Restoration Fund establishes an alternative approach for developers to meet certain environmental obligations relating to protected sites and species where an EDP is in place. The fund is made up of contributions from developers through the Nature Restoration Levy that is payable if they choose to use an EDP to address the environmental impacts of their development. This will provide funding for Natural England (or another designated delivery body) to bring forward EDPs, as described above, hence going beyond necessary compensation for development to meet the EDP's broader nature restoration objectives.

The Nature Restoration Levy required from developers will be calculated by Natural England, according to the expected costs of the measures in the relevant EDP (as described above), taking into account other sources of funding that may contribute to the delivery of the conservation measures. However, importantly, there is also a requirement that Natural England has regard to the potential impact of the Nature Restoration Levy on the economic viability of the development (Clause 68). The Explanatory Notes to the Bill also state that the Secretary of State may consider the impact of the EDP on the viability of development, when considering its approval.

The development economic viability constraint on the levy has been identified by some legal experts as a major weakness in nature protection provisions. In particular, it could lead to conflicts between the amounts required to implement an EDP and the developer's commercial interests. Furthermore, this would be significant divergence from the existing Habitats Regulation and Nature Directives, as no such financial constraint is placed on the mitigation and compensation requirements under their provisions.

Role of Natural England and other actors

The nature restoration measures within the PIB create a number of new processes and activities and their implementation will rely on Natural England (or other bodies appointed by the Secretary of State) to:

- ∞ Prepare EDPs, including the calculation of the required Nature Restoration Levy (as above).
- ∞ Administer the Nature Restoration Fund.
- ∞ Administer EDPs and implement them both through conservation measures and anything else they consider necessary. This includes the power to compulsory



purchase land and provide payment to another person to take conservation measures (presumably, for example, contractors, landowners and nature conservation organisations).

- ∞ Allow, where it is prudent or practicable, another public body to act as the delivery body.
- ∞ Monitor and report on the impacts of each EDP and publish a report each financial year on the exercise of its functions in relation to the preparation and implementation of EDPs.

Given these critical roles, the potential effectiveness and efficiency of the system and the ultimate benefits for both nature and development will rely heavily on the expertise and capacity of Natural England. This leads to some implementation risks as Natural England has faced resource and capacity challenges in recent years, in part due to budget cuts. Whilst funding has been increased in recent years, this has been in part to allow for its extra responsibilities with overseeing the relatively new Biodiversity Net Gain obligations on developers and local authorities (a legal requirement for developers since February 2024). CIEEM noted this year that Natural England is under-resourced and there have been delivery challenges with its role in the District Level Licensing scheme for newts.²⁰

A major increase in funding and capacity in Natural England would therefore be required to produce EDPs at the pace needed to meet the government's ambitions of having them in place within three months of Royal Assent of the PIB. However, such a rapid increase in capacity could be constrained by the widely experienced current shortage of appropriately qualified ecologists within the UK.

20 CIEEM comment on the Planning and Infrastructure Bill 2025 | CIEEM



POTENTIAL DIVERGENCE FROM EU LEGISLATION, RISKS AND BENEFITS

At this stage it is possible to make a preliminary assessment of how the proposed legislation seems likely to give rise to divergence from current EU law, bearing in mind that it may be altered before the final version is adopted. These potential divergences have been identified by different organisations, or by the author, and this is work in progress as the full implications of the Bill become clearer. Divergence is addressed here under four different headings.

Overall level of protection and certainty in the overall improvement test

Probably the most significant form of divergence from the process required under the Nature Directives is in relation to the strength and certainty of protection. This is particularly the case with respect to the impacts of projects and plans on habitats and species features within European Sites (i.e. Natura 2000 sites), which are currently protected under the Habitats Regulations, in accordance with the Habitats Directive. In relation to an appropriate assessment under HD Article 6(3) (63(5) of the Habitats Regulation (emphasis added): ‘...*the competent authority may agree to the plan or project only after having ascertained that it **will not adversely affect** the integrity of the European site...*’

According to the OEP, ascertaining those adverse effects ‘will not’ occur entails a high degree of certainty based on an objective assessment. By contrast, the proposed overall improvement test in the PIB, as originally introduced (see later discussion of subsequent amendment), was (emphasis added): ‘*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.*’

This consideration is significantly more subjective and would need to weigh-up a number of potentially influencing factors, including in the future, to decide if the EDP conservation measures will outweigh any negative effects. A related concern of the OEP is that, according to the PIB explanatory notes, the Secretary of State ‘*will assume that all conservation measures proposed in [an EDP] are fully implemented*’. This is a strong assumption open to question and the OEP considers that assessing identifiable risks to delivery should be part of the decision-making process.

Another weakness with respect to the assessment of plans and projects, is that there is no requirement to consider their cumulative impacts on habitats and species within European sites. Whilst this might occur in practice as Natural England develop an EDP, this is currently not one of their listed requirements.

Similar opinions on the potential strength of environmental protection under the proposed



provisions of the PIB have been given by two other legal experts.

David Elvin KC (a planning and environmental law barrister of Landmark Chambers) was instructed to provide a legal opinion for the Nature Space Partnership on whether Part 3 of the PIB reduces the existing levels of environmental protection in England and/or is in breach of international law.²¹ Mr Elvin's Opinion is that Part 3 does reduce the existing levels of environmental protection for key aspects of England's legally protected ecological features. His view is that the approach adopted in Part 3 is a:

'significantly laxer approach to protection', which '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 [Natural England] and the adequacy of the resourcing provided for these purposes'.

The reduced levels of environmental protection would apply to both European Sites (Natura 2000 sites) and European Protected Species.

Furthermore, Mr Elvin also considered the implications of the Bill in relation to the EU / UK Trade and Cooperation Agreement. For the above reasons, he concluded that *'Part 3 of the PIB and the associated schedules of the PIB as they currently stand do amount to a weakening or reduction of the environmental levels of protection within Article 391(2) 'the levels that are in place at the end of the transition period' i.e. at the end of 2020'.*

Wild Justice (a nature conservation NGO) requested an opinion on the legal accuracy of the statement made by the Secretary of State for Housing, Communities and Local Government, Angela Rayner, on the face of the PIB that *'the Bill will not have the effect of reducing the level of environmental protection provided for by any existing environmental law.'*²²

The opinion stated that:

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

Given the above, Wild Justice has announced that it has sent a pre-action protocol letter calling on the Secretary of State to correct the parliamentary record to make clear that her statement

²¹ <https://bills.parliament.uk/publications/60556/documents/6436>

²² [Planning-and-Infrastructure-Bill-Opinion-29.4.25.pdf](#)

about the level of environmental protection in the Bill was incorrect.²³ Wild Justice also sets out its intention to bring a judicial review claim if this step is not taken.

Weakening of the current mitigation hierarchy

The Nature Directives, and therefore the Habitats Regulations, follow the widely accepted mitigation hierarchy for nature conservation, whereby appropriate measures should be taken first to avoid negative impacts altogether, and then reduce them as much as possible through mitigation measures, before compensating/offsetting any residual impacts.²⁴ The hierarchy should be especially closely followed for habitats and species of highest nature conservation importance and irreplaceability. More flexibility may be more appropriate for less threatened habitats and species where offsetting may provide more reliable and better overall outcomes.

Consequently, as the Nature Directives focus on habitats of high international conservation importance, they firstly aim to avoid harm to existing protected habitats and species where they are now, rather than through compensation/offsetting and recovery elsewhere. Under the PIB there is no requirement to follow the mitigation hierarchy, with the aim being to provide the best overall nature conservation outcome for the features covered by the EDP. For some common, less threatened species with easily creatable habitats, the change could be beneficial. However, this would be inappropriate for most European protected species as they are often rare or otherwise threatened and have complex habitat and ecological requirements that are difficult, if not impossible, to re-create. The EDP approach also introduces complications and risks if recovery measures are insufficient.

Most importantly, circumventing the mitigation hierarchy is inappropriate for habitat and species features in Natura 2000 sites. Compensation/offsetting for damage to such features and sites should only occur in exceptional circumstance, as is currently the requirement under HD Article 6(4). Furthermore, there is a requirement to ensure that compensation measures maintain the overall coherence of the Natura 2000 network under HD Article 6(4). The PIB allows for conservation measures to be carried out away from the impacted sites, with no requirement to maintain the coherence of the European site network within the UK, let alone within Europe more widely.

Scope and components of the EDP

In addition to the above divergence issues, the stated scope and requirements of the EDP in the PIB and explanatory notes suggest that the following important issues with regard to the protection of habitats and species will not be addressed in the new system:

- ∞ A requirement to consider the conservation objectives that are required for all habitat and species features within European sites, as currently under Regulation 63 of the Habitats Regulations.

²³ Wild Justice starts legal proceedings against Government's controversial Planning and Infrastructure Bill - Wild Justice

²⁴ For further details see [P11 iucn_biodiversity_offsets_policy_jan_29_2016_0.pdf](#)



- ∞ A requirement to ensure agreed compensation/offsetting measures are in place before impacts occur, as under Regulation 63 of the Habitats Regulations.
- ∞ Consideration of which habitats are irreplaceable in practice, and which should not fall within the scope of an EDP.

The lack of a requirement for the EDP measures to be implemented in advance of the development's impacts appears to be driven by the government's clearly stated aim of allowing development to go ahead without being held back by burdensome environmental requirements. This is likely to lead to at least temporary losses in European protected habitats and species. Furthermore, the PIB has no requirement for a binding timetable for the implementation of the measures in the EDPs.

An approved amendment to the Bill has clarified the timescale for achieving an overall improvement (Clause 59 subsection 4 of the 23 May 2025 version of the Bill). It is now proposed that (emphasis added): *'An EDP passes the overall improvement test if, **by the EDP end date**, the conservation measures are likely to be sufficient to outweigh the negative effect of the EDP development on the conservation status of each identified environmental feature.'* This could mean that an improvement is not required to occur for ten years (the maximum timespan for an EDP). But for many habitats and their species, this would be unrealistic as habitat restoration and re-creation can take decades, or much longer. Therefore, in practice, the recovery from development losses covered by an EDP may be slow and uncertain, or even impossible where the integrity of the ecosystems or species' populations have been critically compromised.

There is also considerable concern amongst environmental groups over the potential application of the EDP approach to irreplaceable habitats, such as chalk streams and ancient woodland. Some environmental NGOs (e.g. WCL)²⁵ have therefore called for such habitats to be explicitly listed and excluded from the scope of EDP. However, to date this appears to have been rejected. Presumably, Natural England will consider whether the use of an EDP approach would be appropriate for each habitat type and species, including considering their replicability, but it is not a listed requirement in the Bill. Much will therefore depend again on the views of Natural England.

Presumably the cost of measures in an EDP for habitats that are most difficult to re-create or restore could be extremely high. If fully funded, an EDP's Nature Restoration Levy could therefore be a disincentive to destroy or damage such habitats, which has some value in principle but is not equivalent to more certain legal protection. As mentioned earlier, if the Levy is capped to maintain the economic viability of development, then the disincentive for environmental harm would be weakened, and the EDP underfunded.

In practice, for most European sites and protected habitats and species, it might be difficult to prepare an EDP that can both achieve its environmental objectives and be sufficiently cost-effective to be attractive to developers. Indeed, no hypothetical examples of an EDP have been

²⁵ *Proposed amendments for the Planning and Infrastructure Bill*



prepared in detail by the government, and the only similar approaches that have been referred to relate to the Great Crested Newt ([Box 1](#)) and compensation for nutrient enrichment of rivers ([Box 3](#)). In both cases development impacts are fairly straightforward to predict, quantify and address. In the case of the newt, it is relatively easy to survey, predict its distribution, assess impacts (mainly loss of breeding ponds) and to compensate for losses as the species thrives in newly created fish-free ponds. It is difficult to identify any other European protected species that could be as simply dealt with.

As a result of practical difficulties and costs, it might be that the EDP approach would only be used for a very limited range of protected species, habitats and development types. But this is highly uncertain, and varying political views and influence on Natural England could be a key determining factor. At the moment, a government factsheet on the Nature Restoration Fund states that: *'The government recognises there may be times when a strategic approach isn't feasible or will only be feasible once better evidence is available.'* This implies that EDPs would become the normal approach to addressing development impacts. Most nature conservationists would probably think the reverse, such that an EDP approach would only be suitable for a few habitat types, species and development impacts (and if it was much more robust).

Prioritisation of economic objectives

Whilst the Nature Directives provide a framework that aims to enable sustainable development, economic considerations are not given a general over-arching priority. As mentioned above, damaging developments can only affect a European site in exceptional circumstances, and under certain conditions.

Under the PIB, economic and development objectives have a high priority and may override nature conservation requirements, without the caveat in the Habitats Regulations that this is only in cases of overriding public interest. Furthermore, the Nature Restoration Levy set for each EDP must give regard to the economic viability of the development. The implications of this are unclear and unexplained. However, given the consequent pressure to contain developers' costs, it seems likely to lead to underfunding of the EDP measures required to mitigate and offset compensation for development impacts, and especially the wider restoration component.

The Impact Assessment for the PIB²⁶ estimated its net economic benefits as being £3.2 billion over the ten-year appraisal period, based on total benefits of £5.2 billion and total costs of £2.0 billion (present values, 2025 prices, 2026 base year). However, these estimates have a high level of uncertainty due to numerous data deficiencies.

26 *Planning and Infrastructure Bill - Impact Assessment*

CONCLUSIONS



Some elements of the PIB could be beneficial for nature conservation: notably its strategic approach, combined treatment of the impact of multiple developments and new dedicated funding instrument for nature. In particular, it would enable combined actions to address environmental impacts from development to be taken at an appropriate geographic scale, rather than at the level of an individual project, which is often problematic. The new funding could also help fill the substantial ongoing gap in resources for conservation that has been a major constraint on nature conservation and restoration in the UK (as it has in the EU). If fully funded and implemented, the EDPs could contribute more to nature recovery and achieving the overall aims of favourable conservation status, rather than maintaining the status quo under the current approach.

On the other hand, the PIB swaps protection of nature as it is now for uncertain gains in the future. This contrasts with the EU Nature Directives, which have been designed to have a robust approach to the protection of the most valuable sites and threatened habitats and species, in accordance with the precautionary principle and mitigation hierarchy. As currently drafted, the PIB would result in weaker and less certain protection of the habitats and species protected by the Habitats Regulations, in alignment with the Nature Directives, especially in relation to habitat and species features within European sites (i.e. Natura 2000 sites). Cumulative impacts of development on habitats and species within European sites would also not be considered.

In accordance with the widely accepted mitigation hierarchy, the Nature Directives also focus on avoiding harming existing important sites, and protected habitats and species where they are now, rather than through offsetting / compensation and recovery elsewhere. The mitigation hierarchy would be largely circumvented under the changes proposed in the PIB, with the focus instead being to provide the best overall nature conservation outcome. This change could be beneficial for some common and less threatened European protected species. For example, this has been recently shown through the more flexible approach developed under District Level Licensing for the Great Crested Newt. However, deviation from the mitigation hierarchy principles would probably be inappropriate and harmful for most habitats, species and sites that are protected under the current Habitats Regulations.

The new approach would also need substantial expert advice and other inputs from Natural England and Local Authorities, which already have limited resources.

More generally, it is also uncertain if developers would be willing to contribute significantly more to funding nature recovery than required to offset the impacts of their projects.

Even where an EDP is successful in resulting in an overall improvement in its targeted habitat or species, temporary losses from development would be allowed, contrary to the current legislative requirements. This reflects the government's high priority for economic growth and

avoiding delays to development. Whilst an amendment has introduced the requirement for the overall improvement to be within the lifetime of the EDP (up to ten years), this would be unrealistic for many habitat types.

Overall, in its letter to the Secretary of State, the OEP's considered view is that:

'the bill would have the effect of reducing the level of environmental protection provided for by existing environmental law. As drafted, the provisions are a regression. This is particularly so for England's most important wildlife - those habitats and species protected under the Habitats Regulations.'

As noted above, similar legal opinions have been expressed by two other environmental lawyers. One of whom has concluded that as a result of the regression, the PIB would contravene the EU/UK Trade and Cooperation Agreement requirement not to weaken or reduce levels of environmental protection.

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