LEVELLING UP AND REGENERATION BILL

NUTRIENT NEUTRALITY AMENDMENTS

ADVICE

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1. I am asked to advise Rights: Community: Action on the recently proposed amendments to the Levelling Up and Regeneration Bill ("**LURB**") concerning nutrient neutrality which are due to be moved on report of the bill.
2. In my view four issues of relevance to those instructing me arise:
    a. The view of the Office of Environmental Protection is that the proposed amendments will reduce environmental protections of the most important habitats in the UK[1].
    b. Prior to second reading of LURB the Secretary of State certified pursuant to section 20 of the Environment Act 2021 that the Bill would not lead to a reduction in environmental protection. Debate of the Bill has proceeded on that premise up to Report stage and it is now too late to revisit the principles of the Bill. A late amendment of a character which undermines the section 20 certification raises constitutional questions about parliamentary process.
    c. The proposed insertion of a new regulation 85A into the Habitats Regulations introduces a statutorily mandated form of irrationality into decision-making which is likely to be harmful to good administration: it requires that when a council or planning inspector is considering whether to grant planning permission (or a related consent) for development such as housing, they must assume that the development will not adversely affect a habitats site even if the scientific evidence is that it will adversely affect a habitats site.
    d. The proposed amendments include a "Henry VIII clause" empowering the Secretary of State to amend primary legislation so as to further reduce environmental protections without parliamentary scrutiny.

[1] 230830 Letter of advice in respect of the Levelling Up and Regeneration Bill.pdf (theoep.org.uk)

Background to the Amendments

3. 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 (I shall refer to these latter sites as "**habitats sites**"). Sites are 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. The first regulations implementing the Habitats Directive were made in 1994. The latest version is the Conservation of Habitats and Species Regulations 2017 ("**the Habitats Regulations**"). In the UK the existing network of Sites of Special Scientific Interest (SSSIs) (which had already been established) was used as the baseline for designating habitats sites pursuant to the Habitats Directive. However, not all SSSIs are habitats sites and vice versa.
4. Habitats sites are directly protected by the Habitats Regulations which provide the strictest form of environmental protection (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 "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 habitats site. This can be more difficult to prove when the site is already in an unfavourable condition, as more than half of England's habitats sites now are[2]. In practice developers have to provide means of ensuring that a development will not adversely affect the habitats site. For example, developers who wish to build near the Ashdown Forest (which is a SAC) contribute towards the provision of "Suitable Alternative Natural Greenspaces" to ensure that people moving into the area have alternative green spaces for recreation so as to reduce pressure on the sensitive environment of the protected forest (for example from dogs).

[2] UKBI - C1. Protected areas | JNCC - Adviser to Government on Nature Conservation

5. An issue has arisen because many of the UK's rivers and other water bodies are in an unfavourable condition caused by excessive nutrients (phosphates and nitrates) which lead to eutrophication. The main sources of these nutrients are agriculture and sewage. In many parts of the country sewerage infrastructure is inadequate and so it is not possible to load more waste water into those systems without that waste water entering the watercourses untreated and thereby increasing the nutrients in the watercourses which may adversely affect habitats sites.
6. In November last year the government announced plans to address this involving upgrading water infrastructure and providing a national nutrient mitigation scheme allowing developers to purchase nutrient credits to mitigate adverse impacts.[3] In June 2023 DEFRA expressed the view that:

> "Nutrient pollution is an urgent problem for our freshwater habitats and rivers, many of which are internationally important for wildlife. We must tackle this pollution to help meet our legal commitments to restore species abundance."[4]

7. The recently proposed amendments to the LURB seek to change the rules around planning permission so that developments can proceed even though they may adversely affect habitats sites by pollution from increased nutrient loads.

1. Non-Regression

8. I have been asked to advise on whether these proposed amendments (including the Henry VIII clause in the proposed new s.159A and proposed new regulation 85A to the Habitats Regulations), will diminish environmental protections in the UK. In the course of preparing this advice, the Office of Environmental Protection published its statutory advice pursuant to section 30 of the Environment Act 2021 to the effect that the measures do involve regression of environmental protections. The letter from the Chair of the OEP of 30 August 2023 to the Secretaries of State for Levelling Up, Housing and Communities (The Rt Hon. Michael Gove MP) and for Environment, Food and Rural Affairs (The Rt Hon There Coffey MP) could not be clearer[5] and I therefore set out the key passages:

[3] Government sets out plan to reduce water pollution - GOV.UK (www.gov.uk)
[4] Nutrient pollution: reducing the impact on protected sites - GOV.UK (www.gov.uk)
[5] 230830 Letter of advice in respect of the Levelling Up and Regeneration Bill (1).pdf

> "The proposed changes would demonstrably reduce the level of environmental protection provided for in existing environmental law. They are a regression. Yet the Government has not adequately explained how, alongside such weakening of environmental law, new policy measures will ensure it still meets its objectives for water quality and protected site condition.
>
> **The amendments**
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> The proposed amendments include making changes to the Conservation of Habitats and Species Regulations 2017 that would permit certain environmentally damaging activity to proceed without 'appropriate assessment' of certain nutrient impacts, thus risking substantial harm to protected wildlife sites. Planning authorities would also be required to disregard negative findings concerning such nutrient pollution in any appropriate assessments, and disregard representations from Natural England or others. The proposed amendments would therefore remove legal controls on the addition of nutrient loads to sites that already suffer from these impacts. Legal certainty is replaced with policy interventions announced alongside the Bill amendments. These interventions do not unequivocally secure, for the long-term, the same level of environmental outcome as legal obligations in the Regulations do. They also introduce uncertainty and the risk of unintended consequences. It is unclear how such measures take account of the polluter pays and precautionary principles. These are internationally recognised principles which underpin the Regulations, and which are reflected in the Government's Environmental Principles Policy Statement

Further on the letter states:

> … nutrient pollution is a significant problem that requires urgent action. Many of England's most important protected wildlife sites are in a parlous state, with their condition well below where it needs to be. This is often due to nutrient pollution, and development can be a significant contributor to this. In seeking to address these problems, it is important that Government takes specialist advice, including from Natural England as its statutory nature conservation body. The Government reviewed and revised its Environmental Improvement Plan (EIP) in January this year. The revised EIP explains that tackling nutrient pollution and improving the condition of protected wildlife sites are critical steps if the Government is to achieve its aim of significantly improving the natural environment by 2043 and if it is to meet legally-binding targets to do so. On the face of it, the proposed amendments to the Bill would undermine this.

2. Certification of Non-Regression

9. There is a constitutional issue which arises from measures which diminish environmental protections being proposed at a late stage in a Bill's progress through

parliament. Non-regression has become a plank of the government's commitments to environmental protection. To that end it introduced an important constitutional protection for the environment in section 20 of the Environmental Protection Act 2021 which provides (so far as relevant):

> (1) This section applies where a Minister of the Crown in charge of a Bill in either House of Parliament is of the view that the Bill as introduced into that House contains provision which, if enacted, would be environmental law.
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> (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.

10. In the case of the Levelling Up and Regeneration Bill the Minister certified that the Bill would not reduce the level of environmental protection and that appears on the face of the Bill (as it stands). The OEP suggests that the certification on the face of the Bill will need to be revisited and that Ministers will need to make a statement "equivalent to that required by section 20(4)".
11. However, the problem may go further than that. Section 20 of the Environment Act 2021 was designed to secure parliamentary debate at second reading of *the principle* of any environmentally regressive measures. The introduction of the measures at this late stage in the Bill's progress is not consistent with the requirements of section 20. It raises constitutional questions about proper parliamentary process.
12. Introducing the Henry VIII clause (proposed new section 159A) at Report stage seems particularly at odds with the intention of section 20(3) of the Environment Act 2021: it means that the Secretary of State is being given a power to make laws that diminish

protection of the environment where neither those laws, nor the power to make those laws have been debated at second reading.

13. I suppose that among reasons why environmentally damaging measures are to be debated at second reading is not just the intrinsic importance of the environment, but to ensure that issues like the economic costs of environmental damage can be explored and debated. I have not been able to locate any economic impact assessment of the environmental damage the amendments will entail.

3. New Schedule 13 and Proposed Regulation 85A

14. The amendments propose a new schedule 13 to the LURB which in turn will if passed insert a new regulation 85A into the Habitats Regulations. This new proposed regulation 85A will govern how decisions on planning permission (and other related consents) which may affect habitats sites are to be made by a "competent authority" (usually a local planning authority or planning inspector responsible for deciding whether to grant planning permission). Proposed regulation 85A(2) and (3) state:

> "(2) When making the relevant decision [*i.e. whether to grant planning permission or other consents]*, the competent authority must assume that nutrients in urban waste water from the potential development, whether alone or in combination with other factors, will not adversely affect the relevant site [*a "relevant site" is defined as a habitats site connected to a nutrient affected catchment area*].
>
> (3) Accordingly, a potentially adverse effect on a relevant site caused by nutrients in urban waste water, whether alone or in combination with other factors, is not a ground for the competent authority to determine that—
> (a) an appropriate assessment is required by regulation 63(1) or 65(2), or
> (b) the potential development will adversely affect the integrity of the relevant site or otherwise have negative implications for the site."

15. The unusual effects of regulation 85A (as proposed) are therefore:

    a. that a competent authority is <u>required</u> to <u>*assume*</u> that a development will not have an adverse effect on a habitats site even where it will have an adverse effect; and

    b. A competent authority may not require appropriate assessment of nutrient impacts (so that it will never properly know what the true extent of the environmental damage from a development actually is); and

c. Where a development will adversely affect a habitats site, a competent authority (assuming the opposite) may not refuse planning permission on grounds of that environmental damage.

16. The current, and for many decades settled, legal position is that a local planning authority or a planning Inspector deciding whether to grant planning permission must have regard to all "material considerations" (see section 70(2) of the Town and Country Planning Act 1990 and section 38(6) of the Planning and Compulsory Purchase Act 2004). That is a statutory requirement, but it also reflects a general principle of administrative law and of good public administration that those making administrative decisions should weigh up all the relevant factors when taking a decision. The new proposed regulation 85A introduces a concept at odds with that principle: it mandates that a competent authority must make assumptions which are contrary to the facts.
17. This is perhaps best understood by imagining a hypothetical example under current laws. Suppose a Council is today faced with an application for planning permission for 1,000 new houses. When considering whether to grant planning permission it is advised by the developer's own scientific studies that the development is likely to adversely affect a sensitive environmental habitat and the developer proposes ways to mitigate that harm. When council members consider the application on the planning committee, they all announce that they have decided that despite the developer's own evidence of likely harm, they are going to assume that there will be no harm to the habitat. They proceed to grant planning permission without any mitigation. On a judicial review of its decision, a judge in the Planning Court would quash that decision for perversity or irrationality: the judge would no doubt make some wry comment that such reasoning is not permitted outside Wonderland. Yet if regulation 85A is enacted competent authorities will in future be required- by law- to take decisions in a way that would ordinarily be seen as perverse and irrational.
18. If Councils and planning inspectors are required to make counterfactual assumptions, it will become difficult to make good administrative decisions. Consider the following hypothetical scenario. A developer seeks planning permission for 1,000 houses. Their own evidence says, and the Council's ecology officer agrees, that the development will have significant adverse impacts from increased nutrients in the local watercourses.

The development will hasten what is already a failing ecology in those watercourses. Some of the watercourses are SSSIs and some are habitats sites. The local planning authority is considering whether to grant planning permission and turns to consider the impacts.

a. In respect of the habitats sites the proposed new regulation would require the Council to assume that the development will not adversely affect the habitats site (regulation 85A(2)). Further, by proposed new regulation 85A(3) it would not be open to the local planning authority to refuse planning permission on the grounds of adverse effect to the integrity of the habitats site. It would probably not be open to the Council to require mitigation of the impacts.
b. However, the proposed new regulation 85A does not relate to SSSIs so the Council would by section 70(2) of the Town and Country Planning Act 1990 and by ordinary principles of good administration, be required to take into account the adverse effects of the increased nutrients on the site of special scientific interest. The Council could require mitigation, or even refuse permission because of these impacts on the SSSI (but not on the habitats site).

It can be seen that the perverse result of the proposed new regulation 85A would be that those sites which were designated as habitats sites (after careful analysis of their ecological sensitivity) will now enjoy less protection under law than those which were considered less valuable, and which were not designated as habitats sites.

19. Take one further example. Suppose that for a given development there are mitigation schemes available which are capable of abnegating the adverse impacts from nutrient loading. Where there might be adverse impacts on a SSSI, a Council could impose a condition on the planning permission requiring mitigation of the impact or could require a contribution to a mitigation scheme through Community Infrastructure Levy or section 106 agreement. However, a council which is required to make a counterfactual assumption that the development will not adversely affect a habitats site (and which cannot refuse permission on that ground) can hardly insist on a developer mitigating the adverse impact. Again, the proposed new regulation produces perverse outcomes. I do not understand, for example how it is thought that

existing mitigation schemes (such as the scheme established by Natural England in Teesside[6] which allows for nutrient credits to be purchased) will be affected.

4. New Henry VIII Clause

20. Proposed new clause 159A confers on the Secretary of State a power to make regulations disapplying or modifying any piece of UK legislation or retained EU law (save those in part 6 of the Habitats Regulations) related to nutrients in order inter alia to regulate how nutrients are to be taken into account in decision-making. It also expressly allows the Secretary of State a power to treat any obligation related to nutrients as having been discharged[7].

21. The proposed new clause states:

> (1) The Secretary of State may by regulations make provision about the operation of any relevant enactment in connection with the effect of nutrients in water that could affect a habitats site connected to a nutrient affected catchment area.

A "relevant enactment" is defined by proposed subclause (3) to mean any piece of UK legislation or retained EU law relating to the environment, planning or development in the UK. The proposal is therefore to afford to the Secretary of State a legislative power over any legislation which effects nutrients on habitats site (with the exception of part 6 of the Habitats Regulations- see proposed clause 159A(4)) .

22. A common objection to Henry VIII clauses is that they offend the constitutional principle of parliamentary sovereignty by replacing the process of parliamentary scrutiny, debate and control over legislation with an executive power to alter legislation by decree or proclamation. In this case, there is a further objection that this proposal is being introduced after the second reading and after the Committee stages of the LURB are complete, so that there is no opportunity for the Henry VIII clause itself to be subject to the usual processes of parliamentary scrutiny.

[6] How to apply for nutrient mitigation credits from Natural England - GOV.UK (www.gov.uk)
[7] See pages 15-16 of the PDF attached.

Conclusion

23. I understand that my advice may be used to assist in briefing parliamentarians and others who may be concerned about the proposed amendments. I would caveat that I have been asked to advise in short order and even while I have been drafting this advice there have been important developments (such as the publication of the Office of Environmental Protection's advice under s. 30 of the Environment Act 2021). I have no doubt that there are many matters I have not covered. I am happy to advise further if required.

Alex Goodman K.C.

Landmark Chambers

31 August 2023