

Board Paper

Date

16 April 2025

Title

Proposed advice on the Planning and Infrastructure Bill

Report Author

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Paper for decision

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Issue

1. The Planning and Infrastructure Bill (the bill), as introduced on 11 March 2025, would (amongst other things) create a new approach to managing the effects of development on certain protected wildlife sites. The bill is positioned as fundamental to the Government's mission to deliver 1.5 million homes this Parliament.
2. The bill contains a statement by the Secretary of State, under s.20 Environment Act 2021, that she considers that the bill will not have the effect of reducing the level of environmental protection provided for by any existing environmental law.
3. Our view is that, as currently drafted, the bill **would** reduce levels of environmental protection as compared to that provided for by the Habitats Regulations. The existing regime, providing high levels of legal protection for specific sites and species and requiring a high degree of scientific confidence in outcomes, would be partly replaced with one where outcomes are more general and dependent upon Secretary of State discretion.
4. This in turn creates new uncertainty for the delivery of the EIP thriving plants and wildlife goal and the Environment Act targets on species abundance and biodiversity.

Recommendations

5. The Board is recommended to:
 - (a) agree our strategic intent (para 19)
 - (b) consider the proposal to advise the Secretary of State for Housing, Communities and Local Government on proposed changes to environmental law contained in the bill, in the form of the advice letter at annex A, which includes addressing the bill's s.20 statement, laying out the areas in which our view is that protections would be reduced and suggesting amendments that would maintain existing levels of environmental protection
 - (c) agree that the OEP should give that advice, and authorise the Chair, in consultation with the Chief Executive, to first approve any non-material amendments to the letter of advice at annex A
 - (d) agree that the OEP submits a copy of this advice as evidence to the bill committee, and
 - (e) consider and comment on whether to publish the advice immediately or wait until 2 May, after the pre-election period for the local government elections has ended.

Background

6. Part 3 of the bill would bring into law the policy described in the working paper "Development and Nature Recovery" discussed with the Board on 29 January 2025.
7. Part 3 would (amongst other things) amend environmental legislation (Wildlife and Countryside Act 1981, Protection of Badgers Act 1992 and the Habitats Regulations 2017). It contains environmental law, thereby falling within scope of s.20 (non-regression statements) and s.30 (OEP advice) of the Environment Act 2021.
8. The bill would introduce a new system of environmental assessment, seeking to adopt a strategic approach to managing certain (but not all) environmental impacts of development. In essence, Natural England would develop and implement new 'Environmental Delivery Plans' (EDPs) containing conservation measures to address certain impacts of development on certain features of protected sites or on protected species. Developers could pay a 'Nature Restoration Levy', with funds pooled in a 'Nature Restoration Fund'. This fund is intended to pay for the implementation of EDPs. If a developer pays the Nature Restoration Levy in respect of a particular impact of their development, that impact is carved out from the current Habitats Regulations Assessment regime.
9. A more strategic approach to managing environmental impacts of development is, in principle, to be welcomed – it could overcome several barriers to a more effective regime for improving nature whilst also supporting government's growth agenda. However, the way the bill seeks to achieve this gives rise to concern that it would amount to a substantial regression from existing environmental law.

10. The bill is proceeding quickly through Parliament. The House of Commons committee stage will begin on 24 April.

Analysis

Regression

11. Our legal analysis, supported by that of senior counsel (and legal commentators), is that Part 3 of the bill would clearly and significantly reduce the level of environmental protection provided for by existing environmental law. This would be in several respects as described in the Annex to the draft letter at annex A, so not repeated here. The weakness of the 'overall improvement test' proposed by the bill is the most significant issue, but there are other aspects of the drafting which would lower the level of protection when compared to existing law.
12. We have not carried out a comprehensive comparison of the bill against existing environmental legislation, focussing instead on just first and second order points. This means that we are not able to advise comprehensively as to whether, even if government takes all the steps we propose, the bill would still result in a reduction in environmental protection.
13. Our view on regression is at odds with the Secretary of State's statement to Parliament that the bill would not have the effect of reducing the level of environmental protection provided for by any existing environmental law.

This section has been redacted as its publication would be prejudicial to the effective conduct of public affairs

Our proposed approach

14. We have taken up a s.20 statement [once before](#) in relation to other proposed changes to the Habitats Regulations, under the Levelling-up and Regeneration Bill (LURB). The circumstances were different as in that case we did not take issue with the s.20 statement when made, but considered that later proposals for amendment to LURB called it into question. LURB was at a late stage when those amendments arose and could not readily be re-amended. Here, the s.20 statement appears questionable from the outset. However, in principle, the bill could be amended to achieve the strategic approach government intends, whilst also not lowering environmental protection (and thereby better aligning with the s.20 statement).

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In view of this, it seems that our most likely opportunity for influence is to offer the Secretary of State advice under s.30 Environment Act, and thereby raise our concerns about regression directly with her whilst also assisting parliamentarians to understand the environmental risks posed by the government's proposals.

15. **Consequently, our strategic intent is to secure that government can be held to account for being transparent over the implications for environmental protection of the bill, and is influenced to amend the bill to ameliorate the reduction in**

environmental protection so that it is more likely to meet its nature targets and wider aspirations for the environment.

16. In pursuing this intent, we recognise the need to take care not to overstep the OEP's role in querying government policy or Parliamentary decisions over legislation. However, taking at face value the Government's stated aims for a "win-win" for growth and nature recovery, we can point out the aspects of the bill which do not appear to support this outcome and how they could be amended to do so.
17. We can also expect all public statements to be politically sensitive and subject to scrutiny. However, by expressing our views factually and impartially, we can play our proper independent role so that Ministers and parliamentarians are better informed as the bill progresses. This may, in turn, assist them to shape the bill in a way which better supports environmental protection and improvement.

Options

18. In giving advice to the Secretary of State, choices can be made over framing. For example, we propose expressing our view on the Secretary of State's conclusion that the bill will not have the effect of reducing the level of environmental protection provided for by any existing environmental law (the s.20 statement). We also propose offering points for amendment of specific aspects of the bill which would be regressive, but not going into detailed legislative drafting of such amendments.
19. As well as giving advice to the Secretary of State, we could also give evidence to the bill committee. However, timing constraints would risk this cutting across advice to the Secretary of State and any potential response, with high associated political risks. We have given committee evidence on past bills – the [Retained EU Law Bill](#) and the [LURB](#) – so there is precedent for doing so. However, that evidence was not given concurrently with s.30 advice and did not carry the same risks.
20. We therefore propose submitting our advice (i.e. the Annex to the letter at annex A) to the bill committee simply to bring to relevant parliamentarian's attention the same material we have put to the Secretary of State. Given the pre-election period, it will be important to provide our advice directly to the committee, otherwise they may not become aware of it in good time for their deliberations.
1. The Board may notice that we have not included anything in the draft letter about application of the EPPS. *This section has been redacted as its publication would be prejudicial to the effective conduct of public affairs.* Reference to the EPPS could be added if desired.

Northern Ireland

21. The bill is not relevant to Northern Ireland.

Finance and Resource

22. Some finance (£5K) and resources (84 person-days) are in place for this work in the draft 25/26 business plan. This is more than sufficient to cover our advice on the bill and associated work.

23. We will consider where else we could engage to have influence and help to ensure positive environmental outcomes. There are likely to be further opportunities for engagement on implementation if the bill is made law as secondary legislation will be required to set the nature restoration levy, and any EDPs will need to be consulted on before adoption.

Impact Assessments

Risk Assessment

This section has been redacted as its publication would be prejudicial to the effective conduct of public affairs and it contains information provided in confidence.

Environmental Analysis

24. Under the Environment Act we must act objectively and impartially, having regard to the need to act transparently and proportionately. The requirement for impartiality will be particularly relevant to how the Board approaches giving advice in a highly political context. It may also be relevant to how we consider this case, as compared to the similar scenario the OEP faced with a different government under LURB (see above).
25. We also have numerous general duties in environmental law relevant to this work. **Reg 9(3) Habitats Regulations is particularly relevant** as it requires that we, in exercising any functions, have regard to the requirements of the Habitats and Birds Directives, so far as they may be affected by the exercise of those functions. Those requirements include to secure the protection and enhancement of sites covered by government proposals. This duty has recently been interpreted by the High Court as in some circumstances, which may be relevant here, going beyond merely considering those requirements and doing no more.
26. We must also act consistently with our policy to take biodiversity conservation and enhancement into account as part of all relevant operational decision-making. We must have regard to factors such as the purposes of national parks and landscapes and the need to conserve the natural beauty and amenity of the countryside. We must also take reasonable steps to promote conservation of SSSIs and must further the conservation of marine conservation zones.
27. Giving advice in the ways recommended in this paper is highly likely to be consistent with the duties referred to above. However, there is a **medium risk** that if we do not seek to engage to influence the bill/scrutiny of the bill, we fail to comply with the duties above in relation to protected sites and/or in relation to acting objectively and impartially.

Implementation Timescale

23 April	Board Meeting
24 April	Planning and Infrastructure Bill committee stage commences

28 April	If approved, OEP to send advice to SoS and submit as evidence to the bill committee, and undertake targeted engagement with other parliamentarians
28 April onwards	OEP to follow up advice with MHCLG and Defra to influence the bill, and its implementation; potentially publish our advice
1 May	Local government elections
2 May	Potentially publish our advice
Late 2025 onwards	OEP to consider engaging with draft regulations and draft Environmental Delivery Plans

Communications

2. The OEP's view being inconsistent with the Deputy Prime Minister's s.20 statement will be politically sensitive. *This section has been redacted as its publication would be prejudicial to the effective conduct of public affairs and it contains information provided in confidence.* But there is also a reputational risk with other stakeholders, including parliamentarians (including past secretaries of state), if we are seen to be weak in the face of clear reductions in environmental protection. The eNGO community and environmental professionals have both been vocal with their concerns about the bill.
28. The timing of our advice is also politically sensitive, with local elections taking place on 1 May. Civil Service Guidance on the pre-election period and politically sensitive announcements suggests that "[i]n some cases it may be better to defer an announcement until after the elections, but this would need to be balanced carefully against any implication that deferral could itself influence the political outcome". That Guidance suggests that "each case should be considered on its merits".
29. Given the speed with which the bill is progressing through Parliament, there is merit in our making the advice available as quickly as possible to maximise its impact as a resource for other stakeholders' work to influence the bill. However, there may be sensitivities involved with our doing so, given the politically 'hot' nature of this topic.
30. **In this context, we recommend that the Board consider whether we should publish the advice immediately or else on 2 May, after the local elections have taken place.** If the Board decides that we should defer publication, we would continue to undertake targeted engagement with parliamentarians (e.g. the bill committee) in the intervening period.
3. Given that we have not stated in our advice in detail what amendments would be necessary to maintain the current level of environmental protection, we cannot say that addressing each of our comments in the advice would ensure the bill does not reduce levels of environmental protection from that currently. We will develop lines to take as this is likely to be something we are asked.

4. *This section has been redacted as its publication would be prejudicial to the effective conduct of public affairs and it contains information provided in confidence.*
5. An engagement plan covering the above points will be developed and implemented.

External Stakeholders

31. The project team met with officials from MHCLG and Defra on 26 March to discuss our concerns about regression and interest in understanding how the EPPS has been applied. This was followed up with a request for information about those topics in writing on 28 March. We received a response on 16 April.
32. Baroness Coffey has requested a meeting with our Chair to discuss this bill.
33. We are engaging with a small number of other external stakeholders, but this is limited given the time constraints (Natural England, a small number of lawyers, delivery body of strategic mitigation, developers). We are making full use of intelligence and wider networks to maintain situational awareness. A synthesis of this information is provided at annex B to assist the Board in understanding the context of this work.
34. To restrict the extent to which it could be perceived that we are subject to lobbying (and therefore risk perception around our independence), we will principally only engage with those parties that we have approached, and where we have identified a specific purpose to that engagement.
35. Whilst we remain alive to the need to be cautious in our engagement, due to the political sensitivities involved, we consider that engagement with some external stakeholders is necessary. This is with a view to broadening our understanding of the practical and technical issues. Here we are clear that in engaging with stakeholders, it is to obtain information / evidence, whilst maintaining our independence.

Paper to be published	YES subject to redactions
Publication date (if relevant)	With meeting minutes
If it is proposed not to publish the paper or to not publish in full please outline the reasons why with reference to the exemptions available under the Freedom of Information Act (FOIA) or Environmental Information Regulations (EIR). Please include	<p>Proposed FOIA/EIR exemptions for redactions are:</p> <ul style="list-style-type: none"> • information is intended for future publication (s.22 FOIA) • publication would harm the administration/course of justice and the balance of public interest favours withholding disclosure (s.31 / reg 12(5)(b) EIR) • publication would harm the effective conduct of public affairs, including the Board's ability to receive candid advice and engage in free and frank discussion (s.36)

references to specific paragraphs in your paper	<ul style="list-style-type: none"> • publication would breach legally binding confidentiality obligations (s.41 / reg 12(5)(e)) • publication would undermine legal privilege and the balance of public interest favours withholding disclosure (s.42 / reg 12(5)(e))
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ANNEXES LIST

Annex A - draft letter of advice

Annex B - synthesis of stakeholder views of the bill