

**Welcome to Landmark Chambers’
‘Current Issues in Environmental Law Part 4: The
Environment Bill, biodiversity net gain and nature
conservation’ webinar**

The recording may be accessed [here](#).

Your speakers today are...



David Elvin QC (Chair)



Stephen Whale

Topic:
The Environment Bill:
conservation
covenants



Richard Turney

Topic: Biodiversity
Net Gain and the
Environment Bill



Matthew Fraser

Topic:
The Environment Bill:
policy objectives for
biodiversity and local
nature recovery
strategies

The Environment Bill: policy objectives for biodiversity and local nature recovery strategies



Matthew Fraser

Environment Bill

- **Part 6: Nature and Diversity**
 - Biodiversity gain in planning
 - Biodiversity objective and reporting
 - Local nature recovery strategies
 - Tree felling and planting
- **Part 7: Conservation Covenants**

Context

“Nature is in decline, much of England’s wildlife is deteriorating, and many ecosystems are degraded.”

Explanatory Notes, para. 44.

Biodiversity objective: existing legislation

A public authority must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity.

Conserving biodiversity includes, in relation to a living organism or type of habitat, restoring or enhancing a population or habitat.

Section 40, Natural Environment and Rural Communities Act 2006

A weak duty

The requirement to “**have regard**” is contrasted with the requirement in section 66(1) to “**have special regard**” to the desirability of preserving a listed building or its setting: see *Howell v SSHCLG* [2014] EWHC 3627 (Admin) at [46] per Cranston J.

“To have regard to a matter means simply that that matter must be specifically considered, not that it must be given greater weight than other matters, certainly not that it is some sort of trump card. It does not impose a presumption in favour of particular result or a duty to achieve that result. In the circumstances of the case other matters may outweigh it in the balance of decision-making. On careful consideration the matter may be given little, if any, weight.”

”Special regard” = a requirement to give “considerable importance and weight”.

The proposed biodiversity objective

“The existing wording does not adequately reflect the ambition or language of the 25 Year Environment Plan. Shifting the focus of the duty to an active requirement to seek the further conservation and enhancement of nature should better align public authorities’ action on biodiversity with government’s ambition”.

Explanatory Notes, para. 46.

“Beefed up” section 40 of NERC Act 2006

- A “general duty to conserve **and enhance** biodiversity”
- The “general biodiversity objective” is “the conservation and enhancement of biodiversity in England through the exercise of functions in relation to England”
- “A public authority which has any functions exercisable in relation to England must from time to time consider what action the authority can properly take, consistently with the proper exercise of its functions, to further the general biodiversity objective.”
- “From time to time”: the first time must be completed within one year of the Environment Act coming into force, and then every five years.

After that consideration the authority must (unless it concludes there is no new action it can properly take)—

- (a) determine such policies and specific objectives as it considers appropriate for taking action to further the general biodiversity objective, and
- (b) take such action as it considers appropriate, in the light of those policies and objectives, to further that objective.

The requirements of (a) may be satisfied (to any extent) by revising any existing policies and specific objectives for taking action to further the general biodiversity objective.

The “determination” in (a) must happen “as soon as practicable” after the consideration.

“The action which may be taken by the authority to further the general biodiversity objective includes, in particular, action taken for the purpose of—

- (a) conserving, restoring or otherwise enhancing a population of a particular species, and
- (b) conserving, restoring or otherwise enhancing a particular type of habitat.”

In complying with these new duties, “*the authority must in particular have regard to any relevant **local nature recovery strategy***”.

Biodiversity Reports

- A requirement on local authorities (and any other designated authorities) to publish “*biodiversity reports*”.
- Summarise actions already taken to comply with new duties in relation to the biodiversity objective, and proposed actions, and report on biodiversity gains.
- First report must cover a period of no longer than three years, starting with the day on which the authority becomes subject to the reporting duty.
- Subsequent reports must cover a period of no longer than five years.
- Regulations may require reports to include specified quantitative data.

Local nature recovery strategies (“LNRS”)

Spatial plans enable the public, private and charity sectors to direct investment in nature to where it can best benefit the natural environment, and have an important role to play in delivering the government’s commitment to nature recovery. Although such plans do exist in some areas of England, they are often produced by a variety of bodies working at different spatial scales. Local Nature Recovery Strategies (LNRSs) will put spatial planning for nature on a statutory footing, and will support local action by consistently mapping important existing habitats and opportunities to create or restore habitat. For example, the biodiversity net gain consultation identified a need for local plans for nature to target biodiversity increases. Developed through a collaborative approach, LNRSs will also support the delivery of a Nature Recovery Network by acting as a key tool to help local partners better direct investment and action that improves, creates and conserves wildlife-rich habitat.

Explanatory Notes, para. 47

LNRS: the basics

- SoS to determine the areas to which LNRSs relate, but area of a local authority (other than a Country Council) may not be split between LNRSs.
- Compliance with general biodiversity objective requires regard to LNRS.
- Preparation by local authorities, Mayors of London and Combined Authorities, National Park authorities, the Broads Authority, Natural England.
- To be kept under review.
- Regulations may deal with timing of review, LNRSs involving multiple authorities, and consultation with members of the public.

LNRS: content

- A statement of biodiversity priorities for the area, including:
 - A description of the area and its biodiversity;
 - A description of biodiversity recovery/enhancement opportunities;
 - Biodiversity recovery/enhancement priorities.

- A local habitat map, including:
 - National conservation sites (SSSI, RAMSAR, MCZ, SPA, SAC);
 - Nature reserves;
 - Areas that are or could become “of particular importance for biodiversity”
 - Areas where biodiversity recovery/enhancement could make a particular contribution to other environmental benefits.

LNRS: SoS duty to provide information

Secretary of State must prepare and publish a “national habitat map for England” to assist authorities with their LNRSs, identifying:

- National conservation sites;
- Other areas that “in the opinion of the Secretary of State are of particular importance for biodiversity”.

Secretary of State to have a duty to inform responsible authority of any area:

- Which could be of greater importance for biodiversity;
- Where recovery/enhancement could make a contribution to other environmental benefits;
- Which could contribute to a national network of areas for recovery/enhancement.

The Environment Bill: conservation covenants



Stephen Whale

Conservation covenants: what are they?

A conservation covenant (“CC”) can be described as “an agreement between a landowner and a body like a charity or public body to do or not do something on their land for a conservation purpose.”

Conservations covenants: a new idea?

CCs are not a brand new idea

Section 8 of the National Trust Act 1937 allows a landowner to agree with the National Trust certain restrictions on activities on the land, but they can only involve obligations not to do something and they can be agreed only with the National Trust.

Note also section 5 of the Forestry Act 1967, which is a similar provision.

Law Commission project

Starting in 2012, the Law Commission investigated the case for introducing CCs into the law of England and Wales. There was a 2013 public consultation exercise.

On 24 June 2014, the Law Commission published its final Report (Law Com No 349) in which it recommended a new statutory scheme of CCs in England and Wales. Its recommended CCs would (i) be by way of two-party agreement, (ii) be able to contain positive as well as restrictive obligations, (iii) be capable of binding successors in title and (iv) be made for the public good.

The Report included a draft Conservation Covenants Bill.

Government response

Government's response was enthusiastic.

It committed to exploring the part that CCs could play in Defra's 25 year Environment Plan.

That 25 year Environment Plan pledged to review and take forward the Law Commission's proposals for CCs.

Environment Bill Part 7

Government is not pursuing a discrete Conservation Covenants Bill

Part 7 of the Environment Bill is devoted to CCs

Part 7 is clauses 102-124 in the original Bill

CCs defined in clause 103(1)

Clause 123 is a helpful index of defined terms in Part 7

CCs in more detail

A CC is so much of a “conservation covenant agreement” (“CCA”) as is given statutory effect by clause 103 (i.e. the future section 103, or as may be re-numbered).

- A CCA is an agreement between a landowner and “a responsible body” where:
- (a) the agreement contains provision which (i) is of a qualifying kind, (ii) has a conservation purpose and, (iii) is intended by the parties to be for the public good,
 - (b) it appears from the CCA that the parties intend to create a CC, and
 - (c) the agreement is in writing signed by the parties.

Responsible bodies

The Secretary of State is a responsible body.

A local authority (as defined, which excludes parish councils) may apply to be designated as a responsible body, as may other bodies.

A non-local authority may be designated if some of its main purposes or functions relate to conservation (in the case of public bodies or charities) and it is suitable to be a responsible body. In any other case, at least some of the body's main activities must relate to conservation and it must also meet the suitability test.

Provisions of a qualifying kind

Essentially, these are provisions in the CCA:

- (i) requiring the landowner to do, or not to do, something specified on land in England, or
- (ii) allowing the responsible body to do something on the land, or
- (iii) requiring the responsible body to do something on the land

Conservation purpose

- (a) To conserve the natural environment of land or the natural resources of land, or
- (b) To conserve land as a place of archaeological, architectural, artistic, cultural or historic interest, or
- (c) To conserve the setting of land with a natural environment or natural resources or which is a place of archaeological, architectural, artistic, cultural or historic interest.

Clearly broad in scope, not limited to biodiversity conservation and note the reference to conserving “setting”.

Miscellaneous

CCs will be a local land charge (clause 105)

Unless the CC provides for a shorter period, an obligation under a CC endures indefinitely if the qualifying estate is held freehold or for the remainder of the term if the qualifying estate is held on a lease granted for more than 7 years (clause 106)

A landowner's obligation under a CC is owed to the responsible body (clause 107(1)).

Generally, landowner obligations under CCs bind the landowner and successors (clause 107(2)).

Generally, responsible body obligations under a CC are owed to the landowner under the covenant or the successor (clause 108(1)).

In proceedings for enforcement of an obligation under a CC, the available remedies (clause 110(1)) are:

- (a) specific performance,
- (b) injunction,
- (c) damages, and
- (d) order for payment of an amount due under the obligation

The court must take into account the public interest in the performance of the obligation

Landowners and responsible bodies may discharge or modify their obligations by agreement (clauses 112-114)

The Upper Tribunal may do likewise, on application. No application may be made under section 84(1) of the Law of Property Act 1925 in relation to an obligation under a CC: clause 115

See Schedule 16 for further provisions on Upper Tribunal applications. It may discharge or modify an obligation on application, “if it considers it reasonable to do so in all the circumstances of the case”.

Biodiversity Net Gain and the Environment Bill



Richard Turney

Biodiversity net gain today

- NPPF paragraphs 8 and 32 (“opportunities... to secure net gains”) and:
 - “*minimising impacts on and providing net gains for biodiversity, including by establishing coherent ecological networks that are more resilient to current and future pressures*” (170(d))
 - “*plans should... identify and pursue opportunities for securing measurable net gains for biodiversity*” (174(b))
 - “*opportunities to incorporate biodiversity improvements in and around developments should be encouraged, especially where this can secure measurable net gains for biodiversity*” (175(d))
- Local plan policies
- Regularly advanced as a benefit of developments (especially e.g. greenfield housing)

Use of offsetting generally

- Within scheme
- Off-site (e.g. specific receptor/enhancement sites)
- Habitat banks (see e.g. the work of [The Environment Bank](#))
- Use of offsetting matrices to show “no net loss”
 - Controversial in own right (see e.g. [HS2 Select Committee Report](#), para 302ff)

Environment Bill

- Sections 92-94 will make provision for “biodiversity gain”
- Schedule 14 inserts a new s 90A into the Town and Country Planning Act
- Substantive provisions in new Schedule 7A TCPA 1990, “biodiversity gain in England”
- All permissions subject to a condition requiring the submission and approval of a **biodiversity gain plan**

Biodiversity gain objective (1)

- Biodiversity gain objective: “met in relation to development for which planning permission is granted if the biodiversity value attributable to the development exceeds the pre-development biodiversity value of the onsite habitat by at least the relevant percentage”
- Biodiversity value is:
 - the post-development biodiversity value of the onsite habitat,
 - the biodiversity value, in relation to the development, of any registered offsite biodiversity gain allocated to the development, and
 - the biodiversity value of any biodiversity credits purchased for the development

Biodiversity gain objective (2)

- The relevant % is 10%
- Value is calculated by reference to the biodiversity metric, published by S/S
- Provision for establishing the date “pre-development biodiversity value” to ensure that activities for which planning permission was not required have not been used to reduce that value
- Post-development value is the projected value “at the time the development is completed”
- “Value” can only be taken into account if satisfied that it will be secured for at least 30 years

Biodiversity gain objective (3)

- Offsite gains can be counted so long as:
 - Enhancement required under a planning obligation or conservation covenant
 - The enhancement is recorded in the biodiversity gain site register

Biodiversity credits

- Section 94 of the Bill
- S/S may make arrangements for the use of credits to meet the gain objective, including the price to be paid
- Payments may be used to carry out works, purchase land and administer arrangements

Other relevant provisions

- Regulations may be made to modify the requirements for “irreplaceable habitats”
- Regulations may modify the requirements for particular types of planning permissions, including retrospective permissions
- Various consequential amendments to provisions of the TCPA 1990

BNG in infrastructure

- No general support for BNG (but obliquely mentioned e.g. in National Networks NPS)
- Note the recent [Cleve Hill decision](#), where the S/S approved compulsory acquisition powers for a BNG plot:

“a compelling case for inclusion particularly in view of the additional benefits in respect of biodiversity net gain that the Development would be able to deliver if the Lowland Grass Meadow Habitat Management Area can be implemented in full”

What next?

- Bill progress
- Establishment of biodiversity credit system
- Impact on local plan policies/duplication of controls
- Scale of impact (e.g. s 73 applications)

Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you for listening

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