

The Environment Bill: nature conservation issues (excluding biodiversity net gain)



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Outline

Environment Bill as amended at the HL Report stage (15.9.21) (expl notes 26.5.21).

Third Reading due 13 October

- Conservation covenants
- Habitats
- Conservation strategies – local nature recovery, species and protected site strategies
- Trees

Defra policy statement reissued 6 Sept 2021 - *September 2021: Nature and conservation covenants (parts 6 and 7)* -

<https://www.gov.uk/government/publications/environment-bill-2020/10-march-2020-nature-and-conservation-covenants-parts-6-and-7>

Conservation Covenants: Part 7 of the Bill

- These are a form of legally binding agreement which take effect as land charges between a landowner and a “responsible body” designated by the SoS (and including the SoS) intended to include conservation charities, public bodies or other bodies for a “conservation purpose” i.e. a purpose of conserving the natural environment, natural resources or artistic, cultural or heritage features of the land (cl. 120(3)).
- Conservation includes “protecting, restoring or enhancing” (cl. 120(4)).
- “Conservation covenant agreements” can contain positive and/or negative obligations (cl. 120(2)) which have “a conservation purposes” and which are “intended by the parties to be for the public good” (cl. 120(1)(a)). The latter requirement (cl. 120(1)(a)(iii)) appears superfluous.
- They apply where the landowner holds a qualifying estate which is not only a freehold interest but a leasehold interest granted for a term of more than 7 years “from the date of grant” but adds to the latter “in the case of which some part of the period for which the terms of years was granted remains unexpired” – which is unclear as to whether it means a shorter remaining term will qualify, which does not appear consistent with the intention to create “long-lasting benefits” (Defra policy paper Parts 6 & 7, 6.9.21)

Conservation Covenants (2)

- The mechanism used then gives “statutory effect” (cl. 121(1)) as a “conservation covenant” to so much of a conservation covenant agreement as cl. 120 specifies i.e.
 - Within cl. 120(1)(a) and ancillary provisions to any provision within cl. 120(1)(a)
 - Public access arrangements to land in the agreement which meets 120(1)(a) are deemed to be ancillary to them (cl. 121(3))
- The mechanism appears clumsy. Why have separate definitions for conservation covenant agreements and conservation covenants?
- The covenant takes effect as a local land charge (cl. 123(1)) and will run with the land and the exclusion of covenants made between lessor and lessees from local land charges is disapplied to conservation covenants (Cl. 123(2)). Obligations may be owed to and by the responsible body (cls. 125(1), 126(1)). Cls. 125(2)-(5) and 126(2) specifically bind or benefit successor landowners (including those deriving title) with the exceptions in 125(4) and (5) and 126(3).
- CCs have effect for a default period (cl. 124) unless the covenant provides otherwise
 - Indefinitely in the case of freeholds
 - For the remainder of the term in the case of leaseholds
- Could CCs be used instead of planning obligations? Would the CIL Regs reg. 122 apply?

Conservation Covenants (3)

- Probably unnecessarily, cl. 127 provides that breaches of obligation are doing something prohibited, allowing another to do something prohibited or not performing an obligation
- Enforcement may be via specific performance, injunction, damages (including exemplary damages) or order for the payment of sums due under the obligation as the court considers appropriate taking into account “any public interest in the performance of the obligation concerned” (cl. 128). The limitation period is that of simple contract (cl. 128(5)) i.e. 6 years even though the agreement must be signed as a deed under cl. 120(1)(c).
- Cl. 129 set out defences (a) breaches beyond the defendant’s control (b) acting in an emergency to prevent loss of life or personal injury or (c) where the land is within an area designated for a public purpose (after the covenant was created), that compliance would have breached any statutory control applying as a result of the designation providing that where the only reason was a failure to obtain authorisation that all reasonable steps to obtain it had been taken
- Cls. 130-133 provide for modification and discharge by agreement or by the Upper Tribunal (See Schedule 18) by disapplying s. 84 of the Law of Property Act 1925. The Court or UT may declare whether the agreement is a conservation covenant and on whom it is binding: cl. 138
- Cls. 134-5 provide for replacement of the responsible body or the RB ceasing to be such.

Habitats: cls. 113-115

Habitats clauses 113-115 (1)

- Cl. 115 introduced at the Report stage – seeks to control any amendments to the Habitats Regulations 2017 that have only been adjusted to reflect Brexit
- How will any changes introduced focused on overall net gain balance against the existing approach which protects the most important habitats and species?
- Clauses 113-115 of which in many respects 115 is the most restrictive
- Cl. 113 permits amendment to the 2017 Regs for the purposes in cl. 113(2) and also for those matters in (3)-(5) (to clarify the scope of reg. 9)
 - “(a) to require persons within regulation 9(1) of the Habitats Regulations to exercise functions to which that regulation applies—
 - (i) to comply with requirements imposed by regulations under this section, or
 - (ii) to further objectives specified in regulations under this section, instead of exercising them to secure compliance with the requirements of the Directives;
 - (b) to require persons within regulation 9(3) of the Habitats Regulations, when exercising functions to which that regulation applies, to have regard to matters specified by regulations under this section instead of the requirements of the Directives.”

Habitats (2)

- Reg. 9 of the 2017 Regulations is a general duty to secure compliance with “the Directives”
 - “(1) The appropriate authority, the nature conservation bodies and, in relation to the marine area, a competent authority must exercise their functions which are relevant to nature conservation, including marine conservation, so as to secure compliance with the requirements of the Directives.”
 - Reg. 9(2) sets out a non-exhaustive list of functions to which 9(1) applies “in particular”
 - “(3) Without prejudice to the preceding provisions, a competent authority, in exercising any of its functions, must have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions.”
- The reference to “the Directives” is to the Habitats and Wild Birds Directive as modified post-Brexit by reg. 3A for the national site network and its management objectives (reg. 16A).
- The Defra policy paper (6.9.21) states confidently -
 - “This power will enable alignment of the Regulations with our new world leading targets, particularly the 2030 species abundance target, and our binding international obligations.”

Habitats (3)

- 113(3) and (4) state that regulations may impose requirements with regard to biodiversity, environmental improvements, or any other requirements/objectives relating to “the conservation or enhancement of biodiversity” that the SoS thinks appropriate
- 113(6) requires SoS making regulations to “*have regard to the particular importance of furthering the conservation and enhancement of biodiversity*”
- 113(5) allows amendments to other provisions in the 2017 Regs which “refer to requirements, objectives or provisions of the Directives”
- Procedural requirements including not permitting regulations under cl. 113 to come into force before 1.2.23
- Cl. 114 permits amendments to Part 6 of the Habitats Regs but within the context that it again requires the SoS to “*have regard to the particular importance of furthering the conservation and enhancement of biodiversity*”
- 114(3) only permits regulations if SoS “satisfied that the regulations **do not reduce the level of environmental protection provided by the Habitats Regulations**” and (7) requires an explanation of this to be laid before Parliament

Habitats (4)

- The September 2021 policy paper notes -
 - “Where the evidence suggests that amending the Regulations can improve the natural environment, make the processes clearer and more legally certain to help recover the condition of our sites, we will have the means of doing so swiftly. Defra plans to publish a Nature Recovery Green Paper before the end of the year. The paper will set out our approach to driving nature recovery and provide the primary vehicle for developing and engaging on our future plans and proposals.”
- See also Expl Notes §956. It is not clear what is legally uncertain about Part 6. The provisions are very rigorous (*R. (Champion) v North Norfolk DC* [2015] 1 W.L.R. 3710) and have generated issues e.g. with regard to new development and nutrient impacts on protected waters (e.g. *R (Wyatt) v Fareham BC* [2021] EWHC 1434 (Admin)), but the issue does not appear to be one of legal certainty.
- Contrast the Government’s *Report of the Habitats and Wild Birds Directives Implementation Review* (March 2012) which focused on streamlining the procedure. Para 11 noted:
 - “11. It is vital that we maintain the integrity of the purpose of these Directives. In the vast majority of development cases, where major problems do not arise, it is important that the authorisation process under the Directives is as easily understood, accessible and efficient as possible. In those **relatively few cases in which problems arise**, for one reason or another, there can be unwelcome delays and additional costs for developers, uncertainty for the local communities and the environment, and a risk of clouding the reputation of the Directives as a whole...”

Habitats (5)

- Cl. 115 introduced on the last day of the Report Stage by Lord Krebs and seeks to impose a further non regression restriction to permit regulations only to be made under 113 and 114:
 - “(a) for the purposes of—
 - (i) securing compliance with an international environmental obligation, or
 - (ii) contributing to the favourable conservation status of species or habitats or the favourable condition of protected sites;
 - (b) if the regulations **do not reduce the level of protection provided by the Habitats Regulations, including protection for protected species, habitats or sites;** and
 - (c) following public consultation and consultation with—
 - (i) the Office for Environmental Protection,
 - (ii) Natural England,
 - (iii) the Joint Nature Conservation Committee, and
 - (iv) other relevant expert bodies.”
- The Government opposed cl. 115

Habitats (6)

- **Lord Krebs**
 - “Amendment 99 would replace this subjective test, whereby Ministers mark their own homework, with an objective requirement. The Minister pointed out that the Secretary of State’s judgment could be challenged in the courts, but that seems to me to be setting up a system that would generate money for lawyers and take up large amounts of time with uncertain outcomes. Why not simplify with Amendment 99? The Minister said that the Government would consult the office for environmental protection before making any changes to the habitats regulations. Amendment 99 extends the consultation requirement to include other relevant bodies. He also referred to a review led by the noble Lord, Lord Benyon, but did not tell us who was consulted in this review and what its impact will be.”
- **Lord Goldsmith**, opposing the amendment
 - “A clearer, quicker and more easily understood process will support environmental protection by focusing on the issues that really matter for protected sites. I am reminded that Lord Justice Sullivan, when the regulations were formulated, recommended that we needed a system that was simple and not too full of hurdles that could end up causing excessive battles in the courtrooms. It feels to me that, in part, that is where things have ended up.

Habitats (7)

- He added:
 - “However, I can commit to this House that no changes will be made without extensive consultation and strong parliamentary scrutiny. Consultation will include the office for environmental protection and statutory nature conservation bodies. It will also include key environmental NGOs, farmers and land managers to name a few. Those commitments are reinforced in Clauses 108(5) and 109(3), so that, in making regulations using these powers, Ministers must be satisfied that they do not reduce existing protections. In addition, we have added a specific requirement that Ministers justify to Parliament that any new regulations using these powers meet the test. This is a meaningful scrutiny mechanism with strong safeguards ensuring that we will not reduce the level of environmental protection.”
- But –
 - “have regard” duty – a weak duty
 - SoS “satisfied” though has to explain why – what if protection of specific habitats, species or sites may be eroded through the adoption of a different approach?
 - Regulations to guide the making of regulations
 - Interrelationship with new conservation strategies?
 - How far can you go in simplifying ecology and science in any event?

Conservation strategies: Part 6 cls. 105-112

Local nature recovery strategies: cl. 105-109

- Cls. 105-109 Local nature recovery strategies
- Cls. 105 - 6
 - Together are to cover whole of England
 - Published by whichever “responsible authority” appointed by SoS (local authority, mayors, NPA, Broads A, Natural England)
 - To be reviewed from time to time
 - Regulations to provide procedure
- Cl. 107 Content – biodiversity priorities for the strategy area (see 107(2) and local habitat map(s) of national conservation sites, nature reserves and any site which are or could become of particular importance for biodiversity or where recovery or enhancement of biodiversity could make a particular contribution to other environmental benefits (107(3))
- Duty to have regard in making to any SoS guidance as to information to be included within a strategy or as to other matters to be included in it

Species conservation strategies: cl. 110

- Defra Policy Note - “a new mechanism to safeguard the future of particular species at greatest risk. The strategies will find better ways to comply with existing legal obligations to protect species at risk and to improve their conservation status.”.
- SCS may be published by Natural England (and reviewed subsequently) with regard to any species of flora or fauna and may (cl. 110(4))
 - Identify areas or features in the strategy area of importance to conservation of the species
 - Identify priorities regarding conservation or enhancement of habitats
 - How NE proposes to exercise its functions in the area to improve the conservation status of the species
 - Include NE’s opinion on
 - the giving of approvals or consents by other public authorities which might affect the conservation status of the species within the area
 - Measures appropriate to take to avoid, mitigate or compensate for adverse impact of the conservation status of species in the area that “might arise from a plan, project or other activity”
- LPAs and any prescribed authority must cooperate with NE in the preparation and implementation of SCSs so far as relevant to their functions (110(6)). Does “cooperation” include compliance with advice regarding approvals and measures? Relationship to local plans? SoS may given guidance as to the discharge of this duty (110(7)).

Protected site strategies: cl. 111

- Similar to cl. 110, NE given wide powers in respect of local area issues. NE may publish (and amend) a strategy to improve the conservation and management for a protected site to to manage the impact of plans, projects or other activities (wherever undertaken) on the conservation and management of the protected site. The Expl Notes give SANGS as an example (§917).
- Protected sites (England only) = European sites, SSSIs, marine conservation zones
- PSS may include NE's opinion on
 - (a) include an assessment of the impact that any plan, project or other activity may have on the conservation or management of the protected site (whether assessed individually or cumulatively with other activities),
 - (b) include Natural England's opinion on measures that it would be appropriate to take to avoid, mitigate or compensate for any adverse impact on the conservation or management of the protected site that may arise from a plan, project or other activity,
 - (c) identify any plan, project or other activity that Natural England considers is necessary for the purposes of the conservation or management of the protected site, and
 - (d) cover any other matter which Natural England considers is relevant to the conservation or management of the protected site.
- Consultation under 111(5) with public bodies, only with the public or a section of it if NE considers they should be consulted (111(5)(g)). Contrast mandatory consultation with landowners for SSSIs under WCA 1981.

Protected site strategies (2)

- Bodies consulted must cooperate in the preparation of a PSS so far as relevant to their particular functions (111(7)). SoS may give guidance on the discharge of that duty to cooperate
- 111(10) “A person must have regard to a protected site strategy so far as relevant to any duty” under the Habitats Regs 2017, ss. 28G-28I WCA 1981 and ss. 125-128 Marine and Coastal Access Act 2009.
- The new strategies are potentially more far-reaching than the policy or notes suggest, these confer a greater extent of power on NE in respect of decisions respecting species, and protected sites, which are intended to be more influential on local authority decision and plan making than at present. The various duties to cooperate (not a particularly successful concept in plan-making) given rise to a number of uncertainties and scope for dispute and the effect on local decision-making may be significant. See the new duty on public authorities in cl. 103, adding s. 40(A1), (2A)-(2B) NERCA 2006.
- Appear to place greater burdens on LAs and NE whenever current circumstances suggest that this is unwise unless the strategies are seen as a means for NE to give their views for a local area in an omnibus form to dictate the course of decisions and plans – though with an apparently lesser degree of accountability than at present. It appears to permit the imposition of more control with regard to SSSIs than under the WCA
- The relationship between the new strategies and existing species and habitats protection is not clear and the new may presage a reduction in the manner of protections afforded by the existing mechanisms given the apparent overlap in concepts in cl. 110 and 111 and the powers under cls. 113-115 under the guise of finding a “better way”.

Trees: Part 6 cls. 116-118

- Cl. 116 Controlling tree felling – Sched 16 amends the Forestry Act 1967
- Cl. 117 Enhanced protection standard for ancient woodland to be implemented by Government which must set out the steps necessary to prevent further loss of ancient woodland in England which includes refusing development that causes direct loss of ancient woodland unless there are “wholly exceptional reasons” and for the creation of buffer zones (20m minimum) and protection of ancient or veteran trees
- Cl. 118 Consultation with the public before highway authorities fell street trees. New duty on highway authorities (s. 96A Highways Act 1980) to consult with local communities before felling street trees, unless the trees qualify for certain exemptions, e.g. the tree is dead, it is of limited size, required to be felled under the Planning Act 1967 or for other purposes e.g. to make reasonable adjustments or to avoid discrimination under the Equality Act 2010 because the tree is causing an obstruction
- Guidance is to be provided for local highway authorities with regard to their consultation duty.

Thank you for listening

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