



Department
for Environment
Food & Rural Affairs



Foreign, Commonwealth
& Development Office

The Rt Hon the Lord Goldsmith of Richmond Park
Minister of State

13 July 2021

To: All Peers

My Lords,

Day 6 of Committee Stage for the Environment Bill

Thank you to all noble Peers who took part during the sixth day of Committee Stage for the Environment Bill on 7 July. In this letter, my noble friend Baroness Bloomfield of Hinton Waldrist and I would like to respond to points and questions that were made which we were unable to address during proceedings, due to time restraints.

Flood Strategy

The noble Baroness Hayman of Ullock (along with Baroness McIntosh of Pickering, Baroness Bennett of Manor Castle and Baroness Bakewell of Hardington Mandeville) raised the important issue of flood risk. In 2016, the government and insurance industry launched Flood Re, a reinsurance scheme designed to improve the availability and affordability of flood insurance for UK households at flood risk. In 2020/21, Flood Re provided flood cover for over 218,000 household policies, and since its launch more than 350,000 properties have benefitted.

Whilst Flood Re is widely available there are certain properties that are ineligible, including new properties built after 1st January 2009. Changes to planning policy in 2006 set out that inappropriate development in areas at risk of flooding should be avoided. The government is aware of the challenge of needing to build more homes and ensure they are resilient to all sources of flood risk, building the right properties in the right places.

Flood risk is already an important consideration in the planning system and there are strong safeguards in place, helping direct development away from areas at greatest risk of flooding now and in the future. The government's National Planning Policy Framework is clear that local planning authorities must consider the strict tests that protect people and property and where they are not met the development should not be allowed. All new development should be made safe for its lifetime and not increase flood risk elsewhere.

Office for Environmental Protection and Flooding

The Office for Environmental Protection has broad monitoring and enforcement powers in respect of environmental law and will be able to consider on a case-by-case basis whether an issue related to flooding is covered by the definition of environmental law in the Bill.

Where legislative provisions related to flooding are mainly concerned with environmental protection, they would fall within the definition of environmental law, and therefore the scope of the OEP. However, there may be some flooding legislation which is mainly concerned with matters other than environmental protection, and these provisions will not be included in the remit of the OEP.

For example, flooding legislation which is mainly concerned with preserving economic development or commercial activity would not necessarily fall within the scope of the OEP. For instance, Part 4 of the Water Act 2014 which concerns Flood Insurance clearly relates to flooding but would not constitute environmental law.

Storm Overflows Taskforce

The noble Duke of Wellington asked about the estimated cost of the Storm Overflows Taskforce. Early indications from the Taskforce are that elimination of storm overflows would cost in excess of £150bn, but this may be significantly higher depending on the method of elimination chosen.

The Defra-led Storm Overflows Taskforce has commissioned research to gather evidence on the costs, benefits and feasibility of different options. This research project is due to be completed this summer and the findings published. This research and other work from the Storm Overflows Taskforce will inform the Government plan to reduce the frequency and impact of storm overflows and deliver improvements for both customers and the environment. The Government plan will be based on evidence, and subject to consultation and impact assessment. This will ensure that the costs of implementing the plan are proportionate and that it will achieve the desired outcome for stakeholders and government.

Nationally Significant Infrastructure Projects (NSIPs) Biodiversity Net Gain, and Town and Country Planning Act Schemes

My noble friend Lord Blencathra raised some points on technicalities surrounding NSIPs. Major infrastructure projects provide vital benefits to the public, and it is important that this requirement is brought forward in the right way. Government does, however, recognise the benefits of applying Biodiversity Net Gain consistently to reduce complexity and maximise consistency. As drafted, the clauses will require NSIPs to deliver a 10% net gain in biodiversity relative to their pre-development baseline, as is the case for the requirement as it applies to Town and Country Planning Act development. However, government has been clear that the approach may need to be tailored where necessary to ensure compatibility of the requirement with the NSIP planning regime. Therefore, we have developed a flexible approach that will enable us to consult with stakeholders and ensure that the approach can deliver its potential environmental, social and development process benefits.

A number of Lords requested reassurance on the length of time the schemes will last. There are good reasons that the Government does not wish to introduce the biodiversity gain requirement with an obligation for perpetual compensation agreements, and these have been stated already in the passage of this Bill. The government has listened to both sides of this debate and recognises that the right answer to this question might be different for major infrastructure. It has therefore left the issue of agreement duration as it pertains to major infrastructure open to further consultation.

I can confirm that it is not government's intention, subject to consultation, to require a shorter duration from major infrastructure development than will be asked of development consented under the Town and Country Planning Act.

Biodiversity Metric

My noble friend Lord Blencathra asked about the biodiversity metric. The Government believes that the metric is a robust method for calculating net gain and is appropriate for use in relation to a wide variety of development types including many nationally significant infrastructure projects.

However, it is important to engage with stakeholders to ensure that the biodiversity metric will continue to provide positive outcomes across the different types of infrastructure that come forward through the nationally significant infrastructure regime, before mandating its use. For example, it might be necessary to make additions to the guidance with respect to determining the proximity of

off-site enhancements to the site when the site is a large linear project spanning multiple planning authority areas.

Guidance and Regulations on Irreplaceable Habitats

The noble Baroness Young of Old Scone and the noble Lord Hope of Craighead asked for assurance that the guidance and regulations on irreplaceable habitats will not allow projects that are not delivering biodiversity net gain to portray themselves as net gain projects.

We understand that net gain cannot be achieved where irreplaceable habitat is lost, and projects which result in loss or damage to irreplaceable habitat cannot make claims of net gain for the project as a whole. Development of irreplaceable habitats should only take place in wholly exceptional circumstances, in line with national planning policy. In such circumstances, whilst the 10% biodiversity gain requirement will not apply to these losses, bespoke arrangements will be needed as part of a suitable compensation strategy.

Detailed regulations will need to be in place to provide sufficient guidance on how the biodiversity gain condition will apply to irreplaceable habitat. Before making an order under this power the Department intends to engage stakeholders to determine appropriate arrangements for irreplaceable habitat.

The Government and HS2 Ltd recognise that ancient woodland is an irreplaceable resource. Ancient woodland, and all associated compensation, is excluded from the current HS2 no net loss biodiversity calculations and will continue to be excluded from HS2's net gain goal. Instead, where there is unavoidable loss of ancient woodland, this will be addressed through a range of bespoke compensatory measures. For example, on Phase One, this has included creating new native broadleaved woodland, enhancing linkages between ancient woodlands, and helping to restore ancient woodland sites. HS2 Ltd have also been actively engaging with stakeholders such as the Woodland Trust and have committed to publishing annual reports setting out its impacts on ancient woodland and its mitigation measures.

Mitigation Hierarchy

The noble Baroness Young of Old Scone sought assurance that the mitigation hierarchy would remain a requirement of the planning system and that there will be sufficient safeguards to ensure that offsite net gain remains the last resort under the net gain an planning provisions. The biodiversity gain plan provisions will require developers to provide information about the steps taken to minimise adverse effects on biodiversity.

This information can then be judged against existing national and local planning policy relating to the mitigation hierarchy. Planning authorities will therefore be more able to support the mitigation hierarchy when determining the planning application itself.

The biodiversity metric used to calculate biodiversity net gain considers the risks of creating new habitats and recognises the delay between habitat losses and future gains. It therefore incentivises retention and enhancement of existing habitats and supports the mitigation hierarchy.

Under the current National Planning Policy Framework, plans should: identify, map and safeguard components of local wildlife-rich habitats and wider ecological networks, including designated sites of importance for biodiversity and areas identified by national and local partnerships for habitat management.

The Government's White Paper on planning reform was clear that we will continue to protect places of environmental value, but also want the reformed system to play a proactive role in promoting environmental recovery and long-term sustainability.

Whilst we want the planning process to be shorter and more streamlined, we will not do so by cutting corners. Therefore, to improve certainty, we intend to strengthen the emphasis on a planned approach in legislation so that the development plan remains at the heart of the planning system. There will still be an expectation that local authorities consider relevant information in preparing their plans, including the spatial information provided by Local Nature Recovery Strategies which will help avoid impacts on biodiversity and identify opportunities for enhancements.

Biodiversity Net Gain Duration

The noble Baroness Young of Old Scone asked for reassurance that habitat created in the interest of biodiversity net gain will not be destroyed after 30 years. Government will require off-site net gain outcomes to be maintained for a minimum of 30 years after its creation and will encourage longer term protection.

In practice, a 30 year minimum can sometimes amount to funding for conservation management in perpetuity if the funds for 30 years are invested prudently. We expect that the majority of offsite habitat created through net gain will remain in place and there are a range of protections and incentives that could apply according to the habitats created and their quality.

In the unlikely event that development does take place on a biodiversity gain site in future, we want to make sure that the promised biodiversity on that site is taken into account and any losses are properly compensated for. Therefore, the predicted enhanced habitat on a compensation site must be taken as the baseline for any future development subject to the net gain requirement on that site, leading to 10% additional gain each time. Where the actual habitat quality is even higher than the predicted target condition, the actual quality should be used as the baseline.

Biodiversity Net Gain failure due to natural reasons

My noble friend the Earl of Caithness asked what would happen if a net gain plan failed as a result of nature itself. Off-site biodiversity gains will be secured with either a planning obligation or conservation covenant. Whilst these should be drafted in a robust and specific way, they should allow for reasonable adjustment if the parties to the agreement are content.

Nature rarely fails to create a habitat, even without intervention, but it can be very stubborn about what habitat appears in a given place. This is why 'adaptive management' is often spoken of with biodiversity net gain in practice. In the example given, we would expect the land manager to explain the situation to the responsible body or planning authority and find an alternative suitable management scheme that will benefit biodiversity and is more suited to the local climatic conditions.

HS2 and Biodiversity Net Gain

The noble Lord Hope of Craighead raised several technical queries on HS2. The High Speed Rail, London to West Midlands, Act and West Midlands to Crewe Act received Royal Assent in 2017 and 2021 respectively. These schemes are now in detailed design stage, therefore the scope of these Acts cannot be substantially changed in response to new legislation. The Department for Transport are looking at how HS2 might enhance the existing 'No Net Loss' objective, by identifying and implementing appropriate opportunities, where it is reasonably practicable, to move towards net gains in biodiversity. There are good examples of significant gains for nature and 'local' net gains in Phases 1 and 2a of HS2. Two such examples are the Colne Valley Western Slope, a new 127 hectare nature reserve, and the Trent Sow Parklands.

The next phase of the scheme, Phase 2b from Crewe to Manchester, has already committed to aim to deliver a net gain for biodiversity. However due to the advanced stage of design for HS2 Phase 2b, applying the requirement as set out in the Environment Bill would result in legislative

delays and further costs to the scheme for little or no gain in outcomes. We are considering how the requirement should apply to any future phases of HS2.

Planning Reform

The noble Baroness Young of Old Scone asked about the Government's plans for planning reform. The Planning for the Future White Paper specifically sets out support for biodiversity net gain and rightly identifies improving biodiversity as one of our most important national challenges. The 25 Year Environment Plan will be adopted as the first statutory Environmental Improvement Plan through the Environment Bill. Here, we commit to seek to embed environmental net gain, of which biodiversity net gain is an important component, throughout the planning system.

I can reassure Lords that we have no intention to reverse the commitments laid out in the 25 Year Environment Plan. MHCLG and DEFRA will work closely together on the implementation of biodiversity net gain to ensure it is fully integrated into the new planning system.

I can also confirm that when a major infrastructure project is brought forward after commencement of the biodiversity gain provisions, for example, through a hybrid bill, and granted deemed planning permission under the Town and Country Planning Act 1990, this will be subject to the biodiversity gain condition unless specifically exempted in its hybrid bill.

As the Secretary of State for MHCLG, Robert Jenrick recently said at the Local Government Association conference, the government expects to be responding in the autumn to the White Paper and then bringing forward legislation when parliamentary time allows.

Carrion

My noble friend Lord Lucas suggested the possibility of leaving cattle or sheep carcasses to be consumed in the wild. I see the value of his proposition and am grateful for the papers he provided.

The concern of course is that deceased kept animals have the potential to pose a high risk of disease to other farmed animals, wild animals and public health. Removing and disposing safely of these carcasses is a key component to preventing disease including Transmissible Spongiform Encephalopathies (BSE in cows, scrapie in sheep and chronic wasting disease in deer). These diseases can persist for very long periods and be carried by asymptomatic animals, which appear healthy at the point of death. Cases cannot be confirmed or ruled out without testing the animal's brain. Transmissible Spongiform Encephalopathies prions are extremely robust and can survive in the environment for many years, with the potential to contaminate soil and watercourses.

In addition, kept animals may have been treated with veterinary medicines that can be dangerous for wild animals feeding from their carcasses, as has already been seen in other countries.

Habitat degradation and Biodiversity Net Gain

The noble Lord Oates asked about the degradation of habitats before planning permission is granted or surveys undertaken. This is a practice that we have heard about from stakeholders, and a risk that government was keen to address through the new biodiversity net gain requirement. Within Schedule 14 of the Environment Bill, which sets out the biodiversity gain condition for Town and Country Planning Act development, we have included measures that allow planning authorities to recognise any habitat degradation since 30 January 2020, and to take the earlier habitat state as the baseline for the purposes of biodiversity net gain.

For example, if a habitat was ploughed in August 2020, the planning authority would be able to seek compensation for the habitat as it was in June 2020, rather than the degraded habitat present in August. This system will take effect when the biodiversity gain requirement in the Environment Bill is commenced. We recognise that this resolution will require clear guidance and access to

habitat records. We intend to produce guidance on how this will work and which data sources may be of assistance in demonstrating the former value of any degraded or destroyed habitats.

It's important to note that there are also existing protections that apply. A number of our most threatened species are protected by law under the Wildlife and Countryside Act 1981. For example, it is an offence to kill or injure or take any wild bird; take, damage or destroy the nest of any wild bird (while that nest is in use or being built); and take or destroy an egg of any wild bird. Legal protection for hedgerows is provided by the Hedgerows Regulations 1997. These Regulations seek to control any potential removal of countryside hedgerows, requiring notification of intended removal. Hedgerows which are assessed by the local planning authority as 'important', based on their archaeological, historical, wildlife or landscape value as set out in the Regulations, must be retained.

Steam Trains

I am aware that a number of Lords remain concerned about the impact of the Bill on the heritage rail sector, in particular steam trains. I would like to add further detail to my previous letter on 6 July. Clause 72 and Schedule 12 of Environment Bill will make it easier for local councils to enforce the Clean Air Act 1993, which regulates smoke emissions from the chimneys of buildings. The Clean Air Act 1993 does not apply to smoke from steam trains, and this will not change. Nor will the Bill's vehicle recall measures be applicable to steam trains, in line with what was set out in my previous letter. I hope this further reassures Lords that this Bill will not impact upon the heritage rail sector, and therefore an express exemption is not required. I would like to reiterate the Government's commitment to the heritage rail sector.

I hope that Peers find these responses to be useful. I am copying this letter to all Peers who took part in Wednesday's debate, and I am arranging for copies to be placed in the Libraries of both Houses.

Yours sincerely,

THE RT HON THE LORD GOLDSMITH OF RICHMOND PARK