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The Rt. Hon. Angela Rayner MP
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2 May 2025

By e-mail (to angela.rayner.mp@parliament.uk)

Dear Secretary of State

Planning and Infrastructure Bill

I am writing in relation to the Planning and Infrastructure Bill (the bill). This letter follows several helpful meetings with your officials. It concerns our advice on proposed changes to environmental law contained in Part 3 of the bill.

We welcome your intention for the bill to secure better outcomes for nature, at the same time as accelerating necessary development. We also recognise government's ongoing commitment to nature's recovery, which will be so vital to meeting the Environment Act's legally binding targets, the first of which fall due within the next few years.

Much of what the bill is seeking to achieve would be beneficial, if well implemented. We welcome the proposed join-up between Environmental Delivery Plans (EDPs) and both the Environmental Improvement Plan and Local Nature Recovery Strategies, for example. Equally, taking a more strategic approach to addressing environmental challenges such as nutrient overloading has much to commend it. We wish to see that strategic approach succeed, to deliver co-ordinated action that improves nature at the appropriate geographical scale.

We are, however, concerned by several aspects of the bill which undermine its potential to deliver intended win-win outcomes. We recognise that the EDP system is intended to be a different approach, not a direct comparator to existing environmental law. There are, though, fewer protections for nature written into the bill than there are under that existing law. Creating new flexibility without sufficient legal safeguards could see environmental outcomes lessened over time. And aiming to improve environmental outcomes overall, whilst laudable, is not the same as maintaining in law high levels of protection for specific habitats and species.

In our considered view, the bill would have the effect of reducing the level of environmental protection provided for by existing environmental law. As drafted, the provisions are a regression. This is particularly so for England's most important wildlife - those habitats and species protected under the Habitats Regulations.

We summarise two particular concerns below, and provide further detail on these matters and other aspects of the bill in the annex to this letter.

A principal area of concern lies with the framing of the bill's 'overall improvement test' for adopting EDPs. This test rests on a balancing exercise to decide whether negative environmental effects of development are likely to be outweighed by conservation measures taken under an EDP. As drafted at the moment, that exercise would allow considerably more subjectivity and uncertainty in decision-making than under existing environmental law. We advise that the overall improvement test should be strengthened to address this.

The bill as drafted also allows for conservation measures to be located away from the protected sites affected by development. Currently, this is only permissible in limited circumstances and where the overall coherence of the protected site network is maintained. Such safeguards are absent from the bill. Undermining the network of protected sites could affect the Government's ability to meet its legally binding biodiversity targets and '30 by 30' objectives. We advise that the lack of safeguards for the overall sites network is rectified, given the role they play in efforts to meet statutory nature targets.

In our view, the proposed reductions in legal protections for the environment can be ameliorated in large part by acting upon our advice. This would make a material difference to the prospects of government achieving more for nature whilst also streamlining and speeding up planning decisions. It is in this context that we set out our detailed advice (see Annex) for your consideration.

We trust that you will find this helpful in supporting your ambitions for the bill. We will publish this letter in accordance with section 30 of the Environment Act 2021.

Yours sincerely,

Dame Glenys Stacey
Chair of the Office for Environmental Protection

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Annex

The OEP offers the advice below, and in the covering letter to this annex, about changes to environmental law proposed by ministers in Part 3 of the Planning and Infrastructure Bill (the bill), introduced to Parliament on 11 March 2025. This advice is given under s.30(3) Environment Act 2021.

1. Priority aspects of the bill relevant to maintaining environmental protection

a) Overall Improvement Test (clause 55(4))

The 'overall improvement test' must be met for the Secretary of State to make (or amend) an Environmental Delivery Plan (EDP) which, subject to payment of a levy, developers may then rely on to proceed with development that impacts certain environmental features. The test is therefore a crucial legal safeguard to secure environmental protection within the proposed EDP system.

In this advice we do not address the strength of the test as compared to the approach under the Wildlife and Countryside Act 1981 for sites of special scientific interest. Rather, our focus here is on "European sites", protected under the Conservation of Habitats and Species Regulations 2017. Regulation 63(5) of those regulations is as follows (emphasis added):

> *…the competent authority may agree to the plan or project **only** after having ascertained that it **will not adversely affect** the integrity of the European site...*

Ascertaining that adverse effects 'will not' occur entails a high degree of certainty based on an objective assessment. It is interpreted by the courts as requiring that assessments must not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of a plan or project on European sites.

By contrast, the overall improvement test is (emphasis added):

> *An EDP passes the overall improvement test if the conservation measures are **likely to be sufficient to outweigh** the negative effect, caused by the environmental impact of development, on the conservation status of each identified environmental feature.*

This envisages consideration of what is 'likely', and that the decision-maker weighs up the predicted effects of development against those of proposed conservation measures to determine which they believe to be 'sufficient' to 'outweigh' the other. This may involve considering impacts and/or conservation measures arising ten years or more into the future (clause 49(7)) and comparisons that are not like for like: conservation measures need not directly address the environmental impact of development (clause 50(4)). Such an

exercise would be considerably more subjective and uncertain than under existing environmental law.

Further, the explanatory notes to clause 55 (paragraphs 622 and 624) provide that the Secretary of State "*will assume that all conservation measures proposed in [an EDP] are fully implemented*". Making that assumption, regardless of any contrary evidence, would not rest on objective, scientific justification. Disregarding risks to delivery would also be contrary to approaches in other contexts, for example that for drawing up the Carbon Budget Delivery Plan identified in the recent case of *Friends of the Earth v Secretary of State for Energy Security and Net Zero* [2024] EWHC 995 (Admin). As in that case, assessing identifiable risks to delivery should be part of any sound decision-making process.

We recognise that the overall improvement test would not exist in isolation but operate alongside other aspects of the bill, including those covered elsewhere in this advice. Nevertheless, the test sets the baseline that all EDPs must meet so is the crux of environmental protections under Part 3 of the bill. This is illustrated by the fact that Natural England would need to have regard to economic viability when drawing up EDPs (clause 64(1)). This factor should not directly affect EDP adoption, which would still be subject to the overall improvement test. That said, given the points above, the test as currently drafted could be susceptible to compromises based on economic considerations. Such compromises are not necessarily objectionable. A truly robust legal test is, though, essential to guard against them undermining levels of environmental protection.

Another example: ecological features that are particularly threatened, irreplaceable and non-substitutable (for example, ecologically significant sites, habitats and species) are not excluded from the scope of EDPs, but instead will rely on the proper functioning of the overall improvement test to ensure their adequate protection.

We also recognise that the overall improvement test would consider whether conservation measures are likely to *outweigh* certain environmental impacts of development rather than just lead to their mitigation or compensation, as is the current assessment approach. However, the current approach also does not exist in isolation. It must be viewed alongside other existing environmental laws. These include legal requirements on developers and government relevant to ensuring certain environmental impacts of development are outweighed, i.e. that the conservation status of protected sites and species improves notwithstanding those impacts. Requirements exist on a project-specific basis (biodiversity net gain) and overall as obligations on government (regs 9 and 10 Habitats Regulations; s.28G Wildlife and Countryside Act 1981).

Maintaining levels of protection provided for by existing environmental law

To secure government's intent of not reducing levels of protection provided for by existing environmental law, the overall improvement test should be strengthened with respect to its application to EDPs relating to European sites. Specifically, the high degree of subjectivity and uncertainty currently allowed for in meeting the test would need to be addressed. This might be, for example, by providing that consideration of whether conservation measures are 'likely to be sufficient to outweigh' impacts of development be based only on objective information without gaps or weaknesses and conclusions reached based on matters being beyond reasonable scientific doubt.

b) Mitigation hierarchy (clause 50(3) and (4))

Mitigation hierarchies are an important component of existing environmental law. For present purposes we focus on the mitigation hierarchy under the Habitats Regulations rather than the Wildlife and Countryside Act 1981.

Under those regulations the default approach is to avoid or mitigate harm from development. If this cannot be achieved, and *only* where there are no alternatives *and* imperative reasons of overriding public interest exist, does exiting environmental law permit compensatory measures to be taken instead. These can be at another geographical location, but they must ensure the overall coherence of the European sites network.

By contrast, the bill does not limit the instances in which this kind of compensatory approach may apply. The breadth of the term 'conservation measures' in clause 50(3) of the bill is such that there is no requirement to distinguish between avoidance, mitigation and compensation. Clause 50(4) provides that conservation measures need not address the impact of development at the relevant protected site but may instead seek to improve the conservation status of the site's protected features elsewhere.

The effect of this drafting is that the law could allow a protected site to be harmed in such a way as to affect its integrity, even in an extreme case to be destroyed entirely, in reliance on compensatory measures to be implemented elsewhere and where alternatives exist, or overriding public interests are absent. There is no requirement for the EDP system to ensure the overall coherence of the European sites network.

Maintaining levels of protection provided for by existing environmental law

To secure government's intent of not reducing levels of protection provided for by existing environmental law, provision should be made to apply a mitigation hierarchy. This might be by the bill requiring, for example, that implementing conservation measures relating to European sites must in the first instance be focused on those measures that avoid or mitigate negative effects on the

protected features in question. Compensatory measures (in the sense of those that make improvements at other locations) might then be permitted only in circumstances of a similarly exceptional nature to existing environmental law. Consideration should also be given to impacts on the extent and coherence of the national site network.

c) Powers of amendment (clause 76(2))

Clause 76(2) would give the Government power to make changes to legislation - primary and secondary - that are related to or consequential on Part 3 of the bill. This would allow the potential for further reduction of levels of legal protection to occur with limited Parliamentary scrutiny.

This would be avoided were the power in clause 76(2) restricted to making only those changes to legislation which do not reduce levels of environmental protection provided for by existing environmental law.

2. Other aspects of the bill relevant to environmental protection

a) Clause 50 concerns conservation measures. The bill is silent as to when conservation measures must be implemented and by when they must be effective. This gives rise to the possibility of significant impacts on the conservation status of protected species or sites arising before the successful implementation of conservation measures. This is not present under existing environmental law (regulation 63 of the Habitats Regulations 2017). Where compensatory measures are agreed (regulation 68), these should usually be in place and effective before the negative effects occur. A timescale for delivery of the conservation measures should be a mandatory requirement of an EDP.

b) Clause 52 concerns the requirements of an EDP, including at clause 52(1) the baseline conservation status of environmental features. This is to be determined as at the EDP start date, not when development permission is sought, and there could be a lag of over ten years between these events. There is an ongoing obligation to restore European sites to favourable condition, so site condition may well be improving over time. This drafting should be addressed to tackle the risks of setting a baseline which is out of date at the point of impact resulting in inadequate conservation measures being prescribed.

c) Clause 53 concerns preparation of EDPs. It requires Natural England to have regard to certain plans and strategies when preparing a draft EDP. Those documents need not cover the conservation objectives of protected sites or species to which they apply, nor their trajectories to achieve their desired conservation status. There is, therefore, no requirement in the bill for these matters to be considered when preparing an EDP. This is in contrast to existing environmental law. When assessing impacts upon a European site, the decision

maker must make their assessment ‘in view of that site’s conservation objectives’ (regulation 63 of the Habitats Regulations 2017). This should be addressed to avoid EDPs undermining ambitions for improving the conservation status of protected sites and species.

There is also no requirement for EDPs to address cumulative and in-combination effects, as currently required by the Habitats Regulations. This requirement should be included for EDPs insofar as they concern the protected features of European sites if existing levels of environmental protection in law are to be maintained.

d) Clause 58 concerns amendment of EDPs. The Secretary of State would have the power to amend EDPs on request by Natural England or on their own initiative. In either case the bill does not include a requirement to consult, including in the case of government-initiated amendments to consult Natural England. This differs from the adoption of an EDP, where consultation would be required (clause 54), and from approaches under existing environmental law. Although an EDP amendment would need to pass the overall improvement test, the lack of mandatory expert and third-party input risks weakened accountability and poorer-quality EDPs. This should be addressed by the bill requiring consultation, including with Natural England, before amendment to an EDP.

   Furthermore, the bill sets out no mandatory requirement to initiate the review and amendment of an EDP in instances where the relevant conservation measures are found not to be having the intended effect. The Secretary of State must simply revoke an EDP under clause 59(2) if they consider it no longer passes the overall improvement test, unless Natural England has proposed sufficient amendments. To increase certainty that EDPs deliver their intended outcomes in practice and over the course of their life, the mandatory course correction mechanisms set out within the bill should be improved. For example, if Natural England’s monitoring shows that an EDP risks no longer satisfying the overall improvement test or delivering in practice the intended outcomes, this should trigger consideration of additional steps, such as implementation of ‘back up’ conservation measures included pursuant to clause 50(4), or else amendment of the EDP to include further necessary measures. This would help ensure equivalence between the EDP approach and that under existing environmental law.

e) Clause 59 concerns revocation of an EDP. Where this happens, the Secretary of State would be required to carry out actions that seek to outweigh the negative effects previously covered by the EDP, with respect to any development for which a developer has already committed to pay the nature restoration levy. The requirement is only to ‘seek’ that negative effects are outweighed, making it possible that negative effects are in the event left unaddressed. To avoid reducing levels of protection provided for by existing environmental law the bill

should require a more certain approach to negative effects where an EDP is revoked.

f) Schedule 4, paragraphs 3 to 5 of the bill would disapply certain provisions of the Habitats Regulations, Wildlife and Countryside Act 1981 and Protection of Badgers Act 1992 in respect of EDPs. This would mean, for example, that deemed wildlife licences included in an EDP would not be subject to existing legal requirements under this legislation, whereas equivalent safeguards are not included in the bill instead (via the overall improvement test or otherwise).

Further, schedule 6, paragraph 42 would disapply the Environmental Assessment of Plans and Programmes Regulations 2004 entirely in respect of EDPs. This would mean there was no requirement for strategic environmental assessment, to holistically assess the environmental, climate and human health effects of a proposed EDP.

Disapplication of the legal safeguards contained in the above legislation would need to be addressed if the bill is to secure government's intent of not reducing levels of protection provided for by existing environmental law.