

## Environment Bill: briefing for Commons Committee

16 November 2020

### Response to proposed government amendments on Species Conservation Strategies, Protected Sites Strategies and Wildlife Licensing (Amendment 222 and New Clauses 25 to 27)

#### Introduction

The government has tabled an amendment (**222**) and two new clauses (**NC25** and **NC26**) that provide a legal basis for Natural England to establish strategies for species conservation and protected sites. These would require local and other public authorities to have regard to species conservation strategies and protected site strategies when exercising any relevant functions. This includes complying with their duties under sections of the Natural Environment and Rural Communities (NERC) Act 2006, the Wildlife and Countryside Act 1981, the Marine and Coastal Access Act 2009 and the Conservation of Habitats and Species Regulations 2017.

The Defra factsheet published to accompany the amendment and new clauses cites a number of strategic approaches to sites and species conservation developed by local authorities over recent years, including the District Level Licensing scheme for great crested newts. The amendments are proposed to provide “a legal basis for Natural England to prepare these strategies, in consultation with the relevant local planning authorities and others, to provide the necessary confidence in such schemes.”

The government has tabled **NC27** to amend existing licensing provisions under the Wildlife and Countryside Act 1981, including aligning current systems more closely with the Habitats Regulations in relation to criminal offences, providing for the possibility of new licences relating to development and allowing longer licences to be granted.

We assess the government’s proposals for species and site strategies and wildlife licensing changes below.

#### Species Conservation Strategies

Strategic approaches to species conservation are essential to preserving biodiversity and enabling nature’s recovery. This should include protecting, restoring, and creating habitat over a wider area to meet the needs of an individual species. 46% of conservation priority species in England [declined](#) between 2013 and 2018. Many of these species would benefit greatly from a strategic plan that resulted in all relevant public bodies taking appropriate actions to save and restore them.

We are deeply concerned that the primary outcome of species conservation strategies will not be species recovery, but faster development with lower standards. The bill would enable licensing systems to be used to allow the destruction of habitats and protected species, in return for new habitat creation elsewhere in the strategy area.

In an agreed strategy area, a developer could be licensed to proceed with activities that destroy habitat and species in return for contributing to habitat to support the wider population of that species. This would allow a developer to proceed without either

protecting every specimen of a protected species and without always undertaking site-specific survey work. This could speed up development and reduce costs. Implemented well, this could be a positive way to contribute to conservation purposes for certain species. On the other hand, where this strategic power to be managed badly or applied to inappropriate species, it could inadvertently become a shortcut to get round protected species obligations with uncertain consequences for the protection of that species.

Experience of the [operation](#) of existing licensing systems sustain these concerns, as do proposed approaches to other species not currently covered by them. The implementation of District Licensing for great crested newts has not been proven to be effective. Monitoring has been incomplete and the results have not been publicised; there is little evidence that this approach has protected the most important populations of newts from development, and the overall benefits for this important species are unproven.

We are concerned therefore that the government is seeking to advance the roll out of District Licensing around the country, with the proposed duty to cooperate likely to force the hand of local authorities, many of which are concerned about the effectiveness of the scheme. Considerably higher risks would come from extending this kind of approach to other species, which have very distinct conservation needs. As far as we are aware no assessment has been undertaken to establish which, if any, other species would be ecologically amenable to this or to similar approaches.

A number of clarifications and amendments are required to ensure that species conservation strategies deliver gains for nature rather than development and contribute to the achievement of Favourable Conservation Status for species and habitats:

- **New Clause 25** should be amended to ensure that each species strategy is required to identify priorities for the protection of habitats in addition to the existing priorities of ‘creation or enhancement’ of habitats. Purely focusing on enhancement, as is currently the case in the clause, would undermine the planning process by undervaluing the need to protect existing habitats.
- The clause should be amended to ensure that each strategy must give precedence to the mitigation hierarchy. This will give priority to avoidance of harm over destruction with mitigation and/or compensation.
- The clause should be amended to explicitly state that site surveys should still take place when existing data is inadequate to identify impacts on key species. Site surveys, covering features important to species as well as habitats, are particularly important for bats and invertebrates. Bat roosts, essential to species survival, and endangered insects on private sites, are easily overlooked and are often only detected in pre-development site surveys.
- The clause should include a duty, rather than a power, for Natural England to publish species conservation strategies for species listed under S41 of the NERC Act that are in decline or are persisting at unsustainable levels, where actions by any public body are likely to contribute to the recovery of that species. This would help to ensure that species conservation strategies focus on environmental need, rather than development need.

**These amendments would provide reassurance that species conservation strategies will not lead to detrimental outcomes for species.**

The further amendments set out below would help ensure that species conservation strategies make a positive contribution to species recovery:

- The evidence is clear that when authorities only have to have regard to wildlife that this is interpreted as thinking about, rather than taking, action. The wording of this duty in the amendment must be strengthened to ensure that authorities have to take actions that will contribute to the objectives of the species conservation strategy.
- Currently there is no duty to report on any biological outcomes, or on the status of species subject to a species conservation strategy. The new clause should be amended to ensure that there are clear responsibilities for monitoring and reporting on the status of species within the areas covered by strategies, with relevant data published to enable scrutiny.
- The wording of the clause should be amended to prevent the persistence of Species Conservation Strategies that cannot be shown to be improving the conservation status of the species. Any strategies failing in this regard should be revoked or replaced by a significantly strengthened strategy.

The following further assurances from the minister would also be welcome:

- Confirmation that, in every case, conservation gain and the method of achieving this within each strategy will be agreed by the Natural England species specialist and external NGO species leads before strategic approaches are applied. Species extinction risk and trends should be factored into these considerations.
- Confirmation that each strategy will be framed around the action needed to achieve specific conservation objectives and Favourable Conservation Status. These objectives will vary across species, with each species requiring a tailored approach based on species-specific needs and area-specific pressures.
- Confirmation that where species conservation strategies are used in cases of development planning that species needs will dictate the outcome, with the presumption of mitigation onsite or local to a site as a priority over offsite mitigation.
- Confirmation that biodiversity net gains will be additional to meeting legal and policy requirements within species conservation strategies.

### Protected Sites Strategies

If implemented well, **New Clause 26** on protected site strategies could make a valuable contribution to conservation in England's protected site network. 61% of SSSIs are [currently in unfavourable condition](#).

At the moment, sites are often harmed by the cumulative and/or indirect effects of successive developments with no strategic view of how these can be alleviated. Planning disputes often arise when a site is pushed to breaking point. Taking a more strategic view of the conservation needs of the site would help to mitigate those pressures in advance, ensuring that the needs of the ecosystem are considered as part of each individual application and in the round. Many sites are also affected by water extraction, pollution from nearby land, and a range of other activities that are regulated by public bodies that could be addressed in a coordinated way via a protected site strategy.

However, protected sites strategies must not serve as an excuse to destroy valuable habitat for development, or to forego the need for site-specific consideration, assessment and advice.

**We recommend the following amendments and assurances be made to confirm the purpose and clarify the content of protected sites strategies:**

- **New Clause 26** should be amended to make the preparation and publication of protected sites strategies for protected sites that are persistently in unfavourable condition a duty upon Natural England, rather than a power. This would help to ensure that sites strategies focus on environmental need, rather than development need.
- Confirmation should be provided that each strategy will be framed around the conservation objectives for the sites concerned as well as any other conservation considerations. Each strategy should be underpinned by a clear understanding of what successful achievement of those conservation objectives should look like for the sites. This should be accompanied by clear monitoring and reporting requirements.
- The clause should be amended to ensure that each strategy must give precedence to the mitigation hierarchy, allowing for habitat destruction and damage to still be prohibited in appropriate circumstances, including through the use of buffer zones. It should be clear that strategies cannot enable direct habitat loss on protected sites and that biodiversity net gains will be additional to meeting legal and policy requirements for protected sites.
- The duty for other authorities to have regard to a protected site strategy in relation to implementing the Conservation of Habitats and Species Regulations 2017, the Wildlife and Countryside Act 1981, or the Marine and Coastal Access Act 2009, should be expanded to include the Natural Environment and Rural Communities Act 2006 and strengthened to “take all reasonable steps to implement” the strategy, or similar.
- Confirmation should be provided that site specific impact assessments, at the time of planning or other consent applications, should still be carried out to ensure all impacts are identified and addressed. For example, the nitrate trading platform development cited in the Defra factsheet explaining the new clause only looks at nitrates, However, there are likely to be other environmental impacts that need consideration as part of the application process.

Overall, we are more optimistic about the potential of protected sites strategies to deliver for nature than we are about species conservation strategies. Our experience of initial protected sites strategies suggest that they can, if bolstered by the above suggestions, coordinate gains for nature across a coherent area.

### **Wildlife Licensing**

**New Clause 27** amends the way that licenses are granted for activities that would or could harm, disturb, obstruct or remove wild animals and wild plants species that are protected either under the Wildlife and Countryside Act 1981 (“Schedule 5” and “Schedule 8” species) or under Conservation of Habitats and Species Regulations (“the Habitats Regulations”) 2017 (“European Protected Species”).

These parallel systems are complex and involve lots of overlap. There is some merit in aligning them and the Law Commission published proposals for how this could be done in 2015. However, these particular changes are complex and have not been subject to consultation. We are concerned that they would weaken the protection for some species.

## Subsection 1

Subsection 1 would provide a general defence to anyone granted a licence by Natural England under regulation 55 of the Habitats Regulations for any actions that would otherwise be an offence under Section 9 of the Wildlife and Countryside Act.

The intention is to avoid duplication by ensuring that one regime covers activities included under both sets of regulations. We found that the application of this cause, notably in the context of the interpretation of the word “pursuant” to be unclear, for example the degree that the defence is intended to cover actions not explicitly identified in the wording of any licence or as replicated in both pieces of legislation. However, we consider this to be unnecessary, as a single licence can already be provided to cover both regimes.

The change could result in a licence under Habitat Regulations overriding the additional protection currently afforded by Wildlife and Countryside Act. For example, a licence to allow capture of natterjack toads under the Habitats Regulations could permit reckless disturbance of natterjack toads, which is otherwise prohibited under 9(4)(b) and 9(5) of the Wildlife and Countryside Act, but not under the Habitats Regulations.

We also question why this amendment would only apply to animals and not to plants. Protected plant species are also impacted by developments and creating two different licencing tests could be viewed as taxonomic bias and will unnecessarily further complicate wildlife law.

**We recommend that this amendment should not be made until further consultation has taken place.**

## Subsection 2

Section 16 of the Wildlife and Countryside Act currently allows harm and/or disturbance to, to obstruct or remove Schedule 5 protected animals and plants species for a list of specific purposes such as conservation, science, education and public health. Development is not currently listed as a reason. As a result, developments that result in damage or disturbance to protected species currently have to rely either on a conservation licence or on a general defence in for example Section 10(3)(c) that harm was an incidental consequence to otherwise lawful operations that could not reasonably be avoided.

Subsection 2 amends the Wildlife & Countryside Act to allow for licensing activities to take place under a new ground of “overriding public interest”. This would allow development to proceed if it meets the bar of overriding public interest, even when it would result in killing protected species such as grass snakes, if licences are granted to cover this. We are concerned that this will be used as a default position and that licences will be issued too readily and in place of employing measures (such as translocation/ exclusion) that are current best practice.

This amendment also appears to have been proposed to align the Act with licensing rules in the Habitats Regulations. However, the Habitats Regulations wording requires stronger grounds of “imperative overriding public interest”.

The omission of “imperative” in subsection 2 suggests that the amendment will provide an easier route for licensing approval under the Wildlife and Countryside Act than it would

under the Habitats Regulations. We believe that this provides a different legal interpretation in line with existing Natural England advice, which explains that “The word “imperative” means that there must be a high degree of “need” for the action concerned”. We believe that this test should be of equivalent standard between the Habitats Regulations and Wildlife & Countryside Act, especially as this could apply to European Protected Species in both cases. We are concerned that this easier route would be used to short cut necessary conservation measures to fast track development to the detriment species conservation.

The Secretary of State said in his [environment speech](#) in July that “we want better protection for species that are characteristic of our country and critical to our ecosystems that the EU has sometimes overlooked—things like water voles, red squirrels, adders and pine martens”, yet in this amendment the government is proposing to require a lower standard of proof and a new ability to licence destroying those species for development than exists for European Protected Species.

If the intention is to create a single channel for the licencing of development works in relation to protected species then it would make sense to implement the Law Commission’s advice and modernise the “incidental consequence to otherwise lawful operations! defence. Rewording this to require anyone using the defence to have taken reasonable precautions to avoid it happening, unless they could not reasonably have foreseen that the offence would occur, and to have taken urgent steps to minimise damage when it became apparent, as has already been done in Scotland, makes this clause both reasonable and enforceable – it could also require that the relevant authority is notified at the first opportunity.

**We recommend that this amendment should not be made until further consultation has taken place.**

### **Subsection 3**

Subsection 3 amends the Wildlife & Countryside Act to add a new condition for any license granted under Section 16: that it will not be detrimental to the survival of any population of the species of animal or plant to which the licence relates.

Whilst this new condition is welcome, it is unclear how it will be interpreted. A lot of harm can be done to wildlife and plants without endangering the survival of the population in question as a whole.

**We recommend amending the new condition to require that action should not be “detrimental to the survival of any population or its contribution to the achievement of the favourable conservation status of that species” to guard against activities that cause substantial harm to species.**

**For more information, please contact:**

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**On behalf of Greener UK and Wildlife & Countryside Link**

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