UKELA NATURE CONSERVATION WORKING PARTY

THE RESTORATION AND ENHANCEMENT OF WILDLIFE

A working paper to inform discussion at the Working Party's virtual meeting at the Plymouth Conference June 2020

PART 1 – INTRODUCTION

This paper reflects our thinking on this topic over the last eighteen months, and attempts to hold together two diverging processes. First, we have assessed how far the site-based legal rules protective of valued habitats and species accommodate or encourage their enhancement. Secondly, as we have proceeded, we have seen the approach of major changes in the legal and political landscape with the potential to significantly affect, for good or ill, the extent to which biodiversity in the UK is protected or increased. The main drivers here are Brexit and its associated legislation, but the coronavirus pandemic could clearly have major implications in this area. The common feature of these new factors is the unpredictability of their effects.

The law is referenced as it stands in England, but the general thesis applies across the UK, subject to reservations noted in the text.

Our work was kick-started by presentations to our January 2019 meeting by Christina Cork, Principal Specialist at Natural England, on "Defining Favourable Conservation Status – an England Contribution", and by RSPB's Head of Site Conservation Policy, Kate Jennings. These demonstrated the extreme usefulness of the concept "favourable conservation status", but also the different levels and circumstances in which it could be applied, which led us to focus on its genesis and status in law.

Christina followed up by developing a "think piece" examining the current designated sites framework in relation to the restoration of habitats and species populations, which she circulated as a draft in advance of our January 2020 meeting. In it she invited discussion of four questions, in response to which Wyn Jones and Graham Machin submitted written comments prior to the meeting, at which all were discussed.

Part 2 below is mainly a composite text drawn from these documents, and presents a picture of the legal basis of English site protection as it stands (or will stand when the "Brexit" amended version of the Conservation of Habitats and Species Regulations come into effect), and its relevance to wildlife restoration.

Part 3 identifies the clouds on the horizon, with or without silver linings, and we hope to stimulate debate at our national conference meeting on 26th June which will help us to keep track of future developments.

This paper is being circulated for pre-digestion in advance of the conference, together with an Agenda for the working party meeting identifying some of the topics on which discussion is invited.

PART 2 – THE LEGAL FRAMEWORK AND HABITAT RESTORATION

The concept of Favourable Conservation Status ("FCS")

The concept of Favourable Conservation Status ("FCS") has recently been developed well beyond its specifically legal meaning and significance, as amply demonstrated by Natural England's recent work as discussed at recent meetings of the NCWP. It is a very valuable concept, but when one is concerned with identifying legal powers and duties created by legislation it is necessary to confine oneself to the legal significance of the phrase in its statutory context. That context comprises in particular the Wildlife and Countryside Act 1981 (as amended – "WCA"), the Birds Directive ("BD"), the Habitats Directive ("HD") and the Conservation of Habitats and Species Regulations 2017 ("the Hab Regs"), considered here in their Brexit version.

FCS does not feature in either the WCA or the BD. The concept was first developed in the Bonn Convention (1979) in relation to migratory species of wild animals, where the term "conservation status" and the conditions required for its to be taken as favourable for such species, were defined. Its genesis in EU legislation was the HD, which adopted and broadened the Bonn approach to embrace all relevant habitats and species within the scope of the Directive.

In the HD, FCS is first mentioned in the 6th recital:

> "in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, it is necessary to designate special areas of conservation in order to create a coherent European ecological network …"

This follows the fourth recital, to the effect that:

> "in the European territory of the Member States, natural habitats are continuing to deteriorate, and an increasing number of wild species are seriously threatened, …"

Article 1 (a), (e) and (i) respectively provide definitions of "conservation", and the conservation status of a natural habitat and of a species. Thus:

> *"conservation"* means a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status as defined in (e) and (i)
>
> "*conservation status of a natural habitat* means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article 2" and
>
> "*conservation status of a species* means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2".

Thus, at the very heart of the HD is the recognition that conservation includes the restoration, not merely the maintenance, of habitats and populations of species by reference to FCS. Article 2(2) then proceeds as follows:

"Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest."

The territory referred to in Article 2 is "the European territory of the Member States to which the Treaty applies".

Reg 3A (1) of the Hab Regs (Brexit version) says that this last definition of territory is to be read as including a reference to the United Kingdom; i.e. the relevant territory is unchanged – it is the European territory of the continuing Member States plus the UK.

Article 1 (e) and (i) go on to say when the conservation status of a natural habitat and of a species will be taken as favourable.

In these definitions the concept of conservation status is being applied to the whole of the European territory of the Member States, not to any smaller areas or sites within that territory. Given the generally adverse picture painted by the fourth recital, the Directive's underlying assumption and rationale is that many if not most of the natural habitats and species of Community interest do not enjoy a favourable conservation status across the relevant territory.

Article 1 (j) defines *site* as "a geographically defined area whose extent is clearly delineated". The immediately following definitions of *site of Community importance* and *special area of conservation* should not be read as suggesting that the concept of FCS can or should be applied to individual sites. Since the duty to designate a site as a SAC follows necessarily from its adoption as a SCI, the key definition here is that in Art 1(k):

> "(k) *site of Community importance* means a site which, in the biogeographical region or regions to which it belongs contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute significantly to the coherence of Natura 2000 referred to in Article 3, and/or contributes significantly to the maintenance of biological diversity within the biogeographical region or regions concerned. For animal species ranging over wide areas, sites of Community importance shall correspond to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction."

The central factor for selection is the significance of a site's contribution to the maintenance or restoration at a favourable conservation status of any relevant natural habitat type or species. There is no reason here to restrict the ambit of "restoration" to restoration merely of a habitat or species to a quality or level previously obtaining on the individual site. It is

more naturally and purposively apt to cover enhancement of conditions beyond a site's previous level as a contribution towards making good loss or deterioration elsewhere.

The criteria in HD Annex III relating to the assessment of sites at national level, specifically include reference to restoration possibilities. Under the criteria for a given natural habitat type, the relevant criterion is:

> "(c) Degree of conservation of the structure and functions of the natural habitat type concerned and restoration possibilities".

For a given species, the criterion is:

> "b) Degree of conservation of the features of the habitat which are important for the species concerned and restoration possibilities."

Overall, given the perceived gap across the European territory, for all or most habitat types or species, between their actual conservation status and what would be a favourable conservation status as defined, it must follow that the potential of a site to contribute to the closing of that gap across the territory, or any biogeographic region within the territory, is a relevant and potentially important factor in its selection as a SCI. The adequacy of sites submitted by member States was and is determined on the basis of each site's contribution to the conservation status of habitats and species in the relevant biogeographical regions. Disregarding Gibraltar and Cyprus, the UK is in the Atlantic biogeographical region (terrestrial), whilst UK waters contribute parts of two marine regions. The latest reports pursuant to Article 17 of the HD for the period 2013-2018 confirm that across the EU around 75% of habitats and 55% of species are in unfavourable conservation status.

Given the genesis of the FCS concept in a European context in the HD, it is important to note that Natural England's recent work has been directed towards developing and applying the FCS concept at the national level, as a means of better defining the England contribution to FCS status for the commonly occurring priority habitats and associated Annex 1 habitats as defined under the Hab Regs, and a selection of species. FCS definitions are based on the best available evidence about the ecology of the habitat or species and are described through three main parameters (or reference values):

- for habitats these are: i) natural range and distribution; ii) area; iii) structure and function,
- for species: i) natural range and distribution; ii) populations; iii) habitat for the species.

For each of these parameters evidence is considered about four aspects: i) the historical situation; ii) the current situation; iii) what's needed to conserve the habitat or species in the future; iv) the technical potential for changing the situation.

Based on these considerations a level at which the habitat or species is at FCS in England is set for each parameter. The FCS definition should ensure that all the biological variation associated with the habitat or species is sustainably conserved, including protection against catastrophic events and buffering from natural fluctuations.

As Natural England develops a portfolio of FCS definitions, it would like to understand – since many definitions point towards large scale restoration – how far the legal framework provides for the setting of restoration objectives at individual site level. And, furthermore, whether any constraints exist for NE to use the full range of mechanisms to deliver restoration outcomes. In this context NE take restoration to mean an increase in area of habitat of special (European) interest through either recreation (on current site fabric), or through improvement of existing habitat to increase total site extent and/or better habitat structures or functioning.

NE thus posed the following questions for discussion by the NCWP:

1 **Can SPAs, SACs and SSSIs be designated on the basis of restoration potential?**

2 **Can site Conservation Objectives include targets above and beyond conditions present at the time of designation?**

3 **Can conservation objectives that include restoration be secured through compulsory management scheme and notice provisions?**

4 **When assessing plans or projects, can Habitats Regulations Assessments (HRAs) be carried out in light of future restoration objectives?**

Taking these in turn:

1 Can SPAs, SACs and SSSIs be designated on the basis of restoration potential?

It is difficult to imagine circumstances in which it would be appropriate to designate any of these types of site for restoration potential alone; that is, where no relevant interest feature is currently present on the site. Subject to that, we are addressing this question as concerning the necessity or legitimacy of treating restoration potential as a relevant and possibly decisive factor in a decision as to designation. We are also treating restoration as covering the improvement and/or increase in area of a type of habitat within a potential site, including the situation where an increase in area of habitat on a candidate site can be regarded as making good the loss of similar habitat elsewhere.

SACs

The foregoing discussion of the scope and applicability of FCS under the HD essentially led to the conclusion that the decision to identify a site as a SCI, leading to designation as a SAC, can and should take into account the site's restoration potential as a relevant factor. This last point is consistent with the duty imposed on Member States by Art 6(1):

> "For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into their development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites."

The duty to ensure conservation measures corresponding to the ecological requirements of the habitats and species present on the sites is unqualified. It is not limited by reference to condition or levels as at designation, or any prior period. The duty is to establish on the site conservation measures which correspond to the ecological requirements of the habitat types and species present there.

SPAs

The Birds Directive, dating originally from 1979, is less detailed in its structure than the HD, and its operative provisions are not backed by a lengthy set of definitions such as is found in Article 1 of the HD. It relates to "the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies" (Article 1), so its geographical ambit accords with that of the HD. The basic approach is similar to that of the later HD, in that it identifies a problem and proposes a basis for improvement. Recital (3) records that a large number of species of wild birds are declining in number, very rapidly in some cases, representing a serious threat to the conservation of the natural environment. Recital (5) states that the conservation of the species of wild birds is necessary, and Recital (8) states (my emphasis):

> "The preservation, maintenance or <u>restoration of a sufficient diversity and area of habitats</u> is essential to the conservation of all species of bird. Certain species of birds should be the subject of special conservation measures concerning their habitats in order to ensure their survival and reproduction in their area of distribution. ……"

For present purposes, the key articles in the BD are:

Art 2 "Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements ……"

Art 3 "1. In the light of the requirements referred to in Article 2, Member States shall take the requisite measures to preserve, maintain or <u>re-establish a sufficient diversity and area of habitats</u> for all the species of birds referred to in Article 1.

2. The preservation, maintenance or <u>re-establishment</u> of biotopes or habitats shall include primarily the following measures:

(a) Creation of protected areas:
(b) …"

Art 4 …

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species in the geographical sea and land area where this Directive applies."

Given these provisions, including the references to restoration and re-establishment emphasised by underlining above, it is reasonable to conclude that the potential of a site to accommodate an improvement in the condition favourable to relevant bird populations is a

relevant factor, amongst others, in decisions about classification. Putting the point at its lowest, it is certainly permissible for a state to treat such potential as a relevant factor.

It is difficult to know whether and to what extent "restoration potential" (in the sense we are using it) has played a part in the classification of SPAs in the UK. It is fair to say that the JNCC guidelines do not expressly refer to this as a factor. The first three Stage 1 guidelines are numerical, and the Stage 2 guidelines do not specifically refer to potential, though some factors could be regarded as involving an assessment of potential as indicated by current or past experience at a site.

The selection guidelines could of course be revised if thought necessary.

SSSIs

It is still policy in England and Wales that SPAs and SACs should consist only of land which is within a SSSI. In the case of Bramshill Wood[1], in 2000 EN's policy regarding the criteria for SSSI notification were revised specifically in order to make this possible. Nevertheless, the legal basis for notification of land as a SSSI remains that provided in the WCA as amended; and although Part II of the WCA has been the subject of considerable amendment, the key operative words in section 28 governing the duty to notify remain essentially as originally enacted. In the following extracts, the exception is the addition, by the Countryside and Rights of Way Act 2000 (CROW Act), of the words "and shall contain …. those features)" in subsection (4).

Section 28 (1) and (4) provide:

> "(1) Where Natural England are of the opinion that any area of land is of special interest by reason of any of its flora, fauna, or geological or physiographical features, it shall be the duty of Natural England to notify that fact-
>
> (a) to the local planning authority (if any) in whose area the land is situated;
> (b) to every owner and occupier of any of that land; and
> (c) to the Secretary of State.
>
> …….
>
> (4) A notification under subsection (1)(b) shall also specify-
>
> (a) the flora, fauna, or geological or physiographical features by reason of which the land is of special interest, and
>
> (b) any operations appearing to Natural England to be likely to damage that flora or fauna or those features,
>
> and shall contain a statement of Natural England's views about the management of the land (including any views Natural England may have about the conservation and enhancement of that flora or fauna or those features)."

[1] See R. (On the Application of Aggregate Industries UK Ltd) v English Nature [2002] A.C.D 67 [2003] Env. L.R. 3

Before land can be identified as of special interest by reason of any of its flora, fauna etcetera it must evidently be of scientific interest in one or more of those respects

However, once a site is identified as presently hosting a feature of relevant scientific interest, the question is whether it is of special scientific interest? Selection is of course informed by the JNCC SSSI Selection Guidelines, which themselves recognise the relevance of a site's potential for beneficial change. They also (at paragraph 5.12) specifically address "potential value" as a criterion, commencing thus:

> *"5.12.1 This criterion acknowledges that sites can develop a substantially greater nature conservation value as a result of appropriate management or natural change over time. In theory, almost any area of land is potentially of high nature conservation interest, provided that enough re-creative or restorative effort can be expended upon it. However, potential value should only be applied as a criterion in a few specific circumstances. These might include cases where:*
>
> • *the habitat has recently deteriorated through adverse use, such as a degraded peat bog*
>
> *where the underlying substrate remains relatively intact and where the complement of characteristic species is still present or can recolonise, and recovery is likely to take place once the adverse pressure is lifted."*

Other instances are provided, in terms which recognise that circumstances where potential for improvement may contribute to a requirement to notify are not restricted to the examples identified. This recognition is certainly justified. There is no reason why a site's capacity for change or improvement should not be taken into account in deciding whether its scientific interest is "special", and having regard to the dynamic character of site development, natural and imposed, over time, every reason why it should.

In this connection the CROW version of subsection (4) above is of relevance. This contemplates, unsurprisingly, that at the time of notification Natural England may have views about the conservation and enhancement of the relevant features of the site; and if they do, these must be included in the management statement. It would be curious indeed if in forming the opinion that land is of special interest Natural England has to leave out of account (but include in the management statement) its views about the possible enhancement of the notified features.

Summary under Question 1

In a broad sense, therefore, and by reference to our somewhat extended characterisation of "restoration", we would answer this question Yes for all three categories of site designation.

2 Can site Conservation Objectives include targets above and beyond conditions present at the time of designation?

In the HD two recitals, the 8th and 10th, relate to conservation objectives:

> "Whereas it is appropriate, in each area designated [as a special area of conservation], to implement the necessary measures having regard to the conservation objectives pursued;
>
> …
>
> Whereas an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future;"

These recitals, and Article 6(3) of the HD, assume that conservation objectives will exist for every SAC. In the early days, it was sometimes necessary to construct or infer conservation objectives from the site designation and background circumstances, but nowadays in practice there will exist formulated conservation objectives for all sites.

Article 7 of the HD provides that for SPAs obligations arising under Art 6(2), (3) and (4) replace those arising under the first sentence of Art 4(4) of the BD, with the effect that conservation objectives are required for SPAs as well as SACs, and in circumstances in which conservation objectives are legally relevant no distinction can be drawn between SACs and SPAs.

Conservation objectives necessarily look to the future, and in order to reflect the purposes for which sites are designated they could not fulfil their necessary role if they could not identify and plan for future beneficial changes to a site.

The role of conservation objectives in shaping the future is repeatedly recognised in EU Guidance. For instance, the European Commission's *Managing Natura 2000 sites (2018)* discusses conservation objectives in some detail in section 2.3.1, and concludes with this summary (emphasis added):

> *"In principle conservation objectives should be set for each site and for all species and habitat types significantly present on each site. They should be based on the ecological requirements of the species and habitats present and should define the desired conservation condition of these species and habitat types on the site.*
>
> *The conservation objectives should also reflect the importance of the site for the coherence of Natura 2000 so that each site contributes in the best possible way to achieving FCS at the appropriate geographical level within the natural range of the respective species or habitat types."*

Site designation is not simply to conserve or restore the habitats or populations of a site for their own sake, but is specifically related to the contribution which a site makes or could make towards the improvement of the conservation status of habitats or species which it hosts. This should be reflected in the conservation objectives adopted for the site.

Of course, a set of conservation objectives is by its very nature site-specific. Since most sites are likely to host more than one relevant habitat or species, the formulation of a site's conservation objectives may well involve compromises or trade-offs to reach, as a matter of

judgment, the package of measures, including proposed changes, which overall best serves the protected interests both on that site and in the wider territory.

At all events, the answer to Question 2 is in principle Yes.

3 Can conservation objectives that include restoration be secured through compulsory management scheme and notice provisions?

Whilst the WCA provides a legal framework for the recognition and protection of features and species important for nature conservation which was originally and in a sense remains free-standing, the introduction of duties imposed by the Birds and Habitats Directives involved some necessary interaction between the domestic and European regimes, and this (as matters presently stand) should remain the case following Brexit. In accordance with the provisions of the Directives noted above (especially Articles 2 to 4 of the BD and Article 6(1) of the HD) the UK (and each individual national component) has important general duties with regard to the achievement of the Directive's requirements. Whilst the UK has been slow to introduce new mechanisms to implement these duties, each jurisdiction including England must be prepared to employ existing mechanisms in furtherance of these responsibilities. These mechanisms clearly include the powers relating to management schemes and notices in WCA sections 28J, 28K and 28L.

Pausing there, the answer to Question 3 is plainly Yes; but the form of the question, and the discussion in Christina's Paper, reflect the possible complication arising from the fact that whereas the duty imposed on public bodies by section 28G is to further the "conservation and enhancement" of SSSI interest features, section 28J defines a management scheme as a scheme for "conserving" the special features, or "restoring them" or "both". These provisions are all part of the suite of sections, sections 28 to 28R, substituted for the original section 28 by CROW 2000. Their provisions therefore ought to be internally consistent.

A management scheme is a scheme for conserving the special features of a SSSI (obviously including such of those features which are also protected by a SAC or SPA which includes the SSSI) and/or restoring them. I do not think it is safe to assume (though it could be argued) that the inclusion of NE's views about enhancement within a management statement, provided on notification in accordance with Section 28(4), ought to be treated as authorising the inclusion of elements of enhancement in a management scheme.

This prompts the concern that insofar as conservation objectives might include as a target enhancement of a European site, this could not be secured by means of a management scheme and thus potentially an enforceable management notice.

In practice, it is not thought that this is likely to cause a serious problem. Neither "conservation" nor "restoration" is defined in the WCA either generally or for the purpose of section 28J. Even the word "conservation" can be envisioned as requiring physical intervention or changes in management practice which would involve beneficial changes in the quality or quantity of habitat or species as a means of preserving them. "Restoration" implies the making good of past losses in the quantity or quality of an interest feature, but there is no warrant for limiting that to loss or deterioration or loss occurring since

notification. It is not relevant to try to compare the relative scope of "restoration" as against "enhancement", because the latter term does not appear in section 28J; but also, because even in principle the terms are not mutually exclusive. "Enhancement" itself is not a defined term.

The question in any particular case would be whether the measures within a management scheme are measures of conservation and/or restoration. In formulating a management scheme this would be a matter for the judgment of Natural England, a judgment subject to appeal on the merits under section 28L.

Before serving a management notice Natural England is required by section 28K(2) first to have satisfied themselves that they are unable to conclude, on reasonable terms, a management agreement in accordance with the scheme. However, a management agreement need not be confined to matters which are or could be included in a management scheme. This is just one example included in section 7 of the Natural Environment and Rural Communities Act 2006 (NERC Act), but the power is conferred (at section 7(1)) in more general terms:

> "(1) Natural England may make an agreement (a "management agreement") with a person who has an interest in land, if doing so appears to it to further its general purpose."

Under section 2 of the NERC Act:

> "(1) Natural England's general purpose is to ensure that the natural environment is conserved, enhanced and managed for the benefit of present and future generations, thereby contributing to sustainable development.
>
> (2) Natural England's general purpose includes-
>
> (a) promoting nature conservation and protecting biodiversity,
>
> ……."

One might expect that Natural England would normally proceed directly to attempt to achieve a management agreement under their NERC powers, rather than start with a management scheme under the WCA. In that case there is of course no reason why the agreement should not include all matters contributing to targets under conservation objectives; and any obligations so imposed would of course be enforceable on normal contractual principles.

4 When assessing plans or projects, can HRAs be carried out in light of future restoration objectives?

It is a matter of settled principle that where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives, it must be considered likely to have a significant (adverse) effect on that site. All elements of the conservation objectives are relevant, and in so far as conservation

objectives include "future restoration objectives" HRA under Art 6(3) and its transposition in the Hab Regs must take them into account.

PART 3 – CURRENT UNCERTAINTIES

If one takes the above views and conclusions as representing the extent to which current law in the UK requires or supports the restoration and enhancement of sites currently protected, and sets them against the background of government policy as contained in the 25 Year Environment Plan published in 2018, it might seem reasonable to conclude that the weather is set fair for progress. But even as our work on the current topic has proceeded, we have become increasingly aware of accelerating changes that are destabilising the context of nature conservation law in the UK. The areas of uncertainty at this moment can be collected under four heads, two arising from recent political developments and two imposed by worldwide trends and events.

Our future relationship with the EU

As the implications of Brexit have emerged and been explored it has become clear that it will bring fundamental change as regards nature conservation law and practice, with dangers of regression as well as opportunities for improvement. Some issues are inherent in Brexit itself and legislative steps already committed, as for instance:

- Even assuming the effective retention of current EU based environmental law into UK domestic law, and an agreement governing future relations between the UK and EU which embodies "level playing field" provisions, the isolation of the UK from on-going EU developments and control inevitably involves the risk of retained law becoming less coherent and effective over time.
- Despite environmental responsibilities in the UK being devolved, a basic compatibility and consistency was ensured by the fact that all were subject to the EU directives and the oversight of the CJEU. The establishment of an effective new framework for UK-wide co-operation is currently impeded by disagreement about whether the environmental competencies returned from the EU reside with the UK government as such or the four national administrations (including England).

One significant difference between the 2018 version of the Withdrawal Agreement, and the 2019 version approved by Parliament and carried into effect, relates to "the level playing field". Had the 2018 version been approved by Parliament, this would have become a binding treaty, and it contained various provisions designed to ensure the maintenance of common standards in a number of respects (the level playing field) including, under Part Two – Environmental Protection – Article 2, *"Non-regression in the level of environmental protection".*

However, in the 2019 version all "level playing field" mechanisms, including that above, have been removed from the legally binding Agreement and are only referred to in more general terms in the non-binding Political Declaration, thus (our emphasis):

> *"XIV. LEVEL PLAYING FIELD FOR OPEN AND FAIR COMPETITION*

77. Given the Union and the United Kingdom's geographic proximity and economic interdependence, the future relationship must ensure open and fair competition, encompassing robust commitments to ensure a level playing field. The precise nature of commitments should be commensurate with the scope and depth of the future relationship and the economic connectedness of the Parties. These commitments should prevent distortions of trade and unfair competitive advantages. To that end, the Parties should uphold the common high standards applicable in the Union and the United Kingdom at the end of the transition period in the areas of state aid, competition, social and employment 15 standards, environment, climate change, and relevant tax matters. The Parties should in particular maintain a robust and comprehensive framework for competition and state aid control that prevents undue distortion of trade and competition; commit to the principles of good governance in the area of taxation and to the curbing of harmful tax practices; and maintain environmental, social and employment standards at the current high levels provided by the existing common standards. In so doing, they should rely on appropriate and relevant Union and international standards, and include appropriate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement. The future relationship should also promote adherence to and effective implementation of relevant internationally agreed principles and rules in these domains, including the Paris Agreement."

Although legally non-binding, one presumes that this commitment was entered into in good faith on both sides. Nevertheless, recent reports suggest that the UK government is unwilling to enter into level playing field commitments, which would mean that there would be no treaty constraints on a dilution of nature conservation law currently effective in the UK, especially that derived from EU Directives.

This apparent rejection of "level playing field provisions" may increase disquiet felt by some at the late inclusion in what became the EU (Withdrawal Agreement) Act of a power to make regulations providing that any court or tribunal is no longer to be bound by retained EU case law. In the realm of nature conservation the operation of the Birds and Habitats Directives has been defined in vital respects by CJEU case law, so any directions to the effect that such decisions are not binding would open the way for a departure from the current CJEU-derived interpretation of these directives in the UK. See the article by Prof Colin Reid of 6th January 2020: *"The Withdrawal Agreement Bill: New legal uncertainty?"*

Quite apart from the possibility of deliberate retrenchment, a very recent paper by Prof Andrew Jordan and Dr Brendan Moore – "Regression by default? – An analysis of Review and Revision Clauses in Retained EU Environmental Law" – draws attention to the fact that, to quote from the executive summary:

"A detailed comparison of 24 EU environmental laws and the 20 Brexit-related statutory instruments that were used to modify them reveals that the vast majority of the instruments removed the review and revision clauses in the original EU laws.

……

One way in which UK standards could conceivably regress after Brexit is via an open and explicit process of deregulation ('cutting red tape'). Our analysis, however, points to another possibility – a 'back door' form of regression that happens by default through a lack of timely review and revision."

Impending domestic legislation, notably the Environment Bill

It must be noted that the main changes that would be effected by the Environment Bill directed towards the natural environment are confined to England, or, in the case of the establishment of an Office for Environmental Protection, to England and Northern Ireland. This enormous piece of legislation stands with the Agriculture Bill and the Fisheries Bill as responses to the consequences of leaving the EU, and that remains its central function even though it includes a number of new initiatives consistent with the government's aspiration to improve the environment. At a very well attended "virtual" meeting on 2nd May the Working Party enjoyed the benefit of a very informative presentation "Environment Bill and Nature Recovery – Building a Network" from our sometime member and long-standing friend Tom Mosedale, one of Defra's lawyers working on the Bill. He was at pains to emphasise that, once passed into law, the Act would require to be fleshed out by very extensive subordinate legislation before it becomes operational, a process likely to take at least two years.

The delay in full implementation is important, because some of the Bill's provisions, for instance the establishment of an Office for Environmental Protection (OEP) are intended to replace oversight and enforcement mechanisms still (at this moment) performed or enforced by the EU, but which will fall away (as matters stand) at the end of this year. There will therefore be a gap in oversight, as well as uncertainty about the terms on which that oversight will be provided.

In principle, the Bill could yet be improved, and any weaknesses might be alleviated by subordinate legislation, but as matters stand the Bill exhibits weaknesses meriting concern, all of them relevant to the law of nature conservation. For example:

- The Bill has nothing to say about the existing legal principles embodied in the EU Directives and identified as retained UK law, or how any new principles will relate to that body of law.
- Although the Bill contains a definition of "environmental principles" (clause 16(5)), it does not in itself establish them in law. Instead, clauses 16 to 17 merely provide for the production of a "policy statement on environmental principles" to which a Minister of the Crown must, when making policy, have due regard.
- The OEP lacks independence (its non-executive members, set to be a majority, are appointed by the Secretary of State) and its enforcement powers and procedures are weak and indirect.

The Bill certainly contains provisions which, if suitably developed in subordinate legislation, could improve and strengthen environmental law and its application in the hands of a suitably committed government; but as it stands, and in the short term, it would not ensure even the retention and enforcement of the existing law protective of the natural environment.

Climate change

Climate change is upon us, and the extent to which it can be slowed or curtailed depends on worldwide action. Its effects will occur in a world in which human pressure, and the loss and degradation of natural habitats, is already depleting biodiversity and rending an increasing number of species extinct. The progress of climate change will represent a moving backcloth to all other issues. In the UK, as habitats change and species follow the changes, we might expect that site-based conservation will have to respond not only by the more frequent revision of conservation objectives, but changes in designations of existing sites as regards interest features and/or area, and the need to designate new sites to accommodate the changing scene. The law will have to be able to provide for and manage these sorts of interventions.

The coronavirus pandemic

The course and consequences of the pandemic for nature conservation law and practice, as for any aspect of national life, are of course unpredictable, but they are likely to be substantial, with the potential for instance to reduce resources available to effect change or enforce current law, to affect choices which have to be made between competing interests, or simply to deflect legislative and administrative attention to other matters. On the other hand, it has been striking that even at this early stage, the pandemic has stimulated widespread calls for a re-balancing of the relationship between human society and the natural world. There are interesting times ahead!

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