

Habitats Regulations Assessments: Refocusing towards nature's recovery

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Fiona Sawyer considers the regulations and how the regime will change following a government refocus announced earlier in May

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The BBC recently reported that flying insects in Kent have reduced by 71% since 2004. Sadly, this is not as unexpected as it should be. On 18 May 2021, the Environment Secretary George Eustace gave [a speech at Delamere Forest](#) noting that the UK is 'one of the most nature-depleted countries in the world'. He announced a 'renewed focus on nature's recovery', in support of which the Environment Bill would include a power to refocus the Conservation of Habitats and Species Regulations 2017 (the Habitats Regulations) – this is now s113 of the Environment Act (EA) 2021. A small working group of experts was commissioned to consider appropriate changes. Their [summary of findings](#) was published in March 2022 alongside the government's [Nature Recovery Green Paper](#) (Green Paper), proposing changes to Habitats Regulations Assessments.

What are the Habitats Regulations Assessments?

Part 6 of the Habitats Regulations requires that, unless directly connected with or necessary for the conservation management of the site, plans or projects affecting 'habitats sites' must be assessed by the competent authority (for example, the local planning authority or planning inspector) to determine whether or not they are likely to have significant effects on the site. Habitats sites are defined in the National Planning Policy Framework and include Special Areas of Conservation (SAC), Sites of Community Importance, Special Protection Areas (SPAs) and relevant Marine Sites.

If a plan or project is assessed to be likely to have a significant effect on a protected habitats site, an 'appropriate assessment' must then be undertaken to assess the implications of the plan or project in view of the site's conservation objectives. This is to help the competent authority determine whether the plan or project will have an adverse impact on the integrity of the site. The plan or project can only proceed if the appropriate assessment demonstrates that the integrity of the site will not be adversely impacted. If there is an adverse impact, but there are no alternative solutions, the plan or project can

proceed if there are 'imperative reasons of overriding public interest' (regulation 64 of the Habitats Regulations) and if necessary compensatory measures can be put in place.

The term 'Habitats Regulations Assessments' refers to the separate stages of this assessment process.

An important point to note is that the Habitats Regulations Assessments regime sits alongside other assessment regimes, such as those for Sites of Special Scientific Interest (SSSIs) and Environmental Impact Assessment (EIA) requirements.

Why does the government want to make changes?

In his Delamere speech, the Environment Secretary described the government's desire to focus efforts on the delivery of nature recovery rather than 'moderat[e] the pace of nature decline'. Current guidance on appropriate assessments requires that the competent authority must consult Natural England and have regard to Natural England's representations when conducting the appropriate assessment. The government's view is that these 'highly prescriptive legal processes' are a 'distraction' for Natural England staff, who need to be deploying their experience and resources more effectively - hence the review of the Habitats Regulations to see how improvements can be made to the assessment processes.

What has the working group proposed?

The Habitats Regulations Assessment Review Working Group, comprising Tony Juniper, Christopher Katkowski QC and Rebecca Pow and chaired by Lord Benyon, received evidence from across the development industry. Their objectives were to identify how to:

- clarify the scoping and screening process of Habitats Regulations Assessments;
- resolve issues and legal ambiguity arising from historic EU case law; and
- develop an assessment process which 'better reflects' the EA 2021 targets and framework.

The guiding principles included that existing protections must be maintained or enhanced (as required by s133 of the EA 2021) and that a revised system should be easier, quicker, simpler and more intuitive.

The clear message from the evidence received was that the system needs to be improved, with particular attention to issues such as the perceived risk of legal action (which currently, as noted in the Green Paper, often guides whether an activity is permitted or restricted) and also that there needs to be a more strategic approach to the process.

Three solutions have been proposed: (i) a single new assessment process, (ii) a clearer decision making framework and (iii) the use of strategic approaches.

Nature Recovery Green Paper

The Green Paper notes that:

... our current array of protected site designations is a complex set of legal provisions which has developed in an ad hoc way over decades, stemming from both domestic and EU legislation.

Existing designations include: National Nature Reserves; Local Nature Reserves; SSSIs; SPAs; SACs; Marine Conservation Zones (MCZs); and other marine conservation sites.

The government has taken heed of the working party's recommendations, proposing that, while maintaining current levels of protection, the multitude of existing designations should be consolidated and simplified, and the law governing them modernised. This will allow sites to be designated for broader purposes than historical site designations permit, enabling designation to 'promote nature's recovery and climate change'. The hope is that this will make it easier for stakeholders to work with the system, that funding can be targeted more strategically, and that there will be greater consistency between impact assessments of different activities.

The Green Paper sets out various options for reform, for example (in respect of terrestrial sites):

- a tiered approach of 'highly protected' sites and 'protected' sites;
- streamlining and merging existing designations (although again with the labels 'highly protected' and 'protected'); and
- consolidating existing sites into a single protected site designation.

A new rationalised system would be accompanied by adopting a single decision-making process for site designation.

How will the Habitats Regulations Assessment process change?

The Green Paper adopts the proposals of the working group, proposing a 'single coherent assessment to be applied for site protection'.

What is meant by a 'single assessment'? This flows from the proposal to consolidate existing site designations – there will be no need for separate assessment regimes for multiple different site designations once the existing array of designations is consolidated, ie a simplified assessment regime for a simplified, consolidated system of designation.

What about EIA?

The intention is not that the proposed single assessment should also encompass the EIA process. Instead, the Green Paper notes that both the EIA and Strategic Environmental

Assessment (SEA) processes are to be reformed through primary and secondary legislation. Indeed, the Levelling Up and Regeneration Bill was published on 11 May 2022, Part 5 of which provides for new 'Environmental Outcomes Reports' (EOR) – regulations to be made will require that an EOR will be required in order for a 'relevant consent' to be given or a 'relevant plan' to come into effect.

What next?

The working group's summary of findings is high-level and lacking in detail, as is the Green Paper, so we will have to wait for the government's own response to the consultation responses to see whether and how the working party's proposals will be taken forward, at which point perhaps more detail on the proposed changes will be available.

Section 113 of the EA 2021 also needs to be brought into force for any changes to be progressed. In the meantime, attention must turn to the Levelling Up and Regeneration Bill's long-awaited proposals for reforming the planning system and EIA processes.

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