



**RTPI
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BIODIVERSITY IN PLANNING IN POST-BREXIT NORTHERN IRELAND

**The potential contribution of planning to
biodiversity conservation and enhancement
in post-Brexit Northern Ireland**

The Royal Town Planning Institute (RTPI) champions the power of planning in creating prosperous places and vibrant communities. We have over 27,000 members in the private, public, academic and voluntary sectors and over 750 members in Northern Ireland. Using our expertise and research, we bring evidence and thought leadership to shape planning policies and thinking, putting the profession at the heart of society's big debates. We set the standards of planning education and professional behaviour that give our members, wherever they work in the world, a unique ability to meet complex economic, social, environmental and cultural challenges.

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Contents

Contents	3
Summary	4
Recommendations	5
1. Introduction.....	6
2. Biodiversity, Brexit and Devolution in the UK.....	7
Biodiversity protection within the European Union.....	7
Biodiversity protection after Brexit.....	7
Environmental improvement and targets	8
General biodiversity duties	8
Biodiversity conservation and gain in planning	9
Environmental governance and accountability	10
3. The Challenges for Northern Ireland.....	11
Fragmented planning policy and processes	11
Knowledge of and commitment to biodiversity.....	13
Learning from climate change	13
Biodiversity net gain	14
Brexit, biodiversity and the border	15
Monitoring and enforcement.....	16
4. Conclusion.....	18

Summary

The UK's withdrawal from the European Union is both a challenge and an opportunity for environmental protection in general and biodiversity in particular. All parts of the UK have made, or are in the process of making, changes to their biodiversity laws in the wake of Brexit. These changes will have considerable implications for planning. New developments in Northern Ireland include a requirement on the Executive to publish an environmental improvement plan and the establishment of a new environmental law 'watchdog', the Office for Environmental Protection (OEP).

More extensive changes to biodiversity law have been made in England and are likely to follow in Scotland and Wales. Some of the most important include the setting of statutory targets for biodiversity protection, restoration or enhancement and the introduction of 'biodiversity net gain' rules for most types of planning application. There is little opportunity at present to make similar changes in Northern Ireland, where no Executive has been formed and the Assembly has not sat since the March 2022 election.

The Royal Town Planning Institute and the Ulster University School of Law hosted a roundtable of planning and biodiversity experts in September 2023. Participants discussed what changes to the legislative and policy framework, planning system and broader environmental governance structures might improve planning's contribution to biodiversity as part of its overall objective of the sustainable development of Northern Ireland.

A number of key findings emerged:

- **Northern Ireland's planning system has become fragmented**, with regional planning policy statements in the process of being replaced by local development plans. With no regional strategic plan and only a very limited statutory biodiversity duty, there is a risk that nature will be sidelined in favour of other priorities, such as housing.
- **Knowledge of and investment in biodiversity is limited**, notably among councillors, who are now key players in the planning system. Training for elected representatives and public education are required, but stronger statutory duties are needed for these to be prioritised.
- **Biodiversity net gain requirements should be approached with caution**. They can be a useful tool, but there is a danger that over-emphasis on overall biodiversity metrics may distract attention from conserving the species and habitats that exist on a site prior to development.
- **Climate change is now taken seriously at all levels of government**. This can crowd out biodiversity when decisions are made, but also provides a model for raising the profile of biodiversity.
- **Brexit brings particular challenges for biodiversity in border areas** due to uncertainty about whether planning decisions in the Republic of Ireland need to take account of impacts on protected sites in Northern Ireland.
- **Appropriate monitoring and enforcement are essential** if improvements to planning legislation and policy are to result in better biodiversity outcomes in practice.

The political context remains uncertain, if not unpromising. It is unclear when the Assembly and Executive will return, and very difficult to get Northern Ireland-specific legislation onto the UK Parliament's agenda. Nonetheless, there may be opportunities to develop training and public awareness work. The planning and biodiversity policy community can also make the case for the changes it feels are required – like statutory targets, the right approach to biodiversity net gain and enforcement – when the devolved institutions resume business.

Recommendations

The Department of Agriculture, Environment and Rural Affairs and the Department for Infrastructure should bring forward legislation to establish statutory biodiversity or nature recovery targets and ensure these are reflected in a regional strategic planning policy or land use strategy, in order to ensure that the localisation of planning responsibilities does not diminish biodiversity protection.

The Department for Infrastructure, Department of Agriculture, Environment and Rural Affairs, Northern Ireland Local Government Agency and the Environmental NGO sector should work to develop training on the biodiversity crisis, the UK's commitments to biodiversity in international law and the potential contribution of planning for all individuals with a role in planning policymaking or determinations. Local authorities should ensure planning officers and councillors receive appropriate and ongoing biodiversity training and draw on the expertise of biodiversity officers where available. Public education on biodiversity should also be developed to increase buy-in to biodiversity-focused targets and policies.

All tiers of government should work to ensure the climate and biodiversity crises are given comparable prominence, including through the drafting of biodiversity legislation where appropriate.

The Department for Infrastructure and Department of Agriculture, Environment and Rural Affairs should increase the prominence of biodiversity considerations in the determination of planning applications through legislation or strategic policy, ensuring that any requirement for biodiversity net gain through on- or off-site measures does not undermine the conservation of existing high-value habitats on or adjacent to a development site.

The UK Government, Northern Ireland Executive and local government should work with counterparts in the Republic of Ireland to ensure that the UK's withdrawal from the Natura 2000 network does not diminish the protection of Special Protected Areas and Special Areas of Conservation in Northern Ireland from cross-border activities.

Local government should develop monitoring and enforcement mechanisms to ensure compliance with biodiversity-related conditions for planning permission. The Office for Environmental Protection should have a role in ensuring planning authorities' compliance with any future biodiversity targets, with sufficient 'teeth' to take enforcement action where required.

1. Introduction

The existence of a global biodiversity crisis has been acknowledged for decades.¹ Northern Ireland is far from exempt from this crisis. A coalition of conservation and research organisations recently described it as “one of the most nature-depleted countries on earth”² and it has been widely referred to as the “12th worst performing country for biodiversity loss.”³ Legal protection for biodiversity – along with many other aspects of environmental law – in all four UK countries has been shaped by membership of the European Union. Withdrawal from the EU in January 2020 left the UK as a whole facing a degree of uncertainty about the future of biodiversity and other environmental protections. Historic difficulties in securing effective environmental protection, ongoing political instability and the fact that it is the only UK country to share a land border with the EU, renders Northern Ireland in a unique position.

Decisions about land use have a direct impact on nature. The State of Nature report identifies various “pressures” on biodiversity in Northern Ireland, but gives greatest prominence to habitat loss due to development, urbanisation and intensification of agriculture.⁴ Planning policy and decision making must play their part if biodiversity and ecosystems are to be placed on a sustainable footing, something the signatories to the Convention on Biological Diversity have agreed must happen by 2050.⁵

In September 2023, the RTPI supported a roundtable discussion on planning and biodiversity in post-Brexit Northern Ireland. 10 people took part, with one additional participant taking part in a catch-up interview as she was unable to attend on the day. Participants discussed the current and potential contribution of planning to biodiversity conservation and enhancement, with a focus on generating ideas for practical measures that could improve this. A range of perspectives were represented, including devolved government, local government, environmental NGOs, private consultancies and academia. Individuals’ areas of expertise covered planning, ecology, sustainable development and infrastructure. The roundtable took place under Chatham House rules, meaning that talking points could be summarised and quotes used in this report, but not attributed to individuals.

The report itself provides some context on biodiversity law in the UK inside and outside the EU, then goes on to outline the views expressed during, and recommendations emerging from, the roundtable on the future for biodiversity protection and enhancement in Northern Ireland, particularly through planning.

¹ See D Western ‘The biodiversity crisis: a challenge for biology’ (1992) 63(1) *Oikos* 29

² State of Nature Partnership, *State of nature: Northern Ireland* (State of Nature Partnership, 2023) 3

³ For example, M Bain, ‘NI is the 12th worst performing country for biodiversity loss’ (Belfast Telegraph, 1 October 2020)

⁴ State of Nature Partnership, *State of nature: Northern Ireland* (State of Nature Partnership, 2023) 16

⁵ Kunming-Montreal Global Biodiversity Framework (CBD/COP/15/L.25, 18 December 2022)

2. Biodiversity, Brexit and Devolution in the UK

Biodiversity protection within the European Union

Membership of the European Union had a considerable influence on the legal regime for the protection of biodiversity, and on environmental law as a whole, in all parts of the UK.⁶ The precise extent of this influence, and whether it is for good, for ill or indifferent, may be debated,⁷ but that the influence has been significant is not disputed.

Accordingly, EU membership has formed the basis for key pillars of the law for biodiversity protection across the UK. The Natural Habitats Regulations bring the requirements of the key directives into Northern Ireland law.⁸ These include a range of provisions relevant to the protection of specified species and habitats, centred around the designation of protected sites:

- **Special Areas of Conservation (SACs)** are sites of national importance for the maintenance or restoration of habitat types or species listed in the Habitats Directive.
- **Special Protection Areas (SPAs)** should be designated as necessary to ensure protection of the “most suitable” number and extent of sites across the UK for the conservation of native species listed in the Wild Birds Directive and of migratory species.

Designation of a SAC or SPA affects the range of developments and operations that can take place on or near the site, and must be taken into account in spatial plans. The SACs and SPAs within the EU collectively form the Natura 2000 network of protected sites, but those in the UK are no longer part of the network.

The protection of designated high-value sites has been at the heart of EU conservation law and policy, and accordingly “a cornerstone of conservation action on land in Northern Ireland over the last 50 years, and at sea from the mid-2000s.”⁹ However, it is increasingly recognised that a focus on protecting the most prized, most sensitive and most threatened sites has not delivered the “coherent and resilient ecological network” required to halt and reverse biodiversity loss.¹⁰

Biodiversity protection after Brexit

The implications of Brexit for biodiversity remain uncertain. Habitats protection has been described as a “famously vulnerable” area of law outside the EU.¹¹ Concerns about environmental protection in general are based on a combination of the legal opportunity to revoke EU-derived law and the

⁶ For a flavour of the extent of this influence, see Cornerstone Barristers, ‘Brexit: planning and the environment outside the EU’ (London: Cornerstone Barristers, 2016)

<https://www.ukela.org/common/Uploaded%20files/brexit%20docs/Brexit-Planning-and-the-environment-outside-the-EU-final-6-7-16-4-2.pdf>

⁷ L Krämer, ‘EU environmental law and policy over the last 25 years — good or bad for the UK?’ (2013) 25(3) *Environmental Law and Management* 48

⁸ Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995 NISR 380; Directive 2009/147/EC; Directive 92/43/EEC

⁹ Northern Ireland Statistics and Research Agency, *Northern Ireland environmental statistics report* (Belfast: DAERA, 2023) 40

¹⁰ J Lawton, *Making space for nature: a review of England’s wildlife sites and ecological network* (London: DEFRA, 2010) vii

¹¹ M Lee, ‘Brexit: environmental accountability and EU governance’ (OUPblog, 17 October 2016) <https://blog.oup.com/2016/10/brexit-environment-eu-governance/>

political narrative that Brexit provides an opportunity to stimulate the economy through deregulation.¹² On the other hand, the UK Government has stressed that it does not wish to “lower environmental protections or standards,”¹³ instead presenting the post-Brexit period as an “unfrozen moment” in which “we can go further to protect our natural environment” and “encourage biodiversity.”¹⁴

Whatever the ambitions of the UK Government, the environment is an area of devolved competence in Northern Ireland, Scotland and Wales. This means the evolution of all areas of environmental law, policy and practice – including planning – after Brexit may vary between the different UK countries. To date, the most significant biodiversity-related developments have come in England, where the Environment Act 2021 has established a new framework for key areas of environmental law outside the EU. Some of these changes extend to Northern Ireland, while the Scottish and Welsh Governments have committed to make changes in some of the same areas.

Environmental improvement and targets

The Environment Act 2021 requires the Northern Ireland Executive to publish “a plan for significantly improving the natural environment,” but is not prescriptive about the period to be covered by the plan or areas for target setting. The first plan should have been published in 2023. While the previous Environment Minister approved a draft, this deadline has been missed due to the ongoing failure to form an Executive.

The Environment Act 2021 similarly requires the UK Government to publish an environmental improvement plan for England. This plan must cover a period of at least 15 years and include five-year targets for various “priority areas” including biodiversity, as well as species abundance. Longer term, the Secretary of State is required to set 15-year targets for the priority areas, plus a ‘species abundance’ target for 2030.¹⁵

Statutory targets for biodiversity are likely to be introduced in both Scotland and Wales. The Scottish Government has indicated that a future Environment Bill will mandate targets “based on the overarching goal... of halting biodiversity loss by 2030, and restoring Scotland’s natural environment by 2045.”¹⁶ The Welsh Government intends to develop biodiversity targets informed by the Kunming-Montreal biodiversity framework,¹⁷ including a specific commitment to designate 30 per cent of terrestrial and marine environments as protected sites by 2030.¹⁸

General biodiversity duties

Public authorities in all four UK countries are subject to differently worded but (at face value) comparable duties regarding the conservation (and, in England and Wales, enhancement) of biodiversity. Authorities in Northern Ireland, Scotland and Wales should seek to conserve biodiversity in so far as this is compatible with “the proper exercise of [their] functions.”¹⁹ Following

¹² B Johnson, ‘Foreword by the Prime Minister’ in HM Government, *The Benefits of Brexit: How the UK is taking advantage of leaving the EU* (London: Cabinet Office, 2022)

¹³ HC deb 24 May 2023, vol 733 col 328

¹⁴ M Gove, ‘The unfrozen moment – delivering a green Brexit’ (Speech at WWF Living Planet Centre, Woking, July 2017); HM Government, *The Benefits of Brexit: How the UK is taking advantage of leaving the EU* (London: Cabinet Office, 2022) 15

¹⁵ See Environmental Targets (Biodiversity) (England) Regulations 2023 SI 2023/91

¹⁶ Scottish Government, *Scottish biodiversity strategy to 2045: tackling the nature emergency in Scotland* (Edinburgh: Scottish Government, 2022) 48

¹⁷ Kunming-Montreal Global Biodiversity Framework (CBD/COP/15/L.25, 18 December 2022)

¹⁸ J James, Senedd deb 4 October 2022 para 284

¹⁹ Wildlife and Natural Environment Act (Northern Ireland) 2011 s1; Nature Conservation (Scotland) Act 2004 s1, 2A; Environment (Wales) Act 2016 s6

the Environment Act 2021, authorities in England are subject to a more detailed duty to consider what action they can take to conserve and enhance biodiversity, to develop policies and objectives and to take “appropriate” action.²⁰ Public bodies in the Republic of Ireland have just become subject to a duty to have regard to the objectives and targets set by the National Biodiversity Action Plan and any Ministerial guidance on their achievement, and to report on their actions in compliance with the duty.²¹

Biodiversity conservation and gain in planning

A shortcoming of approaches to nature conservation that focus on the protection of specific, high-value sites is that they may fail to stop biodiversity loss elsewhere, and overall. One possible response is a biodiversity net gain requirement for development no matter where it takes place.

To date, within the UK only England has put in place any such requirement.²² The Environment Act 2021 introduces a new biodiversity gain objective, effective from January 2024, under which most types of development will only receive planning permission if “the biodiversity value attributable to the development exceeds the pre-development biodiversity value of the onsite habitat by at least [10 per cent].” The gain can consist of on- and off-site measures or, as a last resort, the purchase of biodiversity credits from Natural England.

The Welsh Government has consulted on and begun to put in place changes to planning policy in pursuit of net benefits to biodiversity.²³ No legislative changes are envisaged as the policy is grounded in public authorities’ general duty to maintain and enhance biodiversity.²⁴ The core principle is that “all development must aim to deliver a net benefit for biodiversity (and ecosystem resilience) ... (proportionate to the scale and nature of the development proposed).”²⁵ This would give planning authorities discretion to decide what, if any, biodiversity gain a development should ‘aim’ to achieve.

In Northern Ireland, strategic planning policy states that planning authorities should “[work] towards the restoration of and [halt] the loss of biodiversity,”²⁶ while Planning Policy Statement 2 states that planning policy “must have regard to any strategy designated for the conservation of biodiversity.”²⁷ Neither provision represents a requirement to achieve biodiversity gain and all of the existing planning policy statements will lapse once all 11 local authorities have adopted their own planning policies.²⁸

²⁰ Natural Environment and Rural Communities Act 2006 s40

²¹ Wildlife (Amendment) Act 2000 s59B, 59F; the fourth action plan is currently in development – see Department of Housing, Local Government and Heritage, *Ireland’s 4th national biodiversity action plan – draft for consultation* (Dublin: DHLGH, 2022)

²² Department for Environment, Food and Rural Affairs and Department for Levelling Up, Housing and Communities, ‘Biodiversity Net Gain moves step closer with timetable set out’ (News release, 27 September 2023) <https://www.gov.uk/government/news/biodiversity-net-gain-moves-step-closer-with-timetable-set-out>

²³ Policy changes with immediate effect are outlined in J James MS, Letter to local authorities’ heads of planning (11 October 2023) <https://www.gov.wales/sites/default/files/publications/2023-10/addressing-the-nature-emergency-through-the-planning-system.pdf>

²⁴ Environment (Wales) Act 2016 s6

²⁵ Welsh Government, *Targeted policy changes to Planning Policy Wales on Net benefit for Biodiversity and Ecosystems Resilience (incorporating changes to strengthen policy on Sites of Special Scientific Interest, Trees and Woodlands and Green Infrastructure)* (Cardiff: Welsh Government, 2023) 14

²⁶ Department of the Environment, *Strategic planning policy statement for Northern Ireland: planning for sustainable development* (Belfast: DoE, 2015) 11

²⁷ Department of the Environment, *Planning policy statement 2: natural heritage* (Belfast: DoE, 2013) 11

²⁸ Derry City and Strabane District Council, *Local development plan (LDP) 2032: draft plan strategy* (Derry-Londonderry: DCSDC, 2019) 74 (GDP1)

Scotland similarly has no specific net gain requirement. The National Planning Framework includes requirements for local development plans, local development and national or major development to “protect, conserve, restore and enhance biodiversity.”²⁹

Environmental governance and accountability

Withdrawal from the EU not only creates uncertainty about the future of environmental law, but removes what has been an important part of the UK’s environmental governance structures – the role of the European Commission in monitoring implementation of, and public authorities’ compliance with, European environmental law.

The newly-established Office for Environmental Protection (OEP) takes on oversight and compliance roles comparable to those previously held by the Commission.³⁰ Its remit, which extends to England, Northern Ireland and reserved areas of environmental law in Wales and Scotland,³¹ includes monitoring progress towards the objectives of the current environmental improvement plan and the implementation of environmental law, and advising government departments on proposed changes to environmental law. The OEP’s enforcement function includes the investigation of possible “serious failure[s]” of compliance, issuing notices where it suspects or finds serious non-compliance occurred and in certain circumstances applying for judicial review”.³²

There are distinct governance and accountability arrangements for devolved areas of environmental law in Scotland and Wales. Environmental Standards Scotland plays a similar role to the OEP in monitoring public authorities’ compliance with devolved areas of environmental law, the effectiveness of environmental law and its implementation; sharing the OEP’s ability to issue notices and apply for judicial review. The Interim Environmental Law Assessor for Wales can investigate complaints about the form or implementation of Welsh environmental law.³³ At present it cannot consider breaches of environmental law, but the Welsh Government envisages a Commission for the Environment with enforcement powers.³⁴

²⁹ Scottish Government, *National planning framework 4* (Edinburgh: Scottish Government, 2023) 38

³⁰ Environment Act 2021 c30 s23

³¹ That is, those areas of environmental law that remain the responsibility of the UK Government – most areas are devolved.

³² Environment Act 2021 c30 sch 2

³³ Interim Environmental Protection Assessor for Wales, ‘What we do?’ (Cardiff: Welsh Government, nd) <https://www.gov.wales/interim-environmental-protection-assessor-wales/what-we-do>

³⁴ L Griffiths, ‘Written Statement: Environmental Governance Stakeholder Task Group Report’ (Cardiff: Welsh Government, 2020); Welsh Government, *Programme for Government – update* (Cardiff: Welsh Government, 2021)

3. The Challenges for Northern Ireland

Decisions about the future of biodiversity protection in Northern Ireland are being made in a distinct political, legal and ecological context. First, for much of the post-Brexit period there has been no functioning Assembly or Executive. This has limited the opportunity to consider changes to biodiversity law. Even when the devolved institutions are functioning, their design can make it easier to obstruct than to innovate. Second, within the EU, Northern Ireland was often slow to bring environmental Directives into domestic law and to comply with their requirements. It has also been slow to establish an environmental regulator independent of government.³⁵ Third, the existence of a common biodiversity framework across the 28 pre-Brexit member states helped ensure a shared approach to the management of the island environment in Ireland. Future divergence from EU biodiversity law could pose particular challenges for the management of cross-border protected sites and nature conservation generally.

Within this context, the research participants highlighted what they felt should be issues of concern for biodiversity and planning law, policy and practice in Northern Ireland during the post-Brexit period.

Fragmented planning policy and processes

The UK's withdrawal from the EU provided the spur for this research, but a striking feature of the roundtable was the extent to which participants associated biodiversity-related challenges in planning with a previous constitutional reform. The 2015 reform of local government saw 26 previous district councils replaced with 11 new authorities, responsible for an increased range of functions. The new functions include key planning responsibilities including the adoption of a local development plan and the determination of individual applications for planning permission, other than those with regional significance.

Devolving greater responsibility to local government is typically justified on the basis of a council's ability to act as a "champion of community needs."³⁶ However, many participants in the roundtable expressed concern that councillors' views of what their communities 'need' might not align with the measures needed to protect and enhance biodiversity. In particular, it was assumed that there would be pressure to prioritise economic, housing and renewable energy development over biodiversity considerations.

"It comes down to the classic conflict between development for the economy in a simplistic sense and protecting biodiversity and preventing climate change... As long as the decision makers are able to say for now we need to get jobs in, so we'll just put these targets back, release them, that's what's always going to happen. The EU was able to take a longer view. The council has a conflict of interest."

Although planning is also largely a local government function in Great Britain and the Republic of Ireland, it was noted that local policy there is more constrained by national strategic policies and statutory requirements. In contrast, the existing Northern Ireland-wide planning policy statements

³⁵ S Turner, 'Transforming environmental governance in Northern Ireland. Part one: the process of policy renewal' (2006) 18(1) *Journal of Environmental Law* 55; C Brennan, M Dobbs and V Gravey 'Out of the frying pan, into the fire? Environmental governance vulnerabilities in post-Brexit Northern Ireland' (2019) 21(2) *Environmental Law Review* 84

³⁶ Northern Ireland Local Government Association, *A programme for local government: 2016-2021 and beyond* (Castlereagh: NILGA, nd)

will be superseded by the new local development plans, once all 11 have been approved by the Department for Infrastructure and formally adopted by the councils. The planning legislation allows the Department to veto or require amendments to these plans,³⁷ but participants suggested this gives insufficient protection to biodiversity, given that the main criteria for the assessment of a draft plan are compliance with the local authority's own policies and a general requirement that the plan should be 'sound'.

This perspective might be proved unduly pessimistic. The legislation does require local policies to take account of the regional development strategy and Departmental guidance or directions, as well as imposing a general duty on planning authorities to act "with the objective of furthering sustainable development."³⁸ However, biodiversity is not mentioned in the Regulations governing the form and content of development plans and the only mention of nature conservation concerns the need for "appropriate distances" between "areas of particular natural sensitivity" and installations posing a risk of a "major accident" involving "hazardous substances."³⁹

Some participants also saw possible advantages for biodiversity in localisation, with local policies better able to acknowledge the local importance of a specific site that might not seem significant in the Northern Ireland context:

"A site could be more important in a really [biodiversity-]impoverished local area than perhaps a really biodiversity-rich area. So that's one of the benefits of having those local policies, that you can give additional weighting."

Views differed on how the desirability of local democracy in planning could or should be balanced with the need to protect and enhance biodiversity. Educational measures to increase knowledge of (and commitment to) nature among councillors and citizens alike were widely acknowledged as part of the solution (see below), but a consensus emerged that statutory targets and/or strategic planning policy must play a key role. Some participants observed that this could be regarded as undermining local government's role, but this was generally considered a price worth paying. One noted that local autonomy on planning in the Republic of Ireland is much more constrained than it might appear at face value, to the frustration of councillors but perhaps to the benefit of nature:

"For years, councillors [in the Republic of Ireland] were told this is your development plan, but increasingly they are saying it's not. They don't have a blank canvas and if they did, it wouldn't be good."

Suggested developments included emulating statutory requirements that apply in England, for example the establishment of biodiversity targets by the Executive, the development of a local nature recovery strategy by each local authority or the achievement of biodiversity net gain through the planning system. As one participant put it, "a biodiversity assessment should be like a drainage assessment" - a standard part of every planning application. One contributor suggested that Northern Ireland needs a holistic land use strategy. Scotland is currently on its third strategy;⁴⁰ the first strategy for England is in development, but may cover rural land only⁴¹ - each examines ways of accommodating the multiple demands on land, including climate change mitigation and adaptation, biodiversity and food production.

³⁷ Planning Act (Northern Ireland) 2011 s12

³⁸ Planning Act (Northern Ireland) 2011 s5, 8, 9

³⁹ Planning (Local Development Plan) Regulations (Northern Ireland) 2015 reg 14

⁴⁰ Scottish Government, *Getting the best from our land: Scotland's third land use strategy 2021-2016* (SG/2021/81, Edinburgh: Scottish Government, 2021)

⁴¹ The framework flows from a recommendation in H Dimbleby, *National food strategy: the plan* (London: National Food Strategy, 2021)

Recommendation: The Department of Agriculture, Environment and Rural Affairs and the Department for Infrastructure should bring forward legislation to establish statutory biodiversity or nature recovery targets and ensure these are reflected in a regional strategic planning policy or land use strategy, in order to ensure the localisation of planning responsibilities does not diminish biodiversity protection.

Knowledge of and commitment to biodiversity

Misgivings about the localisation of planning policy, highlighted above, tended to centre on the role of elected representatives. Planning and, where present, biodiversity officers were seen to approach their roles with “knowledge and professionalism,” but with no guarantee that their recommendations – for example, on the content of a local development plan – would align with members’ priorities.

Councillors were not regarded as antagonistic towards biodiversity protection and enhancement. Rather, they were thought to lack knowledge of the subject. In the absence of a strong steer from statutory duties or targets other than a rather weak biodiversity duty, or from strategic policy, this left them ill-equipped to grasp its importance alongside the more obvious gains to the district from development.

With the development of legislation and strategic policy difficult in the continued absence of a devolved Executive and Assembly, this was seen as an area where action could be taken – perhaps driven by the voluntary sector – in the short term. However, with regular elections and high turnover in council memberships, this could not be a one-off exercise.

“The short term nature of our electoral system, that’s a real problem for the environment... So if you don’t have the legislative requirement, even if we had brilliant politicians, they will switch again, change again, new lads in with very different views.”

Longer term, statutory duties and training or awareness raising were viewed as complementary, as the existence of meaningful legal obligations in respect of biodiversity would act as a strong incentive for local authorities to invest in the necessary training. Climate change was repeatedly highlighted as an example of this effect (see below). Some participants also spoke of the need to “mainstream” concern with biodiversity in the public as well as political consciousness. If electorates routinely ‘have regard’ to biodiversity, the argument ran, then their representatives must also do so in office.

Recommendation: The Department for Infrastructure, Department of Agriculture, Environment and Rural Affairs, Northern Ireland Local Government Association and the Environmental NGO sector should work to develop training on the biodiversity crisis, the UK’s commitments to biodiversity in international law and the potential contribution of planning for all individuals with a role in planning policymaking or determinations. Local authorities should ensure planning officers and councillors receive appropriate and ongoing biodiversity training and draw on the expertise of biodiversity officers where available. Public education on biodiversity should also be developed to increase buy-in to biodiversity-focused targets and policies.

Learning from climate change

Climate change was repeatedly referred to in the roundtable as both competition and model for the biodiversity agenda. Key obstacles to biodiversity protection and enhancement – the absence of strong legislative or strategic policy direction and councillors’ perceived lack of knowledge, awareness or concern – were routinely contrasted with the centrality of climate change to thinking

about land use. The still-recent Climate Change Act (NI) 2022 was never far from participants' minds.

For many years Northern Ireland was unique among the devolved countries in not having dedicated climate change legislation, although emissions reduction targets and carbon budgets under the UK Climate Change Act 2008 included emissions from Northern Ireland. The 2022 Act changed this, introducing Northern Ireland-specific emissions targets, requiring Northern Ireland-specific carbon budgeting and providing for duties to develop proposals and policies for climate change mitigation and adaptation on all public bodies.

As one contributor noted: "Climate change now has a bit of respect. That's because there is legislation." Participants observed that the effects of the statutory requirements around climate change included some of the things they thought were absent in the biodiversity space, including cooperation between government departments, the appointment of specialist staff by local authorities and training for councillors.

The prominence of the climate change agenda could be helpful to biodiversity protection in some cases, for example by encouraging the protection of habitats like peat bogs that act as carbon sinks. However, there was concern about the risk of "trade-offs and unintended consequences," with the imperative to reduce emissions in pursuit of what the Climate Change Committee has presented as an extremely challenging target of net zero by 2050⁴² producing pressure to prioritise, for example, renewable energy development at the expense of biodiversity.

More optimistically, participants suggested that if statutory obligations had helped stimulate a response to the climate crisis, they could also do so for the biodiversity crisis. Climate change was presented not only as an example of the importance of legislation, but as a model for action by the voluntary sector. Work by environmental NGOs to develop a private member's Bill on climate change was felt to have "flushed out" the Executive, which then produced and was pushed to increase the ambition of its own Bill.⁴³

Recommendation: All tiers of government should work to ensure the climate and biodiversity crises are given comparable prominence, including through the drafting of biodiversity legislation where appropriate.

Biodiversity net gain

Of the various measures for biodiversity protection discussed at the roundtable, particular attention was paid to biodiversity net gain. A statutory requirement for most forms of development in England under the Environment Act 2021 and likely component of future planning policy in Wales, the possible contribution of net gain to biodiversity in Northern Ireland proved one of the more controversial topics.⁴⁴ There was general approval for raising the profile of biodiversity in planning decision making, with some participants convinced that, implemented correctly, biodiversity net gain "can be a good system, can bring improvements." Nonetheless, most expressed some degree of caution. A typical observation was:

⁴² Climate Change Committee, *Advice report: the path to a net zero Northern Ireland* (London: Climate Change Committee, 2023)

⁴³ See A Clements, 'We have a Climate Change Act! (Well, nearly)' (Ulster Wildlife Trust blog, 22 March 2022) <https://www.ulsterwildlife.org/blog/annika-clements/we-have-climate-change-act-well-nearly>

⁴⁴ Biodiversity net gain, particularly the ability to offset losses at one location with gains elsewhere, has also been academically and politically controversial. For a review of the literature, see M Maron and 14 others, 'Taming a Wicked Problem: Resolving Controversies in Biodiversity Offsetting' (2016) 66(6) *BioScience* 489; for a briefer summary of UK debates, see J Condon, 'Biodiversity Offsetting and the English Planning System: A regulatory analysis' (2020) 32(3) *Journal of Environmental Law* 529

“Biodiversity net gain, it’s seen as the holy grail for biodiversity loss. I think we should be careful what we wish for, because if we don’t have the right system we could end up trashing sites.”

A central concern was that a purely or overly quantitative approach to measuring biodiversity, combined with developers’ ability to offset biodiversity loss on one site with gains elsewhere or the purchase of biodiversity credits, could result in the loss of valuable habitats and insufficient consideration of how to minimise on-site losses. One participant warned: “It’s much easier for a developer to say here’s some nature credits, here you go, I can do whatever I want.” Special rules apply to irreplaceable habitats in England,⁴⁵ but it was noted that these had yet to be properly tested. It was further feared that the ability to offset might result in spatial inequalities, with a risk that cities might become “biodiversity deprived” as developers prefer to purchase cheaper rural land for enhancement – in the process pricing out potential agricultural buyers.

Other concerns included that the 10 per cent minimum net gain requirement in England (the Welsh Government proposes a “proportionate” net benefit to biodiversity)⁴⁶ could by default become the limit on developers’ ambitions, even where a given development could easily achieve a greater gain. There was also a warning that an apparently ambitious proposal for net gain within a planning application does not automatically translate into gains in practice, with effective monitoring and enforcement essential if this risk is to be avoided (see below).

None of this amounted to an outright rejection of biodiversity net gain as a tool for sustainable development, but participants were clear that heavy reliance on net gain would come with risks that must be managed.

Recommendation: The Department for Infrastructure and Department of Agriculture, Environment and Rural Affairs should increase the prominence of biodiversity considerations in the determination of planning applications through legislation or strategic policy, ensuring that any requirement for biodiversity net gain through on- or off-site measures does not undermine the conservation of existing high-value habitats on, or adjacent to, a development site.

Brexit, biodiversity and the border

Overall, research participants did not often highlight the UK’s withdrawal from the EU as one of the key risks for biodiversity in Northern Ireland. There was some acknowledgement that “the EU was able to take a longer view” of the issue than Northern Ireland’s institutions and might be less prone to sidelining biodiversity considerations in favour of short-term economic gains. On the other hand, one participant noted that the proposed ‘Renewable Energy Directive III’ could increase pressure to prioritise renewable energy development over biodiversity in the remaining member states.⁴⁷

One participant noted that Brexit brings a specific challenge for the protection of biodiversity in Northern Ireland from cross border harms, absent in England, Wales and Scotland as there is no border with a non-UK country. Planning decisions in the Republic of Ireland are subject to an ‘appropriate assessment’ of the impact on Natura 2000 protected sites, with strict controls on the

⁴⁵ Department of Environment, Food and Rural Affairs, *Consultation on biodiversity net gain regulations and implementation: Government response and summary of responses* (London: DEFRA, 2022); Ministry of Housing, Communities and Local Government, *National planning policy framework* (London: MHCLG, 2021)

⁴⁶ Welsh Government, *Targeted policy changes to Planning Policy Wales on Net benefit for Biodiversity and Ecosystems Resilience (incorporating changes to strengthen policy on Sites of Special Scientific Interest, Trees and Woodlands and Green Infrastructure)* (Cardiff: Welsh Government, 2023) 14

⁴⁷ For an overview of the revision process, see European Commission, ‘Renewable energy directive’ (Brussels: European Commission, nd) https://energy.ec.europa.eu/topics/renewable-energy/renewable-energy-directive-targets-and-rules/renewable-energy-directive_en

circumstances in which plans or projects can proceed on these sites if they are likely to have adverse effects.⁴⁸ While the UK has maintained its designations of ‘European’ sites – Special Protection Areas and Special Areas of Conservation – post-Brexit, these no longer form part of the Natura 2000 network. Accordingly, it is uncertain, if not unlikely, whether their protection remains a relevant consideration for planners across the border. The participant observed:

“I think it leaves sites more vulnerable. If planners make a refusal [of planning permission] to protect something over the border, it is technically incorrect and you will have a lawyer telling you. If you think we don’t have to give it any consideration, that doesn’t ring true either. It’s leaving vulnerabilities.”

Clearly, neither government nor civil society in Northern Ireland has any direct control over what is or is not a material consideration for planners in the Republic of Ireland. However, there would appear to be scope to argue that some degree of recognition of the importance of the former Natura 2000 sites in Northern Ireland, and of any Special Areas of Conservation or Special Protection Areas that are designated in the future, would be in keeping with the spirit of the network.

Recommendation: The UK Government, Northern Ireland Executive and local government should work with counterparts in the Republic of Ireland to ensure that the UK’s withdrawal from the Natura 2000 network does not diminish the protection of Special Protected Areas and Special Areas of Conservation in Northern Ireland from cross-border activities.

Monitoring and enforcement

Compliance with and enforcement of environmental law have been recurring concerns in Northern Ireland,⁴⁹ so it was no surprise that the issue arose in the roundtable discussion of biodiversity and planning. This was a concern at multiple levels.

Participants criticised the relative lack or weakness of statutory biodiversity targets and duties, but feared that more robust legislation would not guarantee the necessary investment on the part of public authorities for the targets to be achieved or duties fulfilled. One asked: “You can put statutory targets there, but... what’s the consequences if you don’t meet them?” Nonetheless, there was a general feeling that resources and meaningful action should (at least to some extent) follow statutory requirements (see above).

At the level of local government, where the day-to-day business of the planning system now occurs, it was felt that enforcement tends to be “very reactive,” with a preference for investigating specific complaints over proactive monitoring of compliance with the terms of permissions granted. Ensuring that developers stand by commitments given in respect of any future biodiversity net gain requirement was highlighted as a specific issue. In this case, monitoring might be particularly problematic if off-site gains were promised at a location in a different local government district.

The new Office for Environmental Protection (OEP) has an important role in accountability and enforcement in the post-Brexit environmental law arena. In addition to monitoring the implementation of environmental law and (in England) progress towards statutory environmental improvement targets, the OEP investigates alleged failures by public bodies to comply with their

⁴⁸ Department of Environment, Heritage and Local Government, *Appropriate assessment of plans and projects in Ireland: guidance for planning authorities* (Dublin: DEHLG, 2009/revised 2010)

⁴⁹ C Brennan, R Purdy and P Hjerp, ‘Political, Economic and Environmental Crisis in Northern Ireland: The True Cost of Environmental Governance Failures and Opportunities for Reform’ (2017) 68(2) Northern Ireland Legal Quarterly 123; C Brennan, M Dobbs and V Gravey ‘Out of the frying pan, into the fire? Environmental governance vulnerabilities in post-Brexit Northern Ireland’ (2019) 21(2) Environmental Law Review 84

obligations under environmental law or to exercise functions required by environmental law. This would include an unlawful failure by a planning authority to exercise its own enforcement powers. The OEP was not much discussed during the roundtable, but one participant was sceptical about its likely contribution:

“They can give you a notice... but they’ve no teeth. That’s it. You can make a complaint about a public body, whatever, they can look into it. It’s like so weak. Basically [the Minister] has to read a report.”

This perspective was perhaps unduly pessimistic – the OEP can also bring judicial reviews and Professor Richard Macrory has suggested it is likely to be taken seriously and might offer a faster route to the resolution of failures by public bodies than a complaint to the European Commission.⁵⁰ However, it is fair to say that the jury is still out on just how effective the OEP will be – Fisher has questioned its independence from government and its likely eagerness to use its enforcement powers.⁵¹ Particularly pertinently, it is not clear that failure to comply with or exercise a function conferred by planning law would be regarded as a piece of environmental law within the OEP’s remit, even if the failure had clear consequences for biodiversity.⁵² In any event, effective implementation and enforcement should not be dependent on further enforcement from another authority.

Recommendation: Local government should develop monitoring and enforcement mechanisms to ensure compliance with biodiversity-related conditions for planning permission. The Office for Environmental Protection should have a role in ensuring planning authorities’ compliance with any future biodiversity targets, with sufficient ‘teeth’ to take enforcement action where required.

⁵⁰ R Macrory, ‘The Office for Environmental Protection: environmental fig leaf or game changer?’ (2019) 31(1) *Environmental Law and Management* 7; R Macrory, ‘Breaking the mould – Britain’s new Office for Environmental Protection’ (2023) 35(1) *Journal of Environmental Law* 33

⁵¹ E Fisher, ‘Executive environmental law’ (2020) 83(1) *Modern Law Review* 163

⁵² R Macrory, ‘Breaking the mould – Britain’s new Office for Environmental Protection’ (2023) 35(1) *Journal of Environmental Law* 33

4. Conclusion

It is well known that Northern Ireland faces specific challenges following the UK's withdrawal from the European Union. Northern Ireland also faces distinct challenges of environmental law, governance and enforcement as well as in its political arena. The biodiversity crisis is a global issue, but there is evidence that it is a little more acute in Northern Ireland than in many countries. So, while the implications of Brexit were by no means absent from this Brexit-inspired piece of research, these stood alongside a range of other issues of equal or greater, and often longer standing, importance.

Planning policy and decisions clearly have significant implications for the biodiversity of a site, a local government district and, cumulatively, the country. With hindsight, perhaps it should have come as no great surprise that the balance between local democracy and central direction in the still-crystallising post-2011 settlement came in for particular scrutiny. The transfer of planning competences to local government might pre-date the then-Prime Minister's commitment to a referendum on EU membership,⁵³ but there was a sense that, to some extent, the post-Brexit opportunity to force biodiversity onto councillors' agenda had been seized in England but missed in Northern Ireland. The latest of the recurring rounds of instability in the devolved Assembly and Executive – itself an effect of Brexit – means it is uncertain when there will be an opportunity to revisit this.

It would run contrary to the purpose of devolution for Northern Ireland to automatically follow developments in England, or any other UK country. Nonetheless, insights and ideas can be gained from neighbouring jurisdictions. Research participants saw merit in some recent reforms on the other side of the Irish Sea, notably the setting of targets and duties to ensure all tiers of government devote sufficient attention and resources to biodiversity, in an attempt to avoid the risk of a race to the bottom (or simple disinterest) in a more fragmented planning system. Biodiversity net gain requirements and the establishment of the Office for Environmental Protection as a new environmental law 'watchdog' were viewed with interest but some scepticism. Climate change was ever-present, prompting both concern about the potential for a focus on the climate crisis to overshadow the biodiversity crisis and an aspiration for biodiversity to emulate its rise up the political agenda. Perhaps the most obviously Northern Ireland-specific challenges to be identified concern the possible loss of protection for protected sites from cross-border development and longstanding problems with implementation, monitoring and enforcement.

The recommendations in this report reflect research participants' views of how some progress might be made towards addressing some of the challenges identified. The author and RTPI hope this will be just the start of a conversation on how biodiversity concerns can be better integrated into planning in Northern Ireland.

⁵³ D Cameron, Speech at Bloomberg London, 23 January 2013

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