

**Submissions on the Agriculture (Removal of Cross-Compliance and Miscellaneous Revocations and Amendments, etc.) (England) Regulations 2023 (SI [2023/816](#)) and response by the Department for Environment, Food and Rural Affairs (Defra)**

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## **Submission I: Client Earth**

The SI for the Removal of cross-compliance was laid before Parliament on 18<sup>th</sup> July 2023 (made 17<sup>th</sup> July), accompanied by a short explanatory note, under powers set out in the Agriculture Act 2020. These regulations come into force on the 1<sup>st</sup> of January 2024, at that time removing cross-compliance requirements from the legacy Common Agricultural Policy payment scheme agreements with farmers (including agreements associated with the Basic Payment Scheme and the Rural Development Programme Schemes) in England. The regulations legally implement Government’s previous policy decision to eliminate cross-compliance requirements in the transition to the new Environmental Land Management Scheme pursuant to, e.g., the Defra Agricultural Transition Plan 2021 to 2024.<sup>1</sup>

This is significant as cross-compliance requirements have been in place over an enormous area of land in England for many years. For example, 85,000 farms in England received direct payments under the Basic Payment Scheme in 2016<sup>2</sup> (noting that there are over 9 million hectares of farmland in England, with an average farm size of 87 hectares (see Agricultural facts: England regional profiles (publishing.service.gov.uk)).

Defra’s guidance on cross-compliance states that “most of the standards in cross-compliance will continue to apply to farm activities as they remain in other English laws” and Defra will make sure that farmers/land managers are aware of these legal requirements and approaches to enforcing them.<sup>3</sup>

### **Questions for Defra**

- I. Given that this SI removes cross-compliance as an integral part of the land management agreement and, as a result, appears to reduce or eliminate the Rural Payment Agency’s role in monitoring and enforcing the relevant good agricultural and environmental condition standards, how does Defra intend to continue to apply and enforce these standards after cross-compliance is removed?

### **Duty to make a proper environmental assessment on the removal of cross-compliance**

The significance of the loss of cross-compliance is that a whole-farm level baseline set of requirements will either be diminished via the emergence of gaps or -- for those requirements that survive through independently existing regulations – will no longer be directly tied to payments, and as such directly monitored or enforced, under land management agreements. Therefore, the knock-on effects of the withdrawal of cross-compliance are likely to be long-term and difficult to fully quantify, thus, a precautionary approach should have been adopted. Under both the Environmental Assessment of Plans and Programmes Regulations 2004 (known sometimes as the “Strategic Environmental Assessment” Regulations) and The Conservation of Habitats and Species Regulations 2017 (“Habitats Regulations”), it appears to us that Defra should have carried out steps to establish whether a full environmental assessment was required

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<sup>1</sup> [Defra Agricultural Transition Plan 2021 to 2024](#)

<sup>2</sup> [Moving away from Direct Payments: Agriculture Bill - analysis of the impacts of removing Direct Payments \(publishing.service.gov.uk\)](#)

<sup>3</sup> [Guide to cross compliance in England 2023 - GOV.UK \(www.gov.uk\)](#)

in preparing the policy, plan or programme (e.g., the Agricultural Transition Plan 2021 to 2014) that is given legal effect by this instrument, before the SI was submitted to the legislative procedure.

We have sent an information request to Defra to establish whether an environmental assessment was completed under either of these Regulations (or any other Regulations) and if not, whether the appropriate steps were followed to establish whether an assessment was required e.g., consultation with Natural England. In a response to an environmental information request sent in 2022, Natural England confirmed that it had not been consulted by Defra regarding environmental assessment procedures in relation to the removal of cross-compliance, either Part 6 of the Habitats and Species Regulations 2017 or The Environmental Assessment of Plans and Programmes Regulations 2004.<sup>4</sup>

Under the above Regulations the decision to remove cross-compliance arguably falls within the criteria of a “plan” (or modification to a plan) setting the framework for future development consent of projects in the agriculture sector given its inclusion in the Agricultural Transition Plan 2021 to 2024.<sup>5</sup> (as required under the Strategic Environmental Assessment Regulations) as well as “plan” that may have a likely significant effect on a European site (or several sites) (as required under the Habitats Regulations.)

### Questions for Defra

2. Did Defra complete a full environmental assessment of the impact of the removal of cross-compliance? If not, why not?
3. What steps did Defra take to establish whether a full environmental assessment was required in preparing the policy, plan or programme? Was this done before the SI was submitted to the legislative procedure?

### Regulatory gaps

While some of the set of standards for Good Agricultural and Environmental Condition (“GAEC”) and Statutory Management Requirements that apply via cross-compliance also are independently underpinned by existing domestic Regulations (as emphasised in Defra’s guidance), there are some notable omissions:

- GAEC 4 on **soil protection**, which requires farmers to take reasonable steps to ensure that land is covered by crops, stubbles, residues or other vegetation to protect the soil and also take all reasonable steps to prevent excessive soil erosion on the land<sup>6</sup>;
- Important components of GAEC 1<sup>7</sup>, on the **protection of watercourses**, which requires farmers to take all reasonable steps to maintain green cover on – and not cultivate or apply pesticides to – land in close proximity to watercourses<sup>8</sup>;

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<sup>4</sup> EIR response from Natural England to WWF UK of 17th May 2022, which has been shared with ClientEarth

<sup>5</sup> See number 1

<sup>6</sup> SI 2014 No. 3263 at paragraph 3; see also [GAEC 4: Providing minimum soil cover - Guide to cross compliance in England 2022 - Guidance - GOV.UK \(www.gov.uk\)](#)

<sup>7</sup> Components of GAEC 1 concerning the use of artificial fertilisers and organic manure near watercourses are underpinned by The Nitrate Pollution Prevention Regulations 2015 and The Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018.

<sup>8</sup> SI 2014 No. 3263 at paragraph 4; see also [GAEC 1: Establishment of buffer strips along watercourses - Guide to cross compliance in England 2022 - Guidance - GOV.UK \(www.gov.uk\)](#)

- Important components GAEC 7a<sup>9</sup>, on the **protection of hedgerows**, which requires farmers to take all reasonable steps to maintain a green cover on, and not cultivate, or apply fertilisers or pesticides to land in close proximity to hedgerows<sup>10</sup>.

## Questions for Defra

4. What is Defra doing to protect the environmental areas (such as those listed above) that will be at risk from the gaps in regulation that the removal of cross-compliance will create?

## Monitoring and Enforcement

The RPA has a number of monitoring and enforcement powers available to it under the CAP Regulations in relation to these and other cross-compliance requirements that are revoked by default by this instrument, including:

- Powers of entry onto land and inspect compliance levels thereon, including the taking of measurements, tests and samples, as well as copying and/or removal of documents or records for evidentiary purposes<sup>11</sup>;
- Making a determination that a cross-compliance requirement has been breached<sup>12</sup>; and
- Where a breach is determined to have occurred:
  - Withhold or recover all or part of any payment due to a scheme beneficiary where a breach is determined to have occurred<sup>13</sup>;
  - Terminate the relevant scheme agreement<sup>14</sup>; and
  - Prohibit the scheme beneficiary from making new scheme commitments for two years<sup>15</sup>.

Accordingly, the regulatory penalties that could result from a breach of cross-compliance requirements arguably act as a strong deterrent from managing land in violation of the standards, which in turn protects important environmental features from harm. Indeed, in Dame Glenys Stacey’s review of agricultural regulation, it was found that “in farming ... the far most common approach [to the enforcement of rules] has been the automatic financial penalties imposed [by the RPA] through cross-compliance”.<sup>16</sup>

We consider that Defra’s position that “most of the standards in cross-compliance will continue to apply to farm activities as they remain in other English laws” to be flawed when it comes to how effectively those corresponding regulations will be monitored and enforced after cross-compliance is lost. The RPA was a first point of contact for breaches of those regulations identified during on-the-spot checks; those that result in non-compliances *and* breaches of domestic regulations. The ongoing relationship between the RPA and the Environment Agency and Natural England in inspection and enforcement should have been considered as part of the environmental assessments referred to above and should, in any event, be clarified by Defra prior to the adoption and implementation of the removal of cross-compliance regulations.

<sup>9</sup> Components of GAEC 7a concerning the removal of hedgerows are underpinned by The Hedgerow Regulations 1997.

<sup>10</sup> SI 2014 No. 3263 at paragraph 5; see also [GAEC 7a: Boundaries - Guide to cross compliance in England 2022 - Guidance - GOV.UK \(www.gov.uk\)](#)

<sup>11</sup> SI 2014 No. 3264, see Regulation 11.

<sup>12</sup> SI 2014 No. 3264, see Regulation 14 (1).

<sup>13</sup> SI 2014 No. 3264, see Regulation 15 (1).

<sup>14</sup> SI 2014 No. 3264, see Regulation 15(2).

<sup>15</sup> Regulation 15(3).

<sup>16</sup> *Farm Inspection and Regulation Review* (2018)

## **Questions for Defra**

5. Given the changes made by this instrument and evidence of the Environment Agency's poor enforcement of current agricultural regulations, such as the Farming Rules for Water, how does Defra intend to identify and enforce the breaches listed above after January 2024?

**8 August 2023**

## **Submission 2: Wildlife and Countryside Link**

1. The end of cross-compliance and the delinking farm payments from mandatory land management practices presents significant policy challenges for 2024 and beyond. In absence of new regulations, it is concerning that the SI creates regulatory gaps that will impact nature such as hedgerows and pollinators, as well as human health.

### **Questions for clarification**

2. Prior to the enactment of the SI, does Defra plan on releasing some sort of transition plan to cover the gaps between cross compliance, the ELM schemes and future regulations?
3. How will the deregulatory approach embodied by the SI and shift in language from mandatory to voluntary obligations (e.g., 'shall' to 'may' in Parts 3-6) be complemented by further regulations that mandate appropriate land management practices, which are accompanied by clear, advance timescales for the implementation of such regulations (particularly for hedgerows)?
4. The explanatory note also sets out: "A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sector is foreseen." The reasoning for this approach is unclear - and further clarification from Defra would be useful. Given that the SFI is not expected to achieve 100% uptake, there is going to be an undeniable impact on all three sectors due to the aforementioned gaps, which the public sector will need to expend additional resources addressing (a political challenge), whilst the private and voluntary sectors will suffer unreasonable, costly burdens of closing regulatory gaps to protect vulnerable ecosystems when cross-compliance ends.

**8 August 2023**

### **Submission 3: Green Alliance**

- The Defra consultation on protecting hedgerows closes on 20 September. What steps is the government taking to ensure that in responding to this consultation there will be no regulatory gap on hedgerow protection after 1 January 2024?
- What steps is the government taking to ensure that the loss of other elements of cross compliance does not lead to regulatory gaps on the protection of watercourses, soil and stone walls after 1 January 2024?
- What assessment has the government made of the impact of the loss of cross compliance on the delivery of Environment Act targets and the commitment in the Environmental Improvement Plan to bring at least 40% of England's agricultural soil into sustainable management by 2028?

**8 August 2023**

**Response by the Department for Environment, Food and Rural Affairs**

<b>Wildlife and Countryside Link &amp; Green Alliance</b>	
<b>Questions</b>	<b>Answers</b>
<p>1. Prior to the enactment of the SI, does Defra plan on releasing some sort of transition plan to cover the gaps between cross compliance, the ELM schemes and future regulations?</p>	<p>We have already set out our plan in the Agricultural Transition Plan and subsequent updates. We are consulting on further legislative protections for hedgerows (<a href="https://www.gov.uk/government/consultations/protecting-hedgerows-in-england">Protecting hedgerows in England - GOV.UK (www.gov.uk)</a>) and depending on the outcomes of that consultation will look to bring in those additional protections as quickly as possible to minimise any environmental impacts. We will remind farmers nearer to the end of the year of our approach.</p>
<p>2. How will the deregulatory approach embodied by the SI and shift in language from mandatory to voluntary obligations (e.g., 'shall' to 'may' in Parts 3-6) be complemented by further regulations that mandate appropriate land management practices, which are accompanied by clear, advance timescales for the implementation of such regulations (particularly for hedgerows)?</p>	<p>The majority of rules under cross compliance are already in domestic law and farmers and land managers must still follow them. We published our consultation on further protections for hedgerows which sets out our intentions.</p>
<p>3. The explanatory note also sets out: "A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sector is foreseen." The reasoning for this approach is unclear - and further clarification from Defra would be useful. Given that the SFI is not expected to achieve 100% uptake, there is going to be an undeniable impact on all three sectors due to the aforementioned gaps, which the public sector will need to expend additional resources addressing (a political challenge), whilst the private and voluntary sectors will suffer unreasonable, costly burdens of closing regulatory gaps to protect vulnerable ecosystems when cross-compliance ends</p>	<p>The majority of cross compliance measures are in domestic law and there will be no additional burdens on private or voluntary sectors as a result of the loss of cross compliance. Indeed, outside of the EU we have designed a more effective regulatory approach that focusses on delivering outcomes. For example the Environment Agency have been working with farmers to support them back to compliance – expanding from c. 300 visits p.a. to over 4000 in 22/23, with proportionate action such as over 5500 improvement notices issued in the same year (over 3,000 of which have already been actioned) and, where necessary for the most egregious situations, stop notices or court action.</p>



	<p>A full environmental impact assessment of this policy was not required. The removal of cross compliance is not considered to be in scope of either the Environmental Assessment of Plans and Programmes Regulations 2004 or The Conservation of Habitats and Species Regulations 2017. Cross compliance is a set of conditions placed on legacy CAP payments which applied to those farmers in receipt those payments. It is not a plan or programme directly impacting environmental sites that requires an assessment as set out in the regulations. Even if the removal of cross compliance was in scope, its removal is not likely to have a significant environmental effect. This is because cross compliance rules in underlying domestic legislation will continue to apply to all farmers. The rules within cross compliance that are not in underlying domestic legislation are either planned to be replaced such as new hedgerow protections which are being consulted on (Protecting hedgerows in England - GOV.UK (<a href="http://www.gov.uk">www.gov.uk</a>)) or there are other existing measures to provide ongoing protections.</p>
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<b>ClientEarth</b>	
<b>Questions</b>	<b>Answers</b>
<p>1. Given that this SI removes cross-compliance as an integral part of the land management agreement and, as a result, appears to reduce or eliminate the Rural Payment Agency's role in monitoring and enforcing the relevant good agricultural and environmental condition standards, how does Defra intend to continue to apply and enforce these standards after cross-compliance is removed?</p>	<p>Existing regulators will continue to be responsible for monitoring, inspection and enforcing against domestic regulation that underpins most cross compliance rules. For example, Natural England's role in enhancing protected sites and protecting biodiversity will not change, the Health and Safety Executive will continue to regulate use of Plant Protection Products and EA will continue to regulate, amongst other things, to protect water.</p> <p>Defra is working with regulators to implement a more preventative, advice-led approach to monitoring and enforcement. For example, the Environment Agency have been working with farmers to support them back to compliance – expanding from c. 300 visits p.a. to over 4000 in 22/23, with proportionate action such as over 5500 improvement notices issued in the same year (over 3,000 of which have already been actioned) and, where necessary for the most egregious situations, stop notices or court action. To help support a transparent and proportionate enforcement we are considering the introduction of Penalty Notices for animal health and welfare offences. The consultation on the scope of Penalty Notices closed on the 20th July and we are currently analysing the responses.</p>
<p>2. Did Defra complete a full environmental assessment of the impact of the removal of cross-compliance? If not, why not?</p>	<p>A full environmental impact assessment of this policy was not required. The removal of cross compliance is not considered to be in scope of either the Environmental Assessment of Plans and Programmes Regulations 2004 or The Conservation of Habitats and Species Regulations 2017. Cross compliance is a set of conditions placed on legacy CAP payments which applied to those farmers in receipt those payments. It is not a plan or</p>
<p>3. What steps did Defra take to establish whether a full environmental assessment was required in preparing the policy, plan or programme? Was this done before the SI was submitted to the legislative procedure?</p>	

	<p>programme directly impacting environmental sites that requires an assessment as set out in the regulations. Even if the removal of cross compliance was in scope, its removal is not likely to have a significant environmental effect. This is because cross compliance rules in underlying domestic legislation will continue to apply to all farmers. The rules within cross compliance that are not in underlying domestic legislation are either planned to be replaced such as new hedgerow protections which are being consulted on (Protecting hedgerows in England - GOV.UK (<a href="http://www.gov.uk">www.gov.uk</a>)) or there are other existing measures to provide ongoing protections.</p>
<p>4. What is Defra doing to protect the environmental areas (Soil protection; protection of watercourses and protection of hedgerows) that will be at risk from the gaps in regulation that the removal of cross-compliance will create?</p>	<p>The rules within cross compliance that are not in underlying domestic legislation are either planned to be replaced such as new hedgerow protections which are being consulted on (Protecting hedgerows in England - GOV.UK (<a href="http://www.gov.uk">www.gov.uk</a>)) or there are other existing measures to provide ongoing protections</p>
<p>5. Given the changes made by this instrument and evidence of the Environment Agency's poor enforcement of current agricultural regulations, such as the Farming Rules for Water, how does Defra intend to identify and enforce the breaches listed above after January 2024?</p>	<p>See answer to Question 1.</p>

**11 September 2023**