

# UK laws and policy supporting use of biodiversity offsets in England

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# laws and policies applicable in England

## EU:

- Habitats and Birds Directives
- EIA and SEA Directives
- Environmental Liability Directive

## UK:

- Planning Policy Statements (PPS9)
- Regional Spatial Strategies, Local Development Frameworks, Regional and Local BAPs
- Revised targets for UK Biodiversity Action Plan (BAP) priority species and habitats
- CROW, NERC, WCA
- S106 TCPA, Planning Gain Supplement, CIL
- Revised Habitats Regulations (SI No. 2010/490) effective April 2010

A combination of protection and development planning control

# EU Birds and Habitats Directives

- Use habitat conservation and species protection to achieve Favourable Conservation Status (FCS) for flora, fauna and habitats of European importance.
- Pursue habitat conservation primarily through network of protected areas (Natura 2000), which comprises special protection areas (SPAs) for birds and special areas of conservation (SACs) for other fauna, flora and habitats of Community importance.
- Precautionary principle and **no-net-loss** requirement apply to sites & species afforded strict protection, implemented through strict sequential tests, mitigation and compensation.

Council Directive 79/409/EEC of 2 April 1979 on the Conservation of Wild Birds (Birds Directive).

Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora (Habitats Directive).

# EU SEA and EIA Directives

## SEA(2001/42/EC)

- biodiversity objectives can be incorporated
- *measures envisaged to prevent, reduce and **as fully as possible offset** significant effects on the environment of implementing the plan*

## EIA(85/337/EEC) and (97/11/EEC)

- damage limitation exercise
- *a description of the measures envisaged [...] to prevent, reduce and **where possible offset** any significant adverse effects to the environment*

# Environmental Liability Directive\*

- Holds operators whose activities have caused environmental damage financially liable for remedying this damage.
- Art 2(1).. “*any damage*”
- Annex II ...restoration of these natural resources to their baseline condition is to be achieved by way of so-called primary, **complementary and compensatory** remediation measures.
- compensate for the **interim loss** of natural resources **and services** pending recovery
- **Can be at an alternative site**

\*2004/35/EC

# The Biodiversity Duty

- In England, the various duties under S.74 of the Countryside and Rights of Way Act 2000 were updated by S.40 of the NERC Act 2006 . These include a duty known as the 'Biodiversity Duty'.
- The extent to which local planning authorities and developers must '*have regard*' to the conservation of biodiversity is not clearly defined.
- The requirement to have '*regard*' to biodiversity allows for significant residual adverse effects on biodiversity to be offset, but this is not obligatory.
- It is not regular practice for developers to propose 'no net loss' biodiversity offsets for their proposals to be satisfactory to local authorities, helping the latter to meet their obligations under the Biodiversity Duty.
- Inclusion of the clause '*so far as is consistent with the proper exercise of those functions*' may soften the Biodiversity Duty as the primary duty of the local planning authority is to carry out its main functions, which may not always be compatible with the conservation of biodiversity.

# PPS9

- Where granting planning permission would result in significant harm (to biodiversity interests) LPAs will need to be satisfied that the development cannot reasonably be located on any alternative sites that would result in less or no harm.
- In the absence of any such alternatives LPAs **should** ensure that before planning permission is granted adequate mitigation measures are put in place.
- Where a planning decision would result in significant harm to biodiversity which cannot be prevented or adequately mitigated against appropriate compensation measures **should be sought**.
- If significant harm cannot be prevented, adequately mitigated against, or compensated for, then planning permission **should be refused**.

# No net loss

- ‘**No net loss**’ principle enshrined in international commitments through CBD.
- EU: ‘**no net loss**’ and precautionary policy apply to sites designated under the Birds’ and Habitats Directives.
- Restoration to ‘**baseline condition**’ required under Environmental Liability Directive
- General requirement to seek biodiversity **enhancement** through Biodiversity Duty under NERC

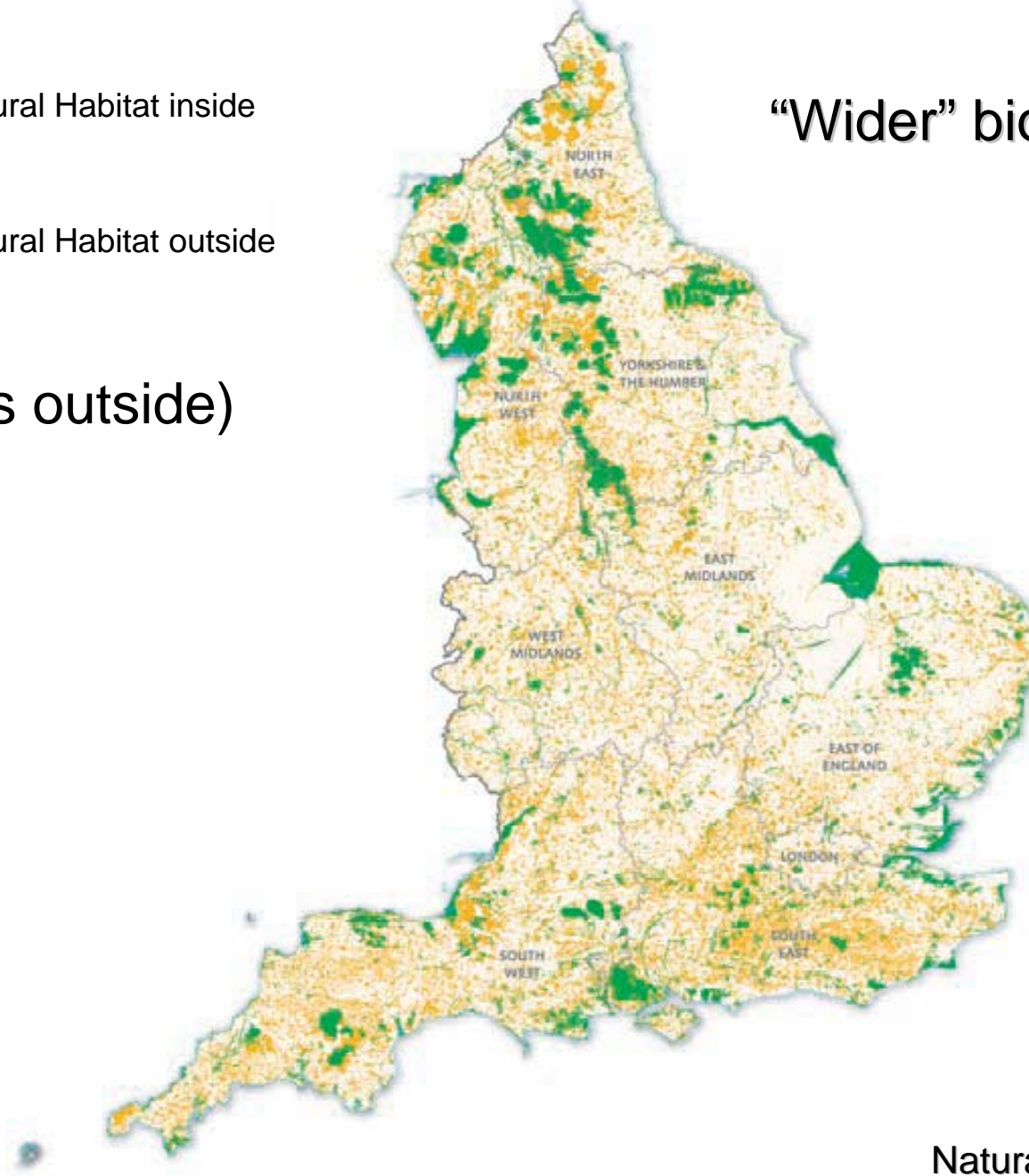


■ Semi Natural Habitat inside SSSIs

■ Semi Natural Habitat outside SSSIs

(52% is outside)

“Wider” biodiversity



## Natural England 2008: A Manifesto for the Natural Environment:

- Conservation has focused on protected areas such as National Parks and Sites of Special Scientific Interest.
- Away from these areas, the natural environment is increasingly under threat. It has less diversity and less local distinctiveness than in the past...
- Coordinated action is needed now, not just by government but by a wider coalition with business and communities. We need a new, more dynamic approach to conservation....

- “We need to ..... explore new policy options including market creation in biodiversity, developing **incentives for biodiversity such as biodiversity offsets**”.
- Offsets should be used with an aspirational goal of achieving a **‘net benefit’** for biodiversity.

## Conserving Biodiversity – The UK Approach

October 2007



Published by Defra on behalf of the  
UK Biodiversity Partnership

# Factors in Favour of a system of offsets..

- The Biodiversity Action Plan lends itself to design of biodiversity credits which could be traded.
- Necessary data and mapping tools could be developed.
- Planning system already allows for developer contributions and has an aspiration to achieve biodiversity enhancement.
- Existing agri-environment schemes have created a precedent for individual landowners to manage their land for conservation benefit and there are tried and tested administrative procedures in place.
- Many local authorities are under-resourced with respect to the Biodiversity Duty under NERC and would benefit from increased investment to address hidden costs of development.

## Issues to resolve...

- Policy intent currently open to interpretation
- Developer contributions may be misconstrued as a green light for developers to buy themselves out of planning policies and restrictions
- Financial, legal mechanisms unclear
- Need for additionality could disadvantage owners of higher value land
- Offsets could undermine existing provision
- Relationship with other developer contribution frameworks is unclear: e.g. how to ensure s106/CIL delivers 'biodiversity' when appropriate?