

# A Cunning Plan... or a Plan too Far?

Comments on the draft National Planning Policy Framework for England

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## The Prologue

Modern planning and nature conservation policy, it could be argued, are bedfellows, twins that were conceived during tumultuous times and born amongst the ashes and destruction of London's East End in the immediate aftermath of World War II. Fast-forward 65 years and these policies are, according to the current Government, due for retirement. This article considers the draft National Planning Policy Framework for England (NPPF), its relevance to developers, planners and ecologists and whether they may lead to changes in how biodiversity is protected through the planning system.

## Background

Out of the wide scale destruction experienced by the industrial cities of England during World War II, before the end of hostilities, the Government, through the reports of several committees, recognised the need and the opportunity to effectively and coherently manage post-war reconstruction. Concurrently, a special committee was convened to identify how land management for nature conservation could be managed in England and Wales. The Huxley Committee's *Report of the Wildlife Conservation Special Committee: Conservation of Nature in England and Wales* (Huxley 1947) paved the way in England for our National Parks, Sites of Special Scientific Interest (SSSIs) and Local Nature Reserves (LNRs). The Committee supported the Government's planning policy, reflecting the public's concern to protect the natural environment and to access the countryside, as well as the need to plan development in accordance with need. This historical background is important to place the proposed changes announced in summer 2011 in context, i.e. it was recognised, perhaps crudely, that policies protecting the environment and enabling development could advance together, though not always without challenges.

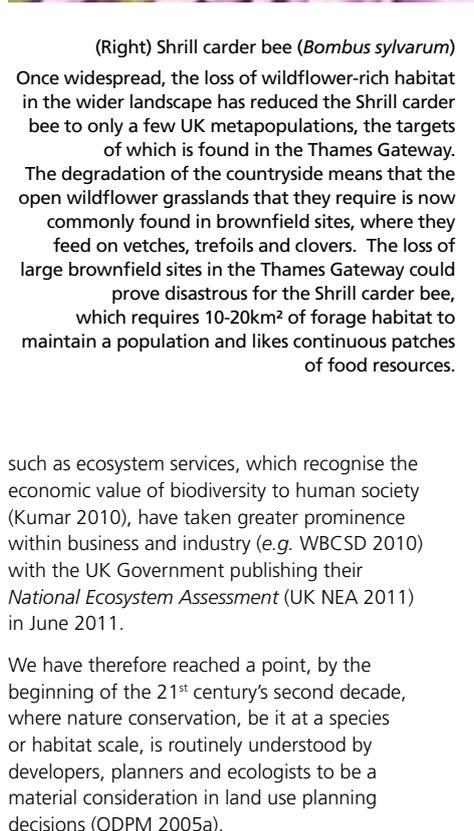
The following decades witnessed an explosion of ideas, policy, legislation and case-law (both domestic and European) that has resulted in the green belt, protected sites (i.e. Special Protected Areas (SPAs) and Special Areas of Conservation (SACs) in addition to SSSIs) as well as the need to protect individual species. Parallel with these are a host of wide ranging but related and relevant ideas and concepts, notably *Our Common Future* (Brundtland Commission 1987), which defined environmentally sustainable development and the Rio Declaration on Environment and Development (United Nations 1992a) and the resulting Convention on Biological Diversity in 1992 (United Nations 1992b) from which the Biodiversity Action Plan process emerged. More recently, concepts



Five-banded weevil-wasp (*Cerceris quinquefasciata*)

The Five-banded weevil-wasp is a rare Red Data Book wasp found in the south-east of England on exposed sandy ground such as sporadically disturbed brownfield sites, gravel pits, soft cliffs and heathlands. In summer months they dig burrows in sand for their eggs and provide each with weevil prey items for the grubs to feed on. Many of the nesting sites in their core area of the East Thames Corridor have been lost or under threat of development. Their persistence in the UK depends on the availability of bare sandy ground to nest, in close proximity to wildflower-rich grasslands and scrub that support their weevil prey species to feed their young, made more difficult by their need for a warm, sunny climate.

Photo by Mike Edwards (Buglife)



(Right) Shrill carder bee (*Bombus sylvarum*)

Once widespread, the loss of wildflower-rich habitat in the wider landscape has reduced the Shrill carder bee to only a few UK metapopulations, the targets of which is found in the Thames Gateway. The degradation of the countryside means that the open wildflower grasslands that they require is now commonly found in brownfield sites, where they feed on vetches, trefoils and clovers. The loss of large brownfield sites in the Thames Gateway could prove disastrous for the Shrill carder bee, which requires 10-20km<sup>2</sup> of forage habitat to maintain a population and likes continuous patches of food resources.

such as ecosystem services, which recognise the economic value of biodiversity to human society (Kumar 2010), have taken greater prominence within business and industry (e.g. WBCSD 2010) with the UK Government publishing their *National Ecosystem Assessment* (UK NEA 2011) in June 2011.

We have therefore reached a point, by the beginning of the 21<sup>st</sup> century's second decade, where nature conservation, be it at a species or habitat scale, is routinely understood by developers, planners and ecologists to be a material consideration in land use planning decisions (ODPM 2005a).



Photo by MJ Clark (Buglife)

# Feature Article: A Cunning Plan... or a Plan too Far? (continued)

## Regime Change

The current Government came in to power promising to be the "...greenest Government ever..."<sup>1</sup>. Within its first 18 months, it published the UK's National Ecosystem Assessment (UK NEA 2011) the first white paper on nature conservation in England in more than 20 years (*The Natural Choice: securing the value of nature* (HM Government 2011)) and a "...new ambitious biodiversity strategy [(Defra 2011)] for England..." , to quote Defra.

But this has also coincided with the most significant economic downturn in living memory on a global scale, uncertainty in the Middle East and North Africa and, closer to home, a loss of confidence in the Euro. Collectively, these factors have increased political pressure on the current Government to act, perhaps radically, to stimulate economic growth. And in doing so, the Government proposed (on 25 July 2011) the NPPF (DCLG 2011a), a single 52-page document of planning policy to replace 1,000 pages of existing national planning policy in England. Whilst some regard this as the most radical overhaul of the planning system since the Huxley Committee, others consider this to be proportionate.

The NPPF has been widely reported, resulting in a range of views being expressed by conservation NGOs (e.g. RSPB<sup>2</sup>, Wildlife Trusts<sup>3</sup>, Campaign for the Protection of Rural England (CPRE)<sup>4</sup> and the National Trust<sup>5</sup>), practitioners (e.g. Royal Town Planning Institute (RTPI)<sup>6</sup>) and users (Confederation of British Industry (CBI)<sup>7</sup> and the National Housing Federation (NHF)<sup>8</sup>).

The remainder of this article aims to comment on the NPPF as published in July 2011 and on how it may affect planning decisions in the context of nature conservation. The outcome of the NPPF consultation (which closed in mid-October 2011) is scheduled to be adopted in spring 2012. Some of the concerns raised and discussed here may therefore not ultimately be pertinent to the final document, depending upon what and whether it is ultimately adopted. This article seeks to offer a balanced consideration.

## Planning Ahead for Biodiversity and Nature Conservation

In the Government's own words, the NPPF "...is a radical streamlining of existing Planning Policy Statements, Planning Policy Guidance Notes and some circulars to form a single consolidated document. The Framework condenses the near 900,000 words of national planning policies (over 1,000 pages) into a user-friendly and accessible document which can be understood and used by everybody who has an interest in shaping the development of their area." (DCLG 2011b page 8 paragraph 10).

The NPPF will cancel *Planning Policy Statement 9: Biodiversity and Geological Conservation (PPS 9) (ODPM 2005b)*, as it will many other (though not all) Planning Policy Statements and older Planning Policy Guidance documents. The NPPF replaces PPS 9's seven pages of policies with three pages on nature conservation and biodiversity (DCLG 2011a



Photo by Sam Ashford (Buglife)

### Brown-banded carder bee (*Bombus humilis*)

As with the Shriill carder bee, the Brown-banded carder bee has suffered from loss of wildflower-rich grassland in the landscape as a result of agricultural intensification. Much of its northern range has been lost, and in the south-east the species now relies heavily on brownfield sites to provide it with sufficient forage of plants such as vetches and clovers. The Brown-banded carder is able to take advantage of quite scattered patches of forage, and one of its strongholds, the Thames Gateway, offers such resources in the scattered brownfields throughout the region, but it still benefits from the extensive resources of larger brownfield sites.

pages 46-48 paragraphs 163-170). However, the NPPF is intended to be read as a whole (e.g. see paragraph 14) and so pages 46-48 cannot be considered in isolation. It appears that Circular 06/2005 (*Biodiversity and Geological Conservation: Statutory Obligations and Their Impact Within the Planning System*) is to be retained as the NPPF includes a footnote on page 46 (footnote 12) making reference to "Circular 06/ 2005" (ODPM 2005a).

The NPPF's policy on biodiversity has been summarised by the Government as: "*The Framework underlines that the planning system should seek not just to protect, but, where possible, to enhance biodiversity – making sure we don't just have isolated pockets of wildlife, but rich and connected green spaces for all kinds of species to thrive. Planning permission should be refused for development resulting in the loss or deterioration of irreplaceable habitats, including ancient woodland.*"<sup>9</sup>

## Responses

Organisations representing business and developers (e.g. CBI and NHF) have broadly welcomed the publication, largely stating that it would be good for the economy, attract investment and create growth and jobs.

However, nature conservation NGOs (e.g. RSPB and Wildlife Trusts) have expressed serious concerns, namely that:

- the NPPF's "presumption in favour of sustainable development" (paragraph 14) has no consistent use or meaning;
- there is a clear emphasis on economic development (e.g. see paragraph 13 of the NPPF);
- the NPPF will lead to a weakening of protection currently afforded to SSSIs and non-statutory sites; and
- the policies of the NPPF do not adequately replace PPS 9 and its associated guidance.

## Outcome

So are the concerns expressed by the detractors justified? Will there be fewer ecological constraints to development under the NPPF?

In answering this, the key starting point is the text in paragraphs 9-19 of the NPPF (*Delivering Sustainable Development*). Paragraph 9 states that "...purpose of the planning system is to

contribute to the achievement of sustainable development." The well-known Brundtland Commission definition of sustainable development is adopted, i.e. "development that meets the needs of the present without compromising the ability of future generations to meet their own needs" (Note 2, DCLG 2011a). The NPPF then goes on to recite the three pillars of sustainable development (paragraph 10): "...for the planning system, delivering sustainable development means planning for prosperity (economic role)...., planning for people (social role)...., planning for places (environmental role)."

Paragraphs 13 and 14 of the NPPF however then appear to reveal a different intention. Under a heading *The presumption in favour of sustainable development*, the NPPF in paragraph 13 singles out the need for economic growth "...significant weight should be placed on the need to support economic growth through the planning system". Thus whilst the NPPF defines sustainable development in accordance with Brundtland, it appears then to interpret the 'presumption in favour of sustainable development' as favouring the economic pillar over the other pillars of sustainable development. Paragraph 14, which is crucial to interpretation of the entire NPPF, including the nature conservation policies on pages 46-48, reads:

"At the heart of the planning system is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan making and decision taking. Local planning authorities should plan positively for new development, and approve all individual proposals wherever possible. Local planning authorities should:

- Prepare Local Plans on the basis that objectively assessed development needs should be met, and with sufficient flexibility to respond to rapid shifts in demand or other economic changes;
- Approve development proposals that accord with statutory plans without delay; and
- Grant permission where the plan is absent, silent, indeterminate or where relevant policies are out of date.

All of these policies should apply unless the adverse impacts of allowing development would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole."

It is important to stress that there already exists effectively a 'presumption in favour of development proposals which comply with sustainable development'. There has been a qualified presumption in favour of development since 1947 and up until the Planning and Compensation Act 1991. This presumption was replaced by the enactment of section 54A of the Town and Country Planning Act 1990 (by section 26 of the Planning and Compensation Act 1991) which effectively introduced a presumption in favour of the development plan. The Planning and Compulsory Purchase Act 2004 then introduced a statutory requirement (section 39) that, in preparing development plans, local authorities must contribute to the achievement of sustainable development. A presumption in favour of development proposals that comply with sustainable development policies therefore effectively applies.

However, in the authors' view, paragraph 14 nevertheless represents a shift from the existing position due to:

- The prominence now given to the economic pillar of 'sustainable development';
- The non-precautionary approach of paragraph 14 "*...all of these policies should apply unless the adverse impacts of allowing development would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole*". This can be summarised as 'where there is doubt (i.e. where there are no are significant and demonstrable negatives) then the development should proceed'; and
- The overriding nature of the policy in paragraph 14, in that Local Plans must comply with it and where they do not (i.e. the plan is absent, silent, indeterminate or where relevant policies are out of date) paragraph 14 will prevail.

With this background it is then useful to consider the NPPF's specific nature conservation policies as against PPS 9. An initial comparison of the two documents has identified some clear differences between them (see Table 1 overleaf for details).

In general terms, the NPPF would appear from Table 1 to offer weaker policy protection to nature conservation interests than PPS 9.

However when considering nature conservation policies, the impact of paragraph 14 of the NPPF is probably of most significance. Paragraph 14, as noted above, is central to interpretation of the entire NPPF.

Current SSSI policy (PPS 9) permits development "*likely to have an adverse effect*" on a SSSI only where the benefits clearly outweigh the impacts. Note therefore that the presumption is against development; in practice it will be for the developer to demonstrate that the benefits of the development will outweigh the adverse effects; and the protection policy kicks in where there is a 'likelihood' of an adverse effect. By contrast paragraph 14 of the NPPF reflects a presumption for development; the presumption will persist

unless there are adverse impacts (though note, likely adverse impacts would appear insufficient to displace the presumption); and displacement of the presumption will only occur when the adverse impacts of allowing development would "*significantly and demonstrably*" (paragraph 14) outweigh the benefits. In addition the decision-maker weighing up the factors in this way must consider that balance "*...against the policies in the Framework taken as a whole...*" (paragraph 14). Since the thrust of the NPPF is to support economic development (see, for example, paragraph 13), the weight to be attached to economic benefits will be notable. However, as Nathan and Overman (2011) argue, the NPPF needs to be "*...more [their emphasis] explicit about what sustainable development involves and should indicate how such judgements could be made in practice*".

The very same issue arises in relation to the protection under PPS 9 for species not benefitting from specific statutory protection. The protection of these species would appear to be undermined in the same way as for SSSIs.

It can potentially be argued that the wording in paragraph 169 of the NPPF ("*When determining planning applications in accordance with the Local Plan and the presumption in favour of sustainable development...*"), mitigates to a degree, the impact of paragraph 14 as described above. However, the interface between the language in paragraphs 169 and 14 is difficult to decipher, and at best the position is far from clear.

It is correct that planning policy should not be read as legislation. The words of Lord Justice Pill in the Court of Appeal judgement in Buglife v Thurrock Thames [2009] EWCA Civ 29 are worth recalling. In his judgement (which went against Buglife), he acknowledged that there had been no sentence-by-sentence analysis of PPS 9 by the planning authority ("*which is not to be construed as a statute*" (paragraph 51)) but nevertheless the overall tenor of the policy had not been ignored which, in that case (and bearing in mind Natural England's withdrawal of its objection), was adequate. Lord Justice Pill stated: "*...consideration of the larger picture, the main issues, should not be defeated by over attention to detail, with the risk of thereby losing, in common parlance, the wood for the trees*" (paragraph 52<sup>10</sup>). Some may argue therefore that the forensic analysis of the differences between PPS 9 and the NPPF is not appropriate. This argument may for example have some merit when considering the difference between, for example, "*adverse impact*" (NPPF paragraph 14) and "*likely adverse impact*" (PPS 9 for SSSI protection). In reality there may be little difference between these phrases, in that predictions as regards ecological impacts made in the context of a planning application are of course only that and there can never be absolute certainty.

However such an argument cannot be used, in the authors' view, to detract from the fundamental switch, where adverse nature conservation impacts are expected, from a presumption against development to a presumption for development.

The evidential burden on the objector under the NPPF is likely to be higher and developers are likely to have a smoother path.

In summary, the NPPF's policies as a whole would appear to offer less comprehensive protection to nature conservation interests than PPS 9. There has been a great deal of confusion and uncertainty in the media, industry and the lobbying groups. The NPPF is of course scheduled to be adopted in spring 2012. The Environmental Audit and the Communities and Local Government Committees (CLGC) have both reported their views on the NPPF and made a number of recommendations suggesting significant changes.

The CLGC has gone as far as making recommendations to change core tenets of the document such as removing the emphasis on the economy and the default 'yes' to development. It will not only be interesting to see how different the final version of the NPPF will be from its current form, but how the final version will be interpreted by users, and ultimately, if it comes to it, the courts.



Photo by PR Harvey (Buglife)

Distinguished jumping spider (*Sitticus distinguendus*)

The Distinguished jumping spider is known from only two sites in the UK, both in the Thames Gateway. Its Essex site at West Thurrock Marshes is threatened with a warehouse development- the species here is found on dry, sparsely vegetated ground, on a saline substrate of sandy PFA and stony clinker (The spider builds a protective cocoon in holes in the clinker). At its Kent site at Swanscombe, the Distinguished jumper is associated with the sparsely vegetated surface of sand and cement flue ash.

## Feature Article: A Cunning Plan... or a Plan too Far? (continued)

Table 1. Some Comparisons between PPS 9 and the NPPF

Section of PPS 9	Comparable Section of NPPF	Comment
<b>Key Principle 1(i):</b> Development plan policies and planning decisions should be based upon up-to-date information.	<b>Paragraph 34:</b> Planning policies and decisions should be based on up-to-date information about the natural environment.	Wording is consistent with PPS 9.
<b>Key Principle 1(ii):</b> Plan policies and planning decisions should aim to maintain, and enhance, restore or add to biodiversity and geological conservation interests.	<b>Paragraph 168:</b> Planning policies should promote the preservation, restoration and re-creation of priority habitats, ecological networks and the recovery of priority species.	The NPPF policy is restricted to priority species. There is a wider scope for interpretation in PPS 9, potentially allowing LPAs to consider protecting biodiversity ( <i>i.e.</i> assemblages) in general ( <i>e.g.</i> 'common' or 'locally rare' species, rather than just priority species).
<b>Key Principle 1(iii):</b> Strategic approach to plan policies for the conservation, enhancement and restoration of biodiversity.	<b>Paragraph 167:</b> LPAs should set out a strategic approach in their Plans, planning positively for the creation, protection, enhancement and management of networks of biodiversity and green infrastructure.	Wording is consistent with PPS 9
<b>Key Principle 1(iv):</b> Policies should promote opportunities for the incorporation of beneficial biodiversity within the design of development.	<b>Paragraph 169:</b> LPAs should aim to conserve and enhance biodiversity by applying a number of principles, including the encouragement of opportunities to incorporate biodiversity in and around developments.	Wording is consistent with PPS 9
<b>Key Principle 1(vi):</b> Planning decisions should prevent harm to biodiversity interests. If planning permission would result in significant harm to those interests, LPAs would need to be satisfied that the development cannot reasonably be located on any alternative sites that would result in less or no harm or if no alternatives, they should ensure that adequate mitigation measures are put in place. If this cannot be achieved, appropriate compensation measures should be sought, or if not then planning permission should be refused.	<b>Paragraph 169:</b> When determining planning applications in accordance with the Local Plan and the presumption in favour of sustainable development LPAs should aim to conserve and enhance biodiversity by applying a number of principles, including if significant harm resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused.	Wording is consistent with PPS 9.
<b>Paragraph 8:</b> Where a proposed development on land within or outside a SSSI is likely to have an adverse effect (either individually or in combination with other developments), planning permission should not normally be granted. Where an adverse effect on the site's notified special interest features is likely, an exception should only be made where the benefits of the development, at this site, clearly outweigh both the impacts that it is likely to have on the features of the site that make it of special scientific interest and any broader impacts on the national network of SSSIs.	<b>Paragraph 166:</b> LPAs should set criteria based policies against which proposals for any development on or affecting protected wildlife sites or landscape areas will be judged. Distinctions should be made between the hierarchy of international, national and locally designated sites (reference is made to Circular 06/2005).	The NPPF does not make a distinction between statutory sites ( <i>e.g.</i> SSSIs), local sites (LNRs) or non-statutory sites ( <i>i.e.</i> Local Wildlife Sites). It places the onus on the LPA to define criteria based policies which will distinguish between the different tiers of protection, albeit using Government Circular 06/ 05 (ODPM, 2005a) as a reference. This could potentially weaken protection afforded to sites and/ or create an unlevel playing field between different LPAs. The most significant point however is in relation to paragraph 14 (see text of main below).
<b>Paragraph 9:</b> Policies should be established in development documents relating to sites of regional and local biodiversity ( <i>e.g.</i> LNRs and Local Sites).		
<b>Paragraphs 15 &amp; 16:</b> Biodiversity in general, though a clear emphasis on priority species should be considered and protected through the planning system. Other species ( <i>i.e.</i> those without a statutory protection under a range of legislative provisions) have been identified as requiring conservation action as species of principal importance for the conservation of biodiversity in England. Local authorities should take measures to protect the habitats of these species from further decline through policies in local development documents. Planning authorities should ensure that these species are protected from the adverse effects of development, where appropriate, by using planning conditions or obligations. Planning authorities should refuse permission where harm to the species or their habitats would result unless the need for, and benefits of, the development clearly outweigh that harm.	<b>Paragraph 168:</b> No equivalent provision for priority species in NPPF.	As for Key Principle 1(ii) (see second row above). The NPPF provides little if any protection for biodiversity in general.

## Editor's Note

Read the IEEM response to the draft NPPF consultation at [www.ieem.net/docs/IEEM%20NPPF%20response%20FINAL.pdf](http://www.ieem.net/docs/IEEM%20NPPF%20response%20FINAL.pdf)

## Notes

1. DECC Press Release: 10/ 059, dated 14<sup>th</sup> May 2010. [Available online at [www.decc.gov.uk/en/content/cms/news/pn10\\_059/pn10\\_059.aspx](http://www.decc.gov.uk/en/content/cms/news/pn10_059/pn10_059.aspx); accessed 13<sup>th</sup> December 2011]
2. RSPB's (Martin Harper, Conservation Director) response to the NPPF; available online at: [www.rspb.org.uk/community/ourwork/bl/martinharper/archive/2011/07/26/new-planning-policy-is-a-step-backwards-for-nature.aspx](http://www.rspb.org.uk/community/ourwork/bl/martinharper/archive/2011/07/26/new-planning-policy-is-a-step-backwards-for-nature.aspx); accessed 13<sup>th</sup> December 2011
3. Wildlife Trusts' response to the NPPF; available online at: [www.wildlifetrusts.org/nppf](http://www.wildlifetrusts.org/nppf); accessed 13<sup>th</sup> December 2011
4. CPRE's response to the NPPF; available online at: [www.cpre.org.uk/resources/housing-and-planning/planning/item/2583-cpre-response-to-the-draft-national-planning-policy-framework-consultation](http://www.cpre.org.uk/resources/housing-and-planning/planning/item/2583-cpre-response-to-the-draft-national-planning-policy-framework-consultation); accessed 13<sup>th</sup> December 2011
5. National Trust's response to the NPPF; available online at: [www.nationaltrust.org.uk/main/w-global/w-news/w-latest\\_news/w-news-planningisforpeople.htm](http://www.nationaltrust.org.uk/main/w-global/w-news/w-latest_news/w-news-planningisforpeople.htm); accessed 13<sup>th</sup> December 2011
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10. Buglife The Invertebrate Conservation Trust, R (on the application of) v Thurrock Thames Gateway Development Corporation & Ors [2009] EWCA Civ 29, dated 28<sup>th</sup> January 2009. The judgement's text is available online at [www.bailii.org/ew/cases/EWCA/Civ/2009/29.html](http://www.bailii.org/ew/cases/EWCA/Civ/2009/29.html); last accessed 13<sup>th</sup> December 2011

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