

## Natural England's revised approach to considering habitat creation as mitigations following the *Briels*, *Orleans* and *Grace & Sweetman* judgments

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In May 2014, the *Briels* judgment, handed down by the Court of Justice of the European Union, provided an authoritative interpretation of parts of the Habitats Directive, and consequently the Habitats Regulations, which are relevant to the identification of mitigation measures in connection with proposed habitat creation. Natural England issued guidance to its staff following this ruling (see the article on page 8 of the January 2015 issue) which informed and shaped our advice in this regard.

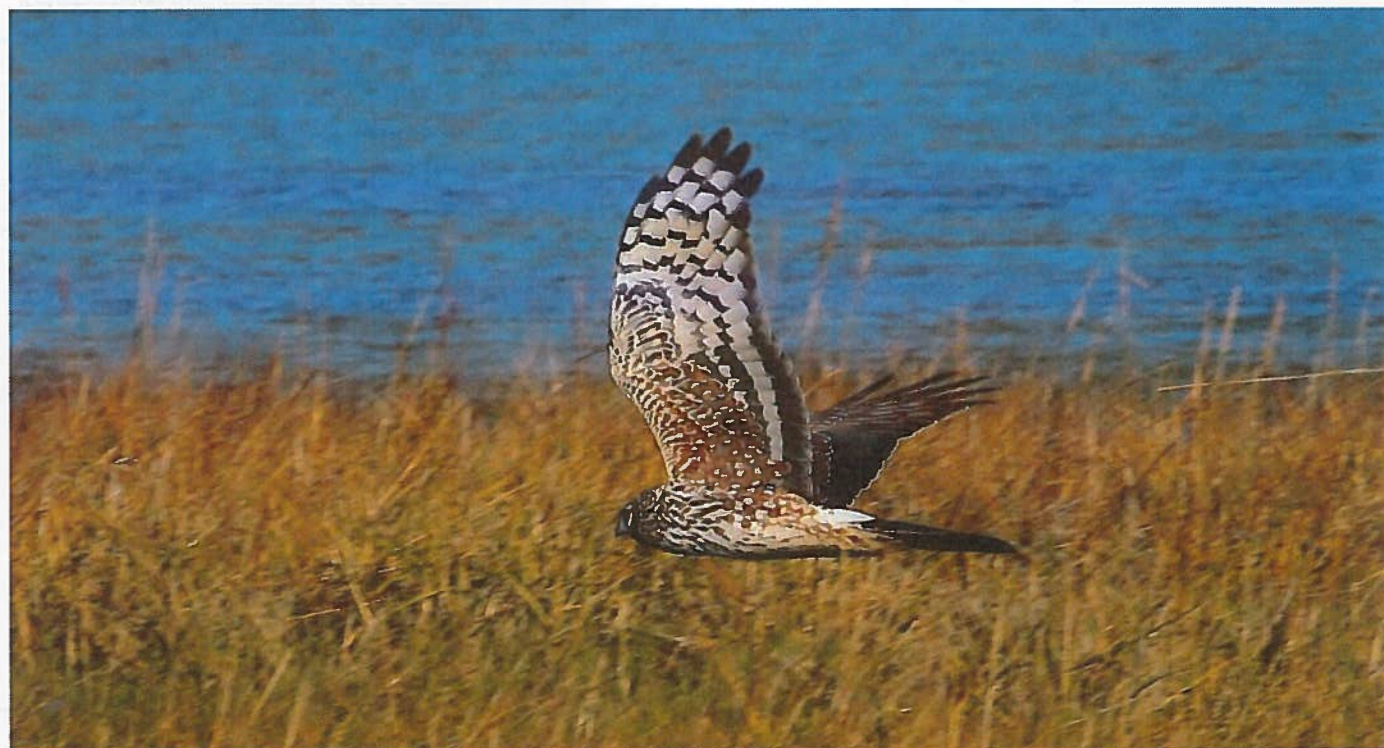
This *Briels* judgment centred on what types of measures are relevant to consider as mitigation, when coming to a conclusion as to the effect on European site integrity of a proposed plan or project, and which measures are, in fact, compensatory measures that should *not* be taken into account until later in the formal Habitats Directive decision making process i.e. after the consideration of alternative solutions and only having established overriding public interest in the project.

Shortly after *Briels*, however, the *Orleans* judgment was handed down which provided a further re-iteration of the issues covered in *Briels*. At this point it became clear to us that our advice based on the *Briels* decision was no longer tenable and this advice was immediately placed on hold pending further review. In the intervening years, more court decisions have been handed down, in particular *Grace and Sweetman* and *Holohan and Others* which have provided further clarification in this important area.

In addition, given the body of case law that the loss of habitat from a plan or project cannot be directly mitigated for through the creation of replacement habitat and therefore might trigger the application of the derogation provisions of the Habitats Regulations, we felt there was a need to ensure that the likely significance of a predicted loss on a site's integrity was carefully assessed. This prompted us to look again at the *Sweetman* judgment from 2013, and to re-consider how the risk or the possibility of habitat loss from within a European Site ought best to be judged at the screening stage of HRA.

As a result Natural England has reviewed and recently agreed upon a revised approach to the consideration of proposed habitat creation under the Habitats Regulations. This is now based upon three operational principles which will now form the basis of our ongoing and future advice. The guidance that is summarised opposite replaces and supersedes the previous internal guidance on Natural England's approach to considering habitat creation as mitigation following the *Briels* Judgment.

Natural England will continue to review this approach and its advice to others in light of any further case law. Our advice on this as the statutory nature conservation body in England is not binding however and an individual competent authority may wish to take their own legal advice on compliance with these particular aspects of case law.



The case of *Grace and Sweetman* involved the Hen Harrier (*Circus cyaneus*)  
Photo by 'Richard Collier (LIKOR) - Hen Harrier in flight.

	PRINCIPLE	REASONING
1	Any risk of a reduction in or loss of a European habitat within either a SAC, SPA or Ramsar wetland should be judged to be a 'likely significant effect', and the full significance of its impact on a site's integrity should be further tested by appropriate assessment.	In light of the ongoing interpretation of <i>Sweetman</i> and <i>People Over Wind</i> , we advise that a predicted effect of habitat loss should always be considered to be 'significant' and require appropriate assessment. In other words, a predicted loss of habitat, no matter how small, should not be screened out as no likely significant effect.
2	A proposal to create new habitat (including habitat translocation, habitat conversion and/or habitat banking*) within a European site's boundary specifically to 'mitigate' for a predicted loss of SAC or SPA habitat should (with regard to HRA) normally be treated as a compensatory measure, and not mitigation, that should only be taken into account following an appropriate assessment and the passing of the no alternatives and IROPI tests.	Given the case law since <i>Briels in Orleans</i> , and <i>Grace and Sweetman</i> , we no longer advocate that there can be a set of pre-defined, limited set of circumstances in which such habitat creation can result in no net loss and by doing so can avoid an adverse effect in the first place.  Proposals to create new habitat should not be considered to be mitigation. This application is specific to Habitats Regulations and may differ when applied to different regimes (e.g. EIA).  * Habitat banking is a concept whereby an area of new habitat is successfully created in advance and independently from a new plan/project and then used to make up for or 'offset' harm to the original designated habitat so as to achieve no overall net loss of a feature. This concept is yet to be tested in case law.
3	The use of habitat creation/conversion outside of a site's boundary to avoid a loss of 'functionally-linked land' that lies outside of a site's designated boundary is still a legitimate mitigation measure	Recently endorsed by <i>Holohan and Others</i> , it remains important for an appropriate assessment to consider the likelihood of adverse effects on those features that may be temporarily outside their European Site during their relevant season (where this might undermine a site's conservation objectives).  Until there is further clarity provided in case law, we continue to recognise that no particular legal status attaches to undesignated land that is strongly and functionally linked to a European Site. This can, by definition, be treated differently to land that has been formally designated.  Provided that the indirectly adverse effects on a protected site are recognised and adequately catered for and there is sufficient certainty and timeliness about the success of habitat creation, so that the designated site continues to function in the same way, habitat creation in this circumstance can be used as mitigation to avoid an adverse effect on the integrity of a designated European Site.

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Richard Broadbent is the Head of Legal Services at Natural England. Richard holds an LLM in Environmental Law from UCL's Centre for Law and the Environment and has lectured and written about environmental law and policy since joining Natural England in 2010. Richard has worked on a number of high profile nationally significant infrastructure, planning, and species licencing cases. Richard currently leads on litigation and regulatory enforcement cases.

