

**REPORT OF THE CORPORATE DIRECTOR POLICY, PLANNING AND  
CORPORATE SERVICES****BIODIVERSITY OFFSETTING IN ENGLAND – GREEN PAPER****Purpose of the Report**

1. To seek Committee ratification for comments appended to this report, which were sent to the Department for the Environment, Food and Rural Affairs (Defra) on 6 November 2013 in response to a Green Paper entitled “Biodiversity offsetting in England”.

**Information and Advice**

2. Biodiversity offsets are conservation activities that are designed to give biodiversity gain to compensate for residual losses arising from the impacts of development. They are different from other forms of ecological compensation as they need to show measurable outcomes that are sustained over time.
3. The government recognises that as well as needing development, the country also needs nature for its long-term prosperity. It also recognises that impacts on biodiversity from development are not always adequately accounted for, but also that some planning decisions can take too long and the outcome be too uncertain, as a result of biodiversity considerations. Biodiversity offsetting has the potential to address these issues, to help the planning system deliver more for both the economy, and our environment.
4. The green paper:
  - Sets out the Government's objectives to avoid additional costs to developers and to achieve better environmental outcomes and explores how offsetting could help achieve these objectives.
  - Sets out the options for biodiversity offsetting
  - Seeks evidence of the costs and benefits of biodiversity offsetting
  - Asks questions about how detailed design of an offsetting system should be approached.
5. The response to the Green paper consultation is provided in Appendix 1, and the key points raised therein are summarised below:
  - Nottinghamshire County Council is leading one of the six national biodiversity offsetting pilots. It is suggested that a consultation on offsetting is premature in advance of these pilots being completed, and a thorough given that the pilots have yet to be completed.

- Biodiversity offsetting has the potential to deliver compensation for residual impacts on biodiversity arising from development, and to provide developers and planners with more certainty, and possibly also reduced costs.
- If offsetting is to become a mainstream planning tool, it will be necessary to ensure that use of the offsetting metric (used to calculate impacts) is required on all sites that have a significant impact on wildlife habitat.
- Consistent and rigorous application of the mitigation hierarchy, as set out in the National planning Policy Framework (and which requires impacts on biodiversity to be avoided, mitigated against, and then compensated for, in that order) will be essential to ensure that offsetting does not become a so-called 'licence to trash'.
- A national approach should be taken to determining when harm to biodiversity caused by developed is 'significant'.
- A strategic approach should be taken when applying offsetting, to help deliver a net ecological gain and to meet identified priorities and opportunities.
- Concerns are raised about whether planning authorities have, or will continue to have, sufficient capacity and ecological expertise to allow offsetting to be properly applied.
- Offsets should be delivered at the very least within the same county or natural area as the development to which they relate.
- Offsetting should operate within a national framework, but there should be flexibility to reflect the local context.
- Concerns are raised about the appropriateness of including 'irreplaceable' habitats, such as Ancient Woodland, within the offsetting metric, and whether these should be treated differently.

### **Other Options Considered**

6. The County Council could choose not to respond. In this case, however, as the Council is leading one of the national Biodiversity Offsetting pilots, this was not considered to be a viable option.

### **Reason/s for Recommendation/s**

7. To enable the County Council to consider the response to the Biodiversity Offsetting in England Green Paper which feeds the direct experience gained through the pilot programme in to the national debate.

### **Statutory and Policy Implications**

8. This report has been compiled after consideration of implications in respect of crime and disorder, finance, human resources, human rights, the NHS Constitution (Public Health only), the public sector equality duty, safeguarding of children and vulnerable adults, service users, sustainability and the environment and ways of working and where such implications are material they are described below. Appropriate consultation has been undertaken and advice sought on these issues as required.

## **RECOMMENDATION/S**

- 1) That Committee ratify the appended comments that were sent to the Department for the Environment Food and Rural Affairs on 6 November 2013.

**Jayne Francis Ward**  
**Corporate Director Policy Planning and Corporate Services**

**For any enquiries about this report please contact: Nick Crouch, Senior Practitioner Nature Conservation (0115 969 6520)**

### **Constitutional Comments (SHB.20.11.13)**

9. Committee have power to decide the Recommendation.

### **Financial Comments ((SEM 21/11/13)**

10. There are no specific financial implications arising directly from this report.

## **Background Papers and Published Documents**

Except for previously published documents, which will be available elsewhere, the documents listed here will be available for inspection in accordance with Section 100D of the Local Government Act 1972.

- None

## **Electoral Division(s) and Member(s) Affected**

- All

## **Appendix 1 - response to green paper consultation**

### **Biodiversity offsetting in England green paper – September 2013**

Comments from Planning and Conservation Group, Nottinghamshire County Council; it should be noted that these are officer-level comments and do not necessarily reflect the views of Nottinghamshire County Council.

#### **Introduction**

These comments are made by the Planning and Conservation Group of Nottinghamshire County Council. The Group is leading one of the six national biodiversity offsetting pilots, and these comments are therefore informed by practical experiences of trying to deliver biodiversity offsetting, although it should be noted that the pilot has yet to successfully deliver any biodiversity offsetting schemes. Given that lessons from the pilots are still being learnt, it is suggested that the wider implementation of offsetting should not take place until the pilots have been completed and evaluated.

#### **Response to consultation**

##### **Question 1: Do you think the Government should introduce a biodiversity offsetting system in England?**

Biodiversity offsetting provides the potential to deliver compensation for residual impacts on biodiversity arising from development, in a meaningful and consistent way, and also to deliver net gains by helping to contribute to the strengthening of ecological networks. However, it is essential that offsetting does not become a 'licence to trash', and that it is not viewed as a vehicle for allowing previously unacceptable development to take place.

##### **Question 2: Do you think the Government's objectives for the system and the characteristics the Government thinks a system would display are right?**

The objectives for and characteristics of the system as proposed appear to be appropriate. However:

- Regarding the objective of avoiding additional cost to businesses, it is possible that business will experience additional costs because in many cases to date, planning permissions have been granted for developments which have not required sufficient mitigation or compensation to be provided and therefore developers have only had to pay a proportion of what they should have had to pay, had impacts been fully mitigated or compensated. Therefore, there is danger that introducing a more rigorous approach to securing compensation through offsetting will be perceived by developers as an increased burden.
- Regarding observation of the mitigation hierarchy, this is absolutely critical if the 'licence to trash' scenario is to be avoided. This is commented on in greater detail in the response to Q6 below.

**Question 3: Do you think it is appropriate to base an offsetting system on the pilot metric? If not is there an alternative metric that should be used?**

The pilot metric, whilst not without problems, has proven to be relatively easy to use and understand when applied to real-life cases in the Nottinghamshire pilot. Any alternative metric would need to share these characteristics.

**Question 4: If you think the pilot metric is the right basis for an offsetting system:**

- a. Are there any other factors which should be considered when quantifying biodiversity loss and gain?**
  - b. Are the weights given to the different factors appropriate?**
  - c. Are there any other changes you think should be taken into account?**
- a. Other factors which should be considered when quantifying biodiversity loss and gain ideally include the position that a site/habitat has within a wider ecological network; the strengthening of ecological networks is identified as a potential net gain arising from using offsetting, but the weakening of existing ecological networks as a result of the loss of a site/habitat is not captured within the current metric. The irreplaceability of certain habitats is also not currently captured.
- b. The weightings given to different factors do generally appear appropriate. However, it is suggested that 'irreplaceable' habitats should be given an additional weighting during the calculation of the initial biodiversity units score, to discourage the development of such habitats.
- c. One of the main practical problems with the metric is that it still requires subjectivity when determining what habitat is being dealt with, and what condition it is in. Whilst this is unavoidable, better guidance may help; for example, the current list of habitats and distinctiveness scores used in the pilots is very long, and it is not always clear which habitat you are dealing with (e.g. there are multiple subsets of grassland). This should be simplified. When assessing habitat condition, the FEP Handbook is meant to be used in the pilots, but not all habitats are included within this (e.g. post-industrial habitats), so this will also need to be addressed.

**Question 5: Do you think offsetting assessment should be used when preparing a planning application for a project?**

It is absolutely vital that the use of the offsetting metric should become mandatory in all planning applications where there is a 'significant' impact on biodiversity (see Q27 below). If not, there will be a continuation of the current wranglings that are experienced about whether or not sufficient on-site mitigation has been provided and whether any compensation is needed, which will lead to delays. Making use of the metric mandatory should not lead to any increased burden on business, as in such cases an ecological assessment of the site will have been completed, and carrying out the metric calculation would be a small addition piece of work as part of this.

**Question 6: Do you agree that it should be the responsibility of planning authorities to ensure the mitigation hierarchy is observed and decide what offset is required to compensate for any residual loss? If not, why, and how do you think offsetting should be approached in the planning system?**

Yes, it must be the responsibility of the planning authority to ensure the mitigation hierarchy is observed. However, there are issues here about capacity, and application:

- In terms of capacity, many planning authorities do not have sufficient in-house expertise to support them in judging whether the mitigation hierarchy has been applied (or indeed, the wider aspects of biodiversity offsetting). It is unclear where this capacity would come from.
- It is my opinion that a more formalised approach to the application of the mitigation hierarchy is required, perhaps akin to the steps which need to be taken to demonstrate that the 'three tests' required by Regulation 53 of the Conservation of Habitats and Species Regulations 2010 (in relation to European protected species) have been met. Such a formalised approach would require LPAs to demonstrate and document how the mitigation hierarchy has been worked through, i.e. why impacts cannot be avoided (why the development has to be located where it is proposed), how mitigation has been put in place (if and how the layout of the development has been modified to retain the highest value habitats on site), and then what the level of residual impact is (as demonstrated through use of the metric) so that compensatory requirements can be quantified. Without such an approach there is a very real danger of being tempted into jumping straight to the 'compensate' stage, which will lead to the realisation of fears about a 'licence to trash'.

**Question 7: Do you think biodiversity offsetting should have a role in all development consent regimes?**

Yes; there appears to be no reason why certain development consent regimes should be exempt.

**Question 8: Do you think developers should be able to choose whether to use offsetting? If so what steps could Government take to encourage developers to use offsetting?**

It is felt that a permissive approach to offsetting would not be successful, as this would result in 'business as usual' and continued wranglings about whether or not sufficient mitigation or compensation has been provided, and insufficient levels of both being permitted due to pressures that planning authorities are under to deliver new housing and employment. This is partly borne out in experience gained during the Nottinghamshire pilot, where developers have not been interested in using offsetting due to the voluntary nature of the pilots. Therefore, it is believed that a partially permissive scheme is required at the very least, where developers are required to use the offsetting metric to determine whether or not there will be a residual impact on biodiversity (see Q5 above). Possibly, this could be adapted such that this would only apply to developments above a particular threshold (see Q9 below). The use of CIL does not appear appropriate, and would be very complicated to administer.

**Question 9: If you think developers should be required to use offsetting do you think this requirement should only apply above a threshold based on the size of the development? What level should the threshold be?**

The use of thresholds is fraught with difficulties, as a large development may have low biodiversity impacts (e.g. if a large area of amenity grassland is affected), whilst a small development could affect an area of high-quality, locally-rare habitat which is potentially 'irreplaceable'. If offsetting were to become mandatory, it would probably be necessary to say that all residual impacts should be dealt with through offsetting.

**Question 10: Do you think there should be constraints on where offsets can be located? If so what constraints do you think should be put in place?**

There should definitely be constraints on where offsets can be located. 'Exporting' biodiversity to other areas (e.g. with less development pressure or lower land prices) is unlikely to be acceptable to the local communities affected (who may value areas for reasons other than their biodiversity value), or to local decision makers. At the very least, offsets should be located within the same county or National Character Area (NCA), and should ideally be located as close as possible to the source of the impact (although noting that this may not always be possible, or indeed desirable if increased benefits can be brought by locating an offset elsewhere). Within this overall constraint, there may then be scope to use either of the two options outlined in paragraph 28 of the green paper, to try and encourage offsets to be appropriately located.

It is suggest there should also be controls put in place regarding things like:

- Which habitats are created, i.e. ensuring that habitats are appropriate to the relevant NCA
- How much habitat is created, i.e. setting minimum size thresholds which created/restored habitat should meet, to avoid lots of small and fragmented habitat patches being created.

**Question 11: Do you have any comments on the analysis set out in the impact assessment?**

No comment.

**Question 12: Do you have evidence that would help refine the Government's analysis of the costs and benefits of the options considered in this paper? In particular, evidence relating to:**

- a. The amount of compensation already occurring where there is residual biodiversity loss which cannot be avoided or adequately mitigated
  - b. The method for estimating costs and their magnitude
  - c. The method for estimating benefits and savings and their magnitude
  - d. How to capture the wider social and environmental benefits of maintaining England's stock of biodiversity and delivering a coherent ecological network
  - e. Likely take up of offsetting under a permissive approach
- a. No comment.
  - b. No comment.
  - c. No comment.
  - d. No comment.
  - e. Experience from the Nottinghamshire Pilot indicates that a permissive approach to offsetting may not be successful, as developers may believe that they can progress with 'traditional' forms of compensation which require them to do less, and therefore cost less.

**Question 13: Do you think offsetting should be a single consistent national system without scope for local variation?**

Whilst offsetting should operate within an agreed national framework, there needs to be scope for local variation to be built in, to reflect the fact that areas differ from each other; some are rich in semi-natural habitats whilst others are not, and what is common in one place may be rare in another. However, such variation should be accommodated in such a way that it does not complicate the system or increase costs.

**Question 14: Do you agree with the proposed exceptions to the routine use of biodiversity offsetting? If not, why not? If you suggest additional restriction, why are they needed?**

There must definitely be exceptions to the routine use of offsetting – applying it to statutorily designated sites does not appear appropriate, as a) such sites should not be routinely be effected by development anyway, and b) due to the special nature of these sites, compensation will probably need to be determined on a case-by-case basis, and be bespoke in nature.

**Question 15: Which habitats do you think should be considered irreplaceable?**

Within a Nottinghamshire context, ancient woodland is probably the only truly irreplaceable habitat we have. However, it could be argued that other areas of semi-natural habitat which have existed for a long period of time, such as a traditionally-managed hay-meadow or a wetland system, are effectively irreplaceable due to their longevity, the complex ecological interactions they support (e.g. mycorrhizal associations, soil microfauna), and particular conditions which support their presence (e.g. hydrological), which cannot be effectively replicated elsewhere.

**Question 16: Do you think offsetting should in principle be applied to protected species?**

It is not made clear how offsetting could or would be applied to protected species such as great crested newts, but there is the potential for offsetting to be used. In the case of great crested newts it is unclear what the 'unit' would be in this case – number of individual animals? Population size? Number of breeding ponds? Area/quality of terrestrial habitat?

**Question 17: Has the Government identified the right constraints and features that need to be addressed when applying offsetting to protected species?**

Species-specificity should apply to all protected species, not just those protected by the Habitats Directive. Priority species (i.e. species of principle importance) should also be included.

**Question 18: Do you agree that great crested newts should be the first area of focus?**

Great crested newt appears a good place to start. Other protected species are likely to be more complicated (e.g. bats).

**Question 19: Do you have any comments on the Government's thinking on how to apply offsetting to great crested newts?**

See Q16.



**Question 20: Should offsetting be considered for any other species in the near future taking account of the constraints on species offsetting?**

No comment.

**Question 21: Do you think conservation covenants should be put in place as part of an offsetting system? If they are required, who do you think should be responsible for agreeing conservation covenants? If not, how else do you think offsets could be secured for the long-term?**

Conservation covenants would appear to be the best way of securing offsets in the long term (in the absence of any other mechanism), although it is worrying to see that a covenant could still be released to allow land to be developed, which appears to defeat the whole purpose of a covenant being used to protect a piece of land.

**Question 22: Do you think management agreements should be put in place as part of an offsetting system? If they are required, who do you think should be responsible for agreeing management agreements?**

Yes, management agreements should be put in place, although it needs to be recognised that management activities will change over time as habitats mature and external pressures come to bear. It may be that the management agreements could be quite broad-brush (i.e. requiring the creation/maintenance of a particular habitat), with the production of more detailed 5 or 10 year management plans required as part of this. Management agreements should be approved at the time that the offset is agreed, and there is a role for Natural England to provide here.

**Question 23: Do you think an offset register should be put in place as part of an offsetting system? If so, who do you think should be responsible for maintaining an offset register?**

Yes, an offset register should be maintained. No views are offered on which organisation should be responsible for this.

**Question 24: How long should offsets be secured for?**

The term 'in perpetuity' is used in the pilots. Offsets should be secured for as long as possible – at least 30 years, probably more like 99 years.

**Question 25: Are there any long-term factors, besides climate change, that should be taken into account when securing offsets?**

Possibly; there is probably a need to give thought here to whether we should be aiming to create habitats which are likely to be more resilient to climate change from the outset.

**Question 26: Do you think biodiversity offsetting should be "backdated" so it can apply in relation to any planning applications under consideration at the point it is introduced?**

There appear to be no reasons why offsetting could not be 'backdated' as described.

**Question 27: Do you think an offsetting system should take a national approach to the question of significant harm and if so how?**

Offsetting should definitely take a national approach to determining when harm is 'significant', as otherwise it will be dealt with inconsistently by individual planning authorities. There also needs to be an element of objectivity introduced into making decisions about what is 'significant', and the use of either a threshold, or excluding low-distinctiveness, low-quality habitats, could work in this respect, but this would need to be examined in greater detail based on specific proposals, and probably there needs to be a combination of the two as neither approach would appear to be perfect. There may need to be an allowance for local variation built in, to reflect, for example, that a habitat which is common in one place may be rare somewhere else (and therefore there will be variation in whether an impact is significant or not). Thought may also need to be given to how 'in-combination' effects are dealt with, given that individually a development may not have a significant impact, but when combined with other developments, the loss of a particular habitat may then become more major, and hence more significant.

**Question 28: Do you think any additional mechanisms need to be put in place to secure offsets beyond conservation covenants? If so why and what are they? If this includes measures not listed above, please explain what they are.**

No comment.

**Question 29: Do you think there should be constraints on what habitat can be provided as an offset? If so what constraints do you think should be put in place, and how should they work in practice?**

Trading-up of habitats should definitely be promoted, as should a like-for-like approach when dealing with habitats of high distinctiveness, with a penalty system incorporated to account for instances where this may not be possible. This is something where local variation should be allowed (in terms of which habitats should be offset on a like-for-like basis), given that a habitat may be rare in one area (and should therefore be replaced), but might be common somewhere else (and therefore providing a different habitat isn't such an issue).

**Question 30: Do you agree an offsetting system should apply a strategic approach to generate net ecological gain in line with *Making Space for Nature*? If so, at what level should the strategy be set and who by? How should the system ensure compliance with the strategy?**

Yes. Such a strategic approach should be provided as a broad national framework, but allow for the development of local strategies to address local issues and utilise local tools such as Biodiversity Opportunity Mapping (i.e. a hybrid model). A prohibition or penalty approach to ensuring compliance seems most appropriate.

**Question 31: Do you think habitat banking should be allowed? Do you think a provider must show intent to create a habitat bank to be allowed to sell it as an offset? Do you think habitat banks should be “retired” if they are not used to provide an offset? If so, after how long?**

Habitat banking is an interesting concept, and one which removes a lot of uncertainty from the offsetting process (i.e. the offset is already created, presumably in an appropriate location, and the costs are known). However, providers must certainly be able to ‘demonstrate intent’ so that the offset is something new, rather than something which would have happened anyway. The issue of retiring habitat banks poses issues for those doing the banking and looking to sell the offsets, as this will presumably leave them out of pocket financially and may put organisations off from doing habitat banking.

**Question 32: Do you think maintaining an environmental gain that might otherwise be lost should count as an offset? If so, how should a value be attached to the offset?**

No comment.

**Question 33: Do you think it is acceptable or not to use biodiversity gain created for other purposes as an offset? If you do, how should it be decided what is allowed to be used as an offset?**

Yes, there appears to be no reason why biodiversity gain created for other purposes cannot be used as an offset (or indeed, as mitigation to reduce the level of residual impact and hence the amount of compensation/offsetting required), provided that it is secured in the same way as any other offset. This may also encourage multi-functional design of things like flood alleviation features.

**Question 34: How do you think the quality of assessments should be assured and who by?**

Quality assurance of assessments is a very important issue. There is probably a need for those undertaking the initial assessments on behalf of developers to have some accreditation (following training on how to use the metric), perhaps something which could be looked at with CIEEM. After this assessment has taken place, the results should not then be taken at face value and accepted without some level of quality assurance. Planning authorities may be able to do this initially, where they have an in-house ecologist or access to ecological advice – where they do not, this will be problematic. Natural England may be able to assist.

**Question 35: How should differences of opinion over assessments be addressed?**

There will inevitably be instances where differences of opinion arise when applying the metric and doing offset calculations (because there is still a degree of subjectivity involved in a. determining what habitat is involved, and b. what condition it is in), and in these cases access to independent arbitration would be necessary, but noting this will add time and cost to the process.

**Question 36: Do you think the metric should take account of hedgerows? If so do you think the current approach is the right one or should it be adjusted?**

The metric should include hedgerows, but may also need to include other linear habitats such as rivers, streams and ditches, and possibly also small-scale features such as ponds.

**Question 37: Do you think it should be possible to offset the loss of hedgerows by creating or restoring another form of habitat?**

Possibly, but this would require the metric to be adjusted to allow comparison.

**Question 38: If conservation covenants are put in place, do you think providing for offsetting through planning guidance will be sufficient to achieve national consistency? If not, what legislative provision may be necessary?**

No comment.

Nick Crouch  
Senior Practitioner Nature Conservation  
Nottinghamshire County Council  
4<sup>th</sup> November 2013