

New "biodiversity offset" proposals for property development

The Government is proposing to incorporate into the planning system a new biodiversity offsetting mechanism targeted at developers in England. The mechanism is currently at the early stages of design and developers should consider responding to Defra's consultation paper¹ to ensure the system is workable and does not unnecessarily add cost and bureaucracy to the development process. This briefing answers 10 key questions about the proposed mechanism.

1. What are Biodiversity Offsets?

Biodiversity offsets are a method of compensating for the residual loss of biodiversity (e.g. habitats, species or ecological systems) caused by development of land. They are based on the idea that any development should cause no net loss to biodiversity, and ideally there should be net gain. Biodiversity offsets can be used to facilitate compliance with planning policy which enshrines the "mitigation hierarchy" (see box inset). They normally use a standard metric to identify and quantify loss of biodiversity in order to facilitate the provision of a similar or greater level of biodiversity improvement elsewhere (whether of the same or a different type). Offsets may be provided on-site by the developer or purchased from offset providers who establish projects offering biodiversity enhancements on land they control elsewhere.

Mitigation Hierarchy

A number of environmental laws and policies including the National Planning Policy Framework (NPPF) apply the mitigation hierarchy:

1. Avoid harm if possible by using a different site for the development
2. Mitigate harm through detailed development design
3. Compensate for any residual harm e.g. by creating alternative habitats onsite or at a different location

There are many schemes across the world that use biodiversity offsetting including in Australia and the United States. A pilot scheme run by Defra², Natural England and the local authorities in 6 areas has been running in England since April 2012.

2. Why are they needed?

In many cases, planning decisions already address and resolve biodiversity loss issues in the development process. However, the Government considers that biodiversity offsetting will overcome two problems:

¹ Biodiversity offsetting in England – Green paper – September 2013 - Defra

² The Department for Environment, Food & Rural Affairs

- The current case-by-case approach means that sometimes impacts are not properly assessed or taken into account in the decision-making. Even where they are taken into account, chosen mitigation or compensation can be inadequate, and in particular, insufficiently long-term.
- The current approach also creates additional costs to developers, e.g. through delays or uncertainty as to how mitigation or compensation would be applied. In some cases it can prevent schemes altogether because developers cannot secure enhancements on-site or cannot find a suitable off-site alternative.

The use of offsets is intended to make the process simpler, quicker and more certain, speeding up both assessment of biodiversity loss and provision of compensation by purchasing the offset. It should reduce costs – in particular, it is possible that larger offset projects could offset biodiversity loss from a number of developments therefore creating economies of scale. The use of national metrics for the offsetting process ought to create a consistent framework across the country. Some of the issues raised below, however, may challenge the apparent simplicity of this "ideal" system.

3. How would the amount of offset be calculated?

The mechanism would use a standard metric to value biodiversity of land and calculate the number of Biodiversity Units it represents (used both for any biodiversity lost and any biodiversity provided through an offset). Defra proposes the metric currently used in the pilot scheme as a possibility for the permanent mechanism. There are 2 aspects to the metric:

- Valuing the biodiversity of land: Points are awarded separately for habitat **distinctiveness**, **quality** and **area of habitat**. Biodiversity Units are calculated accordingly (see box inset).
- Variations to the amount of offset required would be made based on the **risk** of the offset not succeeding (e.g. for habitats that are more difficult to recreate), the **time** needed to create the offset (i.e. additional compensation for interim loss of habitat), and the **location** of the offset (i.e. if it has to be provided outside an area assigned by the local authority for offsets).

Value of 1 ha in "biodiversity units" *		Habitat distinctiveness		
		Low (2)	Medium (4)	High (6)
Habitat quality	Good (3)	6	12	18
	Moderate (2)	4	8	12
	Poor (1)	2	4	6

4. How will the proposed mechanism work?

Defra proposes incorporating biodiversity offsetting into the planning system. Local authorities would measure the biodiversity value of different areas of land at the development plan-making stage. Planning applications would then be considered in line with the mitigation hierarchy to identify what level of residual harm needed to be offset (in Biodiversity Units).

If harm can be avoided or adequately mitigated or compensated for using offsetting, planning permission would then be granted subject to a requirement upon the developer to provide or obtain an offset to the required number of Biodiversity Units (probably through a condition to the planning permission or an associated Section 106 Agreement).

The process could be applied to planning applications and Development Consent Order applications under the Planning Act 2008 as well as road schemes.

* Extracted from the Green Paper - © Crown Copyright 2013

5. Will Local Authorities be able to set their own offsetting strategy?

In order to ensure no net loss in biodiversity, a strategic approach will need to be taken on issues such as which habitats can be offset and where. There is a tension between adopting a local approach to strategy (which is consistent with the Government's localism agenda) and a national approach which is likely to ensure, at the national level, that there is no net loss in biodiversity. Defra has not expressed a preference as to a local or national approach but has also included a hybrid option that national priorities are set, with local discretion on implementation.

In the current pilot scheme, local authorities are permitted to adopt their own strategy. A localised approach is likely to be more attractive to local authorities but will potentially make the system less consistent and easy to apply for developers.

6. Will offsets be voluntary or mandatory?

At this time, Defra favours making the scheme voluntary for developers to adopt where it would be helpful to them. This is partly because Defra is currently uncertain over the costs and benefits of the mechanism (these would inevitably be passed to developers). However, the proposal sets out other options which make the mechanism more or less mandatory (e.g. for developments above a certain size threshold, or where the biodiversity features are of medium or high distinctiveness or quality). Where developers choose a route other than the offset mechanism, however, they would still need to satisfy any planning requirements on a bespoke basis with the associated delay and uncertainty that can arise. It is easy to see that a voluntary scheme could eventually become standard practice, or even mandatory, once the mechanism was proven to work satisfactorily.

A final option would see funds for biodiversity offsets being built in the Community Infrastructure Levy (CIL) payable by developers. Local authorities would then provide or secure the offsets centrally. Controversially, Defra suggests that levy receipts for biodiversity would not need to be ring-fenced, which is unlikely to be attractive to nature groups. This would also raise the similar issues of double-counting between Section 106 Agreements and CIL that have dogged the introduction of CIL.

7. Will there be restrictions on offsetting?

Defra's vision is for a vibrant market in offsets and this militates against placing restrictions on the type and source of offsets which developers can purchase. The imposition of significant restrictions would also make the scheme more complex for developers. However, in order to ensure the integrity of the "no net loss to biodiversity" rule, some restrictions are likely to be necessary. Defra is considering the following options:

- The extent to which lost and offset habitats would need to be of the same type or whether simply purchasing sufficient Biodiversity Units would be acceptable. Some restrictions might be inevitable to ensure that, e.g. the market does not only provide a limited variety of habitats as offsets.
- Requiring offsets to be within a certain distance of the development, or alternatively for a larger offset to be provided for more distant projects.
- Restricting the location of offsets where "high" or "medium" distinctiveness biodiversity is to be lost.

Defra sees offsetting as being potentially useful for specially protected sites, species and habitats. However, existing policy and legal protections would still need to be complied with. For example, development affecting Habitats Directive sites could only be carried out using offsets if the integrity of the site was maintained and the "Imperative Reasons of Overriding Public Interest" (IROPI) test was satisfied. Additional limitations on offsets would apply, e.g. any offsets involving protected species would need to be species-specific.

Unlike corresponding carbon trading schemes, it is not proposed that international offsetting would be permitted.

8. How will the offsets be secured?

The challenge is to find a mechanism that can secure biodiversity benefits permanently (given that biodiversity loss is also likely to be permanent). Defra is considering the use of a new form of "conservation covenant" to secure offsets³. These would be similar to a private law covenant given over land by the landowner and would require conservation measures to be undertaken and maintained. They would bind future owners of the land.

Conservation covenants could be used by offset providers in respect of third party offset land⁴ or by developers in respect of on-site provision. Their principal advantage over an alternative option, using Section 106 Agreements, is that a central body (e.g. Natural England) could be appointed as responsible body to monitor and enforce provision and maintenance of the offsets. This would be consistent with the Government's desire to take a strategic national approach to protecting biodiversity. If Section 106 Agreements were used, individual planning authorities would enforce them and a strategic approach is less likely to be successful.

A conservation covenant is likely to be backed up by a management agreement setting out more detail on putting the offset in place and measurement of outcomes. An offset register may also be created to prevent one identified offset project (or portion of a project) being sold multiple times.

9. Will habitat banking be allowed?

Habitat banking is the concept where an offset provider puts together a large offset scheme to sell offsets at a later time. Such banking is likely to create economies of scale and drive down the cost of offsets. Defra is in favour of habitat banking as long as providers can demonstrate that the offset project is "additional", i.e. that it would not have happened anyway even if the provider was not going to sell offsets. Questions relating to "additionality" have caused problems for other offsetting schemes, e.g. voluntary carbon offsetting, and they can be complex questions to address. Defra is contemplating requirements on providers to declare a site as an offset project before the project is implemented, and to incorporate a longstop deadline for sale of offsets after implementation.

There is a separate question of whether the *incidental* creation of biodiversity benefits could be sold as offsets. Defra raises the possibility that a sustainable urban drainage system (SUDS) could constitute an offset which could be sold to a third party even if the SUDS was originally created as a regulatory requirement (e.g. as a planning condition of development).

10. What are the next steps?

Responses to the consultation are required by 7 November 2013. Once Defra has worked up the design over the next few months, it plans to consult on detailed proposals by the end of 2013.

The mechanism could largely be implemented through guidance, although powers to introduce conservation covenants (and potentially some other associated changes) would require new legislation. No further timetable for implementation of a biodiversity offsetting mechanism has been given.

³ The Law Commission is currently consulting on the possibilities to introduce conservation covenants as has been done in a number of other jurisdictions. Defra will await the consultation outcome before taking this further.

⁴ In such a case the developer's requirement to obtain the offset would probably be secured by planning condition or section 106 agreement in relation to the development site.

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