



## **UK Environmental Law Association's response to the Department for the Environment Food and Rural Affairs consultation on Biodiversity offsetting**

### **UKELA**

UKELA is the UK's foremost membership organisation working to improve understanding and awareness of environmental law, and to make the law work for a better environment. As such, UKELA has a keen interest in ensuring the effectiveness of the legal framework to securing nature conservation.

### **The key issues**

UKELA welcomes this additional initiative to address the continued loss of biodiversity.

If undertaken within a strategic national framework, biodiversity offsetting could make a valuable contribution towards Biodiversity Action Plans, support the existing network of protected areas and addressing the impacts of climate change. The proposed guidance could also improve consistency in addressing biodiversity loss across local planning authorities which will provide clarity for all parties to plan accordingly.

However we have a number of concerns:

- 1. The proposed guidance alone is too weak a mechanism to achieving further benefits for biodiversity - legal underpinning is also required.***

At present the law requires developers and others to provide compensatory habitat for their impacts only on certain lists of species and habitats (for example under the Habitats Regulations 2010 and the Environmental Damage Regulations 2009). However, outside these legal frameworks (and therefore for the majority of biodiversity) there is no legal requirement at present to require developers to first mitigate and then (where mitigation is not possible) compensate for their impacts.

The proposed initiative is helpful in terms of providing the framework for a *process* which LPAs may choose to adopt if they wish. However, this is not adequate to address the continued loss of biodiversity.

In order to make a difference to biodiversity loss, this *process* must be underpinned by a clear *legal duty*. The legal duty should require LPAs to secure that developer's proposals first seek to mitigate any ecological impacts and where such impacts cannot be mitigated,

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and there are no alternatives, to compensate for such impacts. These requirements already exist in policy (see PPS9). However, this policy has existed for years and biodiversity has overall continued to decline. It is clear to us, as practitioners in this area of law, that policy is not strong enough to drive an improvement in biodiversity loss (see for example the Court of Appeal judgment in *Buglife v Thurrock Thames Gateway Development Corp* (28 Jan 2009) which made clear that a sentence by sentence analysis of PPS 9 was not required by planning authorities). Instead our view is that a legal requirement to strengthen the policy is required.

We note that Sir John Lawton in his report (Sept 2010) recommended a strengthening of the section 40 duty on public bodies under the Natural Environment and Rural Communities Act 2006. We wholly support this recommendation and regard it as a key mechanism by which to achieve the underpinning we believe is required.

**2. *The proposals will not ensure consistency across the country - a key issue for developers***

The process proposed in the consultation is helpful in providing a framework to be adopted by LPAs where they are so inclined. It should mean that where LPAs wish to operate a biodiversity offsetting system then the systems should be similar to each other.

However, one of the most difficult issues confronting developers is the difference in approach as between one LPA and the next. At present a developer cannot be sure what requirements any one LPA may impose on him. This will continue to be the case under the proposals because:

(i) there is no obligation on LPAs to adopt any process to require biodiversity offsetting (see point above); and

(ii) the adoption of the proposed process (as opposed to any other process) cannot be ensured - a LPA may choose to adopt something completely different. We note that some LPAs (for example at Brighton and Hove) already have biodiversity offsetting schemes in place which are not aligned with the proposal.

Consistency can only be achieved where clear legal requirements are imposed to drive this.

**3. *The proposals risk undermining the policy in PPS9***

Under PPS9, the use of compensatory measures must be used only where:

(i) the potential mitigation options have been exhausted; and

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- (ii) there are no reasonable alternatives to the development proposals.

We are concerned that the present proposals will tend to encourage a culture whereby developers will see offsetting as a "right" and where the pre-conditions set out above will be pushed aside.

Much more emphasis needs to be given in the proposals to the fact that offsetting should be regarded a last resort, only where tests (i) and (ii) have been satisfied. Any LPA which decides to start an offsetting system must apply these preconditions first.

Again this points to the need for a legal requirement to underpin the system. That is the only way to secure careful consideration of these options before offsetting is considered.

#### **4. *S106 agreements may not be an appropriate mechanism to secure offsets***

- (i) How will there be transparency if the whole process is achieved through planning agreements agreed between the parties?
- (ii). How can there be accountability as planning agreements cannot be enforced by third parties?

In relation to (i) and (ii) our experience of this mechanism is varied but it is clear that section 106 agreements as currently used would not necessarily guarantee the delivery of biodiversity offsets set out in the agreement. More assurance is needed to ensure compliance. One way in which this could be achieved is by including a third party in the agreement that would have the necessary expertise to monitor enforcement and compliance, including access to the offset land.

- (iii). Under regulation 122 of the Community Infrastructure Regulations 2010, a planning obligation may only constitute a reason for granting planning permission for the development if the obligation is .....*"directly related to the development...."*. This requirement may be difficult to meet where offsets to be provided under a planning obligation are not identified or specifically linked to the development at the time the permission is granted

#### **5. *The Community Infrastructure Levy may be a means by which to secure offsets***

As presently drafted the CIL Regulations 2010 (in conjunction with the Planning Act 2008) do not include within the definition of "infrastructure" any limb which clearly indicates that biodiversity could benefit from the levy. The nearest "limb" is "open space". However we note that under section 216(3) of the Planning Act the list of items falling within

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"infrastructure" may be expanded and so there is a mechanism by which the CIL could be used potentially to secure benefits for biodiversity.

## **6. Further issues**

Other issues that need to be addressed include:

(i). What safeguards will there be to ensure that if a habitat of one particular type is disproportionately lost and offset by benefits for others, or indeed if one type of habitat is disproportionately chosen as the beneficiary of offsets? In our view the rules governing habitat banking should be as set out in the Lawton report. The process would need to recognise that some habitats (such as ancient woodland) cannot be replaced.

(ii). How much of the process will be subject to the Environmental Information Regulations?

(iii). How will the time-lag be addressed between the damage to habitat for development and the maturing of alternative offsetting habitat?

(iv). In many parts of the country there is limited land available for biodiversity offsetting. In such areas the only option available will presumably be to enhance existing sites. What guidance will be forthcoming to inform decisions to ensure that the biodiversity offsetting is appropriate and proportionate? A local strategy is needed to identify potential offsetting areas (either habitat creation or enhancement) and the scope of the offsetting options available should be determined. The options available should then be assessed in the light of national priorities to ensure a coherent and effective local strategy.

(v). There may be a role for National Parks in providing appropriate locations for offsetting. While there is a culture of landscape protection within the National Parks biodiversity protection is weak and much interest has been lost. A small change to National Park legislation to improve biodiversity protection coupled with off setting could secure significant gains.

(vi). Another mechanism which could be used to provide biodiversity offsetting is the purchase of rights which could be damaging to wildlife such as shooting rights.

(vii). Incentives should be given to build up banks in advance so that the sites have time to mature and prove their value before being used to offset damage - otherwise one is trading certain damage today against hoped for benefits in the future.

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(viii). Payments in lieu might be appropriate provided that there are clear guarantees of how the money received is used and traceability. It may well be simpler to link developer and habitat improvement through a payment to an appropriate body for a specific project (subject to that body's accountability) than to establish a chain of agreements between planning authority, developer, landowner etc. that has to deal with all the issues of accountability etc.

(ix). In terms of the provision of local advice and expertise as to the appropriateness and adequacy as well as monitoring of biodiversity offsetting, this role could be entrusted to the local wildlife trust or Natural England or involve a broader partnership to include industry, academics, country site access groups etc.

(x). Without prejudice to our comments about the need for a stronger legal requirement to require protection of biodiversity, in order to ensure that sufficient weight is given to the proposed guidance on biodiversity offsetting this must be issued by Government (Defra).

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