

Biodiversity offsetting in England

Defra consultation

UK Environmental Law Association response

Q1. Do you think the Government should introduce a biodiversity offsetting system in England?

In principle the concept of biodiversity offsetting is supported. However, its application should follow certain criteria including undertaken as a last resort, like for like habitat replacement at locations close to the area affected, set within a framework for delivering ecological networks, and underpinned by access to up-to-date ecological data and expertise.

Q2. Do you think the Government's objectives for the system and the characteristics the Government thinks a system would display are right?

The objectives are unlikely to be met. A quicker system and the provision of more certainty for developers may be achieved but who is going to pay for the offsetting? Surely it will be the developer / businesses and therefore it will not be cheaper and will not avoid additional costs.

The net gain for biodiversity based on biodiversity units may result in an imbalance where easily created habitats will replace those difficult to create. The like for like criterion is fundamental to maintaining the balance and range of habitats.

The characteristics must be driven by the mitigation hierarchy and be transparent and consistent to all stakeholders.

Q3. 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 is still being tested. It is difficult to judge its effectiveness given limited use.

The subjective valuation of impacts on habitats is fraught with risk.

Q4. 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 qualifying biodiversity loss and gain?**

The ecological connectivity value is not fully integrated into the pilot. The pilot metric reflects the contribution made to the ecological network by the compensation project (with the multiplier for strategic offsets), but that element is absent in the assessment of the 'lost' habitat, which creates an imbalance.

b. Are the weights given to the different factors appropriate?

c. Are there any other changes you think should be taken into account?

The simplistic and subjective scoring (tick box approach to ecology) resulting in biodiversity units needs careful consideration and further testing.

Any guidance will need to be very clear that factors not included within the metric still need to be accounted for outside the offsetting scheme. Such factors include:

- species requirements (including addressing those less mobile and vulnerable species) unless and until suitable metrics are established;*
- indirect impacts which could reduce the viability of remaining parts of nearby sensitive sites e.g. recreational pressure on nearby important sites where the cumulative impacts must be addressed; predation and disturbance by domestic pets to vulnerable species; other urban effects e.g. fires, anti-social behaviour, disposal of invasive species; pollution. These are matters that do not fall neatly within the compensation metric.*
- the complexities of addressing the impacts on dynamic habitats such as coastal habitats need to be considered*

Q5. Do you think offsetting assessment should be used when preparing a planning application for a project?

Yes. The earliest consideration the better.

Q6. 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?

Ideally yes with the support of competent ecological advisors. However, given inconsistent approaches to the current planning regime and the lack of in house ecological expertise, independent scrutiny is considered necessary..

Q7. Do you think biodiversity offsetting should have a role in all development consent regimes?

No. Where affected habitat is the subject of a statutory designation a case by case consideration meeting the relevant legal provisions is necessary.

Q8. 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?

Many developers provide compensatory measures now on a case by case basis. They may utilise biodiversity offsetting if it is cheaper but will it deliver the same compensation?

If offsetting is introduced it should be mandatory (uniform) and apply without a threshold. A voluntary scheme would not be efficient as the market would not be large enough. We oppose a CIL-based approach where the funds are not ring-fenced and could be spent on matters unrelated to biodiversity compensation.

Q9. 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?

An obligatory scheme would be required but without a threshold. If a threshold is considered it should be on the impact of the development and not the size of the development.

Q10. Do you think there should be constraints on where offsets can be located? If so what constraints do you think should be in place?

No as long as offsets are like for like and at locations close to the area affected.

Q11. Do you have any comments on the analysis set out in the impact assessment?

Q12. Do you have any 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 mitigation.**
- 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.

Q13. Do you think offsetting should be a single consistent national system without scope for local variation?

Local variations will be necessary due the varied distribution of habitats and species and therefore their biodiversity importance. However, this should be accommodated within a consistent national framework.

Q14. 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?

Yes if consistent with current legal and policy requirements.

Q15. Which habitats do you think should be considered irreplaceable?

Impossible to answer. Much depends upon local geology, geography and climate as to the distribution and therefore the importance of a habitat. For example a habitat or habitat for a species at the edge of its range may be irreplaceable but not so the same habitat in its core area.

Q16. Do you think offsetting should in principle be applied to protected species?

Yes given previously stated caveats.

Q17. Has the Government identified the right constraints and features that need to be addressed when applying offsetting to protected species?

It needs to be reiterated that the application of offsetting for protected species needs to be lawful. It is not sufficient for planning authorities to 'have regard' to the Habitats Directive (Regulations) when addressing European protected species. They need to apply the law.

Q18. Do you agree that great crested newts should be the first area of focus?

Yes.

Q19. Do you have any comments on the Government's thinking on how to apply offsetting to great crested newts?

Having better data to inform assessment of conservation status and therefore the impact of plans and projects on individual populations is to be welcomed.

Care is needed when judging the contribution made by a local population to the conservation status of the species considering population dynamic, natural range

and habitat for the species. Note that the most recent Article 17 assessment of conservation status concludes that Great crested newts are in unfavourable conservation status.

The Directive (Regulations) requires that plans and projects must also satisfy the no alternatives / imperative reasons of overriding interest tests.

Q20. Should offsetting be considered for any other species in the near future taking account of the constraints on species offsetting?

Not until proposals have been trialled and tested.

Q21. 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?

Yes. Ideally the planning authority subject to independent advice and support.

Q22. 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.

Q23. 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?

A national offset register is necessary to ensure transparency and consistent application.

Ideally Defra should have the overview and responsibility to maintain the register.

Q24. How long should offsets be secured for?

In perpetuity or a value based on the perceived duration of the impact..

Q25. Are there any long term factors, besides climate change, that should be taken into account when securing offsets?

Creating offset habitats is only a part of the process. Ensuring long term management where necessary, may be problematic. Without the appropriate management habitats will change or possibly lost which undermines the purpose of the offsetting.

Q26. 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?

Possibly but backdating is likely to cause confusion and delay particularly if a mandatory system is adopted.

Q27. Do you think an offsetting system should take a national approach to the question of significant harm and if so how?

A case by case approach in the context of a national framework (and guidance) is needed. The introduction of thresholds based on loss of biodiversity units is fraught with risks.

Q28. Do you think any additional mechanisms need to 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?

Yes..Covenants should be supported by short term agreements and measures to ensure the long term future of the offset.

Q29. 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?

Offsets should be the same habitat otherwise there will be risk of losing the balance and diversity of national wildlife.

Q30. 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. A national strategy led by Defra and Natural England engaging with stakeholders and enabling local variation and flexibility for determining the most appropriate areas for offsets within the locality.

Q31. 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 offset? If so, after how long?

Yes but further work is needed to clarify and test the process and principles to ensure offsetting replaces habitat loss and secure net gains in biodiversity.

Q32. Do you think maintaining an environment gain that might otherwise be lost should count as an offset? If so, how long should a value be attached to the offset?

No. Maintaining or improving the condition of a site important for biodiversity should be the objective in any event. Offsetting should result in the creation of replacement habitat.

Q33. 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?

Q34. How do you think the quality of assessments should be assured and who by?

Yes the quality assessments should be assured and by a national body.

Q35. How should differences of opinion over assessments be addressed?

Q36. 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?

Yes.

Q37. Do you think it should be possible to offset the loss of hedgerows by creating or restoring another form of habitat?

No. Hedgerows are important as ecological corridors.

Q38. 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?

Legislation will be necessary to enshrine the process and implementation including dispute resolution and use of conservation covenants.

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